A. Factual and Procedural Background Regarding Jury Selection.

Mr. Nelson's jury was drawn from a venire panel of 108 potential jurors. Panelists completed questionnaires on a variety of topics, including their race, employment, families, education, religion, and views on criminal justice and the death penalty. Of the 107 panelists whose race is known, 12 were Black, 7 were Asian, 15 were Hispanic, 2 were Native American, and the remaining 71 were white. After voir dire, the court qualified 47 panelists to serve on a capital jury.[43] Of the 46 death-qualified panelists whose race Mr. Nelson knows, 6 were Black, 2 were Asian, 4 were Hispanic, 1 was Native American, and the remaining 33 were white.

On September 25, 2012, the parties exercised their peremptory strikes. The State used nearly 60% (8) of its 14 peremptory strikes against racial minorities, who constituted less than 30% of the qualified venire. The State struck 4 death-qualified Black panelists,[44] all of the Native American and Asian panelists, and 1 Hispanic panelist. The State had run out of peremptory strikes by the time it got to the Hispanic panelist who served as an alternate.

The defense raised *Batson* challenges to 5 of the State's 14 peremptory strikes. 31 R.R. 14 (challenging Mr. Talmadge Spivey, Ms. Amy Lee-Moses, Ms. Somsouk Southichack, Ms. Sheracey Golightly-Hooper, and Ms. Martima Mays). Based on the State's use of a "disproportionate number of strikes used on minorities," the court found that the defense had made a prima facie case of discrimination. *Id.* at 16.

In response, the State proffered race-neutral reasons for striking each of the 5 panelists. The court accepted the State's reasons and shifted the burden back to defense counsel to rebut them. Defense counsel, however, declined further argument and said that they would simply "let

[43] The court originally qualified 48 panelists, 19 R.R. 47–48, but later excused Ms. Paula Grenhaw due to medical reasons, 29 R.R. 125–26; *see also* 31 R.R. 8, bringing the total to 47.
[44] The defense struck 2 Black panelists because they expressed strong views against criminal defendants and in favor of the death penalty. *See, e.g.*, 25 R.R. 12–13; 27 R.R. 66, 114–15, 116.

the record speak for itself." The court denied the *Batson* challenges. *See id.* at 70-71.

B. The State Intentionally Used Race to Secure an All-White Jury.

The tools that courts use to identify race-based strikes uniformly support the inference that the State's strikes here violated *Batson*: (1) a "statistical analysis" comparing the rate of strikes used against white and nonwhite panelists, *see Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("*Miller-El II*"); (2) analysis of the accuracy of the reasons given for striking the nonwhite panelists, *see Foster*, 136 S. Ct. at 1754; and (3) a "comparative analysis" evaluating whether the "race-neutral" reasons for striking nonwhite panelists were used to strike similarly situated white panelists, *see Reed v. Quarterman*, 555 F.3d 364, 373 (5th Cir. 2009).

1. A statistical comparison of the treatment of white and nonwhite panelists demonstrates that race was used to select the jury.

The State's disproportionate use of peremptory challenges against minority panelists is evidence of pretext, as the Supreme Court noted in *Miller-El II*. Indeed, the differential treatment of white and nonwhite panelists is even starker here than it was in *Miller-El II*. In *Miller-El II*, the Court found unconstitutional discrimination when only one Black panelist survived voir dire; here, none did, notwithstanding a roughly similar proportion of Black panelists. *See Miller-El II*, 545 U.S. at 241 (20 Black panelists in 108-person venire panel); *supra* at 74 (12 Black prospective jurors in Mr. Nelson's 108-person venire). Of the 36 venire panelists who were racial minorities, only one, a Hispanic woman, survived the jury selection process, to serve as an alternate, after the State had run out of peremptory strikes.[45] The State struck 8 out of 13 nonwhite panelists who were death-qualified, but only 6 of the 33 white

[45] In *Woodward v. Epps*, 580 F.3d 318, 339 (5th Cir. 2009), the Fifth Circuit held that a thorough statistical analysis "require[s] knowing the minority percentage of the venire." *Id.* As noted, Mr. Nelson has confirmed that at least 36 total racial minorities were in the venire panel. The fact that the venire panel included a substantial number of racial minorities who could have served on Mr. Nelson's jury "strengthen[s]" the inference of purposeful discrimination. *See id.*

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panelists.[46] This statistical disparity is strong evidence of the State's discriminatory intent in selecting Mr. Nelson's jury. *Miller-El II*, 545 U.S. at 240-41.

2. The proffered reasons for striking nonwhite panelists were pretextual because they were neither accurate nor invoked against similarly situated white panelists.

The other two tools for identifying purposeful discrimination require evaluating the race-neutral reasons proffered for striking specific panelists.

First, comparative analysis makes use of "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. If "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* That is, "[i]f the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects." *Reed*, 555 F.3d at 376.

Second, the State's mischaracterization of the record when proffering race-neutral reasons is evidence of purposeful discrimination. *See Foster*, 136 S. Ct. at 1754; *accord Miller-El II*, 545 U.S. at 244 (mischaracterization of a panelist's testimony supported finding of a *Batson* violation); *Purkett*, 514 U.S. at 768 ("implausible or fantastic justifications may (and probably will) be found to be pretexts"); *Reed*, 555 F.3d at 380 (reason contravened by juror's actual testimony was not legitimate basis for strike). It is also evidence of pretext if the State did not "engage in meaningful voir dire examination" on the subject of a proffered reason. *Reed*, 555 F.3d at 376 (citing *Miller-El II*, 545 U.S. at 246).

[46] The State struck *61.5%* of the death-qualified nonwhite panelists, and only *18.18%* of the death-qualified white panelists.