No._____

IN THE UNITED STATES SUPREME COURT
October Term 2007

MARK ALLEN JENKINS,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

CAPITAL CASE

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

Petitioner, MARK ALLEN JENKINS, respectfully prays that a writ of certiorari issue to vacate the order of the Alabama Supreme Court in this case.

OPINIONS BELOW

On December 31, 1997, Mr. Jenkins' state habeas corpus petition was denied by the Circuit Court of St. Clair County, Alabama. *See Jenkins v. State of Alabama*, No. 89-68.60 (Circuit Court of St. Clair County, Ala. Dec. 31, 1997), reproduced at Appendix A. On February 27, 2004, the Alabama Court of Criminal Appeals affirmed the lower court's decision. *See Jenkins v. State of Alabama*, CR-97-0864, 2004 WL 362360 (Ala. Crim. App. Feb. 27, 2004), reproduced at Appendix B. The Alabama Supreme Court denied without opinion, in an unpublished order, Mr. Jenkins' Petition for Writ of Certiorari. *See Ex parte Mark Allen Jenkins*, Certificate of Judgment, (Ala. May 18, 2007), reproduced at Appendix C.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Alabama Supreme Court is predicated upon 28 U.S.C. § 1257(a). The Alabama Supreme Court denied Mr. Jenkins' Petition for Writ of Certiorari on May 18, 2007. *See Ex parte Mark Allen Jenkins*, Certificate of Judgment, (Ala. May 18, 2007), reproduced at Appendix C.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

I. Procedural History

Mark Allen Jenkins was convicted on March 18, 1991, of two counts of capital murder in connection with the death of Tammy Hogeland on or about April 17, 1989, in St. Clair County, Alabama. On the same day as his conviction, the jury recommended, by a vote of 10 to 2, that Mr. Jenkins be sentenced to death. On direct appeal, the Alabama Court of Criminal Appeals ("CCA") and the Alabama Supreme Court upheld Mr. Jenkins' conviction and death sentence. *Jenkins v. State*, 627 So.2d 1034 (Ala. Crim. App. 1992); *Ex parte Jenkins*, 627 So.2d 1054 (Ala. 1993). This Court denied Mr. Jenkins' petition for a writ of certiorari on March 28, 1994. *Jenkins v. Alabama*, 114 S. Ct. 1388 (1994).

On May 26, 1995, Mr. Jenkins filed a timely petition for relief from judgment and sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in St. Clair County Circuit Court. On December 31, 1997, the circuit court denied all of Mr. Jenkins' claims for post-conviction relief. *Jenkins v. State of Alabama*, No. 89-68.60 (Circuit Court for St. Clair County, Alabama, filed December 31, 1997). The CCA affirmed the circuit court's decision in *Jenkins v. State*, CR-97-0864, 2004 WL 362360 (Ala. Crim. App. Feb. 27, 2004). The Alabama Supreme Court granted Mr. Jenkins' petition for certiorari, and reversed on an issue relating to juror misconduct. *Ex parte Jenkins*, 2005 WL 796809, at *6 (Ala. Apr. 8, 2005).

On remand from that decision, the CCA held that Mr. Jenkins' juror misconduct claim was procedurally barred. *Jenkins v. State*, 2005 WL 3120110, at *3 (Ala. Crim. App. Nov. 23, 2005). The Alabama Supreme Court denied certiorari on May 18, 2007. *See Ex parte Mark Allen Jenkins*, Certificate of Judgment, (Ala. May 18, 2007). This Court granted Mr. Jenkins' request for an extension of time until October 16, 2007 to file the instant petition.

II. Relevant Factual Background

A. Mr. Jenkins' Trial

Prior to trial, Mr. Jenkins' attorney filed a motion to bar the State from using preemptory challenges in a discriminatory manner. C1 at 88.[1] Trial counsel argued that Mr. Jenkins, who is Latino, was entitled to prevail on the motion even though he was not African American.[2]

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[1] "Rl at ----" refers to the transcript from Mr. Jenkins' trial; "C1 at ----" refers to the clerk's record from the trial; "R1.Ex. at ----" refers to the exhibits contained in the trial record; "C2 at ----"refers to the clerk's record from Mr. Jenkins' Rule 32 proceedings; and "R2 at --- " refers to the transcript from Mr. Jenkins' Rule 32 evidentiary hearing.

[2] Although Mr. Jenkins is Latino, the Court eliminated the requirement that a criminal defendant raising a *Batson* challenge must show commonality of race with excluded jurors in *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

The trial court advised the defense that it would "reserve ruling on this motion until it's raised in the proper manner at the time of jury selection." R1 at 42. This was the last time the motion was mentioned in the record by anyone. During jury selection, the prosecution used its preemptory challenges to remove all three of the African Americans on the venire. C1 at 111; C2 at 439, 441, 444, 458. As a result, Mr. Jenkins was tried by an all-white jury. Although the three African-American jurors were qualified to serve, Mr. Jenkins' attorney never objected to their removal, despite the trial judge's previous invitation to do so. Trial counsel also failed to ensure that the trial record reflected the potential jurors' races. R1 at 445-50; R2 at 329.

B. Mr. Jenkins' Direct Appeal

Trial counsel represented Mr. Jenkins on direct appeal to both the Alabama Court of Criminal Appeals and the Alabama Supreme Court. On appeal to both courts, counsel raised a *Batson* claim, arguing that the prosecution used its preemptory challenges in a discriminatory manner. Mr. Jenkins' attorney failed, however, to take a basic and essential step to ensure review of the *Batson* claim, namely, he failed to supplement the record with the venire lists reflecting the jurors' race. Although the final strike sheet containing the names of the jurors was included in the record on direct appeal, the corresponding venire list including the race of the prospective jurors was not included in the record. C1 at 111; R2 at 420-21. The only way to confirm that the State used its preemptory challenges to strike all the African Americans from the venire is to compare the strike sheet to the venire list. Although Mr. Jenkins' post-conviction counsel provided to the CCA and the Alabama Supreme Court the appropriate documents to allow for this comparison, Mr. Jenkins' attorney on direct appeal did not.

Without the venire list, it was impossible for the CCA and the Alabama Supreme Court to review Mr. Jenkins' *Batson* claim. The CCA explained that its denial of Mr. Jenkins' *Batson* claim was based on the incomplete nature of the record:

> There is no evidence in the record that the prosecutor used his strikes in a racially discriminatory manner. There is no indication of the racial composition of the jury, though a jury strike list is contained in the record. Neither do we know whether any minorities in fact served on the jury. The record simply does not support an inference of plain error on the alleged *Batson* violation.

Jenkins, 627 So.2d at 1042. Even after the CCA rejected the *Batson* claim due to the missing venire lists, counsel still failed to supplement the record with lists which, he later admitted, were readily available. C2 at 295. As a result, the Alabama Supreme Court also rejected the claim. *See Ex parte Jenkins*, 627 So.2d at 1055 (affirming court of criminal appeals denial of relief on *Batson* claim). In short, the insufficient record was the only obstacle preventing the CCA and the Alabama Supreme Court from reaching a decision on the merits of Mr. Jenkins' *Batson* claim.

C. Mr. Jenkins' Rule 32 Appeal

On appeal from the circuit court's denial of Mr. Jenkins' Rule 32 petition, Mr. Jenkins argued, *inter alia*, that his counsel on direct appeal was ineffective for failing to supplement the record with the venire lists reflecting the race of the jurors. In rejecting this argument, the CCA arrived at two conclusions that are important for purposes of this petition.

First, the CCA determined that there is no right to counsel on an appeal to the Alabama Supreme Court, which, at the time, was an appeal as of right. *Jenkins*, 2004 WL 362360, at *7. In so holding, the CCA explicitly overruled its prior decision in *Watkins v. State*, 632 So.2d 555 (Ala. Crim. App. 1992). In *Watkins*, the CCA had recognized the right to counsel on appeals to

the Alabama Supreme Court and held that appellate counsel was ineffective when he failed to supplement the record with the materials necessary to establish a meritorious *Batson* claim. *Watkins*, 632 So.2d at 564. In reviewing Mr. Jenkins' claim, the CCA overruled *Watkins* and instead concluded that, under *Douglas v. California*, 372 U.S. 353 (1963), Mr. Jenkins was not entitled to counsel on appeal to the Alabama Supreme Court. Because Mr. Jenkins had no right to counsel on appeal, the CCA reasoned that he had no right to effective assistance of appellate counsel. *Jenkins*, 2004 WL 362360, at *7.

Second, the CCA concluded that, even if Mr. Jenkins could assert a claim of ineffective assistance of appellate counsel, Mr. Jenkins failed to present a prima facie case of purposeful discrimination under *Batson*. *Jenkins*, 2004 WL 362360, at *8. The CCA, following established Alabama law, found that "Jenkins' only argument before the circuit court to support this contention was that the State struck three blacks, or all of the blacks, from the venire. Numbers alone; however, are not sufficient to establish a prima facie [case] of discrimination." *Id.*[3]

[3] In his Rule 32 petition and in subsequent briefing, Mr. Jenkins in fact offered more than statistics alone in support of his *Batson* claim. For example, Mr. Jenkins argued that, in addition to the number of African Americans struck by the State, a prima facie showing had been made because virtually all of the factors set forth in *Ex parte Branch*, 526 So.2d 609 (Ala.1987) were in the record. The *Branch* factors argued by Mr. Jenkins included, *inter alia*, the heterogeneity of the prospective jurors struck by the State; the pattern of the State's strikes against a protected class, other instances of jury selection discrimination by the prosecutor; and the manner of the State's questioning during voir dire. The CCA rejected Mr. Jenkins' *Branch* based arguments on the ground that they were raised for the first time on appeal. *Jenkins*, 2004 WL 362360, at *41, n.9 (citing *Myrick v. State*, 787 So.2d 713, 718 (Ala. Crim. App. 2000)) It is Mr. Jenkins' position that he did, in fact, raise the evidence relating to the *Branch* factors before the circuit court and accordingly, the CCA erroneously refused to consider the non-statistical evidence. Nonetheless, even if the CCA correctly limited its review to the statistical evidence, for the reasons discussed herein, the statistical evidence, without more, was sufficient to establish a prima facie case of discrimination.

The Alabama Supreme Court denied Mr. Jenkins' petition for Writ of Certiorari on May 18, 2007. *See Ex parte Mark Allen Jenkins*, Certificate of Judgment, (Ala. May 18, 2007), reproduced at Appendix C. This timely petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve the Split in the Lower Courts as to Whether, Under *Batson v. Kentucky*, Statistics Alone are, in Certain Circumstances, Sufficient Evidence to Establish a Prima Facie Case of Discrimination.

The Alabama Court of Criminal Appeals followed established Alabama law in concluding that Mr. Jenkins failed to establish a prima facie case of purposeful discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). The CCA's conclusion that "[n]umbers alone . . . are not sufficient to establish a prima facie [case] of discrimination," *Jenkins*, 2004 WL 362360, at *8, however, imposed on Mr. Jenkins a standard for evaluating prima facie cases that conflicts with the Equal Protection Clause of the Fourteenth Amendment as well as this Court's holding in *Batson*. Alabama's rule, precluding the finding of a prima facie showing of discrimination based solely on statistics, is also in conflict with the holdings of other state and federal courts, and demonstrates an increasing division in the lower courts. Given the frequency with which courts adjudicate and evaluate *Batson* claims, and given the Constitutional interests at stake, it is imperative that the Court clarify the appropriate standard for establishing a prima facie case of discrimination.

A. By Requiring a Defendant to Present Additional Evidence, Even When Statistics Alone Demonstrate Discrimination, Some Courts are Imposing an Overly Onerous Standard at the First Step of the *Batson* Inquiry.

At Mr. Jenkins' capital murder trial, the prosecution struck all three African-American jurors from the venire. Mr. Jenkins was tried by an all-white jury. Given that there was no

discussion at trial regarding the strikes, the only evidence relevant to Mr. Jenkins' *Batson* claim were numbers alone – the number of African Americans in the venire (three), the number struck by the prosecution (three) and the number of African Americans ultimately impaneled (zero).[4]

Under *Batson*, "a prima facie case of discrimination can be made out by offering a wide variety of evidence, *so long as the* sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" *Johnson v. California*, 545 U.S. 162, 168-69 (2005) (citing *Batson*, 476 U.S. at 94) (emphasis in original). The *Batson* Court explained the requirements of establishing a prima facie case:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (internal citations omitted).

The facts of Mr. Jenkins' *Batson* claim are indistinguishable from the facts in *Batson* itself. In both cases, the prosecutor used his preemptory challenges to strike all African Americans in the venire, resulting in all-white juries in both cases. *Batson*, 476 U.S. at 83. In *Batson*, the prosecutor struck the four African-American jurors; in the case at bar, the prosecutor struck three. In both cases, the State did not offer any reasons for its strikes. In *Batson*, when defense counsel objected, the trial court "flatly rejected the objection without requiring the prosecutor to give an explanation for his action." *Batson*, 476 U.S. at 100. Similarly, in

[4] As previously noted, Mr. Jenkins does not concede that numbers were the only evidence he presented in support of a prima facie case.

Mr. Jenkins' case, the CCA considered no additional evidence beyond the number of jurors struck. In short, numbers, and nothing more, were the only evidence considered by the courts to support both defendants' prima facie cases. In *Batson*, faced with evidence that is essentially identical to the evidence present in Mr. Jenkins' case, this Court concluded that petitioner's evidence supported an inference of discrimination and remanded the case for further proceedings. *Id*. In contrast, the CCA concluded that the evidence in Mr. Jenkins' case did not support an inference of discrimination. *Jenkins*, 2004 WL 362360, at *8.

By summarily rejecting statistical evidence on the grounds that numbers alone are insufficient to raise an inference of discrimination, Alabama imposes a standard for evaluating the sufficiency of a prima facie case of discrimination that violates *Batson* and the Equal Protection Clause. As the *Batson* Court stated, "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" 476 U.S. at 95 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, n.14, (1977)). By failing to even consider and evaluate the numbers presented by Mr. Jenkins, the CCA denied him "the protection that a trial by jury is intended to secure." *Id*. at 86.

B. The Lower Courts are Split as to Whether Statistics, Without More, can Suffice to Establish a Prima Facie Case of Discrimination.

This Court's guidance is necessary to resolve the existing split amongst the lower courts. Alabama, along with Georgia, Indiana, Iowa and the Fourth, Fifth, Eighth, and Tenth Circuits hold that statistics alone are insufficient to establish a prima facie case under *Batson*. In contrast, the Second, Third, Seventh and Ninth Circuits specifically hold that "statistics, alone and without

more, can, in appropriate circumstances, be sufficient to establish the requisite prima facie showing under *Batson*." *Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002).

For example, the Second Circuit's decision in *Tankleff v. Senkowski* is in direct conflict with the decision reached by the CCA in the pending case. In *Tankleff*, as here, the prosecution struck the only three African Americans who were in the venire. Unlike the CCA, the Second Circuit acknowledged that, although it had "little to go on besides the statistic. . . the fact that the government tried to strike the only three blacks who were on the panel constitutes a sufficiently dramatic pattern of actions to make out a prima facie case." *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998); *see also Williams v. Runnels*, 432 F.3d 1102, 1107 (9th Cir. 2006) (citing *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004)) ("[A] defendant can make a prima facie showing based on a statistical disparity alone."); *Jones v. Ryan*, 987 F.2d 960, 972 (3rd Cir. 1993) (finding a prima facie showing based on statistics alone). Similarly, in *Morse v. Hanks*, as here, bare numbers were the only evidence before the trial court. In finding that the petitioner had established a prima facie case, the Seventh Circuit concluded that "when the voir dire is as perfunctory as this one was -- the potential jurors were asked little more than whether they would treat both sides equally -- a prima facie case is established" where the prosecutor strikes the only African-American juror in the venire. *Morse v. Hanks*, 172 F.3d 983, 985 (7th Cir. 1999).

Some state courts have also held that numbers alone, in some circumstances, may be sufficient to establish a prima facie case. *See, e.g.*, *Jones v. State*, No. 482, 2007 WL 666333, at *3 (Del. Mar. 6, 2007) (finding prima facie case based on statistical disparities alone); *People v. Smocum*, 99 N.Y.2d 418, 422 (N.Y. 2003) ("[A] prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination.");

Commw. v. Harris, 409 Mass. 461, 467 (1991) (finding prima facie case where State challenged the only African-American person on the venire).

In comparison, Alabama, as well as the Fourth, Fifth, Eighth, and Tenth Circuits, have reached the opposite conclusion, namely, that numbers alone are always insufficient to establish a prima facie case under *Batson*. As recently as this year, the Alabama Supreme Court found that, without more, evidence that a prosecutor had used ten of his fifteen preemptory challenges to strike African Americans was insufficient to raise an inference of discrimination. The court explained that defense counsel's "objection was based totally on the number of African Americans the State struck from the jury. When the trial court asked for facts or evidence to support the objection, [counsel] was unable to provide any. The trial court properly concluded that [counsel] had not presented a prima facie case of discriminatory use of peremptory strikes." *Ex parte Walker*, 2007 WL 945068, at *2 (Ala. Mar. 30, 2007).

The Fourth Circuit also requires more than numbers alone. In *Allen v. Lee*, the Fourth Circuit, sitting en banc, explicitly rejected the use of statistics to satisfy step one of the *Batson* inquiry. Finding that the petitioner failed to establish a prima facie case, the court explained that "the only facts that Allen identified to support an inference of purposeful discrimination were raw statistics about the racial make-up of the venire and those excluded from the jury through peremptory challenges. He has presented no other circumstantial facts that 'raise an inference' that the State was discriminating against African-Americans in exercising its peremptory challenges." *Allen v. Lee*, 366 F.3d 319, 329 (4th Cir. 2004). The court observed:

> Though statistics are not utterly bereft of analytical value, they are, at best, manipulable and untrustworthy absent a holistic view of the circumstances to which they apply. The statistics relied upon by Allen, and upon which the dissenters command a 'focus,' do not tell the whole story or even an accurate story in this case.

Allen, 366 F.3d at 330.

Other state and federal courts have also rejected prima facie cases that are based on numbers alone. For example, the Fifth Circuit held that "where the only evidence proffered by the defendant" is that the prosecution struck one of two African-American prospective jurors, "a prima facie *Batson* claim does not arise." *United States v. Branch*, 989 F.2d 752, 755 (5th Cir. 1993). Several other courts have adopted the Eighth Circuit's standard that "a prima facie case of racial discrimination requires a defendant to come forward with facts, not just numbers alone." *United States v. Moore*, 895 F.2d 484, 485 (8th Cir. 1990); *see also Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 561 (5th Cir. 2001) (adopting the Eighth Circuit's standard); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991) ("By itself, the number of challenges used against members of a particular [group] is not sufficient to establish . . . a prima facie case."); *Fleming v. Kemp*, 637 F. Supp. 1547, 1553 (M.D.Ga.1986) (finding no prima facie case under *Batson* when number of African Americans on the panel was small and when prosecutor did not strike all African Americans even though he could have done so), *aff'd* 837 F.2d 940 (11th Cir. 1988).

Some state courts have also held that numbers, without more, are always insufficient to establish a prima facie case of discrimination. *See, e.g., Livingston v. State*, 271 Ga. 714, 718 (1999) ("Even though circumstantial evidence of invidious intent may include proof of disproportionate impact, numbers alone may not establish a disproportionate exercise of strikes sufficient to raise a prima facie inference that the strikes were exercised with discriminatory

intent."); *Stamps v. State*, 515 N.E.2d 507, 520 (Ind. 1987) (striking the only two African Americans on venire panel does not constitute prima facie case of discrimination); *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990) (striking only African American on panel does not constitute a prima facie case).

Mr. Jenkins is not requesting that the Court articulate a bright line rule about what types of numbers will always be sufficient to establish a prima facie case of discrimination. Indeed, the *Batson* Court rejected such a rule. The Court explicitly declined to specify the showing necessary to establish a prima facie case of discrimination, stating, "[w]e have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Batson*, 476 U.S. at 97.[5] In seeking review, Mr. Jenkins is requesting only that the Court clarify that, in certain circumstances, statistics alone may be sufficient to establish a prima facie case of discrimination.

C. Given that *Batson* Claims are Adjudicated on a Daily Basis, and Given the Constitutional Interests at Stake, it is Imperative that the Court Resolve the Split in the Lower Courts.

The Court's decisions in *Johnson*, 545 U.S. at 162, *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), signal its continuing commitment to the principles and promises of *Batson*. Each of these cases demonstrates the Court's interest in the continued vigorous and consistent enforcement of its *Batson* jurisprudence. As recently as 2005, the Court reiterated *Batson*'s central role in combating race discrimination in jury selection:

[5] *See also United States v. Clemons*, 843 F.2d 741, 746 (3d Cir. 1988) ("[E]stablishing some magic number or percentage to trigger a *Batson* inquiry would short-circuit the fact-specific determination expressly reserved for trial judges.").

> The constitutional interests *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial, . . . nor to those citizens who desire to participate 'in the administration of the law, as jurors,' . . . Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race . . . The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.

Johnson, 545 U.S. at 171-72 (citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

The Court's commitment to this goal is precisely why it put an end to the defendant's "crippling burden of proof" that existed under *Swain v. Alabama*, 380 U.S. 202 (1965). *Batson*, 476 U.S. at 92-93. The burden under *Swain* had rendered "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93. *See also Miller-El*, 545 U.S. at 239 (observing that the burden under *Swain* "turned out to be difficult to the point of unworkable"). Among the Title VII cases cited in *Batson* was *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981), in which the Court specifically held that the plaintiff's burden in establishing a prima facie case of discrimination was "not onerous." Post-*Batson* cases consistently adhere to the position that the burden for a prima facie showing is not substantial. *See*, *e.g.*, *Johnson*, 545 U.S. at 170; *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000) ("The *Batson* framework was intended significantly to reduce the quantum of proof previously required of a defendant who wished to raise a claim of racial bias in the jury selection procedure.").

The *per se* rule of prohibiting a prima facie showing based on statistics alone violates the Court's mandate in *Batson* and its progeny. In *Johnson*, this Court reaffirmed its position that "it did not intend" for the first step of *Batson* "to be so onerous that a defendant would have to persuade the judge -- on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful

discrimination." *Johnson*, 545 U.S. at 170. It therefore concluded that California's requirement that a defendant "persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination," *id.* at 168, was an "inappropriate yardstick by which to measure the sufficiency of a prima facie case." *Id.* The standard imposed by Alabama, the Fourth, Fifth, Eighth, and Tenth Circuits, which requires a defendant to put forth more than numbers alone, is similarly an "inappropriate yardstick." *Id.*

In fact, beginning with *Batson*, this Court has repeatedly and unequivocally stated that statistical evidence alone may be sufficient to establish a prima facie case. *Batson*, 476 U.S. at 93 ("[T]otal or seriously disproportionate exclusion of Negroes from jury venires is itself such an unequal application of the law . . . as to show intentional discrimination."); *Miller-El*, 537 U.S. at 342 (where prosecutors used ten of fourteen peremptory strikes to exclude 91 percent of eligible African-American venire members, and only one served on the jury, "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason"); *Johnson*, 545 U.S. at 173 (stating that statistical evidence, which was all petitioner offered in support of his *Batson* challenge was "sufficient to establish a prima facie case under *Batson*").

If, as in the multiple jurisdictions discussed above, the threshold for establishing a prima facie case is set too high, judicial enforcement of the Equal Protection Clause in the area of jury selection will be all but impossible. Rigorous insistence on compliance, particularly, as here, where lower courts decline to follow this Court's instructions, is a constitutional and public policy imperative for two reasons. First, courts confront *Batson* challenges on a daily basis. In 2006 alone, *Batson* was cited in 546 state and federal appellate opinions, a figure that only hints

at the frequency with which courts apply *Batson* in trial courts.[6] Without clear guidance from this Court, there is a substantial risk of continued inconsistent application of the *Batson* principles.

Second, although *Batson* was decided 21 years ago, race discrimination remains a pervasive feature of the jury selection process. There is ample empirical support for the conclusion that race continues to influence attorneys' use of preemptory challenges. *See, e.g.,* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure,* 31 Law & Hum. Behav. 261, 263 (June 2007) (comprehensive study finding that prospective jurors' race influences the use of peremptory challenges); Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis,* 3 U. Pa. J. Const. L. 3, 52-53, 73, n.197 (2001) (showing that in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors, whereas defense counsel struck 26% of black jurors and 54% of nonblack jurors).

"For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, 505 U.S. 42, 44 (1992). The conflict among lower courts about what constitutes a prima facie case prevents a uniform, consistent and principled application of *Batson*. The Texas Court of Criminal Appeals observed that, with respect to establishing a prima facie case under

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[6] A Westlaw search was performed on October 9, 2007, using the search term "Batson w/3 Kentucky," and restricting cases to the 2006 calendar year. The search was performed in the file "federal & state cases, combined." A Westlaw search using the same search criteria for the years 2006 through the present found 1004 state and federal appellate decisions citing *Batson*.

Batson, "[c]ases from the federal circuits and our sister states are often conflicting. No common approach to the problem of prima facie proof has clearly begun to emerge." *Linscomb v. State*, 829 S.W.2d 164, 168 n.14 (Tex. Crim. App. 1992). This conflict is an obstacle to achieving the goals set forth in *Batson*, namely, jury selection free of race discrimination. *See McCollum*, 505 U.S. at 44. Resolving this split is critical to the integrity of the jury system and to the public's acceptance of jury verdicts. As stated by this Court, "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' . . . and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). In order to resolve this conflict and promote a principled application of *Batson* and its progeny, this Court should grant certiorari.

D. In the Alternative, Mr. Jenkins Requests that the Court Remand in Light of *Johnson v. California.*

If the Court is not inclined to grant certiorari and settle the split in the lower courts, Mr. Jenkins respectfully requests that the Court vacate judgment, and remand the case to the Alabama Court of Criminal Appeals for further consideration in light of *Johnson v. California*, 545 U.S. 162, 168-69 (2005). This request is reasonable for two reasons. First, the CCA's decision was issued on February 27, 2004, prior to *Johnson*.[7] *See Jenkins*, 2004 WL 362360. Accordingly, the CCA never had the opportunity to reconsider its *Batson* jurisprudence in light of *Johnson*.

[7] The Alabama Supreme Court denied certiorari without addressing the merits on May 18, 2007. As noted in the procedural section of this petition, the Alabama Supreme Court had granted Mr. Jenkins' petition for certiorari and reversed on an issue relating to jury misconduct. *Ex parte Jenkins*, 2005 WL 796809, at *6 (Ala. Apr. 8, 2005). This remand explains the gap in time

Second, lower courts, such as the CCA, should be required to reexamine their standards for evaluating prima facie cases in light of *Johnson's* clear reiteration that the first step of *Batson* is not an onerous burden. A remand in light of *Johnson* would send a clear message to the lower courts that this Court meant what it said in *Batson* and *Johnson*.

II. Capital Litigants Have a Constitutional Right to Counsel on Second-Level Direct Appeals.

The CCA's conclusion that Mr. Jenkins was not entitled to counsel on his direct appeal as of right to the Alabama Supreme Court raises a question that has yet to be addressed by any federal court, namely, whether the right to counsel attaches to all appeals as of right on direct appeal of capital convictions. This question "has not been, but should be, settled by this Court." Sup. Ct. R. 10. There are two reasons why it is critical that the Court resolve this ambiguity in the law. First, although the Court has clarified that defendants have a right to counsel on first-level appeals as of right, *see Douglas v. California*, 372 U.S. 353, 357 (1963), it has yet to clarify whether this right extends to second-level appeals as of right. Second, for purposes of federal habeas review, petitioners must present their claims to the state's highest court, *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In order to prefect these appeals, indigent defendants must be afforded counsel.

A. Whether Petitioner was Entitled to Counsel on his Second-Level Appeal as of Right is a Critical Question Explicitly Left Unanswered by this Court.

At the time of Mr. Jenkins' direct appeal, Rule 39(c) of the Alabama Rules of Appellate Procedure provided that, in death penalty cases, appealing to the Alabama Supreme Court was an

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between the CCA's February 27, 2004 decision on Mr. Jenkins' *Batson* claim and the Alabama Supreme Court's denial of his writ on May 18, 2007.

appeal as of right.[8] Despite the fact that Alabama provided for an appeal as of right to the Alabama Supreme Court, the CCA held in this case that the right to counsel does not extend beyond appeal to the CCA. *Jenkins*, 2004 WL 362360, at *8. Relying on *Douglas v. California*, the CCA concluded that, since Mr. Jenkins did not have a right to counsel on his appeal to the Alabama Supreme Court, he could not claim ineffective assistance of appellate counsel. The CCA's reading of *Douglas* is unreasonably broad given that this Court has not yet addressed the question of whether there is a right to counsel on second-level appeals as of right.

It is well-established that there is a right to the effective assistance of counsel on a first-level appeal as of right, *Douglas*, 372 U.S. at 357, and that there is no right to counsel on a discretionary appeal to the state's highest court, *Ross v. Moffitt*, 417 U.S. 600, 610-12 (1974). In *Douglas*, the Court concluded that the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal if the State has provided such an appeal as of right. *See Douglas*, 372 U.S. at 355-58. Since then, the Court has further clarified that the Fourteenth Amendment guarantees a criminal defendant the right to effective assistance of counsel on first-level appeals as of right, *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985) and that there is no right to counsel in state habeas corpus proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Explicitly left unanswered in *Douglas* and its progeny is whether there is a right to counsel on a second-level appeals as of right. *Douglas*, 372 U.S. at 356 ("We need not now decide whether . . . counsel must be appointed for an indigent seeking review . . . by appeal as of right."). The Second Circuit recently recognized this ambiguity in the law. In *Hernandez v. Greiner*, the Second Circuit observed that this Court explicitly "left open the possibility that a

[8] In 2000, the rule was amended and now review of death-penalty cases is at the discretion of the Alabama Supreme Court.

right to counsel would attach to an appeal of right to a state's highest court, even if such an appeal was a second-level appeal after a first-level appeal to an intermediate appellate court." *Hernandez v. Greiner*, 414 F.3d 266, 269 (2d Cir. 2005).

Despite the fact that no court has definitively addressed this question, *Douglas* and its progeny suggest that where a state creates an appeal as of right, it must supply an indigent defendant with an attorney. *Douglas*, 372 U.S. at 358. "[I]f a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts*, 469 U.S. at 393 (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). In 2005, the Court again reiterated that "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions. Having provided such an avenue, however, a State may not 'bolt the door to equal justice' to indigent defendants." *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (citing *Griffin*, 351 U.S. at 24) (Frankfurter, J., concurring in judgment).

The *Douglas* decision was premised on the principle that "a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas*, 372 U.S. at 355. By concluding that defendants are not entitled to counsel on second-level appeals as of right, the CCA effectively created a rule which discriminates against poor defendants.[9]

[9] This Court's decision in *Wainwright v. Torna,* is frequently relied upon for the principle that a criminal defendant's right to counsel extends only to a first appeal of right and no further. The Court in *Wainwright*, however, expressly stated that it need not consider whether the right to counsel attached in appeals as of right subsequent to a first appeal because the defendant in *Wainwright* did not contend he had a right to review under the limited mandatory appellate jurisdiction of the Florida Supreme Court. *Wainwright v. Torna*, 455 U.S 586, 588 n.3 (1982).

B. The Due Process and Equal Protection Clauses of the Fourteenth Amendment Entitle Mr. Jenkins to Counsel on his Second-Level Appeal.

Even if Alabama did not create an appeal as of right, there are additional compelling reasons why there should be a right to counsel on direct appeal. Under this Court's decision in *O'Sullivan v. Boerckel*, a prisoner filing a federal habeas petition "must give the state courts one full fair opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "Comity, in these circumstances, dictates that [petitioner] use the State's established appellate review procedures before he presents his claims to a federal court." *Id.* Given that Mr. Jenkins must file a petition for writ of certiorari to the Alabama Supreme Court in order to satisfy the exhaustion requirements set forth in *O'Sullivan*, appealing to the state supreme court is critical for preserving claims. If a petitioner fails to appeal to the state supreme court, his claims will be deemed unexhausted in federal habeas review and relief will be denied. By requiring that habeas petitioners invoke one complete round of the state's established appellate review, the Court has, in essence, made direct appeal to the state supreme court obligatory.

It follows, therefore, that, because appealing to the state supreme court is now required for purposes of federal habeas review, this appeal is a critical stage in a criminal proceeding to which the right to counsel must attach. Appealing to the state supreme court affects "substantial rights" of criminal defendants and accordingly, they are entitled to the effective assistance of counsel in perfecting such an appeal. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (holding that because an appeal is a critical stage of criminal proceedings, a defendant is entitled to the effective assistance of counsel in perfecting an appeal).

In light of the obligatory nature of the direct appeal process, both the Due Process and Equal Protection Clauses of the Fourteenth Amendment entitle indigent capital litigants to counsel on all levels of direct appeal. In *Halbert*, this Court observed that its previous decisions regarding right to counsel on appeal "reflect both equal protection and due process concerns. 'The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,' while '[t]he due process concern homes in on the essential fairness of the state-ordered proceedings.'" *Halbert*, 545 U.S. at 611 (quoting *M.L.B. v. S.L. J.*, 519 U.S. 102, 120 (1996)). Both protections "emphasize the central aim of our entire judicial system -- all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin*, 351 U.S. at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

To the extent that indigent defendants are not afforded the right to counsel on direct appeal, all people charged with crimes will not stand "on an equality before the bar of justice." *Id.* As this Court stated in *Evitts*:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial --is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant-like an unrepresented defendant at trial-is unable to protect the vital interests at stake.

Evitts, 469 U.S. at 396. As Justice Sutherland observed in *Powell v. Alabama*, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Filing a petition for writ of certiorari with a state supreme court is challenging for experienced lawyers, much less litigants representing themselves. The Alabama Rules of

Appellate Procedure, for example, require applicants to set forth the factual and procedural history of the case, and detailed reasons for why the petition should be granted. *See* Ala. R. App. P. 39. More importantly, the applicant must persuade the Alabama Supreme Court that the case presents unresolved questions of law and or disagreements between lower courts. *Id.* Justice Douglas, in his dissent in *Ross*, observed that "the technical requirements for applications for writ of certiorari are hazards which one untrained in the law could hardly be expected to negotiate." *Ross*, 417 U.S. at 621*; see also Evitts*, 469 U.S. at 393 ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."). Given the complicated nature of filing such a writ, petitioners proceeding without counsel are at a distinct disadvantage.

The challenges and procedural hurdles of pursuing a petition for certiorari *pro se* are especially daunting for the large number of criminal defendants who suffer from a range of debilitating mental impairments. In writing for the majority in *Halbert*, Justice Ginsburg observed that "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments. Persons in Halbert's situation are particularly handicapped as self-representatives." *Halbert*, 545 U.S. at 621. Citing to its decision in *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) the *Halbert* Court recognized the prevalence of mental health issues that make self-representation all but impossible: "[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills. [S]even out of ten inmates fall in the lowest two out of five levels of literacy-marked by an inability to do such basic tasks as write a brief letter to explain an error on

a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article." *Id.* "Many . . . have learning disabilities and mental impairments." *Id.* (citing the U.S. Dept. of Justice, Bureau of Justice Statistics, A. Beck & L. Maruschak, *Mental Health Treatment in State Prisons*, 2000, pp. 3-4 (July 2001)).

This Court's decision in *Griffin v. Illinois* also supports Mr. Jenkins' position. There, the Court held that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," 351 U.S., at 19, and therefore the State must furnish indigent defendants with free trial transcripts for purposes of direct appeal. *Id.* The *Griffin* principle of equal access to the appellate process is continuously and consistently applied in other analogous situations. *See, e.g., Smith v. Bennett*, 365 U.S. 708, 714 (1961) (invalidating filing fee for state habeas corpus as applied to indigents); *Lane v. Brown*, 372 U.S. 477, 484 (1963) (applying *Griffin* principle to state collateral proceedings). The Court also applied the *Griffin* principle in *Douglas*. In comparing the right to counsel for purposes of appeal with the right to trial transcripts for purposes of appeal, the Court reasoned that, "[i]n either case, the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Douglas*, 372 U.S. at 355 (quoting *Griffin*, 351 U.S. at 19). These cases "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." *Ross*, 417 U.S. at 607.

The *Griffin* principle applies to this situation as well. The Court's requirement in *O'Sullivan* -- that petitioners appeal to the state supreme court before obtaining federal habeas review -- is analogous to the transcript requirement at issue in *Griffin*. Both are conditions imposed on criminal defendants appealing from a conviction. As stated by the *Douglas* Court, "the evil is the same: discrimination against the indigent." *Douglas*, 372 U.S. at 355. Moreover, "when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such . . . review." *Griffin*, 351 U.S. at 23 (Frankfurter, J., opinion concurring in judgment). By analogy, now that the Court has "deemed it wise and just" that prisoners invoke "one complete round of the State's established appellate review process," *O'Sullivan*, 526 U.S. at 845, a line cannot be drawn that "precludes convicted indigent persons from securing such review." *Griffin*, 351 U.S. at 23. By not providing indigent defendants with the assistance of counsel to pursue such an appeal, an impermissible line is drawn between the rich and the poor.[10]

In *Ake v. Oklahoma*, this Court stated that "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (citing *Ross*, 417 U.S. at 612). Given that appealing to the state's highest court is now required in order to preserve claims for federal habeas review, it follows that defendants be afforded counsel in order to prefect these appeals.[11]

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[10] *See also Roberts v. LaVallee*, 389 U.S. 40, 42 (1967) ("Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.").

[11] At least one circuit court has addressed the issue of whether *O'Sullivan* mandates the appointment of counsel on direct appeal. In *Anderson v. Cowan*, the Seventh Circuit held that,

CONCLUSION

For the reasons discussed herein, the Court should grant the petition for writ of certiorari.

Respectfully Submitted,

BY: _____
Ty Alper

Elisabeth Semel
Ty Alper*
Katherine Weisburd
Death Penalty Clinic
UC Berkeley School of Law
Berkeley, CA 94720-7200
(510) 643-7849

Joseph T. Flood, Esq.
Capital Defender
Office of the Capital Defender
7900 Sudley Road, Suite #208
Manassas, VA 20109
(703) 331-4725

* Counsel of Record

ATTORNEYS FOR PETITIONER

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under *O'Sullivan*, the habeas petitioner had defaulted on his ineffective assistance of counsel claim by not raising it to the Illinois Supreme Court. *Anderson v. Cowan*, 227 F.3d 893, 899-901 (7th Cir. 2000). The court rejected petitioner's argument that appellate counsel had also been ineffective. In so ruling, the court found that petitioner had no constitutional right to counsel to pursue discretionary review to the state supreme court. Given that the appeal in Illinois was not an appeal of right, Mr. Jenkins' case is distinguishable.