No._____

CAPITAL CASE

IN THE

SUPREME COURT OF THE UNITED STATES

_____

HERBERT SMULLS – PETITIONER

vs.

STATE OF MISSOURI – RESPONDENT

_____

ON A PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF MISSOURI

_____

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Petitioner Herbert Smulls was convicted and sentenced to death following a trial before an all-white jury because the prosecutor struck the only black juror, purportedly because she was a "mail sorter." The trial court denied Mr. Smulls' *Batson* challenge without deciding whether the prosecutor's reasons were race-neutral, averring he had a problem because he did not "know what constitutes black."

Mr. Smulls was denied relief by the Missouri appellate courts and a federal district court. A panel of the Eighth Circuit Court of Appeals en banc found that the prosecutor's challenge was discriminatory. However, despite the trial court's "ill-advised" comments and the lack of factual findings, the trial court's denial of the *Batson* challenge was entitled to deference. In the interim, a former assistant prosecutor admitted that the "postal worker gambit" was a pretext for race. Mr. Smulls filed a Motion to Recall the Mandate, asking the Missouri Supreme Court to revisit his *Batson* claim in light of the newly discovered evidence and the judge's failure to properly apply *Batson* at trial, which was summarily denied. The question presented is:

1. Do *Batson* and its progeny clearly establish an entitlement to a trial-level determination of whether the prosecutor has intentionally discriminated against minority jurors?

INDEX TO APPENDICES

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SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The en banc Order of the Supreme Court of Missouri overruling Mr. Smulls' Motion to Recall the Mandate and for Stay of Execution While Motion Is Pending, *State v. Smulls*, SC Case No. 75511, January 27, 2014, appears at Appendix A.

Smulls v. Roper, 535 F.3d 853 (8th Cir. 2008)(en banc)

Smulls v. Roper, 467 F.3d 1108 (8th Cir. 2006)

Smulls v. Roper, 4:02CV00618 (February 1, 2005 E.D. Mo.)

State v. Smulls, 935 S.W. 9 (Mo. banc 1996)

State v. Smulls, 1196 WL 344673 (Mo. banc June 25, 1996)

Smulls v. State, 10 S.W.3d 497 (Mo. banc 2000)

Smulls v. State, 71 S.W.3d 138 (Mo. banc 2002)

STATEMENT OF JURISDICTION

On January 27, 2014, the Supreme Court of Missouri (en banc) denied Mr. Smulls' motion to recall the mandate and for a stay of execution while the motion was pending. (App. A).

Mr. Smulls' petition for writ of certiorari is due is timely filed, as the 90-day period to file has just begun to run.

This Court may review final judgments or decrees rendered by the State's highest court by writ of certiorari where any right is claimed under the Constitution of the United States. 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

28 U.S.C. § 2254(e)(1) provides as follows:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Herbert Smulls, an African-American man convicted and sentenced to death by an all-white jury after the prosecutor struck the sole black juror from the venire for pretextual reasons in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

Having found compelling new evidence proving that the prosecutor struck the sole African-American juror for pretextual reasons, Mr. Smulls moved the Missouri Supreme Court to recall its mandate so that his *Batson* claim, decided based on an unreasonable application of *Batson* in his trial, could be evaluated on the merits prior to his impending execution.

The trial judge refused to conduct a *Batson* analysis, stating that he did not know who was "black" or "white" or "orange" or "purple," and that "[y]ears ago they used to say one drop of blood constitutes black." (App. C, 381). The judge added

that he would "rather not even discuss it on the record." (App. C, 382). The judge failed to even apply and rule on the first step of the *Batson* claim – i.e., whether there was a *prima facie* showing of discrimination.

Nevertheless, the state – conceding that Ms. Sidney is black – advanced advanced its purportedly race-neutral reasons for striking her, foremost among them that she was a "mail sorter," an excuse commonly used in St. Louis County, Missouri. Under this Court's precedent, "the trial court *must decide* whether the opponent of the strike has proved purposeful racial discrimination." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). The trial judge's offensive, insensitive allusion to the "one drop of blood" rule and his patent refusal to make a factual finding of the undisputed fact of Ms. Sidney's race show an indifference to – if not an attempt to totally obstruct – Mr. Smulls' rights under *Batson*. Mr. Smulls was denied *Batson*'s protection without any of the required findings.

Although previous decisions in MR. Smulls' case assume that the trial court credited the prosecutor's race-neutral claims for striking Ms. Sidney, they did so without the benefit of direct evidence of the prosecutor's discriminatory intent. Mr. Smulls moved to recall the mandate of the Missouri Supreme Court, which is the remedy provided under Missouri law for reopening a decision rendered unconstitutional by subsequent developments. *State v. Whitfield*. The Missouri Supreme Court summarily denied relief in effect ruling that Mr. Smulls failed to state a claim on which relief could be granted and adhering to its original decision dispensing with the constitutionally mandated findings. The lower courts are deeply

divided as to a defendant's entitlement to a trial-level determination of whether the prosecutor has intentionally discriminated against minority jurors, with Missouri taking a very lax approach that threatens to water down *Batson*, and with it, this Court's protection of core constitutional rights. "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85.

The initial opinion of the Missouri Supreme Court in Smulls' case sharply criticized the trial judge, observing that his statements "reek[ed] of racial animus." (App. J, *State v. Smulls*, 1996 WL 344673 (Mo. banc 1996)). Although the opinion was later withdrawn, *sua sponte*, and reissued with softer language – after the judge's defenders wrote letters to the Missouri Supreme Court – the judge's refusal to conduct a proper *Batson* hearing deprived Mr. Smulls of the ability to contest the prosecutor's obviously pretextual reasons for striking the sole black venireperson. See (App. K, Smulls, 935 S.W.2d 9)(Mo. banc 1996).

In light of new evidence, including a history of St. Louis County cases in which the "postal-worker" pretext was offered routinely in response to *Batson* challenges, Missouri's ruling represents an unreasonable application of *Batson.* Mr. Smulls should be afforded a hearing that complies with *Batson* .

<u>New Evidence Supports Smulls' Previously Unadjudicated Claim that the Prosecutor's Justification for Striking the Sole African-American Juror Was Pretext Intended to Conceal Discriminatory Motive</u>

Recently, evidence has surfaced which makes clear that the prosecutor's claim that he struck the juror because she was a "mail sorter" and supposedly

displayed an irritable attitude was a fraudulent pretext for race. Mr. Smulls developed and presented new evidence to the Missouri Supreme Court in support of his request that it recall the mandate:

1. The affidavit of Joseph W. Luby revealing the St. Louis County Prosecutor's longstanding, unwritten practice of using the "Postal Gambit" – a ploy in fact *invented by* Mr. Smulls' prosecutor, Mr. Waldemer – to eliminate African-Americans from jury service, and disclosing the St. Louis County Prosecutor's practice of removing African-Americans from juries in capital cases because they were perceived as less likely to support the death penalty; and

2. Prosecutor Waldemer's disclosure on his recent application for the position of circuit judge that he himself had been a "mail worker" employed by the United Parcel Service for four and a half years as a High Volume Package Sorter – a fact he did not disclose to the court when he disparaged postal workers at great length to justify excusing the only African-American juror from Mr. Smulls' jury, sharply undermining his creditability.

Since the Missouri Supreme Court last considered Mr. Smulls' *Batson* claim on direct appeal in 1996, it has remarked upon the disproportionate number of *Batson* cases originating in St. Louis County, and in intervening decisions, including *State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003), *McFadden I*, and

McFadden II, the Missouri Supreme Court began to evaluate occupation-based strikes with more scepticism:

> Justice: It's disappointing that there are no African-Americans on the jury again in St. Louis County. Now, that's troublesome.
>
> Justice: An awful lot of our *Batson* cases come from there.
>
> Justice: All of them recently.

See partial transcript of oral argument, State v. *McFadden*, No. SC 87753, (App. G).

This new evidence doubtlessly sheds new light on the original court record, and under a proper application of *Batson*, *i.e.*, *Miller-El* v. Dretke, 545 U.S. 231 (2005)("*Miller-El II*"), it will be clear that the prosecutor's peremptory strike was racially motivated and his proffered justification was pretextual. In *Miller-El II*, this Court made clear that racial discrimination in jury selection threatens justice as it "compromises the right of trial by impartial jury" and jeopardizes the integrity of the courts. *Miller-El II*, 545 U.S. at 237. Here, the right of Mr. Smulls and Ms. Sidney to Equal Protection of the Law was plainly, unjustly violated.

The actions and ultimate decision of the trial court, sanctioned by the Missouri Supreme Court's failure to take action to recall its mandate, contravene the clearly established law of *Batson*.

A. Procedural History

Mr. Smulls was charged with two counts of first degree robbery, two counts of armed criminal action, one count of first degree assault, and one count of first degree murder (App. J). His first trial resulted in a conviction on one count of robbery in the first degree, but the jury was unable to reach a verdict as to the

remaining counts (App. J). Mr. Smulls was tried a second time, convicted on all counts, and sentenced to death for first degree murder (App. J).

At his second trial, defense counsel made a *Batson* challenge when the state used a peremptory strike to remove the only African-American on the panel (App. J). After the prosecutor stated his reasons for the strike, the trial court promptly denied the *Batson* challenge, without giving defense counsel an opportunity for rebuttal (App. J). Despite the court's premature ruling, defense counsel explained why the prosecutor's reasons for the strike were pretextual and masked his discriminatory intent (App. J

On appellate review, the Missouri Supreme Court categorized the prosecutor's stated reasons for the strike as "based on general demeanor and . . . on Mrs. Sidney's occupation." (App. K, State v. Smulls, 935 S.W.2d 9, 15)(Mo. banc 1996)). With respect to the general demeanor reasons the court said, "Reasons such as these have been found to support a ruling that a trial court did not clearly err by finding a prosecutor did not discriminate in the exercise of peremptory challenges." *Id.* (citations omitted). As to the occupation-related reasons, the court said,

> A legitimate reason for exercising peremptory challenges is not one 'that makes sense' but one 'that does not deny equal protection.' Purkett v. Elem, 514 U.S. 765, 769, 115 S.Ct. 1769, 1771, 131 L.3d.2d 834 (1995). Even assuming the prosecutor's reasons for challenging mail sorters and postal workers are non-sensical, this does not establish the reasons are inherently pretextual.

Id. at 15-16. Finally, the court observed that the prosecutor had struck Mrs. Dillard, a similarly situated white juror. Id. at 16. The court summed up,

concluding that the trial court did not clearly err by overruling defendant's *Batson* objection. Id. The court did observe, however, that "the trial judge's gratuitous statements raise serious questions about his willingness to do what *Batson* requires" and "manifest a lack of understanding of the import of the issues underlying *Batson*." Id. at 26.

After his state post-conviction proceedings were final, Mr. Smulls filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The United States District Court for the Eastern District of Missouri denied relief, and Mr. Smulls appealed. A panel of the United States Court of Appeals for the Eighth Circuit reversed the district court's ruling on the *Batson* issue and remanded for further proceedings. *Smulls v. Roper*, 467 F.3d 1108 (8th Cir. 2006). Respondent filed a petition for rehearing en banc which was granted. On rehearing, the Court of Appeals denied habeas relief. *Smulls v. Roper*, 535 F.3d 853 (8th Cir. 2008). Mr. Smulls' petition for writ of certiorari was denied. *Smulls v. Roper*, 556 U.S. 1168 (April 6, 2009).

The Missouri Supreme Court issued its mandate on January 8, 1997. On December 9, 2014, a warrant issued for Mr. Smulls' execution, setting an execution date of January 29, 2014. Mr. Smulls filed a motion for the Missouri Supreme Court to recall the mandate and stay execution based on the newly discovered evidence supporting his *Batson* claims on January 26, 2014. (App. B). The Court issued its order overruling Mr. Smulls' motion on January 27, 2014. (App. A).

B. Factual History

Herbert Smulls, an African-American City of St. Louis resident, was convicted in St. Louis County of first degree murder, among other charges. His initial trial, in which some members of the jury were African-American, hung on every charge except one count of robbery – the jury clearly could not agree beyond a reasonable doubt that Smulls was guilty of first degree murder. The all-white jury at Smulls' second trial not only convicted him, but returned a death sentence on the charge of first degree murder.

At the second trial, prosecutor Dean Waldemer used a peremptory strike against the lone African-American juror, Ms. Margaret Sidney, justifying that strike with what has come to be known as the "Postman Gambit," an excuse for striking potential jurors notorious in the St. Louis County area – and credited to Waldemer himself. In response to Mr. Smulls' *Batson* challenge, the prosecutor advanced the following purportedly race-neutral justification, included in its entirety from the reported opinion:

> Judge, I made nine strikes. I did strike the juror Ms. Sidney who, I guess, for the record was a black female. My reasons for striking Ms. Sidney are based both upon what I observed during our voir dire and based upon my experience in trying criminal lawsuits, which has exceeded 50 cases in this courthouse including several cases before this Court in the nine years that I have been a prosecuting attorney.
>
> My concerns with Ms. Sidney began yesterday. Ms. Sidney was very silent during all of the questioning. I observed at one point during my questioning concerning the death penalty a glare on her face as I was questioning that area. She was seated in the back row, I believe, yesterday. When I looked directly at her and asked that last row a question, she averted her eyes and wouldn't answer my question and wouldn't look at me. That made me very nervous.

> The only response I was able to get out of Ms. Sidney today was when I asked her about her occupation. At first she responded with what I though[t] was a very irritated answer. She indicated that she is a mail sorter for Monsanto Company. That she sorts mail for, I believe she said, 5,000 people. And her husband works for the post office. And I believe she listed him as a custodian.
>
> It's been my experience in the nine years that I've been a prosecutor that I treat people who work as mail sorters and as mail carriers, letter carriers and people who work for the U.S. Post Office with great suspicion in that they have generally – in my experience in many of the trials that I've had – are very disgruntled, unhappy people with the system and make every effort to strike back.
>
> In my experience as a prosecutor, in trying cases where I've had several cases and left mail people on the jury, had them result in a hung jury. The most recent of which was a murder case in this courthouse last September, State versus Dana Ruff (phonetically) where a mail carrier was the holdout for a hung jury in that case.
>
> I also have several in-laws who are employees of the postal department and even though they are somewhat relatives, I share the same opinion of them. So I treat them with great suspicion.
>
> When she glared at me and just her general attitude, which included her outfit – which yesterday, I believe, included a beret and today was a ball cap with sequins on it, I just felt that she wouldn't be a good state[']s juror. Certainly, not a strong juror in the consideration of death, should we get to that part of the trial.
>
> And also I would point out for the Court that I struck juror number eight, Ms. Dillard. I struck her for the very same reason in that she is a letter carrier and works delivering mail. And I though[t] her attitude was also confrontational. And I did not feel that her answers were ones that would give rise to me believing she would be a strong state[']s juror.
>
> Ms. Dillard, I would point out, is a white female. And I struck her for virtually the same reasons. It's been my experience that when I left postal workers on who seem to have an attitude, based on my interpretation, that I've had bad results. And that's why I struck her.

(App. C, 368-370).

Margaret Sidney was not a "mail sorter," as the prosecutor claimed, but in fact a "group leader" – a management level position – at Monsanto who managed

mail distribution for 5,000 employees, as defense counsel pointed out. (App. C, 368-69; *see also* Affidavit of Margaret Sidney, App. H). Significantly, Ms. Dillard, the white juror Mr. Waldemer also struck and compared Ms. Sidney to, happened to be not just any mail carrier, but *the mail carrier who serviced the victim's and key witnesses' home*; acquaintance with the victim and his family, at least one of whom would testify, was what justified her strike, not the fact she was a postal worker.

Mr. Waldemer also stated he was removing Ms. Sidney from the venire based on his experiences from a previous trial, *State of Missouri v. Dana Ruff*, in which he claimed the lone holdout for conviction was a postal employee, which has since been proven to be false: three individuals on that jury were postal workers, and all three voted "guilty." See Affidavits of Donald R. Westrich, Clarence Banks and Lily Tenbarge, attached as App. D.

Evidence demonstrates Mr. Waldemer's professed animus against postal employees ("I treat them with great suspicion") is patently absurd and constituted a misrepresentation by omission. (App. C, 369). *Mr. Waldemer neglected to mention that he had been a postal worker for four years*. Mr. Waldemer's recent application for a Circuit Judge in the Twenty-first Circuit of Missouri was made public. Asked to detail his "entire working career," Mr. Waldemer included, "United Parcel Service, 13818 Rider Trail Drive, Earth City, MO 63045, High Volume Package Sorter, evening shift, April 1976 – November 1980." (App. F at ¶7). During his diatribe about postal workers, set forth above, Mr. Waldemer did not inform the trial court of his own four years of "package sorting." This casts overwhelming

doubt on the credibility of his justifications for striking Ms. Sidney and supports the view that he contrived the "Postman Gambit" as a pretext to justify the striking of African-American venirepersons. *See* App. E, Affidavit of Joe W. Luby.

In addition to mischaracterizing Ms. Sidney's employment, the prosecutor alleged that he struck Ms. Sidney because she "glared" at him and "her general attitude" was poor. (App. C, 369). Mr. Waldemer inferred from Ms. Sidney's general appearance – specifically, the fact she wore a beret on one day and a "ball cap with sequins" on another – she would be unable to impose a sentence of death. (App. C, 369). Defense counsel disputed the prosecutor's observations about Ms. Sidney, but the court made no findings. (App. C, 368-382).

Judge William Corrigan limited his ruling on the *Batson* challenge to stating "overruled" and "denied." (App. C, 370, 372, 272, 380). When defense counsel created a supplemental record, Judge Corrigan made the following statement:

> [COUNSEL]: Judge, I believe I stated on the record yesterday when I made my record that Ms. Sidney was the only black juror remaining out of the 30.
>
> [JUDGE]: You made that statement.
>
> [COUNSEL]: Okay.
>
> [JUDGE]: You see, I have a problem. I don't know what it is to be black. I don't know what constitutes black. And I never, in this Court, *no matter what any appellate court may say*, I never take judicial notice that anybody is black or that only one person or four persons or eight persons are black.
>
> That to me is something that I don't think this Court is wise enough or any other appellate court is wise enough unless there is direct evidence as to who is black and who is white and who is orange and who is purple. I do not under any circumstances in this division ever take judicial notice of the number of people who are black. *And I believe*

> *that's counsel's responsibility to prove who is black and who isn't or who is a minority and who isn't.*
>
> There were some dark complexioned people on the jury. I don't know if that makes them black or white. As I said, I don't know what constitutes black. *Years ago they used to say one drop of blood constitutes black*. I don't know what black means. Can somebody enlighten me of what black is? I don't know; I think of them as people.
>
> I listened to the responses of Ms. Sidney. I watched her attitude very briefly as it may have been, and I'm not going to sit here and say to you that Ms. Sidney is not black. But I'm not going to make a judgment as to whether anybody else on the panel was, so in any event, I'm merely telling you that for the record. *I'd rather not even discuss it on the record.*
>
> But, in any event, I'm going to deny your motion for mistrial on the basis stated. Are we ready to proceed?

(App. C, 380-82)(emphasis added). His thoughtless invocation of the "one drop of blood" rule harked back to the era of slavery.

Because Judge Corrigan refused to take judicial notice of Ms. Sidney's obvious racial identity or that of the rest of the venire, he never made even the most basic finding required to establish a *prima facie* case under *Batson*. Judge Corrigan did not find facts related to the prosecutor's claimed justifications for the strike and never discussed whether the reasons were pretextual or whether the defense had established purposeful discrimination.

Judge Corrigan's racially insensitive remarks formed the basis for the Missouri Supreme Court's first review of Mr. Smulls' case. In the original opinion, App. J, State v. Smulls, No. 75511, 1996 WL 344673 (Mo. banc June 25, 1996), later amended, Missouri Supreme Court Judge Ronnie White, writing for the court, sharply criticized Judge Corrigan's reasoning as "oafish and insensitive." Id. The

state court openly questioned whether Judge Corrigan maintained the ability "to serve as a member of the judiciary" and went on to say "[t]hese statements cannot be benignly ignored. Taken together they speak for themselves and would cause a reasonable person to have a factual basis upon which to question the trial judge's ability to judge defendant's post-conviction hearing with impartiality." Id. at *15. The Court affirmed Smulls' convictions and sentences, but reversed the post-conviction court's ruling on his Rule 29.15 motion.

The Missouri court later withdrew that opinion and re-issued a modified opinion reaching the same result on November 19, 1996. (App. K, *State v. Smulls*, 935 S.W.2d 9)(Mo. banc 1996). Expanding on its previous criticism of Judge Corrigan, it added that his "gratuitous remarks manifest a lack of understanding of the import of the issues underlying *Batson*, and of what the code words 'one drop of blood' mean to many participants in the judicial system." *Id.* at 26. It explained the phrase was "reminiscent of the manner in which slaveholders sought to increase the supply of slaves, and by which many laws denied legal protections to mixed-race citizens." Id. at 26, n. 7.

The Missouri Supreme Court quoted verbatim the prosecutor's entire explanation for the challenge to Ms. Sidney and discussed the "general demeanor reasons" advanced by the prosecutor, noting that similar explanations had passed muster before. Id. But it overlooked the trial court's failure to rule on whether a *prima facie* showing that the peremptory strike had been exercised on the basis of

race, and the lack of factual findings about the purportedly negative behavior or attitude the prosecutor claimed to have observed from Ms. Sidney. *Id.*

This Court's approach to reviewing *Batson* claims has evolved since Smulls' *Batson* claim was last considered, while the Missouri Supreme Court's approach toward analyzing the third prong of a *Batson* claim has remained lax. But even under its more relaxed view, the State of Missouri has begun to pay closer attention to *Batson*'s third prong, particularly with *Batson* claims arising in St. Louis County and in the City of St. Louis and, specifically, the "postal worker" justification. That pretext traces its history back well before Mr. Smulls' unconstitutional trial. Far from being racially neutral, its impact was discriminatory, making the "postal worker" justification a very useful pretext in the peremptory challenge toolbox of area prosecutors. because of the county's demographics.

During the last quarter of 1991, more than 50.7% of the total postal employees in the St. Louis region were African-American. *See* App. I, Affidavit of Grace Corbin, a Senior Equal Employment Opportunity Specialist with the United States Postal Service. The percentage of mid-level postal employees that were African-American is higher still – 61.2%. Striking every postal employee, or person in an occupation related to mail handling, would necessarily result in disproportionate exclusion of African-American members of the community.

As early as 1988, the Eastern District of the Missouri Court of Appeals decided *State v. Rogers*, 753 S.W.2d 607 (Mo. Ct. App. E.D. 1988), a City of St. Louis case where the prosecutor used all of his peremptory strikes to remove blacks from

the venire. *Id.* at 609. The prosecutor "explained that he routinely struck postal workers, black or white, based on his experience that they were notoriously bad jurors for the state." *Id.* at 611. Overlooking the coincidence of both cases originating in St. Louis, the Court of Appeals noted that it had previously accepted the justification in *State v. Payton*, 747 S.W.2d 290, 292-293 (Mo. Ct. App. E.D. 1988). "One venireman was stricken because he was a postal worker and the prosecutor stated he always strikes postal workers, white or black." *Payton*, 747 S.W.2d at 293. And in yet another case from the City of St. Louis, *State v. Pepper*, 855 S.W.2d 500 (Mo. Ct. App. E.D. 1993), the prosecutor justified his strike of an African-American postal worker by saying:

> One of the things that I got when I first started in this office was a list of people that are typically bad for the State versus people that are good for the State. One of the people they had listed there was post office employees. I am not quite sure why. But they are listed.
>
> And it seems to me that every time I have left post office employees on there, they have hurt me on the jury panel. So now I make a habit of striking post office employees in light of what I learned to begin with.

Id. at 503 (emphasis added). Based on *Payton*, the state Court of Appeals ruled that those reasons were sufficiently race-neutral explanations. Id.

For years after Mr. Smulls' case was decided, St. Louis area prosecutors continued to leverag the "postal worker" pretext to strike African-American jurors from juries. In *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003), the St. Louis County prosecutor struck three African-American jurors, one of them because the venireperson "was a postal employee." Id. at 471-72. Citing *Smulls*, the state

supreme court ruled, "Employment is a valid race-neutral basis for striking a prospective juror." Id. at 472. As one prosecutor put it:

> Case law is real clear that employment such as postal, not all employment, but postal service, that's been—a lot of lawyers use that employment as a reason to strike. I don't think I'm coming up with anything that has never been heard in this courtroom before or even by opposing counsel. This is not a new thing.

Edwards, *supra*, 116 S.W. at 526. But by the time it decided *Edwards*, even the Missouri Supreme Court had begun to regard the justification warily:

> As the state notes, prior decisions of this Court and of the court of appeals have approved strikes of potential jurors based on their occupations, including an occupation as a postal worker. . .[citing *Williams* and *Smulls*, *supra*, and quoting from *Smulls*].
>
> But the state goes too far in arguing that a strike automatically survives a charge of pretext if the prosecutor states the strike was based on the prospective juror's occupation as a postal worker . . . If the mere incantation of the phrase "he is a postal worker" were sufficient to overcome any showing of pretext, the third step of the *Batson* test would be illusory. The second step – the identification of a reason, even a nonsensical one, for striking the juror – would end the inquiry. That is not in accordance with the United States or Missouri Constitutions.

Id. at 526. The court went on to discuss the factors set out in *State v. Parker*, 836 S.W.2d 930, 939-940 (Mo. banc. 1992), for determining whether the claimed reason for a strike was a pretext. Id. at 526-527.

Although the Missouri Supreme Court ultimately upheld the denial of the *Batson* challenge in *Edwards*, it counseled caution, urging that "[i]n the future, trial courts should similarly consider strikes based on occupation carefully, assessing them for pretext by looking at whether the occupation and the claimed traits relate

to the particular case or juror, ... and not allow a strike to rest solely on the claim that the juror is 'a postal worker.'" *Edwards*, 116 S.W.3d at 528 (emphasis added).

In *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006) ("*McFadden* I"), the Missouri Supreme Court cited to *Edwards* in ultimately rejecting the justifications advanced by the prosecutor to remove five of six African-American venirepersons, leaving only one African-American to serve on the jury, as pretextual. The state court held, "in light of the totality of the facts and circumstances, it becomes obvious that these explanations were merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons," and quoted the Indiana case *McCormick v. State*, 803 N.E.2d 1008, 1113 (Ind. 2004): "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection.'" *McFadden* I at 657. Finding pretextual a strike based on the juror's occupation as an employee of the St. Louis School District, the Missouri Supreme Court cited *Edwards*' rejection of the notion that a juror's occupation as a postal worker was sufficient to justify a peremptory strike. Id. at 653. *McFadden* I reversed and remanded for a new trial.

At a separate trial, again involving Mr. *McFadden*, a prosecutor struck one Asian and four African-Americans from the jury; the only remaining African-American was removed for hardship, leaving an all-white jury. *State v. McFadden*, 216 S.W.3d 673, 674 (Mo. banc. 2007) ("*McFadden II*"). Among the prosecutor's justifications for striking one of the potential jurors, S.H., was that she had "crazy

red hair" and seemed hostile – claims not dissimilar from the excuses the prosecutor in Smulls' case offered about Ms. Sidney's headwear. The trial court allowed the strike, agreeing "that the look '[made] her separate from the crowd, and very individualistic.'" *Id.* at 676.

At the 2007 *McFadden II* oral argument, the Missouri Supreme Court noted the pattern that was emerging in cases from St. Louis County:

> Justice: It's disappointing that there are no African-Americans on the jury again in St. Louis County. Now, that's troublesome.
>
> Justice: An awful lot of our *Batson* cases come from there.
>
> Justice: All of them recently.

(App. G, p. 1).

McFadden's second conviction was reversed when the court found "a clear *Batson* violation in the State's removal of [African-American venireperson] S.H. for having red hair." *McFadden II* at 675. In evaluating the prosecutor's justification, this Court said, "Viewing the totality of circumstances – the prosecution's disdain for S.H.'s red hair, his scrutiny of her lack of driver's license, and his misperception of her reaction as hostile – the prosecutor's subjective assumptions about S.H. are far from neutral." *Id.* at 676. The Missouri Supreme Court emphasized the need for a nexus between the case and the state's justification for the strike, noting that:

> the State fails to articulate how S.H.'s red hair, even if it were as unusual as the prosecution found it, was related to the case other than another conclusional inference that S.H. was individualistic. Here again, the State and the trial court presume to identify difference from a limited cultural view. '[P]otential jurors are not products of a set of cookie cutters,' nor should they be."

McFadden II at 677 (quoting *Miller-El II*). The court noted that references to attributes like demeanor are largely irrelevant to the ability to serve as a juror and warrant scrutiny because they expose jurors to peremptory strikes racial reasons. Id. at 676, n. 17 (citing *Edwards*, 116 S.W.3d at 550 (Teitelman, J., concurring)).

Mr. Waldemer's justifications for striking Ms. Sidney do not withstand scrutiny under this Court's precedent, like *Miller-El*, nor under Missouri's, outlined above. Smulls' was denied a meaningful trial level hearing on *Batson*'s third step. When Smulls came forth with additional evidence here that supported analyzing whether the prosecutor's justification was pretextual, he should have been given that opportunity to have the *Batson* hearing he never had. There is no evidence being a postal employee would predispose Ms. Sidney to view the facts of this robbery-homicide in a biased manner. Nor does her headwear signify anything about her ability to be fair and impartial.

Despite Mr. Waldemer's assertion that Ms. Sidney looked "hostile" when asked about the death penalty, her demeanor when asked about it was no different from the white individuals in the venire, contrary to Mr. Waldemer's description:

> ... Ms. Sidney was very silent during all of the questioning. I observed at one point during my questioning concerning the death penalty a glare on her face as I was questioning that area. She was seated in the back row, I believe, yesterday. When I looked directly at her and asked that last row a question, she averted her eyes and wouldn't answer my question and wouldn't look at me. That made me very nervous.

(App. C, 368). But not a single one of the twelve white jurors who convicted and sentenced Mr. Smulls responded to *any* death penalty question the prosecutor

propounded. When Waldemer directed death penalty questions specifically to the back row, where Ms. Sidney was seated, the record invariably reflects, "(No response)." (App. C, 78, 84). When defense counsel addressed Ms. Sidney directly about the death penalty, she indicated that she could consider both possible punishments, (App. C, 127).

REASONS FOR GRANTING THE WRIT

I. The Court should end the unwarranted split of authority concerning a defendant's entitlement to a trial-level determination of whether the prosecutor has intentionally discriminated against minority jurors, because the State of Missouri, following the minority approach embraced by the Eighth Circuit, among others, has violated Mr. Smulls' constitutional rights with its unreasonable application of *Batson*.

A familiar three-step process governs claims under *Batson v. Kentucky*, 476 U.S. 79 (1986). First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Id. at 93-94. The State's strike of the only African-American juror on Mr. Smulls' panel creates such a *prima facie* case here, although the trial court refused to make a record of that fact. *See*, *e.g.*, *Devose v. Norris*, 53 F.3d 201, 204-05 (8th Cir. 1995) (struck two black panelists, leaving one black juror). Second, once the *prima facie* case is made, the burden shifts to the State to tender a race-neutral explanation for the challenged strike. *Batson*, 514 U.S. at 97. The prosecutor in this case said he struck Sidney because she was a "mail sorter," and postal workers are "very

disgruntled, unhappy people" who "make every effort to strike back"; because she purportedly "glared" at him during questioning, remained silent when asked about the death penalty, and exhibited "a general attitude" he found poor; and finally because based on Ms. Sidney's general appearance – specifically, the fact she wore a beret on one day and a "ball cap with sequins" on another – he believed she would be unable to impose a sentence of death. (App. C, 369). Third, after the State articulates an explanation for the strike, the trial court must determine whether the defense has carried its burden of proving purposeful discrimination, often by demonstrating the State's explanation is a pretext. *Batson*, 476 U.S. at 98.

This Court has repeatedly emphasized that the third step lies within the province of the trial court. As *Batson* itself holds, "The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." Id. (emphasis added). Other clearly established federal law says the same thing: *Purkett* , 514 U.S. at 767 ("If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.") (emphasis added); *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (same). The rule is not some empty formalism. Rather, the ultimate decision in a *Batson* claim depends on the court's assessment of the prosecutor's credibility. "Evaluation of a prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's

province." *Hernandez*, 500 U.S. at 365. The "best evidence" of discriminatory intent "often will be the demeanor of the attorney who exercises the challenge." Id.

More recent decisions from this Court confirm the clearly established law that preceded the state courts' decisions here. See *Miller-El II*, 545 U.S. at 251-52 (2005) ("*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."); *Snyder,* 552 U.S. at 477 (trial court's "pivotal role"). The Court did so again in *Thaler v. Haynes*, 130 S. Ct. 1171 (2010). *Haynes* rejected an all-encompassing rule that the trial judge must have observed a juror's demeanor in order to credit an explanation that the State struck the juror on account of demeanor. *Id.* at 1174. Nevertheless, the Court emphasized that the prosecutor's credibility is central to what is necessarily the trial court's decision: "[T]he best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." Id. at 1175 (quoting *Hernandez*, 500 U.S. at 365). The Court has also clarified that a state court considering a *Batson* claim "need not make detailed findings addressing all the evidence before it." *Miller-El I*, 537 U.S. at 347. That principle, of course, does not relieve a trial court of its duty to *make* a ruling, as opposed to explaining the ruling.

The prevailing view – Taking this Court at its word, a majority of the lower courts believe that a trial-level determination of *Batson*'s third step is constitutionally and indispensably required. See *Dolphy v. Mantello*, 552 F.3d 236, 239 (2nd Cir. 2009); *Harris* v. *Haeberlin*, 526 F.3d 903, 912-14 (6th Cir. 2008);

McGahee v. Alabama Dept. of Corrections, 560 F.3d 1252, 1259-60 (11th Cir. 2009); *Hayes v. Thaler*, 361 Fed. Appx. 563, 574 (5th Cir. 2010) (unpublished); *Edmonds v. State*, 812 A.2d 1034, 1047-49 (Md. 2002).

The Second Circuit's opinion in *Dolphy* exemplifies the prevailing view on facts similar to the appearance-based peremptory strike justification Mr. Smulls' case. The prosecutor in *Dolphy* claimed that he struck an African-American panelist because she was obese, and, based on the prosecutor's experience, obese jurors tend to sympathize with criminal defendants. The defense argued that the prosecutor had allowed obese jurors to serve in previous cases. But the trial court denied the *Batson* objection, stating "I'm satisfied that is a race-neutral explanation." *Dolphy*, 552 F.3d at 237. Reversing the district court's denial of habeas relief, the Second Circuit held that the trial court failed to adjudicate the prisoner's *Batson* objection. The court acknowledged that a trial judge need not "recite a particular formula of words, or mantra." *Id.* at 239. Nevertheless, the *judge's ruling did not manifest an acceptance of the prosecutor's credibility*, that is, a decision that the stated reason for the strike was the true reason. *Id.* (emphasis added) "An unambiguous rejection of a *Batson* challenge will demonstrate with sufficient clarity that a trial court deems the movant to have failed to carry his burden to show that the prosecutor's proffered race-neutral explanation is pretextual," the court explained. "However, we have repeatedly said that a trial court must somehow make clear whether it credits the non-moving party's race-neutral explanation for striking the relevant panelist." *Id.*; *accord Hayes*, 361

Fed. Appx. at 574 (granting habeas relief, and holding that trial court unreasonably applied *Batson*, where "it appears that the trial judge's analysis was based upon whether the proffered explanation was a 'valid' reason to strike a juror peremptorily, not on whether the reason given was 'true' or, more pointedly, whether the prosecutor was telling the truth.")

The Second Circuit, then, specifically rejected the district court's ruling that "the required credibility finding was implicit in the trial court's rejection of the defendant's *Batson* challenge." *Dolphy*, 552 F.3d at 238, taking precisely the opposite position from the Eighth Circuit (and the State of Missouri) in Smulls' prior appeal, *Smulls*, 535 F.3d at 863 ("[T]he denial of a *Batson* challenge is itself a finding at the third step that the defendant failed to carry his burden of establishing that the strike was motivated by purposeful discrimination."). Based on the trial court's non-decision, the Second Circuit ruled that there was no ultimate *Batson* ruling to which a court could defer on habeas review, and it ordered the district court to hold a hearing and determine the claim *de novo*. 552 F.3d at 239-40. In the event that the district court could not reconstruct the years-ago circumstances of voir dire, *Dolphy*'s conviction would be vacated. *Id.* at 240.

Notably, the Second Circuit did not even discuss the correctness of the state appellate court's ruling. *Id.* at 238-40. The New York Appellate Division observed that the prosecution had offered a race-neutral explanation, and it ruled that *Dolphy*'s "bald contention that the explanation was pretextual" did not merit relief. Id. at 238. Entirely absent from *Dolphy* is any discussion of whether the appellate

court made a factual finding, or whether such a finding required any deference. *Id.* Rather, because the objection was not adjudicated by the trial court, it was not adjudicated at all. Id. at 239.

Consistent with the approach in *Dolphy*, the Sixth Circuit has also emphasized that *Batson* credibility determinations are for the trial court in the first instance. See *Harris*, 526 F.3d at 912-13. The trial court in *Harris* overruled a *Batson* objection, but during the appeal, a videotape surfaced showing the prosecutors conferring about which jurors to strike. 526 F.3d at 908. The state appellate court simply affirmed the trial court's *Batson* ruling, and held that the videotape didn't change its opinion. The Sixth Circuit held that the state court unreasonably applied *Batson* by not allowing the trial judge himself to consider the new evidence. The state court violated the principle that the issue of a prosecutor's credibility "lies particularly within the trial judge's province." Id. at 912-13.

The Eleventh Circuit and the Maryland Court of Appeals agree with that principle, in the sense that it does not suffice for the trial court to make an ambiguous ruling that leaves *Batson*'s step-three issue unresolved. See *McGahee*, 560 F.3d at 1259-60 (unreasonable application of *Batson* for trial judge to simply remark "all right" after prosecutor gave race-neutral explanations for strike); *Edmonds* 812 A.2d at 1047-48 (trial judge overruled *Batson* objections but made contradictory remarks both accepting and rejecting prosecutor's stated reasons). Typifying the prevailing view, the court in *Edmonds* made clear that *Batson* does not require "specific words" at step three. 812 A.2d at 1048 n.14. But the court

refused to infer that the trial judge implicitly accepted the prosecutor's credibility by ultimately denying the challenge. Id. at 1047-48 & nn. 13-14. The record may occasionally permit such an inference, but not when additional comments from the court appear to leave unresolved the issue of whether the defendant has "established purposeful discrimination." Id. The court therefore remanded to the trial court for a step-three finding, observing that "*Batson*'s final step is essentially a credibility assessment, and the parties are not before this Court to permit us to judge their credibility or to explore the validity of any arguments they may advance." *Id.* at 1048.

The more demanding view – Lower courts occasionally take the prevailing view a step further, requiring trial courts to explain themselves. Typical of this more stringent approach is the Seventh Circuit's opinion in *United States v. McMath*, 559 F.3d 657 (7th Cir. 2009). There, after defense counsel disputed the prosecution's demeanor-based explanation, the trial judge simply remarked, "The *Batson* challenge is denied." Id. at 661. The Seventh Circuit reversed and remanded for further findings, ruling that the district court "clearly erred in denying the *Batson* challenge without making findings regarding the credibility of the proffered race-neutral justification for the strike." Id. at 666.

McMath relied on the court's earlier decision in *United States v. Taylor*, 509 F.3d 839 (7th Cir. 2007). The trial court in *Taylor* rejected two *Batson* challenges at the same time. On the first challenge, the prosecutor said he struck the juror because she would "choose life" for a non-shooting defendant, and the court ruled

that the explanation was not a "cover-up . . . or subterfuge" for racial discrimination. *Id.* at 845. But a second *Batson* challenge, concerning a similar juror, was denied without explanation. That ruling contradicted *Batson*: "The third step of *Batson* is a credibility determination – a question of fact . . . Only the district judge, who observed the voir dire firsthand, can make that determination in the first instance." *Id.* The Seventh Circuit was left with "nothing to review," so it remanded for the trial court to provide the required findings. Id. at 845-46. Taylor's claim was later upheld, and his conviction vacated. See *United States v. Taylor*, 636 F.3d 901 (7th Cir. 2011).

Similar to the rulings in *McMath* and *Taylor*, the Third Circuit requires the trial court to at least "engage" the evidence in the course of its step-three ruling. *Riley v. Taylor*, 277 F.3d 261, 289 (3rd Cir. 2001) (en banc). A trial court need not "comment explicitly on every piece of evidence in the record," and need not issue a ruling "as explicit as a Social Security Administrative Law Judge's decision." Id. Nevertheless, "[S]ome engagement with the evidence considered is necessary as part of step three of the *Batson* inquiry." *Id.* An adequate step-three analysis therefore "requires something more than a terse or abrupt comment that the prosecutor has satisfied *Batson*." *Id.* at 291; but see id. at 321 (Alito, J., dissenting) ("[N]either *Batson* nor any later Supreme Court or Third Circuit case suggests that a federal habeas court is free to reject the factual findings of a state court if the state court does not comment on all of the evidence or provide what the federal

court regards as a satisfactory explanation for its finding.") (emphasis in original; footnote omitted).

The Eighth Circuit's lax view, shared by the Missouri Supreme Court – The rulings below in Smulls' case stand in stark contrast to the prevailing view and its more stringent offshoot. The Eighth Circuit explained its rule more fully in Smulls, where the trial court expressly refused to apply *Batson* and to acknowledge the race of a stricken juror: "Even if the trial court made a legal error, the error does not support habeas relief if the state appellate court correctly applied federal law." 535 F.3d at 862. Such "deference" to an appellate court's first-order factfinding is in tension with *Batson*, which states that "the trial court" has a "duty" at step three "to determine if the defendant has established purposeful discrimination." *Batson* v. Kentucky, 476 U.S. 79, 98 (1986); see also *Moody*, 476 F.3d at 274 (Dennis, J., dissenting) ("*Batson* plainly does not authorize an appellate court to take evidence or to act as the initial fact-finder regarding whether a peremptory challenge was racially motivated."). It is also highly anomalous under the circumstances of Mr. Smulls' case, for the Missouri Supreme Court did not reach a finding of non-discrimination of its own accord. Rather, it was *heavily deferring to the trial court's non-decision ruling*: "A trial judge's determination that a peremptory strike was made on racially neutral grounds is entitled to great deference on appeal and will only be overturned if shown to be clearly erroneous, leaving the reviewing court with the definite and firm impression that a mistake was made." State v. Cole, 71 S.W.3d 163, 172 (Mo. 2002); App. E10.

Smulls reflects yet a second departure from the precedent of other courts: a trial court's rejection of a *Batson* claim will always be construed as an adequate step-three ruling, no matter how unexplained or ambiguous the ruling may be. "[T]he denial of a *Batson* challenge is itself a finding at the third step that the defendant failed to carry his burden of establishing that the strike was motivated by purposeful discrimination." *Smulls*, 535 F.3d at 863. Thus, *Smulls* not only allows an appellate court to supplement any shortcomings in a trial court's ruling, but also embellishes a trial court's ruling with findings that were not necessarily made – and even when the record suggests they were not made. *Contra Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (noting, where record was unclear, "we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous").

The conflict of authority is dispositive of Mr. Smulls' claim. Either the Constitution entitled him to a trial-level determination of the prosecutor's credibility or it does not. Compare, e.g., *Dolphy*, 552 F.3d at 239 (granting habeas relief, without regard to appellate court's analysis, where trial court failed in its duty to "somehow make clear whether it credits the non-moving party's race-neutral explanation for striking the relevant panelist"), with *Smulls*, 535 F.3d at 862 (denying relief despite trial court's express refusal to apply *Batson* and to acknowledge the race of a stricken juror: "Even if the trial court made a legal error, the error does not support habeas relief if the state appellate court correctly applied federal law."). If clearly established federal law supports such an entitlement, then

the Missouri Supreme Court should have recalled its mandate, and Mr. Smulls must at least be granted a new *Batson* hearing in the state trial court – in which he can present the newly developed evidence revealing the "mail sorter" justification to be a widely used *Batson*-dodging gambit *devised by the same man who prosecuted Mr. Smulls*, who lacks credibility because he himself *was a postal employee* – or the federal district court, or a new trial in the more likely event that a fruitful hearing is impossible nearly two decades after trial.

The Court should resolve the conflict – The lower courts are deeply, but needlessly, divided over exactly who may perform the trial judge's *Batson* obligations. The division persists despite guidance from this Court in *Batson*, 476 U.S. at 98; *Hernandez*, 500 U.S. at 363 (1991); and *Purkett*, 514 U.S. at 767, that "the trial court" must decide the ultimate issue of discrimination. Fealty to that guidance is essential in order for *Batson* to protect the rights of defendants and jurors alike. See *Powers v. Ohio*, 499 U.S. 400, 406 (1991) ("*Batson* was designed to serve multiple ends . . .").

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.