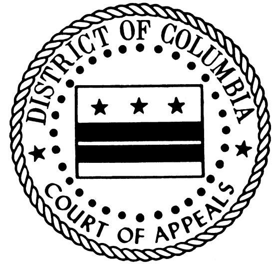

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DISTRICT OF COLUMBIA COURT OF APPEALS
Nos. 18-CO-0289 & 20-CF-0190

GLENN ARTHUR SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division (2011-CF10013068)

EN BANC BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT

---

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded by Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break barriers that prevent Black people from realizing their basic civil and human rights.

LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We have represented defendants in *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); established the affirmative use of civil actions to remedy jury discrimination in *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). Based on the historical and geographical breadth of its expertise, LDF's perspective can benefit this Court.

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[1] Appellant consents to the filing of this amicus brief and the government does not oppose it. *See* D.C. App. R. 29(a)(2).

INTRODUCTION

On December 4, 2012, four Black Americans dutifully reported for jury service at the Superior Court of the District of Columbia. They were assigned to a panel in the case of a Black man named Glenn Smith, who was charged with sexually assaulting a white woman. With little information about these Black prospective jurors, and without asking any questions to learn more, the prosecutor struck them. The prosecutor also struck the only two other prospective jurors of color. The result was an all-white jury in a then-majority-Black city.

After defense counsel raised an objection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), the prosecutor justified her strikes for three of the Black prospective jurors—Jurors 238, 254, and 683—"based on concerns about their intelligence."[2] *Smith v. United States*, 288 A.3d 766, 778 (D.C. 2023). Specifically, the prosecutor claimed to have excluded Jurors 238 and 254—who had worked as a plumber's assistant and a cashier—because "we're concerned about the level of scientific evidence in this case" and "do not feel [those] profession[s] would be able to understand the scientific testimony." Tr. at 129.[3] Despite this alleged concern, the prosecutor sat a white nanny, attempted to sit a white Starbucks barista, and did not ask either of these Black prospective jurors a single question. The prosecutor also claimed that she struck Juror 254 because, along with not having the mental capacity

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[2] For a fourth Black prospective juror (Juror 721), who worked for an IT company, the prosecutor provided "no basis for striking [him] except [she] wanted the other [white] alternate." Tr. at 130. The prosecutor then withdrew that strike. *Id*.

[3] Cites to "Tr." refer to the transcript of the proceedings from December 4, 2012.

to serve in this case, her "dress was very disrespectful to the Court." Tr. at 129.

With respect to Juror 683, who misheard a muddled compound question that asked whether any of the jurors or their family members worked for the federal, state, or local legal systems, the prosecutor "felt that he was not showing a level of understanding of even [a] fairly basic question." Tr. at 129–130. But Juror 683 had clarified that he simply heard the question as "do you or family" work for the "state or local" government, to which he answered "yes" because he worked for the Department of Public Works. Tr. at 27–28, 117. When given the opportunity to address her alleged concern, the prosecutor declined to ask him any questions. Tr. at 117–118. Ironically, Juror 683 worked for the D.C. Government but, according to the prosecutor, lacked the intellectual capacity to serve as a juror in the D.C. courts.

When defense counsel responded, "saying that they were too unintelligent to serve on a jury [isn't] an effective reason to withstand that challenge," Tr. at 131, the trial court said, "that's a race-neutral reason," and found it "credible" because "[t]he Government [has] assured that this was not based on race." Tr. at 132, 135. At no time during the *Batson* challenge did the trial court pose questions to the prosecutor about the intelligence-based justifications, partake in any analysis other than briefly citing Juror 683's answer to the confusing compound question, evaluate the strikes in connection with each other or the context of the case, address (much less substantiate) the clothing-based justification, or express concern that the prosecutor struck 100% of the Black prospective jurors. Instead, the court admonished that it was not required "to guarantee a certain number of blacks that would be on the jury." Tr. at 135. Thus, the trial court failed to conduct a "rigorous evaluation" and "probing

inquiry" of the prosecutor's purported race-neutral reasons, much less apply the "heightened scrutiny" that was required in a racially charged case. *Harris v. United States*, 260 A.3d 663, 676–77, 680 (D.C. 2021).

On appeal, the Division deferred entirely to the trial court's finding that the prosecutor's justifications were credible because "a credibility assessment" lies "peculiarly within a trial judge's province." *Smith*, 288 A.D.3d at 779. But the trial court's finding was not entitled to any such deference because its step-three analysis did not comply with the clear requirement that a court engage in a "probing inquiry"—and in this case "heightened scrutiny." *Harris*, 260 A.3d at 676-77, 680. By improperly deferring to that ruling, the Division shirked its obligation to engage in "careful scrutiny of the record," *id.* at 670, and refused to "examine the whole picture." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019). Specifically, the Division only assessed each strike in isolation, refused to consider in its analysis the strikes of Black prospective Juror 721 and the two other excluded prospective jurors of color, downplayed the significance of the prosecutor's disparate treatment of similarly situated white jurors and lack of voir dire about matters of alleged concern, and—like the trial court—never addressed the suspect clothing-based justification.

Such deference to the trial court's perfunctory acceptance of demeaning intelligence-based justifications "effectively insulate[d] racially discriminatory practices in jury selection from meaningful appellate review,"[4] nullifying the

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[4] J. Thomas Sullivan, *Lethal Discrimination*, 26 HARV. J. RACIAL & ETHNIC JUST. 69, 95 (2010).

purpose of *Batson*. Meaningful judicial scrutiny of *Batson* claims is critical because racial discrimination in the jury selection process inflicts deep and layered harms—to "the defendant on trial," "those citizens who desire to participate in the administration of the law," "the fairness of our system of justice," and "the basic concepts of a democratic society and a representative government." *Johnson v. California*, 545 U.S. 162, 172 (2005) (cleaned up).

These harms are especially pronounced when, as here, the discriminatory action is rationalized through pernicious stereotypes that are "rooted in, and reflective of, historical prejudice." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994). As the Equal Justice Initiative explained in a recent report, "low intelligence is a negative stereotype that has been used throughout our nation's history to illegally exclude African Americans from jury service."[5] For that reason, excluding Black jurors based on claims about their intelligence is a "particularly suspicious explanation" that "has been found suspect by other courts." *McGahee v. Ala. Dep't. of Corr.*, 560 F.3d 1252, 1265, 1267 (11th Cir. 2009).

Such a suspect justification demands more scrutiny, not less. *Amicus* urge this Court to send a clear message that intelligence-based justifications—and similar justifications that are routinely used to exclude Black jurors—be subject to "heightened scrutiny," and that "rigorous evaluation" and "probing inquiry" are not empty words but rather essential requirements. *Harris*, 260 A.3d at 674–75.

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[5] Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection*, ch. 4 (2021), available at https://eji.org/report/race-and-the-jury/.

Otherwise, "*Batson*'s promise of eliminating racial discrimination in jury selection will be an empty one." *Tursio v. United States*, 634 A.2d 1205, 1211 (D.C. 1993).

I. Close Judicial Scrutiny of a Prosecutor's Purported Race-Neutral Justifications Is Required to Remedy Racial Discrimination in the Jury Selection Process.

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers*, 139 S. Ct. at 2238. Nevertheless, for the entire duration of our nation's history, state officials have denied Black people this "valuable opportunity to participate in a process of Government." *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (citation omitted).

To end that long history, the Supreme Court banned the use of discriminatory peremptory challenges in *Batson*, 476 U.S. at 96–98. In so doing, the Court overruled the legal framework from *Swain v. Alabama*, which required petitioners to demonstrate "that the purpose of the peremptory challenge system" as a whole was "being perverted." 380 U.S. 202, 224 (1965). That requirement had created a "crippling burden of proof" that left prosecutors' use of peremptory strikes "largely immune from constitutional scrutiny." *Batson*, 472 U.S. at 92–93. A new legal framework was essential, the Court explained, because the "[e]xclusion of Black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Id*. at 85.

The key to the now-familiar *Batson* process is its third step, which requires courts to carefully evaluate whether a prosecutor's race-neutral reasons for striking a prospective juror are pretexts for racial discrimination. *Id*. at 98. As Justice

Marshall cautioned in his prescient concurrence, *Batson's* entire purpose and the "protection erected by the Court" would be "illusory" if trial courts simply accepted a prosecutor's "easily generated explanation." *Id*. at 106 (Marshall, J., concurring).

Thirty-eight years later, *Batson's* promise remains unfulfilled because courts have failed in their obligation to conduct a searching judicial review of prosecutors' ostensibly race-neutral reasons for striking Black prospective jurors. Myriad studies from across the United States have demonstrated staggering race-based strike disparities, the presence of pretextual justifications, and an abject failure to remedy racial bias in jury selection.[6] Over the past decade, despite reviewing hundreds of *Batson* claims, the highest courts in 32 states have not found that a prosecutor struck a prospective juror of color on the basis of race in even a single case.[7] The persistence of jury discrimination, condoned and compounded by a lack of judicial scrutiny, has led experts in the field to lament that "[t]oday in America, there is perhaps no arena

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[6] *See, e.g.,* Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, Berkeley Law Death Penalty Clinic (June 2020), available at https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.; Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, APM Reports (2018), available at https://features.apmreports.org/files/peremptory_strike_methodology.pdf; Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAN. L. REV. 1593 (2018).

[7] *Race and the Jury*, *supra* note 5, ch. 4. In the nearly 40 years since *Batson*, when examining both criminal and civil cases, this Court has reversed or remanded six cases on *Batson* grounds—less than one case every six years. *See Harris*, 260 A.3d at 669; *Beasley v. United States*, 219 A.3d 1011, 1013 (D.C. 2019); *Haney v. United States*, 206 A.3d 854, 857 (D.C. 2019); *Robinson v. United States*, 878 A.2d 1273, 1276–77 (D.C. 2005); *Cap. Hill Hosp. v. Baucom*, 697 A.2d 760 (D.C. 1997) (per curiam); *Tursio*, 634 A.2d at 1206.

of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries."[8]

II. Close Judicial Scrutiny of *Batson* Claims Is Critical Because Racial Discrimination in the Jury Selection Process Inflicts Systemic Harms.

The harm that flows from jury discrimination "is not limited to the defendant." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (citation omitted). "[T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id*.

A. Jury discrimination harms the accused.

As defense counsel explained to the trial court during his *Batson* challenge, "My client is concern[ed]. My client is concerned." Tr. at 125. Mr. Smith was right to be concerned about the all-white jury that the prosecutor had assembled. Non-representative juries convict Black defendants at higher rates and on more serious counts.[9] Compared to representative juries, all-white and nearly all-white juries make more mistakes and are more likely to presume guilt.[10] They are also more likely to view Black defendants as "remorseless," "dangerous," and even "coldhearted."[11] In contrast, diverse juries are far more likely to hold prosecutors to

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[8] Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 4 (2010).

[9] *See, e.g.*, Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 QUART. J. OF ECON. 1017 (2012); William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 J. CONST. L. 171 (2001).

[10] *See, e.g.*, *Diverse Juries Make Better Decisions*, Stanford Univ. SPARQ, available at https://sparq.stanford.edu/solutions/diverse-juries-make-better-decisions.

[11] *Race and the Jury*, *supra* note 5, ch. 5 (citations omitted).

their standard of proof and discuss problems—such as racial profiling and stereotyping—that are often overlooked by homogenous juries.[12] Representative juries are also better able to assess the credibility of witnesses and the reliability of cross-racial identifications.[13]

B. Jury discrimination harms the excluded Black jurors.

People "excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion," because jury service is a defining feature of American citizenship. *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 329 (1970). Thus, racial discrimination in jury selection violates the rights of the jurors themselves "not to be excluded from a [jury] on account of race." *Powers*, 499 U.S. at 409–410.

When Black people report for jury service only to be turned away on account of their race, it "reinvokes a history of exclusion from political participation" and signals that they "are presumed unqualified by state actors to decide important questions." *J.E.B.*, 511 U.S. at 142. Consequently, when state or local officials bar a citizen from jury service because they are Black, the discriminatory action is not a mere indignity. It is an assertion that the prospective juror is inferior—a second-class citizen who cannot be entrusted with the responsibilities of full citizenship.

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[12] *Id*. (citation omitted); *see also* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberates*, 90 J. PERSONALITY & SOC. PSYCH. 597, 600–606 (2006).

[13] *See, e.g.*, William J. Bowers, et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1507–08, 1511, 1531 (2004).

C. *Jury discrimination strikes at the fundamental value of our judicial system and our society as a whole.*

The jury also plays an essential role in our legal system by legitimizing verdicts to the community and conveying that the proceedings are just and fair. For that reason, the "harm from discriminatory jury selection . . . touch[es] the entire community." *Johnson*, 545 U.S. at 172.

Indeed, judicial acceptance of racial bias during jury selection "condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so it invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers*, 499 U.S. at 412. Such discrimination "undermines our criminal justice system[,] poisons public confidence in the evenhanded administration of justice," *Davis v. Ayala*, 576 U.S. 257, 285 (2015), and is "at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940). It "thus strikes at the fundamental value of our judicial system and our society as a whole," *Rose*, 443 U.S. at 556, compromising our commitment to the rule of law in a multi-racial democracy. This commitment is compromised most acutely when, as here, the discriminatory action is rationalized "based on the very stereotypes the law condemns" and is "rooted in, and reflective of, historical prejudice." *J.E.B.*, 511 U.S. at 127–28.

III. The Pernicious Stereotype That Black People Are Less Intelligent Than White People Is Rooted in and Reflective of Historical Prejudice and Has Long Been Cited to Justify the Exclusion of Black Jurors.

The prosecutor here claimed to have struck three Black jurors "based on concerns about their intelligence." *Smith*, 288 A.3d at 778. This false trope that Black people are less intelligent than white people is deeply rooted in our nation's history and has long been relied upon to deny Black Americans equal citizenship.

To justify two-and-a-half centuries of enslavement, white proponents of slavery constructed false mythologies about Black people being "dumb" and "in need of [the] guidance and supervision" of "smart, hardworking, and more intellectually and morally evolved" people.[14] Indeed, slavery was described by lawmakers as "most necessary to the well-being of the [enslaved], being the only form of government or pupilage which can raise him from barbarism."[15] After the abolition of slavery, the association of Blackness with intellectual inferiority "continue[d] to find expression in both popular discourse and in legal doctrine."[16] The legal historian Anthony Brown has explained that the stereotype of Black intellectual inferiority was reinforced by every institution in American society, including "human sciences, news media, entertainment, school text, and

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[14] Robin Walker Sterling, *Through a Glass, Darkly: Systemic Racism, Affirmative Action, and Disproportionate Minority Contact*, 120 MICH. L. REV. 451, 463–64 (2021) (quoting Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in *Policing the Black Man: Arrest, Prosecution, and Imprisonment* 3, 7 (Angela J. Davis ed., 2017).).
[15] *Id*. at n.85 (citation omitted).
[16] *Id*. at 504.

advertisements."[17] Even the rise of American cinema was marked by films like *The Birth of a Nation*, which was premised on the supposedly unintelligent nature of Black people.[18] Black intellectual inferiority was given the illusion of scientific support through eugenics and related forms of scientific racism that falsely asserted that Black people were biologically inferior to white people.[19] Today, this myth lives on and is perpetuated by pseudo-scientific literature[20] and popular culture.[21]

A. *From Jim Crow through this case, prosecutors and other state officials have relied on the harmful stereotype that Black people are less intelligent to justify their exclusion from jury service.*

From the passage of the Fourteenth Amendment through this trial, state actors have used these "tenacious narratives about Black intellectual inferiority" to rationalize the exclusion of Black people from juries.[22] In 1880, Delaware's Chief Justice responded to evidence that no Black person had ever sat on a jury in the state by claiming that it was not "'remarkable in view of the fact—too notorious to be

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[17] Anthony L. Brown, *Counter-Memory and Race: An Examination of African American Scholars' Challenges to Early Twentieth Century K-12 Historical Discourses*, 79 J. NEGRO EDUC. 54, 54 (2010).

[18] Gary James Jason, *Selling Racism: David W. Griffith's The Birth of a Nation*, 43 REASON PAPERS 90–106 (2023).

[19] *See, e.g.*, *Arthur Jenson, How Much Can We Boost IQ and Achievement?* 39 HARVARD EDUC. REV. 1 (1969); *see also* John P. Jackson, Jr. & Nadine M. Weidman, *The Origins of Scientific Racism*, 50 J. BLACKS IN HIGHER EDUC. 66, 66 (2006).

[20] Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life*, 270–315 (1994).

[21] Robert M. Entman, *Young Men of Color in the Media: Images and Impact*, Joint Ctr. for Pol. and Econ. Stud. Health Pol'y Inst. (2006), available at https://www.nationalcollaborative.org/wp-content/uploads/2016/02/YMOC-and-the-Media.pdf.

[22] Supra note 14 at 504.

ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence.'" *Neal v. Delaware*, 103 U.S. 370, 402 (1880). Likewise, when seeking to justify why no Black person had ever sat on a jury in Morgan County, Alabama, the jury commissioner testified, "'I do not know of any [Black person] over twenty-one and under sixty-five who is generally reputed to be honest and intelligent.'" *Norris v. Alabama*, 294 U.S. 587, 598 (1935). And in the years preceding *Batson*, courts described "an almost automatic peremptory challenge to [Black people] on the assumption that many of them might not possess the intelligence and education requisite to sit on the case." *State v. Washington*, 375 So. 2d 1162, 1164 (La. 1979). *See also, e.g.*, *Turner v. Fouche*, 396 U.S. 346, 359–360 (1970) (remand required where officials disqualified 171 of 178 Black people for lack of "intelligence" or "uprightness"); *Hillery v. Pulley*, 563 F. Supp. 1228, 1232, 1248, 1252 (E.D. Cal. 1983) (granting habeas relief where complete absence of Black grand jurors was rooted in judge claiming that he was looking for "someone who . . . [was] intelligent").

Batson was issued to redress these discriminatory practices, yet it remains true that "[a] startingly common reason given by prosecutors for striking Black prospective jurors is a juror's alleged 'low intelligence' or 'lack of education.'"[23]

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[23] *Illegal Racial Discrimination in Jury Selection, supra* note 8 at 17; *See also, e.g.*, *People v. Murray*, 197 A.D.3d 46, 50 (N.Y. App. Div. 2021) (prosecutor justified striking Black prospective juror because she was looking for people with "higher level jobs" and who "indicated that they read"); *State v. Broussard*, 201 So. 3d 400, 407–08 (La. Ct. App. 2016) (prosecutor justified striking Black prospective juror because she was a "housekeeper" and therefore "not intelligent enough" to follow

Courts have increasingly looked askance at this justification because it is a "subjective rationale" that is "historically tied to racism." *McGahee*, 560 F.3d at 1265, 1267 (reversing conviction on *Batson* grounds where prosecutor claimed to have struck Black prospective jurors because of "low intelligence"). *See also, e.g.*, *People v. Murray*, 197 A.D.3d 46, 50 (N.Y. App. Div. 2021) (reversing conviction on *Batson* grounds where prosecutor struck Black prospective juror based on the "preposterous proposition that only jurors with 'higher level jobs' can effectively consider all the evidence in the case"); *State v. Broussard*, 201 So. 3d 400, 407 (La. Ct. App. 2016) (same where prosecutor claimed to have struck Black prospective juror because she was a "housekeeper" and therefore "not intelligent enough to follow the case"). Nevertheless, an overall lack of judicial scrutiny has left too many prosecutors undeterred from using offensive and demeaning intelligence-based justifications to whitewash juries.[24]

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the case); *State v. Hill*, No. M2005-02347-CCA-R3-CD, 2007 WL 1774275, at *6 (Tenn. Crim. App. June 20, 2007) (prosecutor justified striking Black prospective juror because "I don't think [he] is very bright."); *Taylor v. State*, 620 S.E.2d 363, 366 (Ga. 2005) (prosecutor justified striking Black prospective jurors because of "limited education and work history"); *Lott v. City of Fort Worth*, 840 S.W.2d 146, 152 (Tex. Ct. App. 1992) (prosecutor justified striking Black prospective juror who "didn't appear to be quite that swift"); *Ray Sumlin Constr. Co. v. Moore*, 583 So. 2d 1320, 1322–23 (Ala. 1991) (prosecutor justified striking Black prospective jurors because they worked in "unskilled positions").

[24] In one *Batson* challenge that was rejected on appeal, a prosecutor commented that a Black prospective juror was "too stupid to live, much less be on a jury." *State v. Crawford*, 873 So. 2d 768, 776 (La. Ct. App. 2004).

IV. In a Racially Charged Case, the Prosecutor's Justification for Three Strikes Against Black Prospective Jurors Played on Pernicious Racial Stereotypes Related to Intelligence and the Highly Suspect Justification of Clothing.

Against this backdrop, the prosecutor in Mr. Smith's case claimed to have struck three Black prospective jurors because they lacked the requisite intelligence to serve. Specifically, to justify "eliminat[ing] every Black person from the jury," Tr. at 125, the prosecutor claimed to have excluded Juror 238 and Juror 254—who had been employed as a plumber's assistant and a cashier—because they "would not be able to understand" the "scientific evidence in this case." Tr. at 129.

As other courts have made clear, claiming that jurors cannot understand the evidence because of their jobs is a "preposterous proposition," *Murray*, 197 A.D.3d at 50, and a clear pretext for discrimination. *Accord Broussard*, 201 So. 3d at 407. This is especially true where, as here, the prosecutor sat a white nanny, tried to sit a white barista, and did not ask either of the excluded Black jurors a single question about their knowledge of science or ability to understand it. Indeed, the prosecutor did not ask the excluded jurors any questions at all. *See Chivers v. State*, 796 S.W.2d 539, 543 (Tex. Ct. App. 1990) (reversing on *Batson* grounds where prosecutor "conclude[ed] that [Black prospective juror] had low intelligence and/or education by virtue of his occupation instead of addressing [him] with individual questions").

For a third Black prospective juror, Juror 683, the prosecutor "felt that he was not showing a level of understanding of even [a] fairly basic question." Tr. at 129–130. This was after Juror 683 clarified that he worked for the D.C. government and had simply misheard the trial court's lengthy and confusing compound question. Tr.

at 27–28, 117. Notably, when given the opportunity, the prosecutor specifically declined to ask Juror 683 any questions. Tr. at 117–118.

A prosecutor's reliance on a prospective juror's purportedly confused response during voir dire is a justification that this Court and others throughout the country have rejected as pretextual. *See, e.g.*, *Harris*, 260 A.3d at 678 (finding as pretextual prosecutor's claim that stricken Black prospective juror's exchange with the court "concerned her because it raised a question about the juror's 'ability to follow the [c]ourt's instructions'"); *Givens v. State*, 619 So.2d 500, 501 (Fla. Dist. Ct. App. 1993) (finding as pretextual prosecutor's claim that she "'didn't feel the [Black prospective juror] was able to read the form correctly'"); *Moore*, 265 S.W.3d at 86–87 (finding as pretextual prosecutor's claim that she struck Black prospective juror because she "placed question marks on her juror information card"). Indeed, the Washington Supreme Court and the Supreme Court of New Jersey have specifically recognized that "allegations that the prospective juror . . . provided unintelligent or confused answers" have "historically been associated with improper discrimination in jury selection."[25] Lawmakers in California made the same finding.[26] And prosecutorial training sessions and attendant "cheat sheets" created to help prosecutors circumvent *Batson* at step two have explicitly recommended claiming that an excluded juror "appeared to have difficulty understanding

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[25] Wash. Gen. R. 37(i); *accord* N.J. R. 1:8-3A, Official Comment (3) (July 12, 2022).
[26] *See* Cal. Civ. Proc. §231.7(g)(1)(C) ("The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection . . . The prospective juror provided unintelligent or confused answers.").

questions."[27]

A. The prosecutor also claimed to have struck Juror 254 because her clothing was disrespectful to the court, which is a suspect justification.

The prosecutor also provided another highly suspicious justification: that Juror 254's "clothing" was "disrespectful." Tr. at 129. As with claims about intelligence, clothing-based justifications "are often rooted in troubling racial stereotypes."[28] For that reason, and because concerns about a person's dress are often vague, this explanation required scrutiny from the court. *See, e.g.*, *Harris*, 260 A.3d at 679 (finding that judge "did not engage in the requisite scrutiny" when prosecutor justified striking Black prospective juror because of t-shirt she was wearing).

Here, after claiming that Juror 254 lacked the mental capacity to understand scientific evidence, the prosecutor added that she "also thought her dress was very disrespectful to the Court." Tr. at 129. Several transcript lines later, the prosecutor repeated, "[a]nd her clothing I felt was disrespectful." Tr. at 129. Despite twice claiming that Juror 254's clothing was "disrespectful," the "trial court provided no indication of whether it recalled" anything objectionable about it. *Harris*, 260 A.3d at 678. *See also McGahee*, 560 F.3d at 1269 ("[W]e have no way of determining the accuracy of that claim because the trial court did not respond to it.").[29]

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[27]Top Gun II training materials*, Batson Justifications: Articulating Juror Negatives*, available at https://nccadp.org/wp-content/uploads/2018/03/cheat-sheet.pdf.
[28] *Race and the Jury*, *supra* note 5, ch.4.
[29] *See also Illegal Racial Discrimination*, *supra* note 8 at 18 ("Prosecutors frequently justify strikes by making unverifiable assertions about [Black] potential jurors' appearance and demeanor.").

The need for judicial scrutiny is only more palpable where, as here, clothing-based justifications are couched in racialized terms of respectability. *See, e.g.*, *People v. Bennett*, 206 A.D.2d 382, 383 (N.Y. App. Div. 1994) (finding *Batson* violation where prosecutor claimed that Black woman's attire "showed a certain disrespect for the proceedings"); *Roundtree v. State*, 546 So.2d 1042, 1044 (Fl. 1989) (holding that prosecutor's claim that two Black men were "inappropriately dressed" was "obvious pretext"); *Batson Justifications: Articulating Juror Negatives* (suggesting as top-line item that prosecutors at step two point to "Inappropriate Dress—attire may show lack of respect for the system.").[30] Striking a prospective juror based on their clothing is such a suspect explanation that it is now "presumed to be invalid" throughout the entire State of California.[31]

V. In a Racially Charged Case, the Trial Court Failed to Apply a Rigorous Evaluation of the Prosecutor's Justifications and the Division Improperly Deferred to the Trial Court's Inadequate Step-Three Analysis.

Batson required the trial court to conduct a "rigorous evaluation" and "probing inquiry" of the prosecutor's justifications. *Harris*, 260 A.3d at 674. In fact, even "greater scrutiny of the prosecutor's race-neutral explanations" was required because this was a racially charged case. *Id*. (citations and quotations omitted).

The trial court failed to apply anything close to that level of scrutiny here. In

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[30] *Race and the Jury*, *supra* note 5, ch.4 (describing prosecutorial training manuals that suggest citing at step two, among other things, "'clothing, hairstyle, or other accoutrements'").
[31] Ca. Civ. Proc. §231.7(e)(9).

a racially charged case with a Black defendant, white complainant, all-white jury, and highly suspicious justifications, the trial court rejected the *Batson* challenge without asking the prosecutor questions about her intelligence-based justifications, without assessing the prosecutor's strikes in connection with each other or the context of the case, without engaging in any kind of comparative juror analysis, without asking the prosecutor why she did not voir dire about matters of alleged concern, and without addressing the prosecutor's vague clothing-based justification. Instead, after briefly citing Juror 683's response to the court's own confusing question and saying that the reason for the strike "surely passes [m]ust[er]," Tr. at 132, the court summarily concluded that the suspect intelligence justifications were "credible." Tr. at 135.

The judge's cursory conclusion that the proffered rationales were "credible," Tr. at 135, was "no substitute[] for the 'rigorous evaluation' and 'probing inquiry' of the prosecutor's explanations that the court was obliged to undertake." *Harris* 260 A.3d at 680 (citation omitted). *See also Tursio*, 634 A.2d at 1212 ("The court's statements that 'having read [the prosecutor's] conclusions, they sound perfectly logical to me' and 'I don't have any reason to disbelieve him' show that the court did not engage in the closest possible scrutiny.") (cleaned up); *Compare* Tr. at 135 ("[T]he Government [has] assured that this was not based on race.").

Then, on appeal, the Division deferred to the trial court's finding that the prosecutor's justifications were credible because "a credibility assessment" lies "peculiarly within a trial judge's province." *Smith*, 288 A.D.3d at 779. But the Division erred in deferring to that finding because the court's step-three analysis

failed to comply with the requirement that courts engage in a "probing analysis," much less "heightened scrutiny." *Harris*, 260 A.3d at 676–77, 680. Deference is due only when a trial court properly performs its charge. In deferring to findings arising from a flawed step-three analysis, the Division assessed each strike in isolation, refused to consider in its analysis the strike of Black prospective Juror 721 and the two other excluded jurors of color—which were probative of whether race was a consideration for the other strikes—softened the significance of the prosecutor's disparate treatment of similarly situated jurors and lack of individual voir dire, and never addressed the suspect clothing-based justification. In so doing, the Division did not engage in "careful scrutiny of the record," *Id*. at 670, and refused to "examine the whole picture." *Flowers*, 139 S. Ct. at 2250.

The Division's approach of deferring to the trial court's cursory step-three analysis, evaluating the strikes in isolation, and not examining the whole picture runs afoul of *Flowers*, *Harris*, and *Tursio*. It also serves as an invitation for prosecutors to offer pretextual explanations, for trial courts to accept them with little scrutiny, and for the harms of jury discrimination to persist in perpetuity. In every case with a *Batson* objection, prosecutors deny that race was a consideration for their strikes, which means that crediting a prosecutor's explanation without probing and then deferring to the trial court's perfunctory acceptance would lead to appellate courts always affirming *Batson* violations, including clear *Batson* violations like this one. And since jury discrimination is demonstrably common (see *supra* at §I), such a result would mean condoning almost all jury discrimination and tolerating its harms.

A. *Careful scrutiny of the record demonstrates a clear Batson violation*.

In this case, an appellate court "examining the whole picture," *Flowers*, 139 S. Ct. at 2250, with "careful scrutiny," *Harris*, 260 A.3d at 679, would find a paradigmatic *Batson* violation. Beginning with a bird's eye view, a prosecutor in a then-majority-Black city struck every Black prospective juror and two other jurors of color to seat an all-white jury that would decide whether a Black man sexually assaulted a white woman. There should be no dispute, as the Division correctly found, that this was a "racially charged case" that required "heightened scrutiny." *Harris*, 260 A.3d at 674. *See also, e.g.*, *Tursio*, 634 A.2d at 1213.[32]

By itself, the fact that the prosecutor struck all six qualified prospective jurors of color is highly probative evidence of discrimination. As *Batson* explained, the "total or seriously disproportionate exclusion of [Black people] from jury venires is itself such an unequal application of the law . . . as to show intentional discrimination." *Batson*, 476 U.S. at 93. *See also Tursio*, 634 A. 2d at 1210 ("[N]othing is as emphatic as zero."). The probability that the prosecutor would have struck all four Black prospective jurors and all six prospective jurors of color was 0.5% (1/200) and 0.02% (1/5,000), respectively.[33] When factoring in the defense's alternating sequential strikes, the likelihood that the actual result—striking all four Black prospective jurors and all six prospective jurors of color—would have

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[32] The allegation that a Black man sexually assaulted a white woman has long provoked a singularly charged response. *See, e.g.*, Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 29–30 (3d Ed. 2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf.

[33] *Amicus* LDF's statistical analyses are in "Addendum A."

deviated so greatly from the expected result based on chance alone was 0.09% (9/10,000) and 0.002% (1/50,000), respectively.[34]

Those numbers not only "speak loudly," *Flowers*, 139 S. Ct. at 2245, they demonstrate that "it is all but impossible that the sizable disparity was produced by chance." *Castaneda v. Partida*, 430 U.S. 482, 501 (1977); *see also Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). Where, as here, the "actual number of strikes used against one race deviates further from the statistically expected result, a racial consideration—intentional or not—is more likely to be the true consideration behind the strikes." *Tursio*, 634 A.2d at 1213.[35]

The prosecutor tried to justify this improbable result by invoking a pernicious trope about intelligence. Given the history of that stereotype, the context of this case, and the gross statistical disparities, this justification was not evidence of race neutrality. Rather, it helped to corroborate that race was a consideration behind the strikes. Put more bluntly, a prosecutor cannot justify the total exclusion of Black prospective jurors by claiming that they were not smart enough to serve.

On top of the history of these highly suspect justifications, the record provides several other reasons why the trial court should not have "accept[ed] the

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[34] *Id*.

[35] This is especially true when the jury is comprised "exclusively" of "jurors of the victim's race" *Tursio*, 634 A.2d at 1211, and the defendant is a member of the same cognizable group as the disproportionately excluded jurors. *See, e.g.*, *Powers*, 499 U.S. at 416 (describing "[r]acial identity between the defendant and the excused person[s]" as relevant factor under *Batson* that "may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred").

Government's representation." Tr. at 135. First, it was evident prior to jury selection that it would be "more of a consent defense." 12/3/12 Tr. at 43. Since identity was not at issue, the DNA evidence lost almost all its probative value, thereby undermining the prosecutor's claim that she struck Juror 238 and Juror 254 because they "would not be able to understand the scientific evidence in this case." Tr. at 129.

Second, even if the scientific evidence was significant in this case—which it was not—the prosecutor did not ask a single question to Juror 238 and Juror 254 to gauge their ability to understand science or to assess their intellectual capacity. The prosecutor also did not pose any questions to Juror 683 to test her alleged concern that a D.C. government employee "was not showing a level of understanding of even [a] fairly basic question." Tr. at 117–118, 129–130. The prosecutor's "desultory voir dire," *Ex Parte Branch*, 526 So. 2d 609, 623 (Ala. 1987), about a matter of stated concern is strong circumstantial evidence of pretext. *See Flowers*, 139 S. Ct. at 2249 ("A 'State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination'") (quoting *Miller-El*, 545 U.S. at 246).

Third, while claiming to be concerned about the Black prospective jurors not understanding scientific evidence based solely on their jobs, the prosecutor sat a white nanny (Juror 916). PDS App'x A, C; Tr. at 97–98. The prosecutor would have also sat a white barista (Juror 899) had she not felt compelled to withdraw her strike of the Black alternate (Juror 721). PDS App'x A, C; Tr. at 112–13. This too is strong evidence of pretext. *See Miller-El*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a [B]lack panelist applies just as well to an otherwise-similarly

situated nonblack person who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."). "[I]f the prosecution had been sincerely concerned" about Juror 238 and Juror 254's ability to understand science, "it is hard to see why the prosecution would not have had at least as much concern regarding" the white nanny and the white barista. *Snyder v. Louisiana*, 552 U.S. 472, 484 (2008). Relatedly, the prosecutor struck the Black alternate (Juror 721) who worked in marketing for an Information & Technology company and a Hispanic man (Juror 802) who was a full-time student at a technical school. PDS App'x B; Tr. at 39, 91–92. Based on the claim of wanting people who would "understand the scientific evidence," those excluded jurors "should have been the ideal juror[s] in the eyes of [the] prosecutor." *Miller-El*, 545 U.S. at 247.

With respect to the Black alternate who worked for the IT company (Juror 721), the prosecutor provided "no basis for striking [him] except [she] wanted the other [white] alternate." Tr. at 130. Thus, with real reason to be "concerned," Tr. at 130, the prosecutor withdrew her strike. Tr. 131–132. Nevertheless, the initial strike and the lack of explanation is yet another highly relevant part of the "whole picture," *Flowers*, 139 S. Ct. at 2250, that was explicitly not considered by the Division.

Finally, and consistent with not assessing the strikes in context or examining the whole picture, neither the trial court nor the Division engaged at all with the prosecutor's additional suspect claim that Juror 254 was struck because "her dress was very disrespectful to the Court." Tr. at 129. That neither the trial court nor the Division addressed or substantiated this suspect claim is further indicative of the lack of rigorous—much less heightened—scrutiny applied to this racially charged case.

If the prosecutor struck the panel at random or while wearing a blindfold, the removal of every Black person would have been highly unlikely, and constructing an all-white jury would have been even more so. When one adds to that the nature of this case, the prosecutor's highly-suspect justifications, desultory voir dire, and disparate treatment of similarly situated jurors, the notion that race was not "a consideration" becomes impossible. *Harris*, 260 A.3d at 669.

VI. Intelligence- and Appearance-Based Justifications Are Highly Suspect and Warrant Heightened Scrutiny.

In addition to finding a *Batson* violation, this Court should also make clear—at the very least—that "highly suspect" justifications like the intelligence- and clothing-based justifications presented in this case require "heightened scrutiny" at *Batson*'s step three. This Court has explicitly held and reaffirmed that a prosecutor's justifications require "heightened scrutiny" in cases that are racially charged. *Harris*, 260 A.3d at 676–77; *Smith v. United States*, 966 A.2d 367, 376 (D.C. 2009). The need for heightened scrutiny in such cases recognizes that context creates an increased likelihood that race factored into a prosecutor's strike decisions. The same is true when prosecutors provide a highly suspect justification for a strike.

Both justifications offered here by the prosecutor demand such scrutiny. As detailed above, intelligence-based justifications have long kept Black people off of juries, have been held as pretextual by courts, are cited in jury selection trainings as ways for prosecutors to circumvent *Batson*, and have been found by judicial and legislative bodies to be strongly associated with jury discrimination. *See, e.g.*, *McGahee*, 560 F.3d at 1267 ("The ability of a subjective rationale such as

intelligence to serve as a pretext to cover discriminatory strikes is why the intelligence explanation has been found suspect by other courts"); *Broussard*, 201 So. 3d at 408 ("We note that *by itself*, this statement [about intelligence] could be considered racially motivated") (emphasis added). Many of—if not all—those reasons apply with equal force to clothing-based justifications, especially when the record is devoid of any description about the prospective juror's clothing and is tethered to putative notions of disrespect. Thus, this Court should hold that both justifications are highly suspect and require heightened scrutiny at step three.[36]

CONCLUSION

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Buck v. Davis*, 580 U.S. 100, 124 (2017) (quoting *Rose*, 443 U.S. at 555). This Court should make clear that racial bias has no place in the selection of juries by reversing Mr. Smith's conviction, stressing the importance of judicial scrutiny, and holding that intelligence- and clothing-based justifications are suspect and require heightened scrutiny.

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[36] Washington, California, Connecticut, and New Jersey have also classified the following race-neutral justifications as highly suspicious: "having prior contact with law enforcement"; "expressing distrust in law enforcement"; "having a close relationship with people who have been stopped, arrested, or convicted of a crime"; "living in a high-crime area"; "having a child outside of marriage"; "receiving state benefits"; "lacking employment or being underemployed"; "not being a Native English speaker"; and "alleging that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor." *See* Wash. Gen. R. 37(i); Ca. Civ. Proc. §231.7(g)(1)(C); Conn. R. Super. Ct. Gen. §5-12(g); N.J. R. 1:8-3A, Official Comment (3).

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CERTICATE OF SERVICE

I hereby certify that a copy of the foregoing en banc brief of amicus curiae has been served electronically by the Appellate E-Filing System, upon Nicolas Coleman, Esq., Office of the United States Attorney, and Sean Day, Esq., Counsel for Appellant, and Stefanie Schneider, Esq., of the Public Defender Service for the District of Columbia, this 5th day of March, 2024.

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ADDENDUM A[1]

- The qualified jury pool:
  - 37 total potential jurors[2]
  - 31 white potential jurors
  - 4 Black potential jurors
  - 1 Hispanic potential juror
  - 1 Asian potential juror

- Questions:
  1. What is the probability that a race-neutral/random jury selection process would result in the prosecutor removing all four potential Black jurors?

  2. What is the probability that a race-neutral/random jury selection process would result in the prosecutor removing all six potential jurors of color?

- Approach
  - The statistical analyses below were run by Dr. Sandhya Kajeepeta, who is a Senior Researcher with the Legal Defense Fund's Thurgood Marshall Institute. To answer these questions, Dr. Kajeepeta used the methodologies outlined by Dr. Joseph L. Gastwirth, Professor of

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[1] A reviewing court may "'appl[y] general statistical principles to the evidence on the record in order to assess the role of chance'" as a potential explanation for disparate exclusion of jurors, even if that statistical analysis was not presented in the trial court. *Vasquez v. Hillery*, 474 U.S. 254, 259–260 (1986) (quoting *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977)).

[2] The trial court noted that there should be 36 qualified jurors in the venire, while defense counsel noted at the outset of his *Batson* objection that there were 37 qualified jurors. Tr. at 124–25. We use the number 37 because that was the agreed-upon number in the litigation below. *See Smith v. United States*, 288 A.3d 766, 774 (2023) ("After the court struck a series of jurors for cause, 37 prospective jurors remained, consisting of 31 white jurors, 4 Black jurors, one Hispanic juror, and one Asian juror.").

Statistics and Economics at George Washington University, in his article, *Case comment: statistical tests for the analysis of data on peremptory challenges: clarifying the standard of proof needed to establish a prima facie case of discrimination in* Johnson v. California, published in *Law, Probability & Risk.*[3] The first methodology ("simplified analysis") is commonly used by courts. The second methodology ("more sophisticated analysis") accounts for alternating sequential strikes, which is often absent from courts' analysis because of limited data or lack of statistical expertise.

Simplified analysis (not factoring in sequential alternating strikes):

This simplified analysis assumes that all 11 of the prosecutors strikes happened at the same time (i.e., it does not factor in the sequential alternating pattern of strikes).

1. The probability that the prosecutor removes all four potential Black jurors in their 11 strikes = 0.5%

$$\frac{\binom{4}{4}\binom{33}{7}}{\binom{37}{11}} = \frac{\frac{4!}{4!\,0!} * \frac{33!}{7!\,26!}}{\frac{37!}{11!\,26!}} = \frac{11 * 10 * 9 * 8}{37 * 36 * 35 * 34} = 0.004997$$

2. The probability that the prosecutor removes all six potential jurors of color in their 11 strikes = 0.02%

[3] 4 Law Probability & Risk 179-185 (2005), available at https://academic.oup.com/lpr/article/4/3/179/973897. *See also* Joseph L. Gastwirth, *Statistical Testing of Peremptory Challenge Data for Possible Discrimination:Application to Foster v. Chapman*, 69 Vand. L. Rev. 51 (2016), available at https://cdn.vanderbilt.edu/vu-wordpress-0/wp-content/uploads/sites/278/2016/03/19120017/Statistical-Testing-of-Peremptory-Challenge-Data-for-Possible-Discrimination-Application-to-Foster-v.-Chatman.pdf.

$$\frac{\binom{6}{6}\binom{31}{5}}{\binom{37}{11}} = \frac{\frac{6!}{6!\,0!} * \frac{31!}{5!\,26!}}{\frac{37!}{11!\,26!}} = \frac{11 * 10 * 9 * 8 * 7 * 6}{37 * 36 * 35 * 34 * 33 * 32} = 0.000199$$

More sophisticated analysis (factoring in sequential alternating strikes):

This more sophisticated methodology applies the logic of survival analysis (commonly used in epidemiologic studies) to account for the sequential elimination process. Specifically, the methodology calculates the expected likelihood of a Black potential juror or potential juror of color being removed during each individual strike to calculate an expected number of Black potential jurors removed or potential jurors of color removed. In the following tables, Dr. Kajeepeta used the information provided in the peremptory challenge form to calculate the expected likelihood of the outcome during each strike.

1. The likelihood of removing all four Black potential jurors:

Prosecutor strike number	1	2	3	4	5	6	7	8	9	10	11
Total number of potential jurors	37	35	33	31	29	27	25	23	21	19	17
Number of potential Black jurors	4	4	4	3	3	3	2	1	1	1	1
Number of potential non-Black jurors	33	31	29	28	26	24	23	22	20	18	16
Race of removed juror (1=Black, 0=non-Black)	0	0	1	0	0	1	1	0	0	0	1

Expected likelihood of removing Black juror	0.11	0.11	0.12	0.10	0.10	0.11	0.08	0.04	0.05	0.05	0.06

Expected number of Black jurors removed by prosecution: 0.937

Observed number of Black jurors removed by prosecution: 4

To estimate the probability of 4 Black jurors being removed when the expected number of Black jurors removed was 0.937 (assuming race-neutral/random selection), Dr. Kajeepeta calculated a Z statistic specified as follows:

$$Z = \frac{4 - 0.937}{\sqrt{sum(variance)}} = \frac{4 - 0.937}{\sqrt{0.849}} = 3.324$$

A Z score of 3.324 corresponds to a p-value of 0.000887 applying a normal distribution and using a two-tailed test. In other words, **assuming race-neutral/random selection, the expected number of Black jurors removed during the sequential strike process was 0.937 while the observed number of Black jurors removed was 4. The probability that the observed number would differ so greatly from the expected number due simply to chance is 0.09%**.

Because it may be unrealistic to use a Z score and assume a normal distribution given that 11 strikes is a small sample, Dr. Kajeepeta also conducted a log-rank test to assess the likelihood that the observed number of

Black jurors removed would differ so greatly from the expected number due to chance alone. A log-rank test is non-parametric, meaning it has no distributional assumptions, and is commonly used in survival analysis.

$$\chi^2 = \frac{(sum(observed - expected))^2}{sum(variance)} = \frac{3.063^2}{0.849} = 11.049$$

A χ^2 test statistic of 11.049 corresponds to a p-value of 0.000887 applying a chi-square distribution with 1 degree of freedom. So, the results of the log-rank test are consistent with the results assuming a normal distribution.

2. The likelihood of removing all six potential jurors of color:

Prosecutor strike number	1	2	3	4	5	6	7	8	9	10	11
Total number of potential jurors	37	35	33	31	29	27	25	23	21	19	17
Number of potential jurors of color	6	6	6	5	5	4	3	2	1	1	1
Number of potential white jurors	31	29	27	26	24	23	22	21	20	18	16
Race of removed juror (1=POC, 0=white)	0	0	1	0	1	1	1	1	0	0	1
Expected likelihood of removing POC juror	0.16	0.17	0.18	0.16	0.17	0.15	0.12	0.09	0.05	0.05	0.06

Expected number of jurors of color removed by prosecution: 1.363

Observed number of jurors of color removed by prosecution: 6

To estimate the probability of 6 jurors of color being removed when the expected number of jurors of color removed was 1.363 (assuming race-

neutral/random selection), Dr. Kajeepeta calculated a Z statistic specified as follows:

$$Z = \frac{6 - 1.363}{\sqrt{sum(variance)}} = \frac{6 - 1.363}{\sqrt{1.166}} = 4.293$$

A Z score of 4.293 corresponds to a p-value of 0.000018 applying a normal distribution and using a two-tailed test. In other words, **assuming race-neutral/random selection, the expected number of jurors of color removed during the sequential strike process was 1.363 while the observed number of jurors of color removed was 6. The probability that the observed number would differ so greatly from the expected number due simply to chance is 0.002%**.

Again, because it may be unrealistic to use a Z score and assume a normal distribution given that 11 strikes is a small sample, Dr. Kajeepeta also conducted a log-rank test to assess the likelihood that the observed number of jurors of color removed would differ so greatly from the expected number due to chance alone.

$$\chi^2 = \frac{(sum(observed - expected))^2}{sum(variance)} = \frac{4.637^2}{1.166} = 18.432$$

A χ^2 test statistic of 18.432 corresponds to a p-value of 0.000018 applying a chi-square distribution with 1 degree of freedom. So, again, the results of the log-rank test are consistent with the results assuming a normal distribution.

Statistical significance

For each of these analyses, the p-value (or likelihood of these extreme results occurring by chance) is well below .05 (or 5%), which is the general threshold for statistical significance. *See, e.g.*, *Woodfox v. Cain*, 772 F.3d 358, 380 (5th Cir. 2014); *Stagi v. Nat'l R.R. Passenger Corp.*, 391 F. App'x 133, 137-38 (3d Cir. 2010). In other words, these results are statistically significant.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

s/ Adam Murphy
Signature

18-CO-0289
20-CF-0190
Case Number(s)

Adam Murphy
Name

March 5, 2024
Date

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