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

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INTRODUCTION

This is a simple *Batson* case. It presents the type of allegation—the rape of a white woman by a Black man—where one would most expect prosecutors to strike Black jurors. And that is precisely what happened here. The prosecutor struck every Black juror, and all the nonwhite jurors. The probability that the prosecutor would have struck all four Black prospective jurors if race was not a factor was 0.5% (1/200). When factoring in the defense's alternating sequential strikes, the likelihood that the actual result would have deviated so greatly from the expected result based on chance alone was 0.09% (9/10,000). Those findings are statistically significant.

To justify a result so "unlikely to have been produced by happenstance," *Miller-El v. Dretke*, 545 U.S. 231, 232 (2005), the prosecution relied on well-established stereotypes of Black Americans that are commonly used by prosecutors to strike Black prospective jurors. And the record further demonstrates that the prosecutor's intelligence-based justifications, thinly veiled by references to the jurors' professions, are pretextual because the prosecutor sat a white nanny and attempted to sit a white barista, and struck a Black juror who had the professional pedigree the prosecutor claimed to have wanted. In some *Batson* cases, it may be difficult to ferret out the reason behind a prosecutor's strikes. This is not such a case.

In denying the *Batson* motion raised by defense counsel, the trial court made legal errors requiring reversal. First, the trial court failed to conduct a "rigorous evaluation" and "probing inquiry" of the prosecutor's purported race-neutral reasons. *Harris v. United States*, 260 A.3d 663, 676–77, 680 (D.C. 2021). Under this Court's decisions in *Harris*, *Haney v. United States*, 206 A.3d 854 (D.C. 2019), and

Tursio v. United States, 634 A.2d 1205 (D.C. 1993), failing to engage in the requisite scrutiny at step three is a legal error where the appropriate remedy is reversal rather than remand since more than 12 years have passed since the *Batson* hearing.

Second, the record demonstrates that the prosecutor's rationales for striking Jurors 238, 254, and 683 were pretextual. The trial court's contrary determination is premised on its legal error in failing to engage in a rigorous evaluation at step three. Where, as here, a factual finding arises from a flawed legal analysis, it is not entitled to deference on review. Finally, even if this Court does review the record for "clear error," reversal is warranted because the evidence that race was "a consideration" behind the strikes is undeniable. *Harris*, 260 A.3d at 669.

To avoid this obvious conclusion, Appellee misstates the law and tries to obscure the facts. First, Appellee argues that the trial court's only duty at step three is to engage with the specific evidence and arguments presented by defense counsel and otherwise has no obligation to "rigorously scrutinize" the prosecutor's race-neutral explanations." *Harris*, 260 A.3d at 675. But the Supreme Court and this Court have made clear that the "[t]he trial court's duty is to undertake a sensitive inquiry into such circumstantial . . . evidence of intent as may be available," *Foster v. Chatman*, 578 U.S. 488, 501 (2016), and "must consider the prosecutor's race-neutral explanations in light of all the relevant facts and circumstances." *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019). *Accord Harris*, 260 A.3d at 674. Appellee puts the blame on defense counsel, who did raise key points to support the claim, to hide the fact that the trial court did not conduct anything resembling a sensitive

inquiry, failed to analyze the relevant facts and circumstances, isolated each strike, and "accepted" the prosecutor's perfunctory "assurance" that race was not a factor.

Second, and relatedly, with respect to this Court's review, Appellee claims that there are "gaps in the record," that defense counsel is responsible for those gaps, and that appellate review is limited to the evidence and arguments affirmatively presented by defense counsel at trial. Resp. Br. at 34–46. But these arguments were rejected by the U.S. Supreme Court in *Flowers*, *Foster*, *Snyder*, and *Miller-El*. Those cases make clear that appellate courts must conduct an "independent examination of the record," *Foster*, 578 U.S. at 502, "must examine the whole picture," *Flowers*, 588 U.S. at 314, and consult "all of the circumstances that bear upon" racial exclusion. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). Consistent with that command, the Supreme Court's analyses establish that when defense counsel raises a *Batson* objection, an appellate court must consider all evidence before the trial court bearing on that objection, even if it was not specifically cited by defense counsel below. Thus, careful review of the record is not, as Appellee claims, filling in "gaps," nor is it a "procedural sleight of hand." Resp. Br. at 45. Rather, it is the mode of analysis prescribed and conducted by the Supreme Court in *Batson* cases.[1] Appellee's labels are designed to have this Court blind itself to powerful evidence of pretext and are an echo of Justice Thomas's rejected dissents in those cases.

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[1] In its 70-page brief, Appellee only cites *Flowers* three times (all in passing), cites *Miller-El I* once (also in passing), never cites *Miler-El II*, and never cites *Foster*.

Third, while asking the Court to close its eyes, Appellee's entire brief is structured as if each strike and argument must be assessed in isolation rather than in conjunction with each other and in the context of the case. The Supreme Court has expressly rejected this approach as well. *See Flowers*, 588 U.S. at 314–15.

Fourth, Appellee asks this Court to provide little weight to powerful evidence of pretext. In so doing, Appellee misapprehends the statistical significance of the prosecutor's strikes, claims that the intelligence-based justifications are not intelligence-based, and creates meaningless distinctions to undermine the significance of the prosecutor's disparate treatment of similarly situated jurors.

In sum, Appellee invites this Court to apply a framework that the Supreme Court has repeatedly rejected, and that would nullify the purpose of *Batson* and perpetuate grave 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).

I. The Trial Court Committed a Reversible Legal Error By Failing to Conduct a Rigorous Evaluation and Probing Inquiry of the Prosecutor's Justifications.

"[T]rial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." *Flowers*, 588 U.S. at 302. That responsibility, this Court has explained, requires the trial court to conduct a "rigorous evaluation" and "probing inquiry" of the prosecutor's purported justifications. *Harris*, 260 A.3d at 674, 680.

The trial court failed to apply anything resembling that level of scrutiny here. Instead, when confronted with an all-white jury and arguments from defense counsel that the prosecutor's intelligence- and clothing-based justifications were insufficient to withstand the *Batson* challenge, the trial court rejected the challenge without asking the prosecutor any questions about her intelligence-based justifications for Jurors 238, 254, and 683, and without even addressing the prosecutor's vague clothing-based justification. The trial court also expressly refused to assess each strike in connection with each other and within the context of the case and found the prosecutor's intelligence-based justifications to be "credible" because the "Government [has] assured that this was not based on race." Tr. at 135.

To obscure the trial court's lack of probing and its perfunctory acceptance of the prosecutor's suspect justifications, Appellee principally argues that the trial court's only duty at step three is to engage with the specific arguments presented by defense counsel, and the specific record evidence cited by counsel in support of those arguments. *See* Resp. Br. at 25–46. In making that argument, Appellee insists that requiring more from the trial court would "shift the burden of persuasion to the trial judge" and turn the trial judge into "an advocate." *Id*. at 40, 42.

Respondent's contentions are contravened by U.S. Supreme Court precedent and are contrary to what was required of the trial court here. The Supreme Court has made clear that "in considering a *Batson* objection . . . all of the circumstances that bear upon the issue of racial [exclusion] must be consulted." *Snyder*, 552 U.S. at 478. *Accord Flowers*, 588 U.S. at 302; *Foster*, 578 U.S. at 501. There is no question that even in a fast-paced trial, defense counsel must preserve objections to the trial

court. But once defense counsel raises an objection and presents arguments in support of that objection—which will not possess the detail one would find in an appellate brief—*Batson* "demands" that the trial court engage in a "sensitive inquiry" of the prosecutor's justifications. *Foster*, 578 U.S. at 501.

The trial court's duty to undertake this sensitive inquiry is well illustrated by *Harris*. In *Harris*, the prosecutor claimed that one of her reasons for striking a Black juror was that the juror's t-shirt included an American flag that said, "land of the free," and the prosecutor was "unsure how that message cut." 260 A.3d at 671. Defense counsel raised a *Batson* objection but did not make any argument about this justification during the *Batson* hearing. Nevertheless, this Court found that "it was incumbent on the trial court to ask questions geared at determining whether the explanation might have reflected a race-related" reason. *Id*. at 679.

In any event, defense counsel in this case raised a *Batson* objection and supported the claim. Counsel stressed that the prosecutor struck all of the Black jurors and even all of the jurors of color; argued that "saying they were too unintelligent to serve on a jury" was not an "effective reason to withstand the challenge"; argued the same with respect to the justification about the juror's "disrespectful" dress; and emphasized that the strike of the Black alternate, in favor of a white venire-member, "had no basis." Tr. at 131, 133. Thus, the total exclusion of Black jurors and the other jurors of color, the intelligence- and clothing-based justifications used to whitewash the jury, the lack of any basis to strike the Black alternate, and the replacement of the Black alternate by a white venire-member were all circumstantial evidence of the prosecutor's intent expressly raised by counsel.

Nevertheless, after defense counsel's presentation, the trial court did not ask the prosecutor a single question to gauge whether race was a consideration for her strikes. And the "trial court provided no indication of whether it recalled" anything objectionable about Juror 254's appearance, *Harris*, 260 A.3d at 678, much less did the court scrutinize or substantiate that justification. The trial court instead focused on defense counsel's strikes of white jurors, interrupted both defense counsel and the prosecutor, and asked sarcastically, "would you like me to excuse this panel to lunch so we can spend the rest of the day discussing this?" Tr. at 136.[2]

The trial court also—despite defense counsel's urging—assessed each strike in isolation before cursorily concluding that the justifications were credible. This too is contrary to precedent. *See Snyder*, 552 U.S. at 478 (explaining that the trial court is "required to consider the strike of [one Black juror] for the bearing it might have upon the strike of [another Black juror]"); *accord Tursio*, 634 A.2d at 1211–12. After the prosecutor felt compelled to withdraw her strike of Black prospective Juror 721, the trial court said, "we're down to three." Tr. at 131. After saying the strike of the Black prospective juror who misheard a muddled compound question "surely passes [m]ust[er]," the trial court said, "we're down to two." *Id*. at 132. When defense counsel said, "you have to look at the totality of the selections," *id*. at 133, the trial

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[2] This question continued a general theme. Right before the strike process, the court told the parties that "it should take you ten minutes to do this" and that they had to be "finished by 1:00 o'clock because we're all going to go to lunch." Tr. at 123. During the strike process, he urged the parties to "move a little bit quicker." *Id*. at 124. Immediately before the *Batson* objection was raised, the trial court complained that it took "twenty-eight minutes to make 11 strikes." *Id*. at 125.

court said "No . . ." *Id.*[3] The trial court reiterated, "we're down to the plumber's assistant and at most the cashier," *id*., and concluded: "I will accept the Government's reason that this is a race based neutral reasons for the strike . . . I think that the reason that the Government gives is a credible reason, and the Government [has] assured that this was not based on race." *Id*. at 135.

Appellee's recitation of facts and analysis conspicuously elides the trial court's statement that it rejected the *Batson* challenge because the prosecutor "assured" the court the strikes were not based on race. Appellee's reason for doing so is obvious: it underscores how far the trial court was from conducting a rigorous evaluation at step three. *Compare Tursio*, 634 A.2d at 1211–12. Thus, in addition to failing to ask questions about the prosecutor's suspect justifications and isolating each strike, the court "accepted" the prosecutor's "assurance" that race was not a factor. Tr. at 135. Not only did the trial court fail to engage in a "sensitive inquiry," *Foster*, 578 U.S. at 501, the trial court essentially undertook no inquiry at all.

The trial court was required to engage in a more rigorous evaluation and sensitive inquiry. This would be true at step three in any *Batson* case and is "especially [true] in light of the prosecutor's elimination of all [Black] venirepersons from the jury." *Tursio*, 634 A.2d at 1212. Thus, the trial court committed a legal error by failing to fulfill its obligation at step three.

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[3] Appellee's contention that defense counsel "conceded that 'individually' there was a 'reason' for [the strikes]," was not a concession at all. Resp. Br. at 33. What defense counsel said was that "if you individually separate them there could be a reason," but "you have to look at the totality of the selections." Tr. at 133.

This Court should reverse rather than remand. Twelve years have passed since the *Batson* hearing, which means that the government's proffered reasons "cannot now be meaningfully tested." *Harris*, 260 A.3d at 681 (reversing where trial court failed to engage in the proper level of scrutiny at step three because "over three years" had passed since the *Batson* hearing); *Haney*, 206 A.3d at 864 (same where "[a]ppellant's trial occurred over two years ago"); *Tursio*, 634 A.3d at 1213 (same).

II. The Prosecutor Struck Three Black Potential Jurors on the Basis of Race.

This Court is also required to reverse because the record demonstrates that the prosecutor's rationales for striking Juror 238, Juror 254, and Juror 683 were pretextual. This Court should conduct an independent examination of the record without deference to the trial court's factual finding because it arose from a flawed legal analysis at step three. But even if this Court does review the record for clear error, the record reveals that race was a consideration behind the strikes.

a. This Court must conduct an independent examination of the record and scrutinize the prosecutor's justifications in light of the entire record on appeal.

The United States Supreme Court has repeatedly re-affirmed that when an appellate court reviews a trial court's *Batson* ruling, it must "examine the whole picture," *Flowers*, 588 U.S. at 314, and conduct an "independent examination of the record." *Foster*, 578 U.S. at 502. This independent examination requires reviewing courts to consult "all of the circumstances that bear upon the issue" of racial exclusion and "demands a sensitive inquiry into such circumstantial evidence of intent as may be available." *Foster*, 578 U.S. at 501 (cleaned up). Close appellate

scrutiny is essential, this Court has explained, because "we must be guided by the principle that 'race is an impermissible factor, even if a minor one, in exercising peremptory strikes.'" *Harris*, 260 A.3d at 670 (citation omitted).

Appellee dishonors that principle by seeking to limit this Court's review. Appellee claims that when it comes to this appeal, there are "gaps in the record," defense counsel is responsible for those "gaps," and appellate review starts and stops with the specific evidence and arguments presented by trial counsel. Resp. Br. at 34–46. According to Appellee, comparative juror analyses not raised below, and all other points supporting the *Batson* claim, are functionally forfeited unless they were raised before the trial court. *Id*.

Appellee's arguments are contrary to decades of Supreme Court precedent. The Supreme Court's analyses in *Flowers*, *Foster*, *Snyder*, and *Miller-El* establish that when a *Batson* objection is properly raised, and the evidence is properly before the court, an appellate court must consider theories about that evidence not specifically presented to the trial court. In *Flowers*, the Court interrogated strikes that defense counsel did not object to, conducted comparative juror analyses that defense counsel did not raise, analyzed prosecutorial mischaracterizations that defense counsel did not cite, and even looked at the prosecutor's strike patterns from four previous trials. 588 U.S. at 305–315. In *Foster*, the Court "subjected to scrutiny" prosecutorial justifications that were not challenged by defense counsel, conducted its own comparative juror analysis, and evaluated handwritten notes that were never before the trial court. 578 U.S. at 501–514. In *Snyder*, the Court also conducted its own comparative juror analysis that trial counsel never raised below. 552 U.S. at

483–485. In *Miller-El*, the Court conducted its own comparative analysis, pointed to mischaracterizations not raised by defense counsel, and examined ninety-eight juror questionnaires never called to the trial court's attention. 545 U.S. at 241–266. And, in *Harris*, this Court conducted two separate comparative juror analyses not raised below. 260 A.3d at 671–72, 678–79.

In the same vein, and contrary to Appellee's contention that Mr. Smith was required to present his statistical analysis to the trial court (Resp. Br. at 50 n.26), 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)).

Appellee asks this Court to adopt a position urged repeatedly by Justice Thomas in dissenting *Batson* opinions rather than the binding majority decisions that have repeatedly rejected Justice Thomas's view of the law. Respondent complains, precisely as Justice Thomas complained in *Miller-El* and subsequent cases, that "comparisons of" Black and non-Black venirepersons and "arguments about the prosecution's disparate questioning of" Black and non-Black panelists are not properly before this Court since they were not raised below. *Miller-El*, 545 U.S. at 241 n.2.[4] But that argument has been squarely rejected by the Supreme Court

[4] *See, e.g.*, *Flowers*, 588 U.S. at 338 (Thomas, J., dissenting); *Foster*, 578 U.S. at 537 (Thomas, J., dissenting); *Snyder*, 552 U.S. at 489 (Thomas, J., dissenting); *Miller-El*, 545 U.S. at 283 (Thomas, J., dissenting).

because it "conflates the difference between evidence that must be presented [below] and theories about the evidence." *Id*. There "can be no question that the transcript of *voir dire*, recording the evidence on which [Mr. Smith] bases his arguments," is part of the record. *Id*. Thus, Mr. Smith, in support of his preserved *Batson* claim, is not filling in gaps to the record. Rather, he is reviewing the record and making arguments based on what the record shows. By pointing, for example, to the prosecutor's disparate treatment of similarly situated jurors, Mr. Smith is examining the *voir dire* transcript and engaging in the mode of analysis prescribed and conducted by the Supreme Court in every *Batson* case, and by this Court in *Harris*. *See Miller-El*, 545 U.S. at 252 ("The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons . . . in an implausible light. Comparing [the] strike of the Black juror with the treatment of [white] panel members . . . supports a conclusion that race was significant in determining who was challenged and who was not.").

Finally, Appellee's entire brief is structured and argued as if each argument and strike should be assessed in isolation.[5] But, as explained above (*see supra* at 7), the Supreme Court and this Court's "precedents require" reviewing courts to examine each "strike in the context of all the facts and circumstances" rather than "in isolation." *Flowers* 588 U.S. at 314–15. *Accord Snyder*, 552 U.S. at 478; *Tursio*,

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[5] *See, e.g.*, Resp. Br. at 25 ("Smith's argument that the government's failure to strike a white nanny proves that the profession-based concerns were pretextual fails to establish clear error"); *id*. at 47 ("Smith and Amici's statistical arguments do not establish clear error"); *id*. at 62 ("The fact that the government did not strike Juror 916, the nanny, does not establish discriminatory intent"); *id*. at 68 ("The strikes of the Asian and Hispanic jurors do not establish clear error.").

634 A.2d at 1211–1212. Put another way, this Court "need not . . . decide that any of these facts alone would require reversal." *Flowers*, 588 U.S. at 288. Instead, this Court must determine whether "all the relevant facts and circumstances taken together" demonstrate that race was a consideration for the prosecutor's strikes. *Id*.

i. This Court should engage in careful scrutiny of the record without deferring to the trial court's factual finding.

While "careful scrutiny of the record," *Harris*, 260 A.3d at 670, demonstrates that race was a consideration under clear error review, this Court should not defer to the trial court's factual finding that the prosecutor's justifications were credible. Where, as here, a factual finding is premised on legal errors (*see supra* at 4–9), it is not entitled to deference. *See, e.g.*, *Capitol Hill Hosp. v. Baucom*, 697 A.2d 760, 772 (D.C. 1997) (explaining that if trial court does not properly perform its task at step three it loses "the insulation of the 'clearly erroneous' rule"). This straightforward appellate principle is particularly important in the *Batson* context. Prosecutors will always deny that race was a consideration for their strikes. If trial courts are free to accept such a denial without probing the prosecutor's claim, and appellate courts are required to defer to the trial court's ruling, then reviewing courts will always affirm *Batson* violations, including clear *Batson* violations like this one.

b. The facts demonstrate a *Batson* violation under clear error review.

In any event, the facts of this case demonstrate a *Batson* violation under clear error review.[6] The prosecutor struck all four Black prospective jurors and the only

[6] "Even in the context of federal habeas," which adds a significant layer of deference

two other jurors of color. She then provided justifications that are both rooted in stereotypes and commonly used to keep Black people off of juries. And, while engaging in disparate and desultory *voir dire*, she sat a white nanny, attempted to sit a white barista, and struck a Black juror who had the professional pedigree she claimed to have wanted. Even within a legal system where jury discrimination is all too common, few cases present such textbook indicia of pretext.

Appellee asks this Court to provide little weight to this powerful evidence of pretext. In so doing, Appellee first "questions" whether this case was racially charged because "the District in 2012 was far removed from the world of 'Jim Crow.'" Resp. Br. at 36. But that same logic would apply to *Harris* (2021) and *Tursio* (1993), which this Court found to be racially charged cases. And in this case, unlike those cases, a Black man was charged with sexually assaulting a white woman, which has long provoked a singularly charged response.[7] For most of American history, "white institutions, laws, and most white people rejected the idea that a white woman could or would willingly consent to sex with an African American man."[8] Those deeply ingrained attitudes do not disappear because a hyper-segregated city[9]

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not presented here, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

[7] *See, e.g*, Equal Just. 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.

[8] *Id.* at 30.

[9] In twelve neighborhoods east of the Anacostia River, D.C.'s hypersegregation was found to be "as severe as South African apartheid." Equal Rts. Ctr., Nick Adjami, *Source of Income Discrimination Perpetuates Racial Segregation in D.C.*, (Aug. 19, 2020).

has Black people who work in the court system.[10] Resp. Br. at 36 n.18. It is also ironic for Appellee to suggest that history is no longer with us, and that Jim Crow is a relic, in service of upholding an interracial rape conviction where the prosecutor excluded every Black person to create an all-white jury.[11]

Appellee then argues that the total exclusion of Black people in a racially charged case was not persuasive evidence that race was a consideration in who was struck and who was seated. Resp. Br. at 47–51. Appellee does not and cannot argue that Amicus LDF's statistical analyses and results are faulty. Instead, Appellee argues that the "sample size" of the four stricken Black jurors "is simply too small" to be meaningful. *Id*. at 49. To make that argument, Appellee misleadingly quotes from Professor Joseph Gastwirth that "statistical tests have low power in small data sets," especially when the sample size is "only [between] 0 and 4." *Id.* But Appellee's quote omits and contradicts the key point: when the results from a small sample size reach statistical significance, the disparity is so large that it is highly unlikely to have been driven by chance alone.[12]

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[10] Nor does it matter that one of the prosecutors in this case was Black, which Appellee represents in their briefing even though it is not evident from the record. Resp. Br. at 36 n.18. Prosecutors of any race want to win their trials, which means seating a jury that they perceive to be favorable. That often means impermissibly striking Black jurors—especially in this type of case—based on the "belief that the [B]lack juror would favor a [B]lack defendant." *Flowers*, 588 U.S. at 299.

[11] Given the overwhelming evidence of discrimination in the record, this Court need not rely on the racially charged nature of the case to reverse. Because most *Batson* cases will not be as racially charged as this one, a decision from this Court that turns on its racially charged nature risks the untoward consequence of limiting the requisite level of scrutiny in most criminal cases that are less racially charged.

[12] The full Professor Gastwirth quote is included in LDF's Reply Addendum A.

This case presents the precise scenario that Appellee obscures. The prosecutor's peremptory strikes of four potential Black jurors and six potential jurors of color are arguably small sample sizes. But even accounting for the sample size, the results are statistically significant. And they are highly statistically significant: the p-value (or likelihood of these extreme results occurring by chance) for the strikes of the Black jurors is 0.000887, and for the strikes of the jurors of color is 0.000018—well below 0.05, which is the general threshold for statistical significance.[13] The fact that, even with a relatively small sample size, the disparity rises to such a high level of statistical significance is powerful evidence to suggest that the prosecutor's peremptory strike decisions were motivated by race.

Appellee also attempts to sanitize the prosecutor's intelligence-based justifications for striking Jurors 238 and 254 by claiming that the prosecutor "properly based its strikes on jurors' professions." Resp. Br. at 56–58. But pointing to their professions, without asking them a single question, and saying they would not "be able to understand the scientific evidence," Tr. at 129, was a clear stand-in for intelligence. The prosecutor had no idea how well the excluded jurors—or any other jurors—understood science and did not bother to learn more.[14]

Appellee's only response to the prosecutor's complete lack of *voir dire* is that Mr. Smith and Amici "do not describe what, precisely, the prosecutor should have asked?" Resp. Br. at 55 n.31. But a prosecutor who was genuinely concerned about

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[13] *See* Amicus LDF Opening Brief at Addendum A.

[14] As most lawyers can attest, having a white collar job outside of a scientific field says nothing about one's ability to understand science.

a person's ability to understand science would have asked questions about their science background. That the prosecutor asked no questions at all strongly suggests that she was not actually concerned. *See Miller-El*, 545 U.S. at 246.

The prosecutor's disparate treatment of the seated white nanny (Juror 916) further confirms that the prosecutor's "profession based" justifications were pretextual. In arguing that being a nanny is not "'otherwise similar' to the jobs of plumber's assistant or cashier," Resp. Br at 62 (citation omitted), Appellee draws on meaningless distinctions, most notably, that a nanny "needs a more compassionate, empathetic disposition compared to workers in many vocational industries." *Id*. at 63. Such a questionable notion, even if true, has nothing to do with understanding scientific evidence. Perhaps recognizing that this distinction is irrelevant, Appellee offers associational distinctions, such as the nanny having "a friend who was a public defender." *Id*. at 64 n.39. It strains credulity that the trial prosecutor wanted to seat the white nanny because of her friendship with a public defender.

Appellee also argues that the white Starbucks barista (Juror 899) was not similarly situated to Jurors 238 and 254 because she had "a professional background much different from the jurors the government struck based on their occupations." Resp. Br at 66. The only reason we know about the white barista's professional background is because the prosecutor asked her about it—a question that the prosecutor did not ask either Jurors 238 or 254. *Compare* Tr. at 113 ("Can I ask what you did before [working at Starbucks]?"); *with* Tr. at 62 (explicitly declining to ask Juror 238 any questions), Tr. at 97 (asking no questions of Juror 254). Regardless,

the fact that the barista had worked as a bookkeeper nine years before the start of trial has no bearing on whether she was better equipped to understand science.

Appellee's arguments regarding the struck Black alternate (Juror 721) are similarly unpersuasive. Appellee's primary contention is that the prosecutor mistakenly believed she would be seating a white juror who worked for an energy security non-profit (Juror 839). But even if the prosecutor was genuinely mistaken, which is itself questionable, neither the prosecutor nor Appellee offer any reason why Juror 721 was struck other than the prosecutor's vague preference for Juror 839. Based on the claim of wanting people with high professional pedigree, Juror 721, who worked in marketing at an Information & Technology company, Tr. at 39, "should have been the ideal juror in the eyes of [the] prosecutor," *Miller-El*, 545 U.S. at 247, and should have certainly been more favorable than the white nanny.[15]

Appellee fares no better when trying to rebut the significance of the prosecutor's suspect clothing-based justification. Appellee cannot rebut that clothing is a common pretextual justification cited to exclude Black prospective jurors, especially when couched in putative notions of disrespect. Instead, Appellee argues that "Juror 254 was still in the courtroom when the government made its observation" and "[h]ad the court or defense counsel disagreed with the Government's assessment" they would have said something. Resp. Br. at 61. But

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[15] Given his full-time attendance at a technical school, the same is true of the Hispanic man (Juror 802) who the prosecutor also struck. Appellee's argument that considering the strikes of the Hispanic man and Asian woman (Juror 565) "reincorporate[s] [them] back into the *Batson* claim," Resp. Br. at 68, continues to miss the point: strikes must be assessed in connection with each other.

defense counsel did take issue with the Government's assessment. *See* Tr. at 131. And the Supreme Court has rejected the argument that a trial court's silence means implicit agreement with a prosecutor's assessment. *See Snyder*, 552 U.S. at 479. This is especially true where, as here, the trial court's factual "finding" referenced only the intelligence-based justifications. Tr. at 135.

Finally, Appellee tries to defend the prosecutor's strike of the Black D.C. government employee (Juror 683), who allegedly lacked the mental capacity to serve as a juror in the D.C. courts. Appellee argues that the prosecutor was not saying anything categorical about him—"intellectually or otherwise." Resp. Br. at 59 n.35. According to Appellee, the prosecutor was looking for which qualified jurors were "*best* suited to evaluate the scientific evidence in the case." *Id*. at 60 n.35 (emphasis in original). But that is not at all what the prosecutor said: "I was concerned that—I felt he didn't understand the law enforcement question as he answered the law enforcement question yes, but he meant only that he worked for D.C. Government and I felt that that was not showing a level of understanding of even that fairly basic question." Tr. at 129–130. Thus, the prosecutor did not say anything about who was "best suited" to understand the scientific evidence, much less connect in any way her basis for striking Juror 683 with the scientific evidence in this case.

The record demonstrates that the strike of Juror 683 was pretextual for at least three reasons. First, the record does not support the prosecutor's claim that Juror 683 had trouble "understanding even [a] fairly basic question." Tr. at 129–130. Instead, the record demonstrates that Juror 683 clarified that he simply heard the court's confusing compound 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. *Id*. at 27–28, 117.[16] Second, when given the opportunity to address her alleged concern, the prosecutor expressly declined to ask Juror 683 any questions. *Id*. at 117–118. Third, it is a depressingly common pretextual justification for prosecutors to claim that Black jurors "appeared to have difficulty understanding questions."[17] Thus, the pretextual nature of this strike is evident standing alone. When one also considers the strikes of Jurors 238 and 254, and all of the facts and circumstances, the pretextual nature of this strike is unmistakable.[18]

CONCLUSION

All of the facts and circumstances, taken together, establish that race was a consideration behind the prosecutor's strikes of Jurors 238, 254, and 683.

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[16] In *Harris*, "the court re-read" a similarly confusing "question to the venire, explaining, 'because it's got so many clauses in it.'" 260 A.3d at 671 n.3.

[17] Top Gun II training materials, *Batson Justifications: Articulating Juror Negatives*, available at https://nccadp.org/wp-content/uploads/2018/03/cheat-sheet.pdf. *See also e.g.*, *Foster*, 578 U.S. at 511 ("Lanier [the prosecutor] told the trial court that Hood 'appeared to be confused and slow in responding to questions concerning his views on the death penalty.'"); *Harris*, 260 A.3d at 672 (The prosecutor "recall[ed] the [c]ourt began to say something and [the juror] interrupted but she was confused and so you tried to elucidate the confusion and she was still confused.").

[18] In a footnote, Appellee mischaracterizes Amicus LDF's argument as advocating to "ban entirely peremptory strikes based" on intelligence and appearance. Resp. Br. at 31 n.15. As Amicus explains in our opening brief, those justifications require even more scrutiny—not a ban—because they are rooted in stereotypes and have historically been used by prosecutors as pretexts for discrimination.

Respectfully submitted,

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CERTICATE OF SERVICE

I hereby certify that a copy of the foregoing en banc reply brief of amicus curiae has been served electronically by the Appellate E-Filing System, upon Nicholas Coleman, Esq., Office of the United States Attorney, Sean Day, Esq., Counsel for Appellant, and Stefanie Schneider and Samia Fam, Esq., of the Public Defender Service for the District of Columbia, and by United States Mail upon Elizabeth Gabriel, Esq. and Bridget Fitzpatrick, Esq., Office of the United States Attorney, this 26th day of June 2024.

s/Adam Murphy

LDF REPLY ADDENDUM A

The full sub-section from the Professor Joseph Gastwirth article is below. The key point elided by Appellee is emboldened.[1]

"Notice that these powers are quite low—less than those in *Miller-El*, although slightly higher than those in *Batson*. For example, the probability of detecting a prosecutor using a system in which the odds an African-American is removed are 3 times those of a non-African-American is about 0.20—that is, 80% of the time, the test will not classify the challenges of such a prosecutor as statistically significant. Even if the odds a prosecutor removes minorities are 10 times those of a non-African-American, there is nearly a 40% chance the test will not find the challenges statistically significantly different. **Thus, the finding of a statistically significant disparity with a p-value of 0.0011 indicates that the difference in the challenge rates is substantial, so the explanations offered by the prosecution for removing the African-American members deserve careful scrutiny.**

"Statistical tests have low power in small data sets, regardless of whether the data refers to a small random sample from a large population or a small sample of a modest fraction of a small population. This is a consequence of keeping the significance level, or probability of making a fair prosecutor explain their challenges, low—for example, at 0.05 or 0.10. This problem is more acute in

[1] Joseph L. Gastwirth, *Statistical Testing of Peremptory Challenge Data for Possible Discrimination: Application to* Foster v. Chatman, 69 VAND. L. REV. EN BANC 71, 87-88 (2015).

situations where minority groups form a small fraction of the overall data, as the set of possible outcomes is very small. **In *Foster* or *Batson*, the possible numbers of African-Americans that could be struck were only 0–4. In this low-power situation, when a test reaches statistical significance, courts should realize that the odds of a member of the protected group being challenged by the prosecutor are substantially larger than those of the majority group; otherwise, the result would not be significant. Therefore, such a disparity in the challenge rates of the two groups should be legally meaningful, and the explanations provided by the prosecution and the 'side-by-side' comparison of characteristics of the minorities struck with the majority members retained should be examined carefully.**"