Appeal Nos. 18-CO-0289 & 20-CF-0190

DISTRICT OF COLUMBIA COURT OF APPEALS

GLENN ARTHUR SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

EN BANC BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE IN SUPPORT OF APPELLANT

SAMIA FAM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

* An asterisk denotes an authority upon which amicus curiae chiefly relies.

STATEMENT OF AMICUS CURIAE

This case presents an equal protection issue of vital importance to criminal justice in the District and hence to the Public Defender Service (PDS): whether *Batson*[1] requires the trial judge (and this Court on review) to rigorously scrutinize a prosecutor's race-neutral rationales for strikes that eliminate every juror of color in a racially-charged rape case, and whether the judge's cursory finding that they were "credible" fails in the face of numerous red flags of racial bias that he never probed. The parties do not oppose the filing of this brief. *See* D.C. App. R. 29(a)(2).

INTRODUCTION

The government charged Glenn Smith, a Black man, with raping a white woman as she walked home from a party. Because the defense was consent and there were no eyewitnesses, the central question for the jury was whether to believe the Black defendant or the white complaining witness. During jury selection, the prosecutor used her peremptory strikes to eliminate every qualified person of color, including four Black jurors (one of whom was an alternate), one Hispanic juror, and one Asian juror. None of the stricken jurors had answered any voir dire questions posed by the court, and the prosecutor had not asked them any questions.

Confronted with a *Batson* challenge, the prosecutor claimed to have stricken several Black jurors based on their professions, saying that they would not understand the scientific testimony in the case. This rationale was immediately suspect, yet the trial judge never tested it as the Constitution requires. It was suspect because the prosecutor knew the DNA evidence was undisputed; the proffered

[1] *See Batson v. Kentucky*, 476 U.S. 79 (1986).

medical evidence was simple; while professing to care about science proficiency, the prosecutor had not questioned any juror about it; she did not strike a white nanny, whose job similarly did not require higher education; and her strikes resulted in the statistical anomaly of eliminating every non-white juror in a case with evident racial tension. Under a *Batson* challenge, the prosecutor backtracked and withdrew her strike of the Black alternate, but managed to retain the all-white regular jury. Without probing the prosecutor's supposed preference for a highly educated jury, or reviewing the totality of the record to see whether her rationale withstood closer scrutiny, the judge summarily found the prosecutor's representations credible, and denied the *Batson* challenge. Mr. Smith was convicted of raping a white woman by an all-white jury. This Court granted en banc review after the Division affirmed.

The en banc Court must follow the clear command of the Supreme Court, reaffirm *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993), and *Harris v. United States*, 260 A.3d 663 (D.C. 2021), and hold that *Batson*'s step three requires the trial judge, and the appellate court on review, to rigorously scrutinize the proffered race-neutral reasons in light of *all* the facts and circumstances. Application of these constitutionally mandated principles here requires reversal. *See Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); and *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

RELEVANT FACTUAL BACKGROUND

In the early morning hours of June 13, 2010, V.F., a young white woman, called 911 and reported that a Black man approached her, demanded money, and raped her as she walked home from a party on Wisconsin Avenue. A sexual assault

nurse examiner (SANE) examined V.F., took DNA swabs, and photographed her genitalia. 12/5/12 at 304-05. The government matched the DNA to Mr. Smith, *id.* at 435-38, and indicted him for vaginal and anal first-degree sexual abuse, R. 13.

During pre-trial litigation, it became clear that the case would not involve any contested complex forensic issues and would boil down to a credibility contest about consent. Defense counsel indicated that the defense was consent and that Mr. Smith was not challenging the DNA evidence.[2] Again, when the case was certified to Judge Motley for trial, both the prosecutor and defense counsel apprised him that this was a consent case. The prosecutor explained, "As conversations have ensued with Defense Counsel, I'm sensing that identity . . . w[ill] not necessarily be an issue." 12/3/12 at 41-42. Defense counsel confirmed that Mr. Smith's defense was consent and he would not be contesting identity:

> I've spoken at length with my client on this issue previously about this issue and discussions with Government Counsel. This will be more of a consent defense than an identity defense as we -- as Judge Morin inquired during the IPA hearing . . . .

Id. at 43.[3]

By the eve of voir dire, it was also clear that any expert testimony about V.F.'s

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[2] Mr. Smith waived his right to independent testing of the DNA, 5/15/12 at 2, and when Judge Morin asked whether "identification" or "[i]dentification of the [DNA] contributor" was "going to be an issue in this case," 6/25/12 at 9, defense counsel represented that the defense was "going to be more in the nature of contest as to whether or not [the] actions were voluntary or not." *Id.*

[3] Judge Motley relied on these representations in ruling that evidence was not *Brady* material, ordering counsel to apprise him of evidence of consent during the government's case, 12/3/12 at 153-57; and excusing a juror because marital rape was "too close to the situation involved" given the consent defense, 12/4/12 at 96.

alleged injuries would be straightforward. The government would not present a medical expert in its case in chief. Rather, the SANE would testify as a fact witness about her examination of V.F. and the photographs she took of her genitalia. 6/25/12 at 4. *See also* 12/3/12 (Motley) at 158, 164-65. Dr. Peter Wilk, a colorectal surgeon who had reviewed these photographs, would testify for the defense. He would opine that the depicted anal fissure and redness were more consistent with common medical conditions such as chronic constipation or excessive wiping than with forced sex, but was precluded from suggesting that V.F. suffered from any particular medical condition. *See* 12/3/12 (Morin) at 13-20.

Jury Selection

Jury selection occurred the following day. At the outset, there were sixty-seven prospective jurors, App'x A[4], and Judge Motley sought to qualify thirty-six for service, 12/4/12 at 23. To that end, he asked the jurors twelve standard yes/no questions and directed them to record any "yes" answers, along with the neighborhood where they lived. *Id.* at 20, 25. Judge Motley then called every juror to the bench one-by-one for individual voir dire, during which he asked each juror about their "yes" answers, if they had any, as well as how each juror was employed. *Id.* at 21-22. Counsel were invited to ask follow-up questions. *Id.* at 22. The court excused prospective jurors for cause or hardship based on their answers to these questions. At the end of this process, the Court had qualified four Black individuals,

[4] For the Court's convenience, PDS's Appendix includes redacted copies of the prospective juror list (App'x A); the peremptory challenge form (App'x B); and the final jury list (App'x C). *See also* Supp. Record #83 (unredacted juror documents).

one Hispanic man, and one Asian woman for jury service; the other prospective jurors were white. *See id.* at 125-27.[5]

The judge told counsel they had fifteen minutes to make their peremptory strikes and that they had to work quickly to be finished by the 1:00 p.m. lunch recess. *Id.* at 123-24.[6] He instructed counsel to pass a single strike sheet back and forth, and make strikes one at a time in rounds, with the government striking first. *Id.* at 123. Each party had 11 strikes, which would result in twelve jurors and 2 alternates to hear the case. *Id.* at 124. The first two seats in the jury box were pre-designated the alternate seats. *Id.* at 34; 12/11/12 at 158. The judge instructed counsel to strike from the deliberating jurors (seats 3-14) first, before a separate round of alternate strikes (seats 1 & 2). *See* 12/4/12 at 43-44. *See also* App'x B (peremptory challenge form).

The prosecutor eliminated all six jurors of color, resulting in an all-white jury and all-white alternates. Five of the six stricken jurors of color had not answered "yes" to any of the court's voir dire questions, and the sixth had misunderstood a lengthy compound question. *See* 12/4/12 at 39, 61, 86, 92, 97, 117. The prosecutor had not asked questions of the stricken jurors of color during their individual voir dire. *Id.* As a result, she learned only their employment and neighborhood during the voir dire process.[7] In contrast, four of the five white jurors that the prosecutor struck

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[5] Approximately one third of the venirepersons were African-American, *id.* at 136, but many were stricken for cause, *id.* at 139.

[6] *See also id.* at 124-25 (telling counsel that they had to "move a little bit quicker" and complaining that it took "[t]wenty-eight minutes to make 11 strikes"); *id.* at 124 (promising to try to complete jury selection "by lunch hour").

[7] Juror 721 was employed in marketing at an IT company. *Id.* at 39. Juror 238 was a

had answered "yes" to at least one of the court's questions regarding potential bias, resulting in significant follow-up questioning by the judge and counsel.[8]

Mr. Smith's *Batson* Challenge

Defense counsel raised a *Batson* challenge. He asserted that there was prima facie evidence of discrimination because the prosecutor had "eliminated every [B]lack person from the jury as well as Asian and Hispanic." 12/4/12 at 125. He asked for a "race neutral reason for that," emphasizing that his client was "concerned." *Id. See also id.* at 126 (reiterating that "all of the minorities" were stricken). When the judge asked if the prima facie case depended on the Asian and Hispanic jurors, defense counsel responded that it "would stand" with the four Black jurors—i.e., every qualified Black juror on the panel. *Id.* at 127.

The prosecutor offered race-neutral reasons for striking the four Black jurors. She did not provide reasons for striking the Asian and Hispanic jurors, nor did the court ask her to.[9] Her primary rationale was a professed concern that the Black jurors

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plumber's assistant on disability in Northeast. *Id.* at 61. Juror 565 was a retired housekeeper living in Northwest. *Id.* at 85-86. Juror 254 lived in [LeDroit] Park, was a cashier, and had been a hotel breakfast attendant. *Id.* at 97. Juror 683 lived in Northwest and maintained vehicles for the Department of Public Works (DPW). *Id.* at 117. Juror 802 lived in Columbia Heights, was studying project management and administration at ITT Tech, and worked as a restaurant sever. *Id.* at 92.

[8] Juror 743 had been a defense attorney. *Id.* at 55-56. Juror 603 attended law school, was the victim of armed robberies and car theft, and had witnessed aggressive police behavior. *Id.* at 62-64. Juror 491 had won a settlement against MPD based on a false accusation of a drug crime. *Id.* at 66-67. Juror 684 was a lawyer, interned at a public defender office, and did defense enforcement work. *Id.* at 48-49.

[9] The Hispanic juror (Juror 802) was living in Columbia Heights, studying project management and administration at ITT Tech, and working at a restaurant. *Id.* at 91-

would not understand "the level of scientific evidence in the case." *Id.* at 129. Juror 238 was a plumber's assistant, and the prosecutor "d[id] not feel that profession . . . would be able to understand the scientific testimony." *Id.* She had a "similar issue" with Juror 254's profession as a cashier and hotel breakfast attendant. *Id.*[10] With respect to Juror 683, a DPW employee, the prosecutor again alluded to sub-normal comprehension, claiming she struck him because he misunderstood the lengthy, multi-part law enforcement/defense attorney question and incorrectly answered "yes." *Id.* at 117, 129-30. The juror purportedly "was not showing a level of understanding" of a "fairly basic" question. *Id.* at 130. The judge asked no questions about these strikes other than to inquire what Juror 254's job was. *Id.* at 129-30.

The prosecutor did not articulate an objection to Juror 721, the Black alternate in marketing at an IT company. Instead, she represented that she struck him "because that brought into the number one position a person who had a friend in the Maryland prosecution's office, worked in energy security, had a Brown University affiliation and [the government] just preferred that juror." *Id.* at 130. The prosecutor was presumably referring to Juror 839, although no juror referenced Brown University. *See id.* at 107-08 (stating she was a vice president for policy at an energy security non-profit and had a friend who previously worked at the Maryland prosecutor's office). The judge clarified, "So there was no basis for striking that alternate number

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92; App'x B. The Asian juror (Juror 565) was a retired housekeeper living in Northwest. 12/4/12 at 85-86; App'x B. English was her second language, but she said she would have no problem participating. 12/4/12 at 86.

[10] The prosecutor also represented that Juror 254's "dress was very disrespectful to the Court." *Id.* at 129. The judge did not make factual findings about her clothing.

one except you wanted the other alternate?" *Id.* at 130. When the prosecutor responded affirmatively, the judge reiterated, "You like that one better?" *Id.* In response, she withdrew this strike, and Juror 721 served as the first alternate in seat 1. *Id.* at 130-31. The prosecutor was incorrect about Juror 839's position, however. Juror 839 was not poised to be the first alternate. She had already been designated as a regular juror in seat 14, so an alternate strike would not have affected her status.

Defense counsel countered that the prosecutor's reasons were pretextual. He argued that the prosecutor was essentially "saying that [the Black jurors] were too unintelligent to serve on a jury"—an illegitimate ground that did not withstand scrutiny—and that the prosecutor had admitted she had "no basis" to strike the Black alternate. *Id.* at 131. He emphasized that the totality of strikes, which had to be considered collectively, resulted in an all-white jury. *Id.* at 133.

The judge summarily addressed the proffered reasons for each of the three Black stricken jurors before denying the motion. At the outset, he declared that the strikes of the Hispanic juror, Asian juror, and Black alternate were irrelevant to the *Batson* analysis. *See id.* at 131 ("Well, we're down to three."); *id.* ("[W]e're talking now to three people."). He would not consider the Black alternate because the government "withdrew that." *Id.* The judge mused that the strike of the juror who misunderstood a question "surely passes [m]ust[er]." *Id.* at 132. Defense counsel rejoined that the judge must consider the evidence of bias collectively, not "[i]ndividually." *Id*. Seemingly ignoring this point, the judge then reasoned that they were "down to the plumber's assistant and at most the cashier," and noted that the prosecutor had provided a "race neutral reason." *Id.* at 132-33. He asked defense

counsel: "[Y]ou're saying that I should at this point not accept their reason, is that what your argument is?" *Id.* at 133. Defense counsel responded that the proper analysis was not whether the trial judge "could find a reason" for each strike; it had "to look at the totality of the selections" in evaluating a *Batson* claim. *Id.* He explained: "If you individually separate them from what was actually done, then you could find a reason for each person. But, Your Honor, I think you have to look at the totality of the selections." *Id.* at 133.

Without additional probing or analysis of the voir dire to determine whether the reasons withstood scrutiny, the judge found them "credible": "I think that the reason that the Government gives is a credible reason, and the Government is assured that this was not based on race. I will accept the Government's representation." *Id.* at 135. *See also id.* at 137 ("The Government has given the reason for the three African-Americans that they struck."); *id.* at 138 ("I think that the Government had a rac[e] neutral way of doing that."). A division of this Court affirmed.

ARGUMENT

I. THE TRIAL JUDGE REVERSIBLY ERRED IN DENYING MR. SMITH'S *BATSON* CHALLENGE.

A. STEP THREE OF *BATSON* REQUIRES TRIAL JUDGES, AND APPELLATE COURTS ON REVIEW, TO RIGOROUSLY SCRUTINIZE THE PROFFERED RACE-NEUTRAL REASONS IN LIGHT OF ALL THE FACTS AND CIRCUMSTANCES.

"[T]he central concern of the Fourteenth Amendment was to put an end to governmental discrimination on account of race." *Flowers*, 139 S. Ct. at 2241-42 (internal quotation marks and citation omitted). Racial discrimination in jury selection offends the Equal Protection Clause in three distinct ways. First, it denies

the criminal defendant "the protection that a trial by jury is intended to secure" by enlisting a body of his "'peers or equals'" to "safeguard[]" him "against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86 (citation omitted). Second, it harms the excluded jurors by depriving them of "the honor and privilege of jury duty." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). "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. Third, it "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. As the Supreme Court has recognized, there is a long history of American prosecutors "routinely exercise[ing] peremptories to strike all the black prospective jurors and thereby ensure all-white juries . . . especially in cases involving black defendants." *Flowers*, 139 S. Ct. at 2240.

Batson, 476 U.S. 79, announced a new paradigm to combat this pervasive problem. It held that "[t]he constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers*, 139 S. Ct. at 2244. It established a three-step process for determining whether the government has broken this rule. First, the defendant must establish a prima facie case of discrimination. *Id.* at 2241. Second, the government must "provide race-neutral reasons for its peremptory strikes." *Id.* Third, the "trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Id.*

This case calls upon the Court to decide whether the third-step determination will wither to a hollow gesture in the District of Columbia, or persist as a potent tool to combat an endemic problem the Supreme Court has recognized, targeted, and

insisted on remediating. Since *Batson*, the Supreme Court has "vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers*, 139 S. Ct. at 2243. In a series of cases reversing trial judges' findings that the government's proffered race neutral reasons were credible—*Miller-El*, 545 U.S. 231; *Snyder*, 552 U.S. 472; *Foster*, 578 U.S. 488; *Flowers*, 139 S. Ct. 2228—it has required trial judges, and appellate courts on review, to rigorously scrutinize the entirety of the record in evaluating the credibility of the prosecutor's proffered reasons for strikes, and it has not accepted facile justifications when there were numerous red flags of racial discrimination. The Court has underscored that trial judges "possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." *Flowers*, 139 S. Ct. at 2243. Accordingly, after defense counsel makes out a prima facie case and the prosecution proffers its reason for the strike, "the rule in *Batson* . . . requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El*, 545 U.S. at 251-52.

The trial judge's duty to conduct a "sensitive inquiry into such circumstantial evidence of intent as may be available," *Foster*, 578 U.S. at 501 (cleaned up), and to closely examine the voir dire as a whole in assessing whether the proffered reason is credible, extends to appellate review. The Supreme Court has repeatedly "'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" *Foster*, 578 U.S. at 501 (quoting *Snyder*, 552 U.S. at 478). Relevant considerations include statistical evidence about the strikes; a prosecutor's

"disparate questioning" of white jurors and nonwhite jurors; side-by-side comparisons of stricken jurors of color and white jurors; a prosecutor's misrepresentations about the record in defending her strikes; the history of strikes in past cases, *Flowers*, 139 S. Ct. at 2243; whether the case is racially-charged, *Powers*, 499 U.S. at 416; and any "other relevant circumstances that bear upon the issue of racial discrimination," *Flowers*, 139 S. Ct. at 2243. And, as the Supreme Court's body of decisions bears out, under no circumstances may a cursory finding of credibility substitute for this probing inquiry lest *Batson* become a dead letter.

While a litigant may elect to "center[]" his claim on the most egregious strike or strikes, *see, e.g.*, *Snyder*, 552 U.S. at 477; *Foster*, 578 U.S. at 501, judges may not assess the proffered reason for those strikes "in isolation," *Flowers*, 139 S. Ct. at 2250. They must "examine the whole picture" and consider each challenged strike "[i]n light of all the facts and circumstances," including those involving other strikes. *Id.*[11] *Flowers*, which reversed by finding error in the single strike of Carolyn Wright, illustrates this principle. The Supreme Court explained that its "disagreement" with the Mississippi courts came down to whether it evaluated, "in isolation," the government's proffer that it struck her because she knew several defense witnesses, or "in the context of all the facts and circumstances." *Id.* Precedent required it to "examine the whole picture." *Id.* The Supreme Court acknowledged that "[i]n a different context," the strike of Wright "might be deemed permissible." *Id.* However,

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[11] *See also Snyder*, 552 U.S. at 478 (explaining, as an example, that "if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Ms. Brooks").

"[i]n light of all the facts and circumstances"—including the striking of five out of six Black jurors, misrepresentations to the court, and a side-by-side comparison of Wright and accepted white jurors who also knew defense witnesses—the trial court "clearly erred" in ruling that the strike of Wright was "not motivated in substantial part by discriminatory intent." *Id.* at 2250-51.

Although appellate review of the trial's judge's *Batson* finding is deferential, *Snyder*, 552 U.S. at 479, the Supreme Court has made patent that deference is not owed and a judge clearly errs where his step three inquiry is lacking in rigor, such as when he overlooks record evidence bearing on racial bias. For example, in *Miller-El*, a case in which the prosecutor struck 91% of the Black jurors, the Supreme Court reversed the trial judge's finding that the government's race-neutral reasons for the strikes were "completely credible." 545 U.S. at 236-37, 240-41. The Supreme Court itself determined, in the absence of the trial judge's meaningful examination of the facts, that the "whole of the *voir dire* testimony"—in particular, side-by-side comparisons of stricken Black and accepted white jurors—"support[ed] a conclusion that race" was a substantial factor. *Id.* at 252. Similarly, in *Snyder*, a case where the prosecutor struck all five prospective Black jurors and the trial judge found credible his representation that he struck Juror Brooks because of his student-teacher obligations, the Supreme Court reversed "even under the highly deferential standard of review." 552 U.S. at 476, 479-80. In light of all the circumstances, including a side-by-side comparison of Brooks with white jurors who the prosecutor accepted despite their conflicting work obligations, the Supreme Court determined that the

proffered rationale was implausible and the trial judge clearly erred in rejecting the *Batson* challenge. *Id.* at 483-84.[12]

Moreover, where the trial judge fails to conduct a sufficiently rigorous inquiry, the Supreme Court has consistently considered all record evidence of pretext on appellate review, even when defense counsel did not specifically argue it below as part of the *Batson* claim. *See, e.g.*, *Miller-El*, 545 U.S. at 241 n.2, 278 (relying on comparisons of Black and non-Black panelists as well as prosecutor's racially disparate questioning in reversing *Batson* ruling, even though defendant "did not even attempt to rebut the State's racially neutral reasons at the hearing" (quoting Thomas, J., dissenting)); *Snyder*, 552 U.S. at 483, 486 (reversing based on side-by-side comparison of jurors, even though "alleged similarities were not raised at trial"); *Flowers*, 139 S. Ct. at 2250, 2266 (relying on "pattern of factually inaccurate

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[12] Contrary to the Division's suggestion, *see Smith v. United States*, 288 A.3d 766, 779 (D.C. 2023), *Hernandez v. New York*, 500 U.S. 352 (1991), does not hold that the prosecutor's demeanor is the best evidence of the prosecutor's intent. Nor does *Hernandez* relieve appellate courts of the obligation to scrutinize the prosecutor's explanations to see if they "hold up" in light of the "whole of the *voir dire* testimony." *Miller-El*, 545 U.S. at 252. The Supreme Court's more recent step three jurisprudence, *see* discussion *supra*, makes clear that *Hernandez* stands for the far more limited proposition that in *cases where there is little evidence* bearing on prosecutorial intent, demeanor will be especially probative. *See Hernandez*, 500 U.S. at 365. Notably, *Hernandez* thoroughly examined the voir dire transcript before holding that the trial judge did not clearly err in crediting the prosecutor's claim that he struck two Latino jurors because of their expressed doubt that they could rely solely on the English translation of Spanish testimony. *Id.* at 356, 369-70. It found that this rationale was amply supported by the record and that the Latino ethnicity of the victims and government witnesses "undercut any motive to exclude Latinos from the jury." *Id.* at 370.

statements about black prospective jurors" in reversing for clear error even though specific argument was not made below (citing Thomas, J., dissenting)). In each instance, an overwhelming majority of the Supreme Court rejected Justice Thomas's dissenting view that appellate review is limited to the evidence of pretext specifically argued by trial counsel.[13]

Tursio and *Harris* adhere to the Supreme Court's articulation of *Batson* principles and clearly explicate the trial judge's duty to rigorously scrutinize the proffered rationale on facts similar to what occurred here. In *Tursio,* the prosecutor struck nine white jurors, creating an all-Black jury in a case where the defendant's misidentification defense turned on whether the jury believed white defense witnesses or Black government witnesses. 634 A.2d at 1207. The judge denied the *Batson* challenge. On appeal, this Court emphasized that as 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." *Id.* at 1213. "Strikes based on race are even more likely to occur

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[13] The Division went awry on this point, seemingly feeling constrained by *Nelson v. United States*, 649 A.2d 301 (D.C. 1994), a case which preceded *Miller-El*, *Snyder*, and *Flowers* and suggested that the defendant had not met his "burden of proof" because he made only a "conclusory" argument about pretext. *Smith*, 288 A.3d at 779 (citing *(Edwin) Smith v. United States*, 966 A.2d 367, 387 (D.C. 2009) (quoting *Nelson*, 649 A.2d at 311)). To the extent that *Nelson* suggests that appellate review is limited to the precise arguments defense counsel made below, it is superseded by subsequent Supreme Court cases. *Miller-El*, *Snyder*, and *Flowers* all considered record evidence supporting a *Batson* claim that was not argued below, adhering to the established principle that "[o]nce a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below," *Yee v. City of Escondido,* 503 U.S. 519, 534 (1992).

when the government's entire case turns, as it did here, on whether the jury believes the testimony of the black witness over the . . . white witness[]." *Id.* Under these circumstances, the judge clearly erred in "accepting" as "logical and believable" the prosecutor's explanation that he preferred a less educated jury, without "further probing." *Id.* at 1211-12. The judge should have "assess[ed] each challenge in the entire context of the case," *id.* at 1212, and "probed the prosecutor in detail about his different treatment of similarly situated jurors," *id.* at 1213. Absent "[t]hat kind of analysis," the "prosecutor's explanations r[a]ng hollow." *Id.* at 1212-13.

Similarly, in *Harris*, a racially-charged case where the prosecutor struck five out of nine Black jurors, this Court reversed the trial judge's finding of no *Batson* violation because he failed to conduct a sufficiently "probing inquiry of the prosecutor's proffered explanations for her strikes." 260 A.3d at 681. The Court explained that it was "incumbent on the trial court" to ask questions, review the voir dire, and conduct a "side-by-side comparison" of stricken Black jurors and accepted white jurors, all of which "would have cast doubt" on the sincerity of the proffered explanations. *Id.* at 679-80. The judge's conclusions that the proffered rationales "can be 'legitimate,'" *id.* at 680, and that he "did not think that the jurors were struck 'because of race,'" *id.* at 673, were "no substitutes for the 'rigorous evaluation' and 'probing inquiry' of the prosecutor's explanations that the court was *obliged* to undertake." *Id.* at 680 (emphasis added) (citation omitted). This Court should reaffirm *Tursio* and *Harris* and make clear that *Batson* step three requires the judge, and the appellate court on review, to rigorously scrutinize the proffered race-neutral reasons in light of all the facts and circumstances.

B. THE TRIAL JUDGE FAILED TO PROBE THE PROSECUTOR'S PROFFERED RATIONALE, AND IT DOES NOT WITHSTAND SCRUTINY WHEN THE RECORD IS EXAMINED AS A WHOLE.

Here, the prosecutor used her peremptory strikes to eliminate all six jurors of color, engineering an all-white jury to decide a racially-charged rape case where the central issue was whether to credit a white woman's account of rape or a Black man's defense of consent. Despite this compelling prima facie showing of racial discrimination, the trial judge failed to rigorously scrutinize the prosecutor's proffer that she struck three Black jurors based on her concern that they would not "understand . . . the level of scientific evidence in the case," 12/4/12 at 129, because one was a plumber's assistant (Juror 238); one was a cashier (Juror 254); and one misunderstood a 143-word compound question (Juror 683). The judge's *Batson* inquiry was perfunctory, consisting of little more than asking the prosecutor to state her race-neutral reasons for striking Jurors 238, 254, and 683 before accepting them. This lax review of a serious constitutional claim was a far cry from "the rigorous evaluation and probing inquiry of the prosecutor's explanations that the court was obliged to undertake." *Harris*, 260 A.3d at 680 (internal quotation omitted).

The judge did not inquire, for example, why scientific learning mattered in a consent case where DNA was not contested and the medical evidence was short and simple; why the prosecutor did not question the plumber and cashier—or any juror, for that matter—about their science proficiency, if this was an actual concern; why she believed that plumbers and cashiers had less science literacy than others similarly not in technical fields; or why she did not strike a white nanny (Juror 916), whose profession also did not require higher education. Such factors indisputably

bore on the strikes' propriety. And the manner in which the prosecutor answered pertinent questions would have given the judge much more insight into the credibility of her response. Indeed, without such probing to see if the prosecutor's asserted rationale held up under examination, any demeanor-based evaluation of her credibility was next to worthless. Had the prosecutor been forced to defend her strikes of Jurors 238 and 254 under a rationale that appeared implausible, she may well have faltered or withdrawn the strikes altogether, as she did when asked about her preference for a white alternate over the initially stricken Black alternate. Indeed, it took only two questions confirming that there was "no basis" for the prosecutor's strike other than that she "wanted the other alternate" because she "like[d] that one better," for her to abandon the strike. 12/4/12 at 130. "[E]valuations of credibility . . . are entitled to great deference," but "unless the trial court rigorously scrutinizes the prosecutor's race-neutral explanations, *Batson*'s promise of eliminating racial discrimination in jury selection will be an empty one." *Tursio*, 634 A.2d at 1210-11.

The judge likewise failed to consider the record as a whole in determining whether the prosecutor's rationale held up in light of all the facts and circumstances. He did not assess whether the prosecutor treated jurors of color differently from white jurors, or consider the implications of the prosecutor striking every juror of color in a racially-charged case. To the contrary, he evaluated the strikes of Jurors 238, 254, and 683 as though they were wholly independent of one another and excised all consideration of the strikes of the Black alternate, the Hispanic juror, and the Asian juror from his step three analysis of whether the proffered rationales for Jurors 238, 254, and 683 were credible. *See* 12/4/12 at 131-35. This siloed approach

violates the Supreme Court's command that the judge consider the "whole picture" in evaluating the strike of a single juror. *Flowers*, 139 S. Ct. at 2250-51 (relying on statistical evidence and disparate questioning of Black and white prospective jurors as a whole in analyzing the strike of Juror Wright).

Reversal is required because the judge's credibility finding is clearly erroneous. A more rigorous evaluation of the proffered rationale for striking Jurors 238, 254, and 683, taking into account all of the relevant facts and circumstances, "casts the prosecution's reasons for striking [these jurors] in an implausible light." *Miller-El*, 545 U.S. at 252. The record is replete with indicia that these strikes were motivated in substantial part by the jurors' race. At the outset, the strength of the prima facie case weighs heavily on the side of pretext. Absent racial bias, it is statistically improbable that the prosecutor would eliminate six out of six qualified jurors of color, resulting in an all-white jury. "Coincidences happen, but an alternative explanation not predicated on happenstance is often the one that has the ring of truth." *Tursio,* 634 A.2d at 1213 (citation omitted). *See also id.* at 1210 ("Statistics are not, of course, the whole answer but nothing is as emphatic as zero." (citation omitted)); *Miller-El,* 545 U.S. at 241 ("Happenstance is unlikely to produce this disparity." (citation omitted)). Here, the statistical evidence was more compelling than the striking of five out of five Black jurors in *Snyder*, 552 U.S. at 476, the striking of four out of four Black jurors in *Foster*, 578 U.S. at 491, and the striking of five out of nine Black jurors in *Harris*, 260 A.3d at 670.

The elimination of every non-white juror was particularly suspicious given the "racially-charged nature of the case." *Tursio*, 634 A.2d 1210. *See also Harris*,

260 A.3d at 676 (applying "heightened scrutiny" because of case's racial overtones). The allegation that a Black man raped a white woman is the quintessential racially-charged case given the "sordid history of racism in rape prosecutions." *Smith*, 288 A.3d at 777 (citing, *inter alia*, Randall L. Kennedy, McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, 101 HARV. L. REV. 1388, 1411 (1988); Jeffrey J. Pokorak, Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities, 7 NEV. L.J. 1, 38 (2006)). *See also* Appellant's Br. at 19-20 (citing cases). Given this context, the engineering of a jury made up "exclusively" of "jurors of the victim's race" is powerful indicia that a discriminatory motive was at play. *Tursio*, 634 A.2d at 1211. *Cf. Powers*, 499 U.S. at 416 (observing that "[r]acial identity between the defendant and the excused person" is "relevant to discerning bias" and makes it easier "to establish . . . that wrongful discrimination has occurred").

That none of the stricken black jurors had any "yes" answers to the judge's questions is another indicator that the strikes were racially motivated. The vast majority of stricken white jurors, in contrast, answered "yes" to at least one question and reported experiences disfavored by prosecutors such as being a criminal defense attorney or having negative impressions of police. *See supra* note 8. Because the prosecutor asked no questions of the jurors of color, she knew only their appearance, neighborhood, and profession. Given this limited universe of information, she had little choice but to identify Juror 238 and Juror 254's professions, and Juror 683's confusion about a lengthy question as the reasons for her strikes.

The prosecutor's alleged concern that a plumber's assistant (Juror 238) and a cashier (Juror 254) would not "be able to understand the scientific testimony," 12/4/12 at 129, does not survive scrutiny. As an initial matter, this was not a complicated or science-heavy case. At bottom, it was a rape trial that required the jury to evaluate the credibility of V.F.'s account of forcible rape against Mr. Smith's account of consensual sex—something ordinary people are well-equipped to do. Although the government presented a DNA expert to explain how the government identified Mr. Smith for charging, the defense had made clear through numerous in-court representations that Mr. Smith was not contesting the validity of the DNA match because his defense was consent. *See supra* p. 3.

To the extent "scientific evidence" referred to the defense expert testimony of Dr. Wilk, a colorectal surgeon, his testimony was limited and easily understandable to the average person. Significantly, the government did not notice a medical expert in its case in chief, electing to call the SANE as a *fact* witness to testify about the photographs she took of V.F.'s genitals. Judge Morin's pre-trial ruling limited Dr. Wilk's testimony to a high level of generality, permitting him to testify only that the photographed anal fissure and redness were more consistent with chronic constipation or excessive wiping than with forced sex. *See* 12/3/12 (Morin) at 13-20. Understanding such pedestrian medical testimony, or even an expert rebuttal to it, does not require higher education. Doctors and nurses are particularly well suited to this task because they routinely explain the symptoms of medical conditions to patients of all educational backgrounds. Likewise, virtually all jurors have been to the doctor and made important medical decisions based on the information they

received. "When all of these considerations are taken into account," the proffered concern about the jurors' inability to understand the scientific evidence "is suspicious." *Snyder*, 552 U.S. at 482-83 (finding "suspicious" the prosecutor's professed concern about juror's inability to fulfill student teaching obligation given "brevity" of trial and its occurrence early in the semester).

The proffered rationale also "ring[s] hollow," *Tursio*, 634 A.2d at 1213, because the prosecutor did not apply her supposed preference for highly educated jurors to white jurors and jurors of color alike. "Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Flowers*, 139 S. Ct. at 2248. "When a prosecutor's 'proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Id.* at 2248-49 (citation omitted). *See also Snyder*, 552 U.S. at 483-84; *Harris*, 260 A.3d at 678-80.

Significantly, the prosecutor did not strike Juror 916, a white nanny who, like the Black plumber's assistant and cashier, had a profession that does not require a degree in higher education. In the District, nannies are specifically exempted from childcare licensure requirements, and their credentials are largely unregulated.[14] Yet the prosecutor did not inquire about the nanny's education level or familiarity with science before accepting her. Nor did she ask the plumber's assistant, cashier, or any juror for that matter, about their educational or scientific backgrounds. The

[14] *See* Off. of State Superintendent of Educ., Licensing and Compliance, *available at* https://osse.dc.gov/service/licensing-and-compliance (last visited Feb. 29, 2024).

government's "failure to engage in any meaningful voir dire examination on a subject [it] alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Flowers*, 139 S. Ct. at 2249 (quoting *Miller-El*, 545 U.S. at 246).[15]

At the same time, the prosecutor struck a Hispanic college student studying project management and administration (Juror 802), App'x B; 12/4/12 at 91-92, and a Black information technology marketing professional (Juror 721), App'x B; 12/4/12 at 39. These strikes further undermined a supposed preference for highly educated jurors and suggest a racial motivation. Tellingly, Juror 721, the Black alternate, had no "yes" answers, and the prosecutor was unable to articulate a specific objection to his serving on the jury. "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state [her] reasons as best [she] can and stand or fall on the plausibility of the reasons [she] gives." *Miller-El*, 545 U.S at 252.

The prosecutor's proffer that she struck the Black alternate to "br[ing] into the number one position" a white juror who had a "friend in the Maryland prosecution's office, worked in energy security, had a Brown University affiliation," 12/4/12 at 130, is dubious on the heels of her elimination of all five other jurors of color. Additionally, her claim about the impact of striking Juror 721 on jury composition

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[15] The government previously suggested that the nanny was not similarly-situated because her grandfather was a judge and her friend was a public defender. Gov't Opp. to Rehearing Pet. at 13 n.10. However, jurors need not be "*identical*" "for the side-by-side comparison to be suggestive of discriminatory intent." *Flowers*, 139 S. Ct. at 2249 (emphasis in original). Moreover, a public defender friend seemingly would make the juror less attractive, not more, if race were not a factor.

was wrong. Juror 839, the "preferred" white juror, would have served as a deliberating juror irrespective of whether the prosecutor struck Juror 721, the Black alternate. Indeed, the final jury (after the prosecutor withdrew her strike of Juror 721) included Juror 721 in the first alternate seat and Juror 839 in seat 14, meaning that that prosecutor's reason for striking the Black alternate was not sustainable on its face. *See* App'x C (final jury list). In fact, striking Juror 721 would have replaced a Black IT marketing professional with a white Starbucks barista. 12/4/12 at 112-13; App'x A (showing that Juror 899 was the next qualified venireperson), further undermining the claimed higher-education-preference rationale. This misstatement, "when considered with other evidence of discrimination," is "another clue" that racial bias was at play. *Flowers*, 139 S. Ct. at 2250. In sum, the combination of the compelling statistical evidence, the racially-charged nature of the case, the suspect rationale, the disparate treatment of white jurors and jurors of color, the side-by-side comparison of the white nanny with the stricken jurors of color, and the striking of highly educated jurors of color, considered together, compel a conclusion that the trial judge clearly erred in finding that the strikes of the plumber's assistant (Juror 238) and cashier (Juror 254) were not based in substantial part on race.

In light of these overwhelming facts and circumstances indicative of racial discrimination, the judge also clearly erred in crediting the prosecutor's claim that she struck Juror 683 because he misunderstood a voir dire question, and not because he was Black. Juror 683 answered "yes" to question six because "he worked for D.C. Government," whereas the question targeted a narrower subset of government jobs. 12/4/12 at 27-28, 129-30. Contrary to the prosecutor's characterization of this

question as "fairly basic"—and her implication that confusion suggests low intellect—question six was, in fact, long and confusing. It packed 143 words, with a preamble and multiple subparts.[16] It combined law enforcement, prosecutors, defense attorneys, investigators, court systems, and neighborhood watch groups, and repeated the phrase "local, state or federal" in three contexts. It is entirely understandable that Juror 683 heard this phrase and answered "yes" because he worked for local government. *See* 12/4/12 at 116-17. Indeed, he was not the only juror to be overinclusive. Juror 362 responded "yes" because their friend was a civil attorney, but did not connect this friend to any of the specific categories targeted by the question. *Id.* at 46. The government accepted this white juror nonetheless. App'x C. Even if, in a different context, the strike of Juror 683 might "be deemed permissible," *Flowers*, 139 S. Ct. at 2250, given the other numerous indicia of racial bias and the differential treatment of Juror 362, it was clearly erroneous for the judge to rule that the strike of Juror 683 was not motivated in substantial part by race. For the foregoing reasons, the judge clearly erred in finding no *Batson* violation.

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[16] "Now, question number five and number six that apply to a group of people. Five and six apply to a group of people. Let me tell you the members of that group. The first member of that group is you, yourself. It applies to you. The second members of the group are members of your immediate family. And the third member of the group is any close, I underscore close, personal friend. Has any member of that group, you, yourself, members of your immediate family, close personal friends ever worked for any local[,] state or federal police force, investigative agency or Department of Corrections? Has any member of that group worked for any local, state or federal prosecutor's office, any local, state or Federal Court system, any defense attorney or defense investigator or participated in a neighborhood watch program such as Orange Hats?" 12/4/12 at 27-28.

Respectfully submitted,

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CERTIFICATE 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 by email upon Christopher Kemmitt, Esq., NAACP Legal Defense and Educational Fund, ckemmitt@naacpldf.org, and Adam Murphy, NAACP Legal Defense and Educational Fund, amurphy@naacpldf.org, this 1st day of March, 2024.

/s Stefanie Schneider
Stefanie Schneider

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.

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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.

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Stefanie Schneider
Signature

18-CO-0289; 20-CF-0190
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