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 REPLY BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE IN SUPPORT OF APPELLANT

SAMIA FAM

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ARGUMENT

"Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process," *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019). Judges have "the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." *Id.* at 302. This is a weighty responsibility given the intractable problem of prosecutors using race-based peremptories to engineer all-white juries, *id.* at 295-98, and the imperative to vindicate this constitutional right for the accused, the improperly excluded jurors, and "public confidence in the fairness of our system of justice," *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). As *Tursio v. United States* observed, "[u]nless 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." 634 A.2d 1205, 1211 (D.C. 1993). In the decades since *Tursio*, the Supreme Court has been unequivocal that *Batson*'s step three inquiry has teeth and is not a rubber stamp for facially race-neutral justifications. It is a "sensitive inquiry into such circumstantial . . . evidence of intent as may be available," *Foster v. Chatman*, 578 U.S. 488, 501 (2016) (cleaned up), and it "requires the judge to assess the plausibility of [the proffered] reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("*Miller-El II*").

In its opening brief, PDS contended that the trial judge fell short of his step three duty and reversibly erred in summarily denying Mr. Smith's *Batson* challenge in a racially-charged rape case where the prosecutor systematically struck all six jurors of color, four of whom were Black like the defendant. Critically, the judge

failed to probe the prosecutor's proffered rationale for striking Jurors 238, 254, and 683—a supposed concern that they would not "understand . . . the level of scientific evidence in the case," 12/4/12 at 129-30—to see if it withstood rigorous scrutiny. The need to probe was acute—not just because it was a racially charged case and the prosecutor struck every juror of color—but because the DNA evidence was uncontested; the medical evidence was narrow and simple; the prosecutor asked no voir dire questions of *any* juror to ascertain their science literacy or whether they might have trouble understanding an expert whose role it was to illuminate to lay people limited technical matters; the prosecutor grossly used current blue-collar occupation, without more, as a proxy for low intelligence; she did not strike a white nanny, whose job similarly did not require higher education; and she struck a Black alternate and Hispanic juror whose education was comparable to accepted white jurors. The judge's perfunctory acceptance of the prosecutor's proffered rationale as "racially neutral" and "credible," 12/4/12 at 135, 138, without a more "rigorous evaluation and probing inquiry," was in itself reversible error, *Harris v. United States*, 260 A.3d 663, 680 (D.C. 2021) (quotation omitted). Additionally, PDS argued that a review of the record as a whole compels a conclusion that race was a substantial motivating factor in the strikes and also requires reversal. *See, e.g.*, *Miller-El II*, 545 U.S. at 266.

The government counters that the judge "properly found that the government's proffered race-neutral reasons were credible on the basis of the record before it and the arguments of the parties." Corrected Government Br. ("Gov't Br.") at 33. At the outset, the government seeks to artificially narrow the universe of facts

and arguments that this Court considers in reviewing the *Batson* ruling. It claims that Mr. Smith "abandon[ed] any challenge to the Asian and Hispanic prospective jurors," *id.* at 28, and that the Court must excise all consideration of those strikes from its assessment of the propriety of the strikes of Jurors 238, 254, and 683—an approach at odds with the Supreme Court's command that the judge "examine the whole picture" and evaluate the strike of an individual juror "in the context of all the facts and circumstances," *Flowers*, 588 U.S. at 314-15. The government also argues that Smith and Amici's reliance on record indicia of racial bias not specifically argued at the *Batson* hearing—e.g., side-by-side juror comparisons—is "inconsistent with Smith's burden and the clear-error standard of review." Gov't Br. at 37. It stops short of saying that the Court is required to blind itself to indicia of pretext manifest in the record in a case where the *Batson* claim is clearly preserved, but strongly so insinuates. *See id.* at 45. These arguments are meritless.

Although the government marshals outdated caselaw to suggest that Smith did not meet his burden to show racial bias below, *id.* at 37-46, its 70-page brief eschews any meaningful discussion of the Supreme Court's step three jurisprudence—the only cases binding on the en banc Court. And for good reason. In applying *Batson* to ferret out racial bias in jury selection, the Supreme Court has pointedly rejected the crabbed appellate review espoused by the government here, and by Justice Thomas in his dissents, in favor of a totality analysis that assesses the proffered race-neutral rationale in light of the entire record of voir dire, irrespective of the precise points advanced by defense counsel below. *See, e.g.*, *Miller-El II*, 545 U.S. 231; *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Flowers*, 588 U.S. 284.

The government's alternative argument, which addresses and minimizes each indicator of pretext in piecemeal fashion, fares no better. The point is not that any one piece of evidence alone is dispositive on the question of racial bias. Rather, when this Court considers the "whole picture," as it is required to do, "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the [strikes of Jurors 238, 254, and 683 were] not motivated in substantial part by discriminatory intent." *Flowers*, 588 U.S. at 288 (cleaned up). There are too many red flags of racial bias to explain away on this record.

I. STEP THREE REQUIRES THE TRIAL JUDGE, AND THE APPELLATE COURT ON REVIEW, TO RIGOROUSLY SCRUTINIZE THE PROSECUTOR'S PROFFERED RACE-NEUTRAL REASONS IN LIGHT OF *ALL* RECORD EVIDENCE OF PRETEXT, IRRESPECTIVE OF WHETHER DEFENSE COUNSEL EXPLICITLY ARGUED IT BELOW.

The *Batson* inquiry requires the trial judge, and this Court on appellate review, to rigorously scrutinize the prosecutor's proffered rationale in light of all record evidence of pretext, irrespective of whether defense counsel argued it as evidence of pretext below. *See* PDS Br. at 9-16. The government resists this judicial responsibility, insisting that it is "inconsistent" with defendant's "burden of establishing racial motivation in the government's strikes" and clear error review. Gov't Br. at 24. The government's brief reflects a fundamental misunderstanding of the *Batson* framework, the defense burden of persuasion, and the pivotal role of both the trial judge and appellate court in ensuring that jury selection is free of racial bias.

Batson's burdens framework is "essentially just a means of arranging the presentation of evidence." *Johnson v. California*, 545 U.S. 162, 171 n.17 (2005) (cleaned up). "The first two *Batson* steps govern the production of evidence." *Id.* at

171. At step one, the defendant has the burden to "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* at 170. This prima facie showing triggers the government's burden at step two to "come forward with a race-neutral explanation." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Step three, in contrast, is the "credibility-assessment stage," *Johnson*, 545 U.S. at 171 n.7 (citation omitted), and it "requires the judge to assess the plausibility of th[e race-neutral] reason in light of all evidence with a bearing on it." *Miller-El II*, 545 U.S. at 252. Because the "whole of the *voir dire* testimony," over which the judge presided, is in evidence, *id.* at 241 n.2, 252, it is incumbent on the judge to consider this "overall context" in assessing the proffered explanations, *Flowers*, 588 U.S. at 315. That the defendant ultimately retains the "burden of persuasion," *Johnson*, 545 U.S. at 170-71, does not limit the judicial inquiry to trial counsel's precise rebuttal points. Which party carries the burden of persuasion is decisive only when the evidence is in equipoise on the question of pretext. In those rare instances, the defendant, as the bearer of the burden of persuasion, will lose.[1]

Accordingly, the Supreme Court has consistently relied on record evidence of pretext not argued below in reversing trial judges' findings that no *Batson* violation occurred in response to a defense claim. *Miller-El v. Cockrell*, 537 U.S. 322 (2003)

[1] *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (differentiating between "burden of production" and "burden of persuasion" and explaining that "burden of persuasion" answers "which party loses if the evidence is closely balanced"); *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 127 (2021) (explaining that a "burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise").

("*Miller-El I*"), and *Miller-El II*, 545 U.S. 231—the Court's first opinions explicating step three's requirements—are instructive. In that murder trial of a Black defendant, the prosecutor struck ten out of eleven Black jurors. *Miller-El I*, 537 U.S. at 326. The prosecutor proffered facially race-neutral reasons for each strike, *Miller-El II*, 545 U.S. at 236, and defense counsel "presented no evidence and made no arguments" to rebut the proffered rationales, *id.* at 278 (Thomas, J., dissenting). As in this case, the state trial judge "accepted" the prosecutor's reasons as "completely credible [and] sufficient," and the appellate court affirmed. *Id.* at 236-37. The federal courts deferred to the state courts' findings in denying habeas relief under 28 U.S.C. § 2254 ("AEDPA"). *Miller-El I*, 537 U.S. at 330.

The Supreme Court reversed after reviewing "[t]he whole of the *voir dire* testimony." *Miller-El II*, 545 U.S. at 251. The Court explained that the proffered rationales for striking at least two of the Black jurors—their views on the death penalty—do "not hold up and are so far at odds with the evidence that pretext is the fair conclusion." *Id.* at 265. Central to the Court's analysis and finding of *Batson* error were side-by-side comparisons of stricken Black jurors and accepted white jurors; the disparate questioning of Black and white jurors; and the prosecutor's use of the jury shuffle—none of which trial counsel had argued below. *See id.* at 279 (Thomas, J., dissenting). The 6-3 majority rejected Justice Thomas's dissenting view that this evidence was "not properly before" the Court. *Id.* at 241 n.2. The Court explained that "[t]here can be no question that the transcript of *voir dire*, recording the evidence on which Miller-El bases his arguments and on which we base our

result, was before the state courts," and that the defendant had "fairly presen[ted]" his *Batson* claim to the lower court. *Id.* (citation omitted).

Similarly, *Snyder*, 552 U.S. 472, relied heavily on a juror comparison not argued below in holding that the proffered explanation for striking a single Black juror was "unconvincing," and that the trial judge committed clear error in allowing it. *Id.* at 474, 478. In that case, the prosecutor struck five out of five Black jurors in a murder trial of a Black defendant. *Id.* at 474, 476. The trial judge credited the prosecutor's representation that he struck Juror Brooks because of his expressed concern that jury duty would interfere with his student-teaching obligations. *Id.* at 478-79. In reversing, the Supreme Court reiterated that "[a]ll of the circumstances that bear upon the issue of racial animosity must be consulted." *Id.* at 478 (citing *Miller-El II*, 545 U.S. at 239). After scrutinizing the voir dire, the Court found the prosecution's explanation "suspicious" in light of the anticipated brevity of the trial, its occurrence early in the semester, and the dean's pledge to help the juror make up missed classes. *Id.* at 482-83. The "implausibility of this explanation [was] reinforced by the prosecutor's acceptance of white jurors [with] conflicting obligations [comparable to those of] Mr. Brooks[]." *Id.* at 483. The Court compared Juror Brooks to Jurors Laws and Donnes, even though neither comparison had been argued to the trial judge or to the intermediate appellate courts. *Id.* at 483-85. *See also id.* at 489 (Thomas, J., dissenting). The 7-2 majority dismissed Justice Thomas's dissenting view that the Court "ha[d] no business overturning a conviction . . . based on arguments not presented to the courts below." *Id.* (Thomas, J., dissenting).

Foster reiterated that *Batson* requires "a sensitive inquiry into such circumstantial evidence as may be available," and that appellate courts cannot "blind" themselves to evidence of racial discrimination. 578 U.S. at 501 (cleaned up). In that case, the prosecutor struck four out of four Black jurors, and the trial judge repeatedly denied Foster's *Batson* challenges, finding the proffered rationales credible. *Id.* at 491. During state habeas proceedings, the defense unearthed the prosecutor's jury selection documents which contained numerous race-based notations about the stricken Black jurors. *Id.* at 493-95. The habeas court ruled that Foster "failed to demonstrate purposeful discrimination," and the Georgia Supreme Court denied a certificate of appealability. *Id.* at 496.

The Supreme Court reversed based on its own "independent examination of the record." *Id.* at 502. The Court emphasized that while the prosecutor's justifications "seem[ed] reasonable enough" "[o]n their face," *id.*, the rationale for striking two Black jurors did not "withstand closer scrutiny" in light of the totality of the evidence. *Id.* at 508. *See also id.* at 511 (explaining that justifications "come undone when subjected to scrutiny"). After considering "all of the circumstantial evidence that bears upon the issue of racial animosity," *id.* at 512 (cleaned up)—i.e., the government's misrepresentations, its shifting explanations, side-by-side comparisons, and the newly discovered jury selection documents, *id.* at 502-03—the Court was "left with the firm conviction that the strikes of [two jurors] were motivated in substantial part by discriminatory intent," *id.* at 512-13 (cleaned up). The 6-2 majority was unmoved by Justice Thomas's dissent accusing it of "distort[ing] the deferential *Batson* inquiry" and claiming that the trial judge's

credibility finding should have been decisive. *See id.* at 524, 531-34 (Thomas, J., dissenting).

Flowers "reinforce[d]" that trial judges and appellate courts alike must "examine the whole picture" and consider "all the facts and circumstances" in assessing whether an individual strike was motivated by discriminatory intent. 588 U.S. at 314-16. The majority again rejected Justice Thomas's view that record-based arguments of pretext are "forfeited" if they are not made below. *Id.* at 331, 338 (Thomas, J., dissenting). It weighed the prosecutor's disparate questioning of Black and white jurors and his factually incorrect statements in its credibility analysis even though trial counsel had not argued that evidence below. *Id.* at 307-11, 313-14. After reviewing all indicia of pretext—which also included a history of striking Blacks; striking five out of six Black jurors in this trial; and disparate treatment of similarly-situated Black and white jurors—the Court held that the evidence, "taken together," established that the judge committed "clear error" in ruling that Juror Wright's strike was "not motivated in substantial part by discriminatory intent." *Id.* at 315-16.

These Supreme Court cases make clear that step three requires trial judges to rigorously scrutinize the proffered race-neutral rationales in light of the record as a whole, and that appellate review of a *Batson* claim is not limited to the precise factual arguments advanced by trial counsel. The Court's analysis breaks no new ground, but rather adheres to the well-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. Escondido*, 503 U.S. 519, 534 (1992). The government's contention that Mr. Smith did not meet his

burden of persuasion and cannot show clear error because trial counsel did not make every argument he presses on appeal, Gov't Br. at 37-38, echoes Justice Thomas's losing dissents and cannot be reconciled with binding Supreme Court precedent.

The government's reliance on *Nelson v. United States*, 649 A.2d 301 (D.C. 1994), *Walker v. United States*, 982 A.2d 723 (D.C. 2009), and *(David) Brown v. United States*, 128 A.3d 1007 (D.C. 2015), is misplaced because these cases do not accurately reflect the Supreme Court's step three jurisprudence. Although *Nelson* seemingly requires affirmance where a defendant makes only a conclusory argument about pretext, it has been superseded by *Miller-El II*. *Walker* and *Brown* parrot *Nelson*'s reasoning without grappling with the impact of the intervening Supreme Court cases. *Walker*, 982 A.2d at 732 (citing *Smith v. United States*, 966 A.2d 367, 387 (D.C. 2009) (citing *Nelson*, 649 A.2d at 311)); *Brown*, 128 A.3d at 1012 (same). The en banc court should clarify that the appellate court must rigorously scrutinize the prosecutor's proffered race-neutral reasons in light of *all* record evidence of pretext, irrespective of whether defense counsel explicitly argued it below.

II. THE JUDGE'S FAILURE TO RIGOROUSLY SCRUTINIZE THE PROFFERED RACE-NEUTRAL RATIONALE IN LIGHT OF ALL THE CIRCUMSTANCES WAS LEGAL ERROR REQUIRING REVERSAL.

PDS argued that the judge committed reversible *Batson* error because he failed to rigorously scrutinize the proffered race-neutral rationales in light of all of the evidence bearing on intent, as step three requires. The perfunctory *Batson* inquiry amounted to asking the prosecutor to state her reasons for striking Jurors 238, 254, and 683, and accepting as "race neutral" and "credible" her proffered concern that they would not "understand . . . the level of scientific evidence in the case" because

one was a plumber's assistant, one was a cashier, and one misunderstood a confusing 143-word compound question. PDS Br. at 17-19 (citation omitted). The government does not dispute that the judge asked zero follow-up questions to test the sincerity of the prosecutor's supposed preference for jurors with professions correlated with higher education; did not assess whether this rationale made sense in the context of a consent case; and did not review the voir dire as a whole to determine whether the prosecutor applied her employment-based criteria to white jurors and jurors of color alike. Nor does the government contest that the judge evaluated the strikes of Jurors 238, 254, and 683 in isolation from each other, and without weighing the strikes of the Black alternate, Hispanic juror, and Asian juror in his pretext analysis.

Instead, the government maintains that the judge "properly found no *Batson* violation," notwithstanding these deficiencies, because (1) the rationales were race-neutral and have been upheld in other cases, Gov't Br. at 29-32; (2) defense counsel acknowledged that "individually" certain strikes would withstand challenge (though was steadfast that they failed in a "totality" analysis), *id.* at 28, 33; and (3) the judge made "key . . . credibility findings," *id.* at 32. These arguments are not responsive to the constitutionally required demand of rigorous scrutiny at step three.

First, the government's analysis, like that of the trial judge, erroneously collapses the step two and three inquiries into one. At step two, "the issue is the facial validity of the prosecutor's explanation." *Purkett*, 514 U.S. at 768 (citation omitted). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* The prosecutor met this low bar. The question at step three is "the persuasiveness of the justification," *id.* The judge

"must engage in the closest possible scrutiny of the proffered explanations," *Harris*, 260 A.3d at 680 (cleaned up), and evaluate them "in the context of all the facts and circumstances" of the particular case, *Flowers*, 588 U.S. at 315. At a minimum, this will involve "ask[ing] questions to probe the verity of the prosecutor's proffered explanation," "review[ing] the record," and in some cases, conducting "side-by-side comparison[s]." *Harris*, 260 A.3d at 678. Here, the judge did none of this. He simply accepted the rationale without follow-up questioning and moved on.[2] His credibility finding was nothing more than a determination that the rationale was facially race-neutral.[3] That a different court upheld an employment-based strike in a different context says little about "how reasonable, or how improbable, the explanations are," *Miller-El I*, 537 U.S. at 339, in *this* case.

Second, far from conceding the legitimacy of the proffered rationale for any strike, defense counsel was pointing the judge to the required rule of law—that strikes may not be assessed in isolation and must be considered in light of the totality of the evidence of pretext, which in this case included the striking of every Black juror and juror of color.[4] *See Flowers*, 588 U.S. at 314-15 (acknowledging that in a

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[2] For example, the judge said of the cashier: "She's -- that's a race neutral reason. You might say you shouldn't strike the person because the person is black, but that is a rac[e] neutral reason." 12/4/12 at 132-33. The judge then moved on to the plumber's assistant. *Id.* at 133.

[3] *See, e.g.*, 12/4/12 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.").

[4] Counsel argued: "If you individually separate them from what was actually done, then you could find a reason for each individual person. But, your Honor, *I think you have to look at the totality of the selections.*" 12/4/12 at 133 (emphasis added).

different context, the strike of Wright "might be deemed permissible" and holding that the Mississippi courts erred in considering the strike in "isolation" rather than "examin[ing] the whole picture," which told a different story). *Cf. Tursio*, 634 A.2d at 1212 (explaining that the "inherent logic and credibility of the prosecutor's individual explanations . . . are not sufficient" given his elimination of all non-Black venirepersons). The judge, however, persisted in evaluating the strikes of Jurors 238, 254, and 683 as though they were divorced from each other and refused to consider the significance of the strikes of the Black alternate, Asian juror, and Hispanic juror on the credibility of the proffered rationale.[5] The failure to rigorously scrutinize the proffered rationale in light of the case as a whole was legal error.

Finally, because the step three inquiry was wholly inadequate and the judge applied the wrong rule of law, this Court must reverse his credibility finding notwithstanding the deferential standard review. "[D]eference [to a trial judge's *Batson* finding] does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El I,* 537 U.S. at 340. Accordingly, *Tursio* reversed where the judge "focused exclusively on whether the prosecutor's explanations about each rejected juror were logical and believable rather than assessing each challenge in the entire context of the case." 634 A.2d at 1211-12. Likewise, the *Harris* judge's conclusions that the proffered rationales "can be legitimate," and he "did not think that the jurors were struck because of race,"

[5] *See, e.g.*, 12/4/12 at 131 ("Well, we're down to three."); *id.* at 133 ("[W]e're down to the plumber's assistant and at most the cashier."). *See also id.* at 131 (declining to consider the stricken Black alternate because the government "withdrew that").

were "no substitutes for the rigorous evaluation and probing inquiry of the prosecutor's explanations that [he] was obliged to undertake." 260 A.3d at 673-74, 680 (cleaned up). Here, too, the judge's pro forma inquiry was legal error and requires reversal. *Tursio*, 634 A.2d at 1213; *Harris*, 260 A.3d at 681.[6]

III. THE PROSECUTOR'S RATIONALE DOES NOT WITHSTAND SCRUTINY IN LIGHT OF THE RECORD AS A WHOLE.

Reversal is also required because the prosecutor's rationale does not withstand scrutiny, and the finding of no *Batson* violation is clearly erroneous in light of the record as whole.[7] PDS pointed to the compelling statistical evidence (i.e., striking six out of six jurors of color and four out of four Black jurors); the racially-charged nature of a rape case that pitted a white woman's credibility against a Black man's; the dubiousness of the need for science-literate jurors where the defense was consent and the contested medical evidence was limited and easily understandable; the prosecutor's failure to ask *any* juror about science proficiency; the side-by-side comparison of the accepted white nanny and stricken Black jurors; and the striking of highly-educated jurors of color who did not affirmatively answer any voir dire questions—all of which together cast serious doubt on the sincerity of the

[6] The government does not dispute that the remedy for a deficient *Batson* inquiry is reversal. "*Batson* procedure relies heavily on the value of an on-the-spot exploration of counsel's motives," which cannot be replicated at a later hearing that is colored by appellate arguments developed with "the benefits of hindsight and preparation." *Robinson v. United States*, 878 A.2d 1273, 1289 (D.C. 2005) (cleaned up).

[7] *See, e.g.*, *Miller-El II*, 545 U.S. at 265 (*Batson* ruling was clearly erroneous because rationales were "so far at odds with the evidence that pretext is the fair conclusion").

prosecutor's rationale. The government's attempts to minimize and explain away these indicia of pretext are unavailing.

The government concedes that statistical disparities are relevant at step three, Gov't Br. at 47-48, but seeks to blunt their impact by arguing that "statistical disparity *alone*" does not establish pretext because the sample size is too small for "definitive" conclusions, *id.* at 48-49 (emphasis in original). This misses the point of a totality analysis. Statistical disparities are an important factor in the analysis, and the starker the disparity, the more probative it is of pretext. *See, e.g.*, *Tursio*, 634 A.2d at 1213 ("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."). Here, the "numbers speak loudly." *Flowers*, 588 U.S. at 305. They were comparable to the striking of five out of five Black jurors in *Snyder*, four out of four Black jurors in *Foster*, and five out of nine Black jurors in *Harris*, 260 A.3d at 670. The proffered rationale must be examined against this statistical backdrop.

The racially-charged nature of the case also weighs heavily against the government in the totality analysis.[8] The danger that a prosecutor will strike jurors based on race is at its zenith in a case such as this one where securing a conviction

[8] This Court has said that the racially-charged nature of a case triggers "heightened scrutiny." *See Harris*, 260 A.3d at 676. We think a better articulation, consistent with the Supreme Court's jurisprudence, is that judges must conduct a rigorous inquiry in *every* case, irrespective of whether it is racially charged. To be sure, racial tension is a key fact in the totality analysis that weighs heavily toward pretext. The Court should clarify, however, that *Batson* requires a searching and rigorous inquiry at step three in all cases, including where the defendant and victim are the same race.

turns on the jury crediting a white woman's account of rape over a Black man's competing account of consensual sex. Given the well-documented history of racism in rape prosecutions, *see* PDS Br. at 20, a prosecutor seeking to pick the jury most likely to convict may be tempted to strike Black jurors on the assumption that they will sympathize with the Black defendant and be more open to reasonable doubt.[9] Likewise, she may be tempted to strike other non-white jurors on an assumption that white jurors will most closely identify with a white complaining witness and credit her. Where the prosecutor then strikes every Black juror and every juror of color, the inference of racial motivation is overwhelming.[10]

Notwithstanding the optics of excluding every juror of color in a racially-charged case, the government insists that the strikes of the plumber's assistant (Juror 238) and cashier (Juror 254) were based on their professions—not race—and that the strike of the DPW mechanic (Juror 683) was based on his misunderstanding of a lengthy, compound question.[11] Its primary rationale—that it "legitimately wanted

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[9] A prosecutor violates *Batson* if she acts on a race-based assumption about a juror's sympathies even if she harbors no racial animus. *Harris*, 260 A.3d at 669.

[10] The government's attempt to downplay the racially-charged nature of the case, Gov't Br. at 35-36, is unavailing. That DNA identified Mr. Smith did not alleviate racial tension in a *consent* case that pitted a white woman's account of forced sex against a Black man's denial. The racial makeup of the city, police force, and U.S. Attorney's Office is a red herring. The prosecutor eliminated all such diversity, and she did so in a way that aligns with popular intuitions about race.

[11] Because the judge made no findings about Juror 254's clothing, this Court may not uphold her strike on that basis. *Snyder*, 552 U.S. at 479 (refusing to presume that judge credited prosecutor's assertion that juror appeared nervous absent a finding). Moreover, subjective clothing-based justifications are suspect. LDF Br. at 16-17.

jurors well-equipped to evaluate the scientific evidence," and used their employment as a proxy for facility with science, *see* Gov't Br. at 52, 56-58 & n.32—fails when the record is examined as a whole. This was not a scientifically complicated case despite the government's post-hoc effort to make it one. The only complex forensic evidence was DNA, and the jury did not need to understand the intricacies of DNA analysis because Mr. Smith admitted having sex with V.F.[12] As defense counsel repeatedly represented, Mr. Smith's defense was consent, and he was not challenging the DNA match. *See* 5/15/12 at 2; 6/25/12 at 9; 12/3/12 (Motley) at 43. The prosecutor articulated her understanding of the consent defense the day before voir dire, 12/3/12 (Motley) at 41-42, and won a favorable *Brady* ruling on this basis, *id*. at 130-146. Mr. Smith was locked into a consent defense as a practical matter given his videotaped admission to a police officer that he had sex with V.F., 12/10/12 (excerpt) at 39-40, and the government's possession of evidence that he told others he had consensual sex with V.F. 12/3/12 (Motley) at 130. The notion that the prosecutor was worried that Mr. Smith would, at the eleventh hour, attack "the

[12] The government emphasizes the contested medical testimony about the significance of an anal tear, but does not argue it was unusually complex or confusing. Gov't Br. at 52-55. Forensic evidence is part and parcel of criminal cases, and the medical evidence here was on the simpler end of the spectrum. SANE examinations are standard in sexual assault trials. The notion that blue collar workers are categorically ill-equipped to sit on rape cases where such evidence is challenged is offensive and at odds with the premise of our jury system, in which lay people sit as trier of fact and rely on experts to make understandable any "scientific, technical, or other specialized knowledge" relevant to their determination. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 591 (1993) (citation and emphasis omitted).

validity of random-match calculations," Gov't Br. at 53 n.28, is counterfactual and "reeks of afterthought," *Miller-El II*, 545 U.S. at 246.

The voir dire also belies the government's claim that it sought jurors who would "underst[and] complex forensic evidence" such as "how DNA testing work[s]" and "the statistical significance of the profile matches in this case," Gov't Br. at 52-53. Tellingly, the prosecutor asked no questions to ascertain jurors' scientific backgrounds, proficiency, or anticipated ability to understand a DNA expert. The government responds that voir dire was too "fast-paced," *id.* at 55 n.31, but the judge repeatedly invited counsel to ask questions, *see, e.g.*, 12/4/12 at 43, 51, 56, 58, 62, 65, 68, 74, 78, 81, 87, 89, 106, 117, 140. Indeed, the prosecutor asked jurors about topics of concern such as prior work experience on sexual assault cases, *id.* at 51, 58, 104; personal feelings about their interaction with the police and the criminal justice system, *id.* at 89-90, 95, 110-12, 120; and a nurse's practice area, *id.* at 84. The prosecutor could have (but did not) propose in advance a well-crafted and science-focused voir question for the judge to ask each juror. The 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*, 588 U.S. at 312 (citation omitted).

The employment-based rationale is also dubious because employment is a poor proxy for ability to understand DNA analysis except for the rare juror in a scientific field. Because the prosecutor did not ask, she did not know what scientific education or background a plumber's assistant, cashier, reading tutor, lawyer, nanny, investigator, or retired bookkeeper had. The most she could infer is that some had

jobs that generally require higher education, whereas others did not. To state the obvious, graduating from college does not ensure facility with science, let alone DNA analysis. Many humanities majors avoid science entirely after high school and are poor at mathematical reasoning and statistical analysis. Without more information, the government could not predict with any accuracy how comfortable a white elementary school reading tutor (Juror 362) or white private investigator (Juror 212) would be with science, or reasonably conclude that they would be more capable of understanding a DNA expert—whose job it was to make DNA analysis understandable to a lay jury—than a Black cashier or Black plumber's assistant.

To the extent the government is suggesting that the Black prospective jurors in blue collar jobs lacked "*aptitude* for understanding complex evidence," Gov't Br. at 55 n.31 (emphasis added), which is how defense counsel understood the rationale, *see* 12/4/12 at 131, this intelligence-based rationale is highly suspect given how closely its invocation parallels the longstanding and pernicious stereotype that Black people are less intelligent than white people, and therefore less capable of serving on a jury. *See* LDF Br. at 10-13.

Finally, the government's failure to apply its employment/higher education criteria to white jurors and jurors of color alike is further evidence that the strikes were racially motivated. As discussed in PDS's opening brief, the prosecutor accepted a white nanny and white barista/retired bookkeeper even though their jobs do not require a college degree or scientific study. She also accepted a white reading tutor who, like the Black mechanic, was confused by the law enforcement question. While simultaneously being more lenient about the requisite credentials for white

jurors, she struck a Black IT marketing professional and Hispanic full-time college student studying project management and administration, even though both seemingly met the government's employment/higher education criteria and neither had any "yes" answers that would otherwise explain the strikes. PDS Br. at 21-25.

The government's efforts to explain away these contradictions are unavailing. It argues that a nanny is not "the functional equivalent of a plumber's assistant and cashier in terms of education and scientific knowledge," Gov't Br. at 62, and that the barista/bookkeeper had a "professional background much different from the jurors the government struck," *id.* at 66, but it is unable to explain how either was better suited to understand DNA testimony than Black jurors who similarly had professions that do not require higher education. Jurors need not be "*identical*" "for the side-by-side comparison to be suggestive of discriminatory intent," *Flowers*, 588 U.S. at 311-12 (emphasis in original), and a contrary rule "would leave *Batson* inoperable." *Miller-El II*, 545 U.S. at 247 n.6. The government notes that the Hispanic juror attended a for-profit technical school, but one is hard-pressed to see how that renders him less qualified than white jurors who may have no higher education at all. Finally, the replacement of a Black IT marketing professional with a white barista/bookkeeper is glaring. The government's insistence that this strike (which it ultimately withdrew) was the result of a "benign" miscount, Gov't Br. at 66, is hard to swallow given that it was the sixth strike of six jurors of color and resulted in an all-white jury and all-white alternates.

In light of the totality of evidence indicative of racial bias, the judge clearly erred in upholding the strikes of Jurors 238, 254, and 683. Reversal is required.

Respectfully submitted,

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CERTIFICATE 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 Christopher Kemmitt, Esq., NAACP Legal Defense and Educational Fund, and by email upon Bridget Fitzpatrick, Esq., Bridget.Fitzpatrick@usdoj.gov, and Adam Murphy, Esq., amurphy@naacpldf.org, this 26th day of June, 2024.

/s Stefanie Schneider