18-CO-0289 & 20-CF-0190

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

GLENN ARTHUR SMITH
Appellant

v.

UNITED STATES OF AMERICA
Appellee

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Case No. 2011-CF1-013068

EN BANC BRIEF OF APPELLANT

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Glenn Smith	Brandi Harden Kia Sears Mani Golzari Kanita Williams Daniel Gross	Sean R. Day
United States	Amy Zubrensky (trial) James Sweeney (post-trial)	Nicholas Coleman
Judge	The Honorable Thomas J. Motley, Senior Judge	

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STATEMENT OF THE ISSUE

I. Did the trial court err in concluding that *Batson* was not violated where, in a case involving the allegation that a black man raped a white woman, the government struck every black person and other person of color from the jury panel?

STATEMENT OF THE CASE

V.F. was allegedly raped on June 13, 2010. Glenn Arthur Smith, Jr., was on December 14, 2011, charged by indictment with related offenses (vaginal rape, anal rape, and attempted robbery), followed by a superseding indictment on October 24, 2012.

Following a jury trial (before the Honorable Thomas J. Motley, Senior Judge) on December 4, 5, 10, and 11, 2012, on December 12 the jury returned guilty verdicts on the two rape counts and acquitted on the attempted robbery charge.

Smith filed a series of *pro se* motions under Super. Ct. R. Crim. P. 33. Following appointment of new counsel, the trial court requested one comprehensive replacement filing; on October 18, 2013, Smith (through counsel) filed a replacement *Motion for New Trial*.

With the motion for a new trial pending, the trial court sentenced Smith on April 11, 2014, to 25 years incarceration, 5 years supervised release, $200 VVCA, and lifetime sex offender registration.

Considerable briefing and litigation followed, and on February 13, 2018, the trial court issued a *Memorandum Opinion* denying the motion. The trial court extended the time to file a notice of appeal to April 13, 2018. A notice of appeal was filed March 19, 2018.

On October 28, 2019, prior appellate counsel filed a brief addressing the post-trial motions. On February 24, 2020, prior appellate counsel filed a new notice of appeal to create a direct appeal and the government filed a waiver of the time limit.[1]

On November 23, 2020, Smith (through new counsel) filed a replacement consolidated brief addressing all trial and post-trial issues.

A decision affirming the trial court was issued and entered on February 2, 2023. *Smith v. United States*, 288 A.3d 766 (D.C. 2023). A petition for rehearing *en banc* was filed (following an extension) on June 15, 2023, which was granted on November 28, 2023.

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[1] This second notice of appeal was superfluous, as the March 19, 2018 notice of appeal covered all trial and post-trial issues. D.C. Ct. App. R. 4.

STATEMENT OF FACTS

On June 13, 2010, V.F. was a 22-year-old woman and May 2010 college graduate. (12/4/12 at 209, 214; 12/5/12 at 263.) She testified that while walking home from a party she was raped by an unidentified man. (12/5/12 at 242-50.) DNA collected at the time of the incident was later matched to Glenn Smith. (12/11/12 at 103-4.) Smith testified that the encounter was consensual, but that V.F. became upset when he penetrated her anally; they argued and he left. (12/10/12 Smith at 4-12.)[2]

Smith is black and V.F. is white. (12/3/12 Trial at 22-23.)[3]

The defense was expected to be, and was, consent.[4]

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[2] The December 10 transcript is in two parts; one part is primarily Smith's testimony.

[3] There is a separate transcript for a motion heard the same day.

[4] Government: "As conversations have ensued with Defense Counsel, I'm sensing that identity … would not necessarily be an issue." (12/3/12 at 41-42.)

Defense Counsel: "This will be more of a consent defense than an identity defense …." (*Id*. at 43.)

Court: "Given that your defense is it was consensual, [Mr. Smith's alleged statement to a third party that it was consensual] shouldn't [be] a bombshell." (*Id*. at 139.)

Court, to juror being excused: "The Defense here is going to be consent." (12/4/12 at 96.) *(footnote continues)*

At the time of trial a little over 50% of D.C. residents were black; 38.5% were white.[5] The jury venire consisted of 67 persons (approximately one-third black) from which the trial court qualified 36 (plus one extra). (Juror List; 12/4/12 at 136.) Though this case ultimately depended upon a credibility determination between two civilians, two jurors (one black, one Hispanic)[6] were struck for cause due to distrust of police. (12/4/12 at 81-82, 110-12.)

Of the 36 persons qualified, 30 were white (83%), four black (11%),

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Also, the court discussed the government's obligations regarding disclosing information that Mr. Smith told others the incident was consensual with the understanding that Mr. Smith's defense was consent, not identity. (12/4/12 at 10-14.)

While the defense strategy might have changed if the government did not go through the formality of introducing DNA evidence, everyone understood it was just that — a mere formality of ticking off the identity box for the government's case-in-chief. The defense required the government to put on evidence of identity but did not contest it.

[5] 2010 census, located at *https://www2.census.gov/geo/pdfs/reference/guidestloc/11_DistrictofColumbia.pdf* (accessed 01/04/24)

[6] With reasonable certainty. One juror had a Hispanic surname, while the other resided in a zip code in which 97% of residents were black (and 1% multiracial). 2010 Census data for 20019 zip code at *https://data.census.gov/cedsci/table?g=8600000US20019&tid=ACSDP5Y2012.DP05* (accessed 01/04/24)

one Filipino, and one Hispanic. (12/4/12 at 86, 125-26.) Each of the six persons of color answered *No* to all *voir dire* questions. The prosecution struck every one of them.[7]

The *Batson* challenge was based upon all persons of color being removed, though the discussion later focused on the black persons; without accepting the strikes of the Filipino and Hispanic persons, the defense argued that just the strikes of the four black persons violated *Batson*.[8] (12/4/12 at 126-28.)

The prosecution offered its claimed race-neutral reasons for the four black persons. Juror 13/238, it argued, was a plumber's assistant and so the scientific evidence would be above his mental capacity. (12/4/12 at 61, 129,

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[7] Black persons were thus 50% of the District population, 33% of the venire, 11% of persons qualified for the jury, and 0% of the deliberating jury.

The random probability of drawing 12 out of 12 white persons from the District's population was approximately 1 in 100,000 ($(0.385)^{12}$).

[8] "Your Honor, I do at this time raise a Batson issue. The Government has eliminated every black person from the jury as well as Asian and Hispanic …." (12/4/12 at 125.)

"[The government struck] all of the African-American jurors … as well as the only Asian and Hispanic juror." (126)

"I believe with just the four [black] individuals [the *Batson* challenge] would stand, Your Honor." (127)

132-33.) The government was similarly concerned about the mental capacity of Juror 34/254, a black cashier, and without specificity that "her dress was very disrespectful to the Court." (97, 129, 132-33) The prosecution did not strike the white nanny (Juror 35/916). (97-98, 143) The prosecution *did* strike a Hispanic man who was a full-time student at a technical school studying project management and administration. (92) The prosecution also struck a black man (Juror 1/721) who did information technology (12/4/12 at 39), which would have brought from the venire into the deliberating jury someone who was a Starbucks barista (explained below).

The prosecution asked not a single question of any juror about their scientific knowledge or interests.

Regarding the third black person (Juror 7/683), the prosecution explained that he did not understand one of the questions well; he mistakenly answered *Yes* to the question regarding employment in the criminal justice system; he worked for the Department of Public Works and heard the part about local or state government, so he answered affirmatively. (12/4/12 at 117, 129-30.)[9]

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[9] The question was:

Regarding Juror 1/171, a well-educated black man eliminated with an "alternate juror" strike, the prosecution explained it had no reason to strike him other than it would have brought someone they preferred (who was a white woman) "into the number one position." (12/4/12 at 107-9, 130.) Challenged on it, the prosecution withdrew its strike of the non-deliberating black juror.[10]

> 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.)

[10] The reason the prosecution gave was incorrect. The juror it preferred (Juror 45/839) was already slated to be a deliberating juror in Seat 14 (Seats 1 and 2 were alternates) and was going to be unaffected by the strike. Striking Juror 1/721 would have caused Juror 18/688, a white man (foreign service officer and economist for the Department of State), to go from a deliberating juror into Seat 1 (alternate), and Juror 47/899, a white woman (Starbucks barista and former bookkeeper), to join the deliberating jury. *(continued next page)*

The defense continued to object, arguing repeatedly that even if one could state a reason for each stricken person in isolation, it was problematic that the prosecution struck all black persons (and the two other persons of color); this aggregate of strikes revealed racial discrimination. (12/4/12 at 125-34.)[11] Rather than considering defense

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As the jury documents show, persons not struck remained in their original seat; persons struck were replaced by the next person who was outside the first 14. Thus, the jury seats were filled as follows:

Seat 1 (alternate): Juror 1/721 (not struck so he stayed in original seat)	Seat 2 (alternate): Juror 17/327 (the first available outside the first 14)
Seat 3: Juror 3/450	Seat 4: Juror 18/688 (next available outside the first 14)
Seat 5: Juror 19/272	Seat 6: Juror 6/362
Seat 7: Juror 26/733	Seat 8: Juror 35/916
Seat 9: Juror 37/511	Seat 10: Juror 41/212
Seat 11: Juror 11/298	Seat 12: Juror 12/800-2
Seat 13: Juror 44/625	Seat 14: Juror 45/839

[11] Mr. Gross: Individually [for] him I think that could have a basis.

Court: Okay. So that one surely passes [muster].

Mr. Gross: Individually, Your Honor.

(12/4/12 at 132.)

Mr. Gross: I think based upon the totality of the strikes it does establish a *prima facie* case. 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

counsel's point, the trial court targeted defense counsel for only striking white persons, even though the panel was disproportionately white and the prosecution left no one else to strike. (134-35)

Unlike the persons of color it struck (all six of whom answered *No* to all *voir dire* questions), the prosecution had good reason for its strikes of white persons. One had been a criminal defense attorney (including rape defense) in her home country (12/4/12 at 54-56); one had a negative encounter with police (64); one had been falsely accused of a crime, falsely arrested, and roughed up by police (67); and one had interned at a public defender's office and his sister had been convicted of some crimes (49-50). (See chart of jurors and government strikes in addendum to this brief.)

Without further probing or analysis, the trial court rejected the *Batson* challenge by accepting the race-neutral reasons:

> I will accept the Government's reason[s] that [these are] race [] neutral reasons .... I think that the reason that the Government gives is a credible reason, and the Government [has] assured that this was not based on race. I will accept the Government's representation.

(12/4/12 at 135.)

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the totality of the selections. (133)

SUMMARY OF ARGUMENT

The Division's opinion is at odds with *Harris v. United States*, 260 A.3d 663, 669 (D.C. 2021), and Supreme Court precedent, that require trial judges to participate actively in the *Batson* process. The trial court did nothing more than require the prosecution to state a race-neutral reason (Step 1 of the *Batson* process).

Three factors required the highest level of scrutiny here: (1) this was a quintessential racially-charged case, a type described by one court as more incendiary that interracial homicide; (2) the statistical evidence was overwhelming; and (3) every single person of color was struck.

The reasons provided by the prosecution were disconnected from the case and fail a side-by-side comparison. While not asking a single potential juror about scientific knowledge or interests, the prosecution mainly cited the professions of the struck jurors due to "the level of scientific evidence in [the] case," even though the defense was consent with minimal contested scientific evidence (competing expert testimony about skin tears). Meanwhile, the prosecution did not strike a white nanny; struck two well-educated nonwhite jurors; and made a strike that would have moved a (male) foreign service officer and economist from a deliberating seat to an alternate seat and replaced him with a (female) Starbucks barista from the venire.

STANDARD OF REVIEW

A *Batson*[12] inquiry contains three steps:

> First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328-29, 123 S. Ct. 1029, 1035 (2003) (citing *Batson*).

Whether a defendant made a *prima facie* showing is reviewed *de novo*. *Haney v. United States*, 206 A.3d 854, 860 (D.C. 2019). However, where the government offers its reasons, the first question is moot. *Johnson v. United States*, 107 A.3d 1107, 1112 (D.C. 2015).

The second question is whether the government offered a "clear and reasonably specific" race-neutral explanation that is "related to the particular case to be tried." *Batson*, 476 U.S. at 98 incl. n.20, 106 S. Ct. at 1724. The explanation, however, does not have to make sense at the second step. *Smith v. United States*, 966 A.2d 367, 374 n.10 (D.C. 2009). This issue is reviewed *de novo*. *See, e.g., United States v Uwaezhoke*, 995 F.2d 388,

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[12] *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986).

392 (3d Cir. 1993); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 854 (10th Cir. 2000); *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998); *Goldberg v. State*, 280 Ga. App. 600, 602, 634 S.E.2d 419, 422 (2006); *People v. Knight*, 473 Mich. 324, 343, 701 N.W.2d 715, 726 (2005); *Moeller v. Blanc*, 276 S.W.3d 656, 661 (Tex. App. 2008).

On the third step — determining whether the defendant has established discrimination —

> the trial court must rigorously scrutinize the race-neutral explanations offered to rebut the allegation of discrimination; if it fails to do so, *Batson*'s promise of eliminating racial discrimination in jury selection will be an empty one. The court must decide whether counsel's explanation is to be believed and its evaluation of credibility in this area is entitled to great deference.

Epps v. United States, 683 A.2d 749, 753 (D.C. 1996) (internal citations and notations omitted). The trial court's determination must be reversed if clearly erroneous. *Smith v. United States*, 966 A.2d 367, 377 (D.C. 2009).

Where the trial court fails to apply the correct legal analysis, however, the decision "lose[s] the insulation of the clearly erroneous rule." *Ingram v. United States*, 885 A.2d 257, 263 (D.C. 2005) (quotation marks and citation omitted).

ARGUMENT

THE NUMBERS	
Black Persons 50% of the District's population (2010 census) 33% of the jury venire 11% of qualified jurors 0% of jurors Probability of randomly eliminating 4 out of 4 black persons from a pool of 36 persons with 11 selections: 0.56%, or 1 in 179 Probability of randomly selecting 12 persons out of the District's entire population and having 0 black persons: 0.02%, or 1 in 5,000	All Persons of Color 61.5% of the District's population Unk% of the jury venire 17% of qualified jurors 0% of jurors Probability of randomly eliminating 6 out of 6 nonwhite persons from a pool of 36 persons with 11 selections: 0.024%, or 1 in 4,216 Probability of randomly selecting 12 persons out of the District's entire population and having 12 white persons: 0.001%, or 1 in 100,000

[13]

[13] Numbers cited herein verified on three statistical calculators:
https://www.emathhelp.net/calculators/probability-statistics/hypergeometric-distribution-calculator/

https://stattrek.com/online-calculator/hypergeometric.aspx

https://www.wolframalpha.com/widgets/gallery/view.jsp?id=ab7e3f4ceba7f23947ef49a3bbf93b56

In this case there was racial discrimination. Alternatively, the trial court failed to apply the correct legal analysis in failing to scrutinize, much less rigorously scrutinize, the government's stated reasons.

This is a quintessential racially-charged case, as the Division acknowledged. *Smith*, 288 A.3d at 777; *see also*, *People v. Johnson*, 8 Cal. 5th 475, 538, 453 P.3d 38, 83 (2019) (describing the black defendant's allege rape of a white women as perhaps even more "incendiary" than murder); *Johnson v. State*, 355 Md. 420, 435-36, 735 A.2d 1003, 1011 (1999) (describing *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932), involving black men accused of raping white women, as "racially charged"); *Miller v. North Carolina*, 583 F.2d 701, 703 (4th Cir. 1978) (interracial rape case was "necessarily a racially sensitive prosecution"). As Justice Thurgood Marshall wrote regarding limitations on jury *voir dire* in a case where black men were accused of assaulting and robbing a white man:

> [T]o say that petitioner is not a potential target of racial prejudice would be to ignore as judges what we must all know as men. That petitioner was tried in Boston, Massachusetts, while Gene Ham [*Ham v. South Carolina*, 409 U.S. 524, 93 S. Ct. 848 (1973)] was tried in Florence, South Carolina, is of no consequence. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the

> South. And where, as here and in the strikingly similar circumstances of the *Aldridge* case, a [black man] is being accused of an attack on a white policeman, it would be disingenuous at best to assert that he is not apt to be a particular target of racial prejudice.

Ross v. Massachusetts, 414 U.S. 1080, 1085, 94 S. Ct. 599, 602 (1973) (Marshall, J., dissenting from denial of *certiorari*, joined by Justices Douglas and Brennan).

The *Batson* protections are not just for a defendant; they are for the protection of jurors, the integrity of the judicial system, and the benefit of society overall. *Powers v. Ohio*, 499 U.S. 400, 406-07, 111 S. Ct. 1364, 1368 (1991). As the Supreme Court has explained:

> Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law. Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Id., 499 U.S. at 407, 111 S.Ct. at 1369. So important are these rights that if race plays just a part of a single strike, reversal is required. *Harris v. United States*, 260 A.3d 663, 669 (D.C. 2021). "In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers v.*

Mississippi, 139 S. Ct. 2228, 2241 (2019).

Mr. Smith will focus on the third *Batson* step, which looks to "the honesty — not the accuracy — of a proffered race-neutral explanation." *Lamon v. Boatwright*, 467 F.3d 1097, 1101 (7th Cir. 2006) (quoted in *Smith v. United States*, 966 A.2d 367, 374 (D.C. 2009)). In the third *Batson* step, "[t]he trial court must rigorously scrutinize the race-neutral explanations offered to rebut the allegation of discrimination [.]" *Epps*, 683 A.2d at 753. The court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93, 106 S. Ct. at 1721 (internal quotation marks omitted).

Trying to expose the motivations of a prosecutor, when they themselves may not even be fully in touch with their own motivation and biases, it not an easy task. "[A]t step three, *Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment — the underlying basis for which may be invisible even to the prosecutor exercising the challenge." *Miller-El v. Dretke*, 545 U.S. at 267-68, 125 S. Ct. at 2341 (Breyer, J., concurring). As Justice Marshall noted in his concurring opinion (arguing for the end of peremptory strikes as the only way to fulfill *Batson*'s promise), "[a]ny prosecutor can easily

assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Batson*, 476 U.S. at 106, 106 S. Ct. at 1728. One author, as noted in the title, observes that an attorney will be caught under a *Batson* challenge only if "unapologetically bigoted or painfully unimaginative." Jeffrey Bellin and Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075 (July 2011). One appellate court has referred to it as "the charade that has become the *Batson* process," citing numerous "race-neutral reasons" that it imagined were from a prosecution handbook entitled "Handy Race-Neutral Explanations." *People v. Randall*, 283 Ill. App. 3d 1019, 1025, 671 N.E.2d 60, 65 (1996).

Another court, agreeing that the *Batson* process is prone to being a charade of easily-supplied race-neutral reasons, called upon trial judges to oversee the process diligently, "assess the entire milieu of the voir dire objectively and subjectively," use the judge's "personal, lifetime experiences with voir dire," and even rely upon "intuitive perceptions." *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987) (*en banc*). "*Batson* ... requires the trial judge to embrace a participatory role in voir dire." *Id.* at 64.

The goal in a *Batson* inquiry is not to find conclusive proof of discrimination, and an improper strike may not be deliberately discriminatory. "[The] probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice." *People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83, 395 P.3d 186, 208 (2017) (Liu, concurring) (citation and quotation marks omitted).

These difficulties, and the importance of *Batson*, are why compelling numbers may be sufficient proof of bias, and courts must be particularly sensitive in cases such as this one with obvious potential for bias, which "may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred." *Powers*, 499 U.S. at 416, 111 S. Ct. at 1373. Compelling statistical evidence alone may establish discriminatory intent. *Batson*, 476 U.S. at 93, 106 S. Ct. at 1721 ("seriously disproportionate exclusion ... is itself such an unequal application of the law as to show intentional discrimination") (cleaned up); *Beasley v. United States*, 219 A.3d 1011, 1015 (D.C. 2019). Total exclusion

of a class of people is particularly compelling evidence of discrimination. *Id.* at 1016 ("[T]he total exclusion of a class of people may be powerful evidence of discrimination"); *Miller-El v. Cockrell*, 537 U.S. at 342, 123 S. Ct. at 1042 (where the government used its strikes to eliminate all but one black venire member, "[h]appenstance is unlikely"); *Tursio v. United States*, 634 A.2d 1205, 1210 (D.C. 1993) ("'Statistics are not, of course, the whole answer but nothing is as emphatic as zero'") (reversing where an all-black jury convicted a white Latino man of killing a black man). The emphasis on disparate statistics becomes even more important in a racially sensitive case:

> 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. Strikes based on race are even more likely to occur when the government's entire case turns, as it did here, on whether the jury believes the testimony of the black witness over the two white witnesses.

Tursio, 634 A.2d at 1213.

The defense in this case adamantly protested the totality of the strikes as a manifestation of discrimination (while the trial court insisted on isolating each one). The Division, however, improperly focused on the lack of a detailed, impromptu attack on the prosecution's credibility and

their stated reasons for each individual strike. *Smith* at 779 ("[W]e are reticent to conclude that the trial court clearly erred in crediting the government's rationale when defense counsel made no real effort to rebut it.")

The Division's passive approach in this case is contrary to the searching appellate inquiry in *Harris*, which is needed to determine whether the trial court fulfilled its duty. In *Harris*, this court performed various side-by-side comparisons that were in the record but not raised by defense trial counsel. In racially-charged cases such as this one it is necessary for this court to determine whether the trial court fulfilled its "oblig[ation] to undertake" "a probing inquiry," to "engage in the closest possible scrutiny," "ask questions," "probe the prosecutor," "examine each challenge," "engage in a comparative juror analysis," and "evaluate the explanations" "in the entire context of the case." *Id.* at 676-81.

The review in *Harris* followed Supreme Court caution and guidance. For example, in *Snyder v. Louisiana*, 552 U.S. 472, 483, 128 S. Ct. 1203, 1211 (2008), the Court's review included a "retrospective comparison of jurors" that "were not raised at trial," over the protest of the dissent ("Those jurors, however, were never mentioned in the argument before

the trial court." *Id.* at 483 (Thomas, J., dissenting).) All that is required is that the defense "fairly present his *Batson* claim" and that the supporting evidence be in the record. *Miller-El v. Dretke*, 545 U.S. 231, 241 n.2, 125 S. Ct. 2317, 2326 (2005). In *Flowers*, 139 S. Ct. at 2250, the Court even scrutinized a strike that the defense did not challenge (*id.* at 2257 (Thomas, J., dissenting)). "'Once a ... claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below.'" *West v. United States*, 710 A.2d 866, 868 (D.C. 1998) (quoting *Yee v. Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522 (1992)). Ultimately, the question is whether the trial court was sufficiently "alerted ... that further probing might be required." *Walker v. United States*, 982 A.2d 723, 732 (D.C. 2009).[14]

This case was in even greater need of rigorous scrutiny than *Harris*. In addition to being a quintessential racially-charged case, this case contained compelling statistical evidence and the total exclusion of

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[14] In *Walker*, 46 of 68 members of the venire were black; 11 of the 14 jurors selected were black. *Id.* at 730. Given that, and that the case was not "racially charged," the need for further probing of the prosecutor was not apparent. By contrast, the need for further probing in this case was evident.

persons of color, and should have triggered the utmost rigorous scrutiny.

In *Harris*, after strikes for cause (which removed every black male from the venire), there were 37 qualified persons: 9 black women (24%), 24 white persons (65%), and four Hispanic persons (11%). The prosecution used five of its 10 peremptory strikes against black women. As in this case, the defense in *Harris* made a *Batson* challenge based solely on the improbable numbers. The prosecution provided reasons for striking each of the black women. On appeal this court focused on three of the black women.

Regarding one of the black women (Juror 214) in *Harris*, the prosecution noted that she made a face when the court read the open container charge. The prosecution added that the woman was employed in the public schools and that the prosecution had a preference against persons who work at public schools. *Harris*, 260 A.3d at 671.

Harris Juror 924, according to the prosecution, had difficulty following questions and explanations. Also, in her responses and demeanor, she showed a lack of interest in being a juror. Additionally, she was wearing a T-shirt with the United States flag on it and the motto, "Land of the Free." *Id.* at 671.

Harris Juror 038 appeared confused when her number was called to approach the bench. She did not respond *Yes* to any of the *voir dire* questions and when asked if there was anything else she wanted to add, the prosecution explained that she responded "Nope," "'[l]ike she was like a closed book,' giving 'the impression that she just wasn't really excited answering the court's question.'" *Id.* at 672.

The defense in *Harris* primarily argued that the reasons the prosecution gave were pretextual, given that the prosecution struck five black women. The trial court in *Harris* noted that "all counsel had provided 'really is the numbers and the disparity'" was based on "it seemed like 'a rather small sampling' and 'a pretty small pool to make these conclusions about.'" *Id.* at 673.5 Defense counsel repeated her disparity argument, concluding that "given the fact that there were only nine black women, I think striking five of them is rather significant out of the 37." *Id.* at 673.

The trial court in *Harris* concluded that the disparity in strikes was not significant, the sample size was small, and often decisions to strike jurors are made on the jobs people have, how they dress, and their level of interest in serving on a jury, which can be legitimate rather than pretext.

Id. at 673.

This court reversed in *Harris*, concluding that the trial court "failed to rigorously scrutinize the government's proffered race neutral reasons." *Id.* at 675. This case, in addition to being more racially-charged than *Harris*, contained greater statistical improbability. Even if one ignores how or why in a city that was 50% black at the time of trial that only 11% of the qualified persons were black, there was still gross statistical improbability that all black persons (and the Filipino and Hispanic persons) were struck. In *Harris*, the government used 45% of its strikes against 24% of the venire (less than 2-to-1 ratio); in this case, the government used 36% of its strikes against 11% (black persons) of the venire (more than 3-to-1), and 55% of its strikes against 16% (all persons of color).

Even more compelling, in this case the government could not have struck more black persons or other persons of color, and reached the highest level of disparity possible, as trial counsel noted. (Trial counsel: "I mean, it's not higher because it was not capable of being higher." 12/4/12 at 128.)

In this case, there was a 1 in 179 probability that random strikes would have eliminated the four black persons from the pool of qualified

persons (and a 1 in 4,216 probability that all six persons of color would be randomly stricken).[15] This also achieved the compelling statistical result of zero, *Tursio*, 634 A.2d at 1205, leaving an all-white jury in a case of a black man accused of raping a white woman in what would ultimately put her

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[15] The Division opinion curiously started its discussion with the defense strikes, not at issue on appeal, noting that the defense struck only white persons. *Smith* at 774. Given that 84% of the qualified persons were white, and that the government struck the other 16%, it was not improbable that the defense would only strike white persons. But assuming both sides were striking based on race, that would have been even more reason, not less, for the trial court to get involved.

The Division opinion also disregarded the withdrawn strike of the black alternate, since the defense acquiesced to the strike being withdrawn. The withdrawn strike is, in isolation, moot. However, it remains part of the evidence of race-based strikes. The government struck all four black persons from the venire, and withdrawing the strike when challenged (for an alternate juror not likely to deliberate) does not erase what happened.

The Division opinion also perplexingly claimed that the defense's "acceptance" of the government's withdrawal of the strike at trial means that bringing it up on appeal takes a contradictory position. This misapplies the invited error doctrine, which stops parties from gaming the system by creating error from which they can later appeal. *See, e.g., Brown v. United States*, 864 A.2d 996, 1001-02 (D.C. 2005). The defense did not have to reject the withdrawn strike (if the defense even had the power to do so) to preserve the evidence that the prosecution struck every single black person plus the other persons of color.

word against his.[16]

The government also overplayed the one prospective juror's confusion over a *voir dire* question. The Division opinion in this case similarly simplified the question, summarizing it as "whether he, his immediate family, or his close personal friends had ever worked in local, state, or federal law enforcement." *Smith* at 775. In fact it was 143 words consisting of a confusing introduction and two consecutive questions (set forth p. 12 n.9 above).

The prosecution's strikes also fail a side-by-side comparison. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Cockrell*, 545 U.S. at 241, 125 S. Ct. at 2325. The prosecution did not strike the white nanny and was never asked why not. While claiming to want an "educated" jury, the prosecution struck

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[16] Though the defendant required that the government put on evidence of DNA identity — just in case it could not do so — everyone understood it was a mere formality and that the defense was consent. As the trial court plainly explained to one juror who was excused because the subject matter would be too upsetting for her, "The Defense here is going to be consent." (12/4/12 at 96.)

the Hispanic full-time student at a technical school studying project management and administration. Additionally, the prosecution struck a black man (Alternate 1) which would have caused a State Department economist to become an alternate juror (filling Seat 2 instead of Seat 4), replacing him with a Starbucks barista.

Moreover, the reason was pretextual because the DNA identity match was not contested, so the desire for a science-capable jury was not "related to the particular case to be tried." *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724. Additionally, striking black blue-collar workers in favor of Caucasian white-collar workers is facially suspect. It is not apparent, for instance, that a plumber's assistant would have less ability to understand scientific evidence than an office worker. Plumbing involves things like geometry, measurement, chemistry, corrosion, pressure, adhesion, and thermo-dynamics. The government was also eager to get rid of the black man (who slightly misheard a 143-word question) who was a government vehicle mechanic, which requires mechanical, electrical, and computer sciences. And anyone, including a Starbucks barista, may be intelligent, have an interest in science, and read or watch scientifically educational materials. The prosecution, however, displayed zero interest in finding

out, asking not one juror a single question about scientific knowledge or interests.

There was stark contrast in how *voir dire* answers affected the prosecution's strikes depending on the person's skin color. Every person of color it struck answered *No* to all *voir dire* questions, leaving the prosecution grasping for explanations. In contrast, the reasons it struck white members of the venire were plain and obvious: a defense attorney; a lawyer who was upset by aggressive police; a person falsely arrested and subjected to excessive force; a former public defender intern whose sister was convicted of crimes.

The Division concluded that trial counsel did little to make comparisons or contest the claim that the stricken jurors, due to their professions, would be unable to understand the scientific evidence. Defense counsel did object.[17] But also, it was known to all that the defense

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[17] Defense Counsel: "I don't think that of the strikes that were made who were black individuals, saying that they were too unintelligent to serve on a jury, I don't think that's an effective reason to withstand [the] challenge. The plumber is not intelligent enough to understand testimony, the other person was not, the cashier was not intelligent enough to understand the question or dress was disrespectful. And I don't feel that those reasons would overcome [the *Batson* challenge]." (12/4/12 at 131.)

was consent, not identity, and the white nanny, who even disclosed she had a public defender friend, was right there in the jury box.

The Division's hands-off approach to this appeal contradicted the searching inquiry of the record that the court conducted in *Harris*, including side-by-side comparisons not argued by trial counsel. As noted at the start, the rights protected by *Batson* are not just for a defendant, they are also for the protection of prospective jurors, the integrity of the judicial system, and benefit of society overall. It is a lot to require defense trial counsel, on the fly, without the ability to question the prosecutor, to be the sole defender of the defendant, the constitution, the prospective jurors, the judicial system, and society. In a racially-charged case *the trial judge* is "obliged to undertake" "a probing inquiry," "engage in the closest possible scrutiny," "ask questions," "probe the prosecutor," "examine each challenge," "engage in a comparative juror analysis," and "evaluate the explanations." *Harris*, 260 A.3d at 676-81. The decision in *Harris* is in marked contrast to the opinion in this case, which placed responsibility entirely on defense counsel. *Smith* at 778-79. Defense trial counsel here did at least as much as counsel in *Harris*, and the facts of this case — more racially-charged, more statistically overwhelming, and the total exclusion

of persons of color — were more obviously in need of rigorous judicial scrutiny.

In a case demanding the utmost scrutiny, this case received none, with the third step here bearing no distinction from the second step. The trial court did not *rigorously scrutinize* the proffered reasons (Step 3), it *cordially accepted* the reasons at face value (Step 2):

> I will accept the Government's reason[s] that [these are] race [] neutral reasons .... I think that the reason that the Government gives is a credible reason, and the Government [has] assured that this was not based on race. I will accept the Government's representation.

(12/4/12 at 135.) While the trial court used the word "credible," the overall context reveals that the decision was driven by trust, cordiality, and the facial neutrality of the reasons proffered — not the credibility assessment and rigorous scrutiny required. Even if the trial court made a credibility determination, it was unsupported by the record and disputed by overwhelming statistical probabilities.

Because the protections of *Batson* are not defense counsel's sole burden (especially in a racially charged case), it was similarly wrong to dismiss the objections to the Hispanic and Filipino persons simply because trial counsel, after repeatedly objecting to the strikes that eliminated

every single person of color, stated that he believed the strikes of the four black prospective jurors were enough to make a *Batson* challenge, and then focused on those four. The trial court was obliged to engage in an inquiry regarding those jurors as well.

The panel decision also lacked sufficient concern regarding the backdrop of this case, which in a city that was 50% black qualified just four black jurors on a panel of 36, and thus allowed the prosecution to strike every black juror using less than half their strikes. Mr. Smith did not and does not raise this as an independent issue for appeal, but continues to urge that it provides concerning context to the case. The deck often gets stacked, as here, starting with the jury pool. In this case, the jury venire was only one-third black, not fifty percent. Next, some black persons and other persons of color get systematically eliminated through police bias questions. "[A] black juror's articulation of skepticism about whether police officers are generally truthful during *voir dire*, ... to the extent that such views tend to predominate among one racial group or another, ... may easily serve as a surrogate for race discrimination." Daniel P. Tokaji, *First Amendment Equal Protection: on Discretion, Inequality, and Participation*, 101 Mich. L. Rev. 2409, 2521 (June 2003). There is an abundance of

evidence of a wide gap between whites and blacks regarding trust in police. *See, e.g., Deep Racial, Partisan Divisions in Americans' Views of Police Officers,* Pew Research Center (September 15, 2017) (73% of whites but only 30% of blacks have "warm feelings" about police).[18] A June 2-3, 2020, Marist Poll found 42% of whites had "great confidence" that police treat blacks and whites equally; only 6% of blacks felt the same.[19]

Police bias questioning serves as racial discrimination. In this case, two persons of color were struck for cause on police bias questioning.[20] This case was ultimately decided on credibility assessments between a white woman and a black man, not police, so it was particularly

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[18] *https://www.pewresearch.org/fact-tank/2017/09/15/deep-racial-partisan-divisions-in-americans-views-of-police-officers/*

See also, *e.g.*, *The Racial Confidence Gap in Police Performance*, Pew Research Center (September 29, 2016), at *https://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/*

[19] *http://maristpoll.marist.edu/wp-content/uploads/2020/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_2006041039.pdf* (page 7)

[20] Jurors 24/180A and 46/180. (12/4/12 at 82, 110-12.) Though the race of these two persons is not listed, one had a Hispanic surname, the other resided in a neighborhood that was 97% black.

pernicious to eliminate jurors for anti-police bias.[21]

The process here ended with an all-white jury in a black-majority city deciding the fate of a black man charged with raping a white woman. The trial court was unbothered by the outcome: "I cannot ensure that the jury we have is a jury that has a certain number of African-Americans on it. I can only assure that the process is done racially neutral." (12/4/12 at 137-38.) When the odds are 1 in 100,000 that outcome here would happen

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[21] While theoretically people can get eliminated on the other end (trusting police more than civilians), empirically it rarely happens. In practice, the question eliminates people who have negative feelings about police (disproportionately black), not those who have positive feelings about the police.

No jurors were struck from the panel for positive feelings about police. For instance, Juror 18/688 (who ended up on the jury) had two splendid interactions with police when he was a theft victim. He said, "I don't think that either of those would necessarily affect how I decide the case?" (12/4/12 at 71 (question mark in original).) In follow up, he twice said he "thought" he would be able to put those positive feelings aside. (71-72)

Juror 22/217 worked closely with law enforcement for seven years, paused when asked if it would affect how she might decide the case, and said she had "learned to trust [the agents'] opinion[s]." (12/4/12 at 76-77.) But when prompted she said she could fairly evaluate the evidence. (77-78)

Common sense suggests that people who trust police will tend to give the more "socially proper" response to the judge, unlike Juror 46/180, who believed police officers "lie with impunity." (12/4/12 at 112.)

randomly, the trial court should have been concerned about the Jim Crow outcome as well as the process (given the lack of scrutiny, the trial court did not demonstrate concern about the process, either). Where the outcome/impact is an all-white jury in a racially-charged case where the random probability of such a jury is 1 in 100,000, the process malfunctioned somewhere. Less has been found to be problematic. *Haney*, 206 A.3d at 861 (no black men on jury in case that was not racially charged); *Robinson v. United States*, 878 A.2d 1273, 1285 (D.C. 2005) (no black women in a case that was not racially charged).

With only four black prospective jurors in a case that was as racially charged as there is, and just two other persons of color, this made every single strike against these persons meaningful, and it is concerning that the prosecution could so easily, and without serious judicial scrutiny, create an all-white jury with five strikes to spare. Those "spare" strikes helped the government defeat the *Batson* challenge (Prosecution: "Our response is that our strike is race neutral. There's no prima facie. We struck five white jurors[.]" 12/4/12 at 126.)[22]

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[22] The government added that it also struck the Hispanic and Asian jurors, as if that made things better, not worse.

The Division concluded that the trial court "gave adequate scrutiny to the government's explanations for each strike," without pointing to *anything* in the record showing any scrutiny at all, much less adequate (rigorous) scrutiny. *Smith* at 778. The trial court asked no follow-up questions, made no inquiry, and even flipped the *Batson* challenge against the defense, pointing out that the defense struck only white persons. The rigorous scrutiny here was solely against the defense. In the end, the trial court said twice that it was "accepting" the prosecution's explanations and noted that "the government [has] assured that this was not based on race." (12/4/12 at 135.) The prosecution was required to do no more than state race-neutral reasons (Step 2 in a *Batson* inquiry) and the trial court did nothing to scrutinize those reasons (Step 3).

If the *Batson* inquiry is to be more than "the charade that has become the *Batson* process," *People v. Randall*, *supra*, trial judges must be more actively involved especially in racially-charged cases, as the court required in *Harris*.

The outcome, regardless of manifest intent, was unacceptable. To have an all-white jury in a city that was just 38.5% white deciding a rape case with a white complainant and a black defendant — where the

random probability of such a jury is 1 in 100,000 — is beyond the pale of acceptable outcomes and reeks of discrimination.

Reversal is required. *Batson*, 476 U.S. at 100, 106 S. Ct. at 1712; *Smith v. United States*, 966 A.2d 367, 369 (D.C. 2009).[23]

CONCLUSION

For these reasons and others that may appear on the record, Mr. Smith requests reversal.

SIGNATURE OF COUNSEL

Respectfully submitted,

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[23] There is no meaningful way to allow the trial court, currently more than 11 years after trial, to try to conduct a rigorous analysis that it failed to do in 2012. Even the passage of three years interferes with such a mission. *Haney,* 206 A.3d at 864.

Additionally, there is no undoing the disturbing disparate impact here.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this

En Banc Brief

has been served electronically, by the Appellate E-Filing System, upon:

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this 26th day of February 2024.

/s/ Sean R. Day
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ADDENDUM TO BRIEF — CHART OF JURORS AND GOVERNMENT STRIKES

Seat	Venire	Pool	Race	Sex	Occupation	Notes
ALTERNATES						
1	1	721	B	M	Internet technology marketing (39)	Answered "no" to all voir dire questions. (39) Strike withdrawn after *Batson* challenge.
2	17	327	W	F	Accounting and financial services consultant (70)	
DELIBERATING JURY						
3	3	450	W	M	Technology sales (43)	
4	18	688	W	M	foreign service officer and economist (72)	Would have been an alternate if Juror 1 was struck
5	19	272	W	M	Government counter-terrorism analyst (73-74)	
6	6	362	W	F	Reading teacher (second year) (46)	
7	26	733	W	F	nurse practitioner (84)	
8	35	916	W	F	Nanny (98)	
9	37	511	W	F	telecom training supervisor (100)	
10	41	212	W	F	private investigator (103)	
11	11	298	W	M	Child support enforcement office (58)	
12	12	800	W	M	Government assistant executive (59-60)	
13	44	625	W	F	nonprofit policy advocate (107)	
14	45	839	W	F	energy security nonprofit vice-president (108)	

GOVERNMENT STRIKES						
1	10	743	W	F	part-time real estate investigator (55-56)	Was a defense attorney in home country, including rape defense. (56)
2	14	603	W	M	Immigration work for government, former immigration lawyer (64-65)	Had a negative experience with aggressive police who were stopping vehicles for no reason. (64)
3	**13**	**238**	**B**	**M**	**former plumbing assistant, on disability (61)**	**Answered "no" to all *voir dire* questions. (61-62)**
4	16	491	W	M	college admissions officer (68)	Was falsely accused of a drug crime, subjected to excessive force, and falsely arrested; sued the police. (67)
5	**28**	**565**	**Filipino (86)**	**F**	**Retired housekeeper (86)**	**Answered "no" to all *voir dire* questions. (85-87)**
6	**34**	**254**	**B**	**F**	**Cashier (97)**	**Answered "no" to all *voir dire* questions. (96-97)**
7	**53**	**683**	**B**	**M**	**Government vehicle technician (117)**	**Answered "no" to all *voir dire* questions except that he misheard question about law enforcement employment. (117)**
8	**31**	**802**	**H**	**M**	**Full-time student in project management and administration; café server. (92)**	**Answered "no" to all *voir dire* questions. (91-92)**
9	54	258	W	M	retired musician and songwriter (118)	

10	8	684	W	M	Government desk attorney (49-50)	Interned at public defender's officer; sister convicted of several crimes. (49-51)
Alt	**1**	**721**	**B**	**M**	**Internet technology marketing (39)**	**Answered "no" to all voir dire questions. (39) Strike withdrawn after *Batson* challenge**

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

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

(a) the acronym "SS#" where the individual's social-security number would have been included;
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(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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/s/ Sean R. Day
Signature

18-CO-0289
Case Number(s)

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