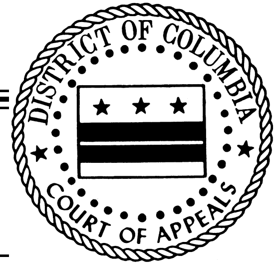

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18-CO-0289 & 20-CF-0190

**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 REPLY BRIEF OF APPELLANT

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COMPLIANCE WITH PAGE LIMITATION

This brief is 18 pages exclusive of statements, tables, and addenda required by Rule 28(a)(1)-(4) and Rule 28(f).

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REPLY ARGUMENT

The government announces that after hundreds of years, by 2012 racism was vanquished in the District. (Govt. Br. at 36 n.18.) Therefore there was nothing "racially charged" about the case or worrisome about having twelve white persons judge a black man accused of forcibly raping a young white woman. But the government at least concedes that in *Tursio v. United States*, 634 A.2d 1205, 1211 (D.C. 1993), the court concluded that "heightened scrutiny" must be applied on a *Batson* challenge in a racially-charged case even in the District, noting that all racial discrimination must be eliminated from jury selection, not just discrimination that is overt or insidious. "The strength of the prima facie case, not the location of the trial, must dictate the level of scrutiny the trial court should exercise." *Id.* This court recognizes that "race is an impermissible factor in jury selection even if … the prosecutor was not motivated by racial animus …." *Harris v. United States*, 260 A.3d 663, 669 (D.C. 2021).

Nor is this court required to find that there was racial discrimination; it is enough to show that "a more probing inquiry … was required." *Harris* at 681; Opening Br. at 19.

The government tries to bolster the trial court's inaction by pointing out that competent counsel litigated an ineffectiveness of counsel claim and "in none of his ... pleadings ... did Smith raise any claims alleging error in connection with the *Batson* challenge." (Govt. Br. at 23.) The most likely explanation is that post-trial counsel concluded, as we argue in this appeal, that trial counsel sufficiently raised a *Batson* challenge. On that point, either the division opinion in this case or the *Harris* opinion adopted the correct approach. The *Harris* opinion adopts the correct approach for racially charged cases. Not only was this a quintessential racially charged case, but every single juror of color was struck. Under the facts here, a trial judge cannot simply sit on his hands.

In racially charged cases such as this one it is the trial court's "duty" and "oblig[ation]" to undertake with "the closest possible scrutiny" "a rigorous evaluation" and "sensitive inquiry" of each strike, "ask questions," "prob[e] the prosecutor," "engage in [a] comparative juror analysis," consider circumstantial evidence, and "evaluate the explanations" "in the entire context of the case." *Harris* at 676-87. Such cases demand "the closest possible scrutiny" on appeal as well. *Id.* at 680 (quoting *Jefferson v. United*

States, 631 A.2d 13, 15 (D.C. 1993)).

This court in *Harris*, fulfilling its duty to apply "the closest possible scrutiny," conducted two side-by-side comparisons not raised by trial counsel. *Harris* at 678-79 ("a side-by-side comparison of Juror 924 and Juror 395 called for skepticism about the prosecutor's proffered explanation regarding Juror 924[] …") and 680 ("a side-by-side comparison *would have* cast doubt on the prosecutor's first explanation [regarding Juror 038]") (emphasis added). This approach has been followed repeatedly by the Supreme Court.[1] At odds with the Supreme Court cases and *Harris*, the division in this case was "reticent" to add to the effort of the beleaguered trial counsel, on whom the court placed the sole obligation to "undermine the basis for the government's strikes." *Smith v. United States*, 288 A.3d 766, 779 (D.C. 2023).

As mentioned in the opening brief, the Supreme Court has

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[1] *Flowers v. Mississippi*, 588 U.S. 284, 331-14 and 326, 139 S. Ct. 2228, 2250 and 2257 (2019) (scrutinizing a strike the defense did not challenge); *Snyder v. Louisiana*, 552 U.S. 472, 483, 128 S. Ct. 1203, 1211 (2008), (conducting "retrospective comparison of jurors" "not raised at trial"); *Miller-El v. Dretke ("Miller-El II")*, 545 U.S. 231, 241, 125 S. Ct. 2317, 2325-26 (2005) (developing comparative analysis on appeal).

explained that the protections of *Batson* are not just for the defendant, but are also for the protection of jurors, the integrity of the judicial system, and the benefit of society overall. The cases cited by the government (Govt. Br. at 42) to argue that defense counsel must do everything and the trial court need not be the least bit involved were not *Batson* cases,[2] or lacked the racially-charged nature of this case and the disturbing pattern of striking every juror of color,[3] or do not support the government's argument.[4] The trial court here did not need to be an advocate, but it did

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[2] *Ruffin v. United States*, 219 A.3d 997, 1010 (D.C. 2019) (defense counsel failed to argue admission of a knife was prejudicial); *In re Jackson*, 51 A.3d 529 (D.C. 2012) (whether the trial judge could prosecute indirect contempt proceedings).

[3] *United States v. Houston*, 456 F.3d 1328 (11th Cir. 2006) was not a racially-charged case and not only did the prosecutor offer a legitimate reason for the strikes (criminal histories of family members), the prosecutor credibly stated that he made the strikes looking at his notes where he wrote "C" for conviction(s), without checking the race of the person, and offered his notes for inspection. The resulting jury still had five black persons.

[4] In *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018), a federal *habeas* appeal, the district court concluded the Mississippi courts were required to conduct a comparative analysis *sua sponte*. Finding no such *requirement*, the Fifth Circuit reversed, but noted that such comparative analyses was permitted on appeal for the first time as part of a totality-of-the-record review, as the Supreme Court conducted in *Miller-El II* and as the

need to be actively engaged.[5]

Mississippi Supreme Court did on collateral appeal. *Id.* at 839. Any *sua sponte* review merely requires an opportunity for the prosecution to respond, as has happened here. *Id.* at 844 ("Our holding today does not eviscerate *Batson* protections: We simply allow a prosecutor the chance to respond whenever the court engages in a comparative juror analysis.")

[5] In addition to *Harris*, s*ee, e.g., Cartwright v. State*, 962 N.E.2d 1217, 1221 (Ind. 2012) ("[T]he third [*Batson*] step — determination of discrimination — is the 'duty' of the trial judge."); *Jordan v. Lefevre*, 206 F.3d 196, 197-98 (2d Cir. 2000) ("[I]t is the duty of the trial court to inquire into the motivation for the peremptory challenge when a defendant makes a prima facie showing of racial discrimination in the prosecutor's pattern of peremptory strikes."); *Jessie v. State*, 659 So. 2d 169, 170 (Ala. 1995) ("*Batson* specifically recognized that ensuring the elimination of 'purposeful discrimination' was the duty of the trial court."); *People v. Walker*, 47 Cal. 3d 605, 625, 765 P.2d 70, 80 (1988) (once a *prima facie* case is shown, "[i]t then becomes the duty of the trial court to make a sincere and reasoned attempt to evaluate the prosecution's explanation[.]") (citation and internal quotation marks omitted).

It is not unusual to obligate the court to safeguard the rights of non-parties (as in the case of *Batson* to protect the interests of jurors, the judicial system, and society). *See, e.g.*, *In re Access to Jury Questionnaires*, 37 A.3d 879, 887 (D.C. 2012) (court must protect privacy interests of prospective jurors); *Jackson v. United States*, 623 A.2d 571, 584 (D.C. 1993) ("incumbent upon the court" to ensure that witness-spouse is advised of spousal privilege); *Davis v. United States*, 482 A.2d 783, 785 (D.C. 1984) ("When a witness called by the defendant claims the privilege against self-incrimination, it is the duty of the trial judge — not the witness nor his counsel — to determine whether the witness can properly invoke the privilege."); *Waller v. United States*, 389 A.2d 801, 806 (D.C. 1978) ("It is the duty of the trial judge to maintain the integrity of trials by jury[.]")

Though the trial judge here was not merely passive; he was impatient and adverse. The government itself says so, describing the jury selection environment as "fast-paced" (Govt. Br. at 55 n.31) and "extremely hurried" (66). During the peremptory strikes, the government notes the judge "admonished the parties 'to move a little quicker.'" (66) The *Batson* challenge was no different, with the judge seeking to isolate and move through each challenge one at a time as if there was not a disturbing pattern and total exclusion. The most spirited inquiry from the trial judge occurred when the prosecution noted the defense had only struck white jurors; suddenly numbers mattered. (12/4/12 at 134-35.) When the government noted that it had planned a *Batson* challenge of its own, the judge was impatient: "Would you like me to excuse this panel to lunch so we can spend the rest of the day discussing this?" (136) The prosecution's response suggests they did not sense a welcoming tone but irritation and

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(citation and internal quotation marks omitted).

The trial judge's duties are broad whenever justice requires. "[I]t is not only the right but the duty of the trial judge to participate directly in the trial, including the propounding of questions when it becomes essential to the development of the facts of the case." *Womack v. United States*, 350 A.2d 381, 383 (D.C. 1976) (trial judge properly posed questions to witnesses); *see also, Long v. United States*, 940 A.2d 87, 100 (D.C. 2007) (citing *Womack*).

sarcasm ("No, Your Honor. Government will withdraw so we can get started."). The court then simply required the defense to deny the suggestion before rejecting the *Batson* challenge.[6]

The government describes the jury selection environment as so fast, hurried, and impatient that the prosecution team could not think of questions to ask jurors (Govt. Br. at 55 n.31) or figure out what jurors would go where (Govt. Br. at 65-66), yet demands that the defense have put together a richly-detailed *Batson* challenge in that same environment. The government admits it resorted to guesses and approximations (*id.*) yet also wants one to believe it had a rational strategy for striking jurors that had absolutely nothing to do with race, not even subconsciously.[7]

The government describes the case as not a credibility battle, but one where the "science" got Mr. Smith convicted. (Govt. Br. at 35.) But Mr. Smith did not contest identity. Everyone knew before jury selection that

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[6] As noted in the opening brief, the prosecution left no one else to strike, but if both sides were striking based on race — in a racially-charged case no less — that would be more reason, not less, for the trial judge to get involved.

[7] The issue is not on a prosecutor's potential prejudice, but the defendant's right to a fair trial, *Harris* at 669, as well as the interests of jurors, the judicial system, and society.

identity would not be resisted. (See Opening Br. at 8-9 n. 4.) Since V.F. did not identify Mr. Smith, however, the government was expected to prove identity through the DNA analysis. A box to check, nothing more. While the defense strategy might have changed if the government decided not to put on the DNA evidence, it was at most a burden of production, not persuasion.[8]

Defense counsel's first words to the jury in opening were, "Ladies and gentlemen, Glenn Smith did not rape anyone. This is a case about consensual sex ...." (12/4/12 at 167.) While this was after the jury was selected, it surprised no one. Before the jury was selected, the expected consent defense was used to downplay the concerns regarding belated disclosure of witnesses whom Mr. Smith told the sex with V.F. was consensual (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." 12/3/12 at 139), and an issue regarding the SANE report (Government: "[S]ince the Defense has been consent and not DNA, I'm not

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[8] "[T]he success of Mr. Smith's consent defense rested centrally on whether the jury would find the accounts of the white alleged victim or the Black defendant more credible." *Smith v. United States*, 288 A.3d 766, 777 (D.C. 2023).

sure how this would be prejudicial ....” *Id.* at 153).

In addition to statements to others that the sex with V.F. was consensual, there was a police interview with Mr. Smith; both the videorecording and a transcript were admitted into evidence. (Admitted 12/11/12 at 84.) In the interview, after being told there was a DNA hit, Mr. Smith confirmed he had sex with V.F. (12/10/12 Smith at 39-40.)

With Mr. Smith’s statements to the police and others that V.F. consented to sex, it was not true, as the government claims, that “[t]he DNA evidence was the government’s sole proof that Smith was the [alleged] assailant.” (Govt. Br. at 20 and 53.) In selecting the jury, the government and defense were picking a jury for a case that was going to be about consent, not a DNA match.

The nurse examination report and expert testimony were about simple matters, such as whether the anal tears could have resulted from consensual sex (or a medical condition); the absence of blood; and the presence of semen. Both sides knew none of this was going to be as important as pitting the word of a white woman against a black man.

The claimed desire for an “educated” did not match the needs of the

case and did not match the strikes. The government dismisses the intelligence of the Hispanic juror because he attended "technical school instead of college." (Govt. Br. at 69.) He was in school full-time for project management and administration, from which the government concludes illogically that he was less able to understand scientific evidence than any college graduate regardless of the field of study. In addition to going to school full-time, the Hispanic student was a server at a bookstore café. (12/4/12 at 92.)

Meanwhile, the government supposes that in 2012 the prosecution team figured that the nanny must have been college educated, but points to 2016 regulations, which in addition to being promulgated four years after this trial, excluded nannies. *Sanchez v. OSSE*, 45 F.4th 388, 399 (D.C. Cir. 2022).

The government now, for the first time, also claims it wanted an "empathetic" jury, and thus did not strike the nanny or the second grade reading teacher (who misunderstood the same question as a black man, but unlike the black man was not booted for it). *Empathy for whom?* Not empathy for the black man accused of rape. Rather, empathy for the

alleged victim, who was, like both the nanny and the reading teacher, a white woman. Believing that persons of one race or another will be sympathetic to one's case lacks racial animus but is an equally prohibited basis for striking a prospective juror. *Harris* at 669.

The government claims that the challenges to the strikes of the Hispanic student and the Filipino retiree were withdrawn, but the record indicates defense counsel merely asserted his opinion that the *Batson* challenge should have prevailed on the four black jurors. ("Court: In order to support that you then group the one Hispanic and the one Asian American in order to come up with six? Defense Counsel: I believe with just the four individuals it would stand, Your Honor. ..." 12/4/12 at 127.) But also, the strikes of the Hispanic and Filipino persons do not have to be directly challenged to have value as supporting evidence that the prosecution struck the other four persons of color, or any one of them, based in part on race. The government also wonders how the race of these two persons mattered when they were not black. These two jurors might have had relatable experiences surrounding racial discrimination. Additionally, the Supreme Court had held that *Batson* is implicated

regardless of a match between the defendant and the person struck. *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364 (1991).

Similarly, the strike of the black alternate is evidence supporting the conclusion that the prosecution struck one or more of the other three black persons based in part on race.[9] That the prosecution struck every single person of color cannot be erased.

It is also misleading to suggest that defense counsel conceded that the government's proffered reasons for each strike were individually valid. (Govt. Br. at 2-3.) Defense counsel questioned the reasons cited but, as many judges and legal scholars have written, recognized that it is easy for anyone to conjure up a seemingly race-neutral reason for striking a

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[9] As explained in the opening brief, this is not a situation where an attorney caused or invited an error and now uses that error to his advantage on appeal. To the contrary, trial counsel fought for a *Batson* violation. But trial counsel could not have stopped the prosecution from withdrawing the strike of the alternate. Additionally, the government could have offered reasons for striking the Hispanic man and the Filipino woman, as it did for the black jurors (Prosecutor: "[The] Government is happy to provide race neutral reasons. I don't think that establishes a prima facie case, but we will nevertheless provide race neutral reasons." 12/4/12 at 128.) The government has also had the opportunity to proffer reasons on appeal that are supported by the record. *Chamberlin*, *supra*.

The division opinion in this case misapplied the invited error doctrine.

juror, such that isolating and analyzing each strike as if the other strikes did not happen was not the appropriate way for the trial court to review the strikes. It was the disturbing accumulation of strikes against every person of color and the racially-charged nature of the case that were calls to attention and the "the closest possible scrutiny."

The government prides itself in pointing out that it did in fact strike a white person who — like every person of color it struck — answered *No* to every *voir dire* question. (Govt. Br. at 55 n.31.) But the government fails to mention that by the time that person was struck with the ninth selection, every person of color was already eliminated so they could not have struck anyone but a white person.

The government correctly notes that the court should consider statistics; disparate questioning; side-by-side comparisons; the prosecution's misrepresentations of the record; history of strikes; and other relevant circumstances. (Govt. Br. at 26-27, citing *Flowers*.) One must bear in mind that conclusively proving discrimination in a racially-charged case should be "easier" than in other cases. *Powers v. Ohio*, 499 U.S. 400, 416, 111 S. Ct. 1364, 1373-74 (1991); *Tursio v. United States*, 634 A.2d

1205, 1211 (D.C. 1993); *(Edwin) Smith v. United States*, 966 A.2d at 367, 375 n.12 (D.C. 2009). Although it may be that statistics alone will not usually prove discrimination, a highly unusual statistical pattern, with an alarming result (an all-white jury in a racially-charged case), may be an exception, or at the very least close to conclusive in need of only the smallest boost. *Batson v. Kentucky*, 476 U.S. 79, 93, 106 S. Ct. 1712, 1721 (1986); *Miller-El v. Cockrell ("Miller El I")*, 537 U.S. 322, 342, 123 S. Ct. 1029, 1042 (2003) (where the government used ten of fourteen strikes against black persons, "[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'").

The prosecution's strikes also fail a side-by-side comparison. They kept the white nanny (even though she had a public defender friend) and struck a black plumber's assistant. They struck another black person because, they claim, he did not understand a complex 143-word question, but kept a white person who was similarly confused by the same question. The government asserts that this white panel member, who had a friend practicing civil law not criminal law as was asked, "on her own initiative

immediately qualified her answer." (Govt. Br. at 59 n.34.) But that juror was prompted into correction by the judge's question: "And you answered the law enforcement defense attorney question with a yes. Why'd you answer that a yes?" (12/4/12 at 46.) The government struck a well-educated Hispanic student working part-time at a bookstore café and the best they can respond is that he did not have the right kind of education.

The government further argues that one could not surmise that the person who "kept government vehicles going" was a vehicle technician (the prosecution did not bother to get clarification), or that he or the plumber's assistant had any training relevant to DNA analysis. (Govt. Br. at 57.) But there was no information about any of the white potential jurors, with the exception of a nurse practitioner, to indicate they had any such specific training either. (See Chart of Jurors in addendum to Opening Brief.) Like the Hispanic juror who did not have the *right kind* of education, the government's argument is that these black jurors did not have the *right kind* of intelligence. But in reality the government was not looking for an intelligent or educated jury because this case was about credibility, not science.

The government claims that defense counsel in *Harris* did more than defense counsel here. In *Harris*, the defense counsel relied on the disparity of the strikes, and further noted that three of the black women — like all of the persons of color struck here — responded *No* to all of the *voir dire* questions. *Id.* at 670. In this case, there was no need to add up the number of persons of color who answered *No* to all questions because it was all of them.

In *Harris*, the prosecution gave more detailed reasons for striking persons than happened here, and the defense did little on a one-by-one basis. The prosecution claimed it struck Juror 214 because she rolled her eyes in response to one of the charged being mentioned, and worked at a public school; the defense argued that the number of strikes against black women suggested the reasons were pretextual. *Id.* at 672. The prosecution claimed it struck Juror 924 because she did not understand a question, seemed uninterested in being there, and had the American flag depicted on her shirt; the defense merely responded that it did not recall the juror being confused by the question and asked if the transcript could be reviewed. *Id.* The prosecution claimed it struck Juror 038 because she did

not seem interested to be there, displayed a negative attitude, was confused when it was her turn to approach the bench, and seemed closed off to inquiry; the defense responded generally that others were confused about their turn to approach the bench and vaguely asked the court to "look at the record." *Id.* at 673.

The trial court in *Harris* correctly assessed that defense counsel's argument was really about the numbers, that "all counsel had provided 'really is the numbers and the disparity.'" *Id.* at 673. Defense counsel did not disagree, repeating the disparity argument and again reciting the numbers. *Id.* As noted above, this court in *Harris*, fulfilling its obligation to apply "the closest possible scrutiny" on appeal, conducted two comparative analyses that were not raised in the trial court.

The government in this case suggests there was a credibility determination in the *Batson* review (Govt. Br. at 27-28, 32, 33), but points to nothing in the record to suggest the trial court based the "credibility determination" on anything other than the prosecution's ability to come up with racially-neutral reasons (Step 2 of the *Batson* analysis). The government cites five pages of the transcript (12/4/12 at 131-35) without

singling out anything that would support a credibility determination. A review of the transcript reveals nothing of the sort happened.[10]

At least one or more of the prospective jurors was struck due to race. Alternatively, the trial court failed to apply the correct legal analysis in failing to closely scrutinize the government's stated reasons. The convictions must be reversed and the case remanded for a new trial.

SIGNATURE OF COUNSEL

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[10] "I will accept the Government's reason that this is a race based neutral reasons for the strike. ... [T]he Government [has] assured that this was not based on race. I will accept the Government's representation." (135) While the trial court referred to the reason(s) as "credible," it only reviewed each strike for facial credibility in isolation without considering, as defense counsel repeatedly urged, the aggregate of strikes, and never attempted a comparative review.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **En Banc Reply Brief** has been served electronically, **June 14, 2024**, by the Appellate E-Filing System, upon:

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