SECOND CORRECTED EN BANC CONSOLIDATED BRIEF
APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 18- CO-289 & 20-CF-190

GLENN A. SMITH, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

MATTHEW M. GRAVES
United States Attorney

* BRIDGET M. FITZPATRICK
Principal Assistant U.S. Attorney

ELIZABETH H. DANELLO
AMY H. ZUBRENSKY
NICHOLAS P. COLEMAN
D.C. Bar #460109
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Nicholas.Coleman@usdoj.gov
(202) 252-6829

Cr. No. 2011-CF1-13068

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Other References

ISSUE PRESENTED

Whether the trial court clearly erred in denying appellant Smith's challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), where the court credited the prosecutors' race-neutral reasons for their peremptory strikes, and where the evidence that Smith seeks to present for the first time on appeal does not establish that those reasons were pretextual.

INTRODUCTION

In the early morning hours of June 13, 2010, 22-year-old V.F. was making her way home from a party when she was grabbed from behind, forced to the ground, and vaginally and anally raped in the dirt by a stranger. The violent sexual assault left visible injuries noted by a sexual assault nurse examiner (SANE). Although V.F. immediately reported the rape to the police, she never saw her assailant's face and could provide no useful description of him. The case accordingly remained unsolved for almost a year, until a DNA profile from semen found in swabs of the victim's genital area was entered into the Combined DNA Index System (CODIS) and found to match the DNA of appellant Glenn Smith.

Smith was indicted and charged with, inter alia, two counts of first degree sexual abuse. When the case proceeded to trial and jury selection was nearly concluded, Smith raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), complaining that of the government's 10 peremptory strikes, five had been used on white prospective jurors, four on Black prospective jurors, and one each on an Asian and a Hispanic prospective juror. Because those strikes left an all-white jury, Smith insisted that he had made out a prima facie case of racial discrimination. Smith quickly withdrew his challenges to the strikes of the Asian and Hispanic jurors, however, and similarly abandoned his complaint about the strike of one Black

alternate juror after the government gave a race-neutral explanation but nevertheless offered to withdraw the strike.

With respect to the remaining three challenged strikes, the government again offered race-neutral reasons. Two strikes were based on the prospective jurors' professions: one was a former plumber's assistant on disability, the other a cashier and former hotel breakfast attendant whose dress the government further believed was disrespectful to the court. The third prospective juror was struck because he had misunderstood the court's question during voir dire as to whether prospective jurors had connections with law-enforcement agencies; the prospective juror had answered "yes" because of his job – in vehicle maintenance – with a clearly non-law-enforcement agency, the District of Columbia's Department of Public Works. As to each strike, the government was concerned about the prospective juror's ability to follow and understand the scientific evidence in the case.

The defense did not question the importance of scientific evidence to the case, and for good reason: in addition to the government's DNA evidence, which was the sole evidence linking the defendant to the crime, the heart of the planned defense case was the expert medical testimony of a colorectal surgeon, who opined, inter alia, that the victim had not suffered injuries consistent with rape and any injuries she had suffered were the result of other causes. Indeed, the defense ultimately conceded that the government's proffered reasons for each strike were individually

valid. The defense nevertheless argued that the strikes should be disallowed because of their aggregate effect. The trial court ultimately found no reason to discredit the prosecutors' explanations and denied the *Batson* challenge.

After spending years of post-trial litigation pursuing other issues, on appeal Smith argued that the trial court had erred in its *Batson* ruling. Smith's principal evidence of racial motivation was the fact that the three Black prospective jurors were all struck, which he sought to buttress by resuscitating the challenges he had withdrawn during jury selection (i.e., to the strikes of the Black alternate juror and the Asian and Hispanic prospective jurors). He further argued, for the first time on appeal, that the government's primary reason for the strikes – concern about whether jurors would fully understand the scientific evidence in the case – was pretextual, because the defense had conceded identity and rendered the DNA evidence unimportant. He also argued that the case was "racially charged" – V.F. is white, and Smith is Black – and as such, the trial court should have given the strikes heightened scrutiny by inquiring sua sponte about an unstruck white nanny, whose profession Smith insisted was similar to that of the plumber's assistant and cashier.

A Division of this Court (Chief Judge Blackburne-Rigsby, then-Associate Judge AliKhan, and Senior Judge Fisher) unanimously rejected Smith's claim. *(Glenn) Smith v. United States*, 288 A.3d 766, 776-79 (D.C. 2023). In its carefully reasoned opinion, the Division held that the case was "racially charged" and thus

required heightened scrutiny of the government's strikes, but it ruled that Smith had abandoned any argument as to the challenges he voluntarily withdrew. *Id.* at 777-78. As for the three remaining challenged strikes, the Division found that Smith had failed to raise the issue of the nanny or offer any meaningful rebuttal to the government's legitimate, race-neutral reasons before the trial court. *Id.* at 778-79. Smith accordingly had not demonstrated clear error in the trial court's finding that the prosecutors' explanations were credible and did not violate *Batson*. *Id.* at 779.

Smith, joined by amici the Public Defender Service (PDS) and the NAACP Legal Defense & Education Fund, Inc. (LDF), now asks the en banc Court to overturn the Division's judgment. Although we acknowledge and embrace the vital importance of ensuring that no juror is prevented from serving on account of race, nothing of the kind occurred in this case. Smith and amici rely on statistical "evidence" from a sample size far too small to prove racial motivation; they give short shrift to the government's entirely legitimate concerns about the complexity of the scientific evidence in the case and the desire for jurors best equipped to evaluate it; and they seek to shift to the trial court the defense's ultimate burden, as the opponent of the strikes, to establish racial motivation. Because Smith has never come close to meeting that burden, the Court should affirm.

COUNTERSTATEMENT OF THE CASE

On October 24, 2012, Smith was charged by superseding indictment with, as relevant here, two counts of first degree sexual abuse (forced penetration of the vulva and anus) (D.C. Code § 22-3002(a)(1)), and attempted robbery (D.C. Code §§ 22-2801, 22-2802) (Record on Appeal (R.) 35). A jury trial was held December 4-12, 2012, before the Honorable Thomas J. Motley (R.A at 27-33). On December 12, 2012, the jury found Smith guilty of both counts of first degree sexual abuse but acquitted him of attempted robbery (R.53; 12/12/12 Transcript (Tr.) 3).[1]

While awaiting sentencing, Smith filed pro se and represented motions for a new trial, claiming ineffective assistance of trial counsel (RR.54, 55). On April 11, 2014, while the new-trial motion was pending, the trial court sentenced Smith to concurrent terms of 25 years' incarceration on each count, and five years' supervised release (4/11/14 Tr. 69-70; R.82). Smith did not note an appeal after sentencing.

On February 13, 2018, after over five years of proceedings on Smith's new-trial motions (see R.A 55-61, 65-90), Judge Motley denied Smith's various postconviction claims (R.138). The trial court extended the time to file a notice of appeal under D.C. App. R. 4(b)(4), and Smith noted a timely appeal under the

[1] Where there are multiple transcripts for a day's proceedings, we identify the transcript by the court reporter's last name. The transcript containing Smith's trial testimony is identified as "12/10/12 (Excerpt) Tr.".

extended deadline (R.A at 91; R.139).[2] The Division affirmed Smith's convictions in a published opinion on February 2, 2023. *(Glenn) Smith*, 288 A.3d 766. Smith filed a petition for rehearing and rehearing en banc, and on November 28, 2023, the Court denied panel rehearing but granted rehearing en banc, vacating the Division's opinion. *(Glenn) Smith v. United States*, 305 A.3d 380 (D.C. 2023).

Relevant Pretrial Proceedings

The Defense Expert Notice

On June 22, 2012, the defense moved for a continuance of the trial date to allow it to obtain additional medical records and photographs of the victim's injuries for the purpose of presenting expert testimony (R.28; see 6/25/12 Tr. 2-4). At a June 25 hearing before the Honorable Robert E. Morin, the government, which opposed the continuance, noted that it had considered but decided against calling its own expert witness to discuss the victim's injuries; instead, the evidence of those injuries would be presented through the SANE who observed and photographed them (6/25/12 Tr. 4).[3] The defense argued that it needed an expert to "counter" testimony

[2] This first appeal was assigned a collateral-appeal case number, No. 18-CO-289. As Smith notes (at 7), Smith's first appellate counsel filed a second, "direct" notice of appeal on February 24, 2020, thus creating the additional appeal (No. 20-CF-190). This Court consolidated the appeals.

[3] Smith was represented at trial by Dan Gross and Kanita Williams, and the government by Assistant United States Attorneys Amy Zubrensky and Kenya Davis.

that V.F.'s injuries were significant and consistent with the allegations against Smith (*id*. at 7-8). Judge Morin granted the continuance (*id*. at 10).[4]

On September 27, 2012, the defense filed its expert notice, stating that it intended to present the testimony of Dr. Peter J. Wilk, a colorectal surgeon (R.31 at 1).[5] The two-page notice indicated that Dr. Wilk would testify, in essence, that the victim's injuries and medical condition were inconsistent with the allegations against Smith and that the medical professionals who had examined V.F. had done so deficiently (*id.* at 1-2).[6] In response, the government moved to exclude Dr. Wilk's

---

[4] The court asked trial counsel if identification was "going to be an issue in this case from [the defense's] point of view[,]" and counsel replied, "No . . . not *specifically*, Your Honor, I don't believe so[,]" noting that DNA evidence would be presented in the case (6/25/12 Tr. 9 (emphasis added)). The court replied, "Right. So it is going to be more in the nature of [a] contest as to whether or not actions were voluntary or not[?]" (*Id*.) Trial counsel responded, "Yes, Your Honor, *essentially*. That's why we feel that the medical testimony would-" (*Id.* (emphasis added).) The court interrupted, "Right. I got it." (*Id.*)

[5] Dr. Wilk's curriculum vitae is not contained in the existing record (see R.31 at 1). The notice stated that Wilk was a graduate of Yale University and New York Medical College, and had treated more than 50,000 patients since 1976, including "a great number of rape victims" (R.31 at 1). At trial, Wilk stated that he had completed residencies and fellowships at the Cleveland Clinic, Mount Sinai Hospital in New York, and with the U.S. Army (12/10/12 Tr. 37-38). He then practiced and/or taught at the State University of New York-Downstate Medical Center, Albert Einstein College of Medicine, and Beth Israel Hospital in New York (*id.*).

[6] Specifically, the notice stated that Dr. Wilk would provide the following opinions: "1. An absence of any injuries consistent with forced sex. 2. Any injuries to [V.F.] (including anorectal area) depicted in the photographs provided by the [g]overnment, medical records and SANE report [we]re common in nature and frequently seen and caused by various non-sexual reasons. 3. The complainant's

(continued . . .)

testimony, arguing, inter alia, that the defense expert notice provided insufficient information as to the bases and reasons for Wilk's opinions, making it "impossible for the government to prepare an effective cross-examination" (R.41 at 1, 5-11). The trial court subsequently ruled that the defense should provide the government with further detail about some of Dr. Wilk's opinions (11/16/12 Tr. 14-17).

On December 3, 2012, the Monday that trial was to begin, the government filed a motion in limine to exclude evidence of the victim's purported other sexual activity (R.46; see 12/3/12 (Etekochay) Tr. 1-2). As the government explained in its motion and at a hearing before Judge Morin that same morning, over the preceding weekend the defense had emailed the government with additional opinions of Dr. Wilk (R.46 at 2-3; 12/3/12 (Hawkins) Tr. 5, 13). Specifically, the defense now stated that Wilk would opine that the victim had pre-existing conditions, including a "superficial" anal fissure likely caused by hardened stool or excessive wiping; the HPV virus and genital warts; and leaking of stool or mucus due to engaging in

---

responses and results to medical tests and examinations were not consistent with the trauma alleged in this case. This includes but is not limited to the Glasgow Coma Scale, blood chemistry, and other tests performed. 4. The [s]tandard of [c]are in evaluating injuries related to alleged sexual abuse. 5. The failure of the medical professionals to comply with well-established protocol undermine[d] any finding of forced sexual contact. 6. [Wilk's] general observations as to what if anything [wa]s depicted in the photographs, SANE report (including diagrams), and medical records. 7. Dr. Wilk w[ould] also testify to the absence of any injuries or trauma to the anorectal and vaginal area of the alleged victim consistent with the allegations in this case." (R.31 at 1-2.)

repeated anal sexual intercourse (R.46 at 3; 12/3/12 (Hawkins) Tr. 5-7). The government argued that such late-disclosed testimony was barred by the District's rape shield law, which required, inter alia, that a defendant seek permission to introduce proposed evidence of a victim's purported past sexual history at least 15 days before the scheduled trial date (R.46 at 4 (citing D.C. Code § 22-3022(b)); 12/3/12 (Hawkins) Tr. 6).

Judge Morin agreed with the government that, to the extent Dr. Wilk's new opinions expressly or implicitly attributed V.F.'s injuries to her alleged prior sexual activity, it had been disclosed too late under the rape shield statute (12/3/12 (Hawkins) Tr. 12). The defense then offered to have Dr. Wilk remove specific references to the victim's alleged sexual activity or sexually transmitted diseases from his trial testimony, and attribute the victim's injuries or symptoms to unspecified pre-existing conditions (*id*. at 13-15). Judge Morin ruled that he would permit the expert testimony with that limitation (*id*. at 16-19). The defense warned, however, that the government might "open the door" to Dr. Wilk's opinions about V.F.'s alleged sexual history if, inter alia, it cross-examined Wilk about the causes of the unspecified "condition[s]" (*id*. at 14-15, 19).

After the case was certified to Judge Motley for trial later that day, Judge Motley conducted an extended discussion with counsel for both parties about the expected scope of Dr. Wilk's testimony; Wilk's qualifications to opine on the

victim's injuries; and what the government could permissibly ask him on cross-examination without (as the defense again warned) opening the door to what Wilk believed was the nature of the victim's purported pre-existing medical conditions (12/3/12 (Etekochay) Tr. 49-76, 96-103).

Jury Selection, and the Batson Challenge

Jury selection began the day after the hearing on Dr. Wilk's testimony (12/4/12 Tr. 1, 3). Judge Motley began voir dire by reading a list of questions to the venire in open court, and the prospective jurors were to note on index cards any questions to which they had positive answers (*id.* at 20-36). Then, each prospective juror came to the bench for individual questioning by the court (*id*. at 21-22, 36).

As later estimated by the government (without objection from the defense or correction from the court), Black jurors made up approximately one-third of the original, 67-juror venire (12/4/12 Tr. 136; see Supplemental Sealed Record (SR.) 3).[7] The court conducted individual voir dire of 57 prospective jurors, not reaching

[7] That estimate is the only evidence in the record as to the racial composition of the original venire, because the jury lists contained in the supplemental sealed record do not indicate the race, ethnicity, or genders of the jurors, but only their names, numbers, and "seat" or position numbers (see SRR.2-4). The peremptory strike form recorded the perceived gender and race of each juror so struck, but only for those jurors (SR.1). We have attached, as Addendum A to this brief, a chart showing the original position number, juror number, and profession of each of the 57 jurors questioned at the bench; whether the government asked questions of the juror

(continued . . .)

the remaining 10, and struck 21 for cause, leaving 36 qualified venire members (12/4/12 Tr. 39-124).[8] The defense subsequently asserted (without objection from the government or correction from the court) that four of the 36 qualified jurors were Black, one was Hispanic, and one was Asian (*id*. at 125-28). Of its 11 peremptory strikes (including one alternate), the government struck five white jurors, four Black jurors (Nos. 238, 254, 683, and 721), one Hispanic juror (No. 802), and one Asian juror (No. 565) (SR.1; 12/4/12 Tr. 125-126).

After peremptory strikes, the defense raised a *"Batson* issue," asserting that the government had eliminated all of the Black jurors from the qualified venire, as well as the lone Hispanic and Asian jurors (12/4/12 Tr. 125). The court asked whether the defense was "grouping" the Hispanic and Asian jurors with the four Black jurors to make out his *Batson* challenge; defense counsel clarified, "I believe with just the four individuals it would stand, Your Honor. The number is four

---

(defense counsel did not ask any questions); and whether the juror was struck for cause, struck peremptorily, or seated in the final jury (including the seat number).

[8] Judge Motley asked each of those 57 prospective jurors (except for a few jurors whose answers to the open-court questions indicated that they would have to be excused for cause) to state his or her profession, and where in the District he or she lived (12/4/12 Tr. 39-123). The remaining 10 prospective jurors who were not questioned at the bench were eventually excused (*id.* at 142).

because that – it was the number of [B]lack males or [B]lack individuals in this jury pool. I believe." (*Id*. at 127-128.)

After the court asked the government for its response, the government disagreed that the defense had made out a prima facie case under *Batson*, but it offered to provide race-neutral reasons for the strikes (12/4/12 Tr. 128). First, the government explained that it struck Juror 238 because "because he was a plumber's assistant and we're concerned about the level of scientific evidence in this case. We do not feel that profession that he would be able to understand the scientific testimony." (*Id*. at 129.) Second, the government had a "similar issue" with Juror 254, namely "her profession . . . [c]ashier and breakfast attendant and the cashier job she had for 90 days"; the government also "thought her dress was very disrespectful to the court" (*id.*).

Third, with respect to Juror 683, the government was "concerned that . . . he didn't understand" the voir dire question asking whether any jurors had a connection to law enforcement (12/4/12 Tr. 129).[9] Juror 683 had answered yes, but only because

[9] That question asked whether the juror, members of the juror's immediate family, or close personal friends "ever worked for any local state or federal police force, investigative agency or Department of Corrections[,] . . . 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 Tr. 27-28).

he worked for the D.C. Department of Public Works (DPW) (*id.* at 117, 129).[10] The prosecutors "felt that that was not showing a level of understanding of even that fairly basic question" (*id.* at 129-130).

Finally, the government explained that it struck Juror 721, an alternate, "because [striking that juror] brought into the number one position a person who had a friend in the Maryland prosecution's office, worked in energy security, had a Brown University affiliation and we just preferred that juror" (12/4/12 Tr. 130).[11] The court and the government then had the following exchange:

> The Court: So there was no basis for striking that alternate number one except you wanted the other alternate?
>
> [Prosecutor]: Yes, Your Honor.
>
> The Court: You like that one better?
>
> [Prosecutor]: If the Court is concerned, I will withdraw the strike.
>
> The Court: Okay. You withdraw on that issue?

---

[10] When the court had asked Juror 683 why he had responded yes to the question, the juror responded, "It say either you or family work for state or local or state [sic]. That's what I answered." (12/4/12 Tr. 117.) The court stated, "That says police force. Anybody work for police force?" (*Id.*) The juror replied, "No, I work for DPW" (*id.*). The court asked what the juror did for DPW, and he responded, "Help keep the vehicles going" (*id.*).

[11] The government evidently was referring to Juror 839, who was a vice-president for policy for an energy security nonprofit and previously worked at the National Academy of Sciences (see 12/4/12 Tr. 107-09). As we discuss infra in text at 65-67, the government believed (apparently incorrectly) that Juror 839 would have been the next juror in the panel to move into the jury box.

> [Prosecutor]: I don't think it's a race-based issue, however. It's a totality of circumstances based on who the individuals were.
>
> The Court: That was just a preference, but you withdraw it.

(*Id*. at 130-31.)

After the government gave its race-neutral reasons, defense counsel argued that he did not "think that of the strikes that were made who were [B]lack individuals, saying that they were too unintelligent to serve on a jury, I don't think that's an effective reason to withstand that 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. And Your Honor – as Your Honor said the one which they withdrew had no basis –" (12/4/12 Tr. 131.) The court noted, "The [g]overnment . . . withdrew that saying[,] 'I didn't strike them for any particular reason, it's because I wanted the second alternate to be the first alternate.' They withdrew that. You have no objection to that?" (*Id.*) Defense counsel replied, "No, Your Honor" (*id.*).

The court, after noting that only three strikes were now at issue, then had the following exchange with the defense:

> The Court: . . . You have to admit that the person who got up here and did not understand where it said he was reading I work for District of Columbia Government and I said law enforcement that the [g]overnment had a basis for striking that person. I don't think you

could say that person – because that person's [B]lack they couldn't strike that person for that answer. Is that what you're saying?

[Defense counsel]: I think that –

The Court: Just talking about him.

[Defense counsel]: Individually him I think that could have a basis.

The Court: Okay. So that one surely passes [m]ust[er].

[Defense counsel]: Individually, Your Honor.

. . .

The Court: She's given a reason which you seem to agree with so we're down to two. The cashier who had the job for 90 days. She's – that's a race neutral reason. You might say you shouldn't strike the person because the person is [B]lack, but that is a racial neutral reason. And then there's one more, that's number 13. Thirteen is plumber person. . . . So we have – we're down to the plumber's assistant and at most the cashier. And she said – and you're saying that I should at this point not accept their reason, is that what your argument is?

[Defense counsel]: 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 the totality of the selections.

The Court: No, you're looking at the totality of the makeup of the jury and that's your premise of saying it is racially based because a lot of [B]lacks weren't on the jury.

(12/4/12 Tr. 131-34.)

The court then observed, "[O]ut [ ] of the first ten strikes they struck three [B]lack people and you say that makes out the prima facie case, and your rationale has to be they were the only [B]lack people on the regular panel. Is that what your

rationale is?" (12/4/12 Tr. 134-35.) The defense responded, "Yes, Your Honor" (*id*. at 135). The court opined, "So, therefore, they couldn't strike them because to strike them makes a prima facie case of no [B]lacks being on the jury, and I don't think the nature of this is to guarantee a certain number of [B]lacks that would be on the jury" (*id.*). Counsel conceded, "No, Your Honor" (*id.*).

The court "question[ed] whether" the defense had made out a prima facie case under *Batson*, but "[a]ssuming arguendo that" it had, the court "accept[ed]" the government's race-neutral reasons[,]" finding "that the reason that the [g]overnment g[ave] [wa]s a credible reason" (12/4/12 Tr. 135-36).

The court further explained:

> 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. I believe the process here was done racially neutral, so, therefore, I will not, in essence, tell the [g]overnment they cannot use those strikes because those strikes were used in a racially neutral way. . . .
>
> I do not think that the policy here was to eliminate African-Americans from the jury . . . . It happens to [b]e that many were excused for cause and that the government then has the burden of making decisions. I cannot find that those decisions were based on race. So I will deny the motion." (12/4/12 Tr. 137-139.)

The Trial

The Government's Evidence

On the evening of June 12, 2010, V.F. attended a party on Garrison Street, NW (12/4/12 Tr. 212-213). At around 2:30 a.m., V.F. left the party and walked to

Wisconsin Avenue to catch a taxi (*id.* at 214). Finding no unoccupied taxis, V.F. continued south on Wisconsin Avenue (12/5/12 Tr. 241-42). Feeling an urgent need to urinate, V.F. relieved herself in a wooded area behind a building (*id.* at 242).

As she stood up to leave, a stranger grabbed her arm and put her in chokehold, leaving her unable to scream (12/5/12 Tr. 242-243). The stranger asked her what she was doing there, whether she had kids, and how much money she had (*id.* at 244). Terrified, V.F. told him that she had only $15 and offered him her purse, but the man "said that it wasn't good enough so he would just have to get something else from [her]" (*id.*). He then pushed her face down on the ground and got on top of her, pulled down V.F.'s shorts and underwear, pushed her legs apart, and forcibly penetrated her vagina with his penis several times (*id.* at 244-45). He stated that when he was finished, "he was going to put his cock in [her] mouth and that if [she] bit him, he was going to kill [her]" (*id.*). After penetrating her vaginally, he said, "it wasn't good enough" and forcibly penetrated her anus several times (*id.* at 247, 249). V.F., who was in "excruciating" pain, protested and "tried to get away at first, but when he told [her] that he was going to kill [her], [she] just tried to be still because [she] didn't want to aggravate him more" (*id.* at 249-250). When the assault ended, the man took V.F.'s underwear, wiped her genitals with it, and ran off (*id.* at 249-50).

V.F. ran back to Wisconsin Avenue and hailed a cab to a gas station, where she called the police (12/5/12 Tr. 249-50). The gas station attendant testified that

when V.F. entered the station, she was "weeping" and "scratching her face," her hair was disheveled, and she said, "police, police" (12/4/12 Tr. 181-182, 185). Officer Shannon Williams responded to the gas station, where she observed that V.F. was "scared" and "traumatized" and had dirt on her clothing, legs, and face (*id.* at 190-91). V.F. reported the sexual assault and showed the officer where it had occurred (*id.* at 195-196). The officer saw "wet dirt" where V.F. said she had urinated, and noticed that V.F.'s shorts were wet in the crotch and buttocks area (*id.* at 197, 201).

V.F. was taken to a hospital, where she underwent a sexual assault examination (12/5/12 Tr. 255-56). Anita Moses, the SANE, saw dirt on V.F.'s clothing, and that her hair was disheveled (*id.* at 301). Moses saw dirt and blood in V.F.'s perineum and anal area and a tear in her anal wall (*id.* at 309-10, 315, 345). Moses collected V.F.'s shorts, which had red stains described by Moses as "blood" in the inside rear crotch area, and secured them with the rape kit (*id.* at 301, 304).

Moses took swabs of V.F.'s genitalia and anal area and secured them in the rape kit (12/5/12 Tr. 319-322). The kit was later submitted for forensic testing (*id.*). Lesley Eschinger, an expert witness in forensic science and serology, testified about forensic serology in general, the chemical tests for the presence of semen that she conducted in this case, and her findings that identified semen in the swabs of the victim's external genitalia, thighs, perianal, and anorectal areas (*id.* at 386-92).

Candice Larry, also a forensic scientist, was qualified as an expert witness in forensic science and DNA analysis (12/5/12 Tr. 402-03, 406). Ms. Larry testified about the nature of DNA, how DNA evidence is tested, what results can be obtained and how to interpret the significance of those results (*id.* at 410-23). She testified that she obtained DNA profiles of V.F. and an unknown male from the rape kit swabs and compared the unknown male profile to the DNA profile of Smith (*id.* at 426-39). Larry testified that Smith's DNA profile matched that of the unknown male contributor, and calculated that the probability of randomly selecting a person out of various U.S. ethnic populations with the same DNA profile as Smith at the 15 tested loci was approximately one in 270 quintillion of the African-American population, one in 120 quintillion in the U.S. Caucasian population, and one in 520 quintillion in the U.S. Hispanic population (*id.* at 439-40). Larry used a 20-slide PowerPoint presentation (Government Exhibit (Govt. Exh.) 44) as a demonstrative aide to help explain DNA and DNA testing (*id*. at 407, 410-23, 425). She further used four slides (Govt. Exhs. 45-48) that showed the DNA profiles of Smith, V.F., and the contributors to the evidentiary samples, as well as the statistical probabilities of a random match to Smith's DNA profile (*id.* at 409, 437-38, 441).[12]

[12] We are moving to supplement the publicly available record on appeal with a copy of Govt. Exh. 44, and redacted copies of Govt. Exhs. 45-48; we are further moving to file under seal unredacted copies of Govt. Exhs. 45-48.

V.F. never identified the defendant – not on the night of the crime, at any lineup, in any photo array, or at trial. The DNA evidence was the government's sole proof that Smith was the assailant.

The Defense Evidence

Dr. Wilk testified that, based on his review of the SANE report, there was nothing indicating that the victim had "suffered any significant damage or injuries" (12/10/12 Tr. 44-45, 49). He opined that the photographs taken by the nurse examiner of V.F.'s vaginal area showed no sign of "acute trauma," but only a "preexisting lesion" (*id.* at 53). He acknowledged that the photographs of the victim's anal area showed "a number of abnormalities[,]" but opined that they were "all chronic[,]" i.e., pre-existing conditions (*id.* at 55-56). He thus attributed the fact that V.F.'s anal area was "quite reddened" to "preexisting leaking of mucus and stool from the . . . rectum"; characterized "multiple black spots" seen in the photographs as "consistent with chronic lesions growing around the rectum"; and described the "significant tear" in V.F.'s anal area as "an anal fissure which is a very common condition that people get, actually primarily women, usually from constipation" (*id.* at 55-56). Dr. Wilk testified that when he had observed persons alleging forced anal sex, they had different injuries from the laceration seen in V.F., namely "superficial" anal tears "extend[ing] in a radial fashion[ ]" (*id.* at 133-34). He further claimed that he could not see any liquid, blood, or debris in the photographs of the victim's anal

area despite that having been noted in the SANE report (*id.* at 58). Dr. Wilk also criticized the SANE examination conducted in this case, opining that the examiner had "omitted" several steps he believed "proper" (*id.* at 60).

Smith, testifying in his own defense, claimed that he saw V.F. on Wisconsin Avenue as he was driving home (12/10/12 (Excerpt) Tr. 6). According to Smith, V.F. told Smith that she was waiting for a cab, and he offered to wait with her (*id.* at 6-7). V.F. accepted the invitation, Smith pulled over, and they eventually began flirting and kissing (*id.* at 7-8). When Smith "started caressing [V.F.]," V.F. stopped him and said that they "couldn't do th[at] right [t]here on the corner" (*id.* at 8). Smith then led her to the wooded area behind the water treatment plant, where they continued kissing and "caressing each other[']s bodies[ ]" (*id.* at 9). They then went to the ground and had consensual sex (*id.* at 9-10). When Smith was about to ejaculate, his penis "slipped out," and he "accidentally penetrated [V.F.] anally, which made her fall forward and jump and scream" (*id.* at 11). V.F. "got very upset" and accused Smith of assaulting her (*id.*). Smith told V.F. that she was "overreacting," and they argued (*id.*). The argument made Smith feel "uncomfortable[,]" so he walked away, followed by V.F. (*id.*). V.F. eventually stopped, and Smith drove home (*id.* at 12).

Smith was impeached with prior convictions for making false reports to law enforcement, theft by deception, false impersonation, and a weapons offense

(12/10/12 (Excerpt) Tr. 12, 28, 40). The government cross-examined Smith about a videotaped statement he gave to the police in July 2011 (*id.* at 29-40). Smith told Detectives Yvette Maupin and Alexander Mac Bean that, around the time of the offense, he had not engaged in any late-night encounters with women he had just met, and he adamantly denied that he had such an encounter on the night in question, stating, "no," "never happened, dude," "[i]t's not me[ ]," that he was "positive, 100 percent" (*id.* at 31-38). When Detective Mac Bean informed Smith that his DNA had been found, Smith changed course and said, "That means I had sex with a girl and gave her money[ ]" (*id.* at 39-40).

The Government's Rebuttal Evidence

To rebut the defense expert testimony, the government called expert witness Dr. Heather Devore, an emergency physician and the medical director of the District's SANE program (12/10/12 Tr. 160-66). Dr. Devore opined, inter alia, that her review of the photographs of V.F.'s vaginal area showed debris present and redness that appeared to be abrasions; the photographs of V.F.'s anal area also showed debris scattered in multiple locations, redness to the anus, blood, and abrasions; and the tear in V.F.'s rectum was an "acute" not "chronic" laceration, meaning that it had been recently inflicted (*id*. at 160-161; 12/11/12 Tr. 38-39, 42-45, 47-48). She also testified that it was common to find no apparent injuries to the

vagina after nonconsensual sex; and injuries from anal penetration did not present themselves in "radial" form or any other consistent pattern (12/11/12 Tr. 41-42, 48).

The Post-Trial Litigation

In late December 2012, while the case was pending sentencing, Smith filed his initial, pro se motions for a new trial, complaining that his counsel had been ineffective (RR.54, 55). Over the next five years, Judge Motley appointed and replaced several sets of post-conviction counsel for Smith,[13] received hundreds of pages of pleadings from the parties on Smith's claims, and held a seven-day evidentiary hearing concerning some of Smith's allegations against trial counsel (see, e.g., R.A 55-61, 65-90; RR. 71, 73-74, 76, 78, 84, 86, 98-101, 107, 111-12, 114, 117, 120, 129-31). In none of his pro se or counseled pleadings, however, did Smith raise any claims alleging error in connection with the *Batson* challenge.[14]

SUMMARY OF ARGUMENT

The trial court properly followed *Batson*'s three-step process and did not clearly err in finding that the government offered valid, race-neutral reasons for its

[13] Post-conviction counsel included Kia Sears and Mani Golzari of PDS, which had also represented Smith prior to Smith's retention of trial counsel, as well as highly experienced attorneys Stephen Kiersh, Michael Madden, and Brandi Harden.

[14] Notably, Ms. Harden instead raised a fair cross-section claim, asserting that trial counsel was ineffective for failing to object to the composition of the jury venire (R.117 at 13-15).

peremptory strikes. After the defense first raised its *Batson* challenge, and then affirmatively narrowed it to just the strikes of the four Black jurors, the trial court invited the government to explain its strikes. The government proffered reasons that this and other courts have recognized as race-neutral. Having heard those reasons, the court then gave the defense every opportunity to rebut them – but the defense neither identified any evidence in support of its position or argument beyond its general complaint that the strikes had removed all four of the Black jurors.

Smith's current arguments, all raised for the first time on appeal, fail to establish clear error. At the outset, even assuming this case was "racially charged," Smith – not the trial court – had the burden of establishing racial motivation in the government's strikes, and retains the burden of showing clear error before this Court. Smith's reliance on new factual claims is inconsistent with either burden, and denied the government the opportunity to respond to those claims and the trial court to evaluate and rule on them. Thus, to the extent that there are gaps in the record, those gaps are chargeable to Smith.

In any event, Smith did not carry his burden in the trial court and has not done so before this Court. Smith and amici err in arguing that statistical evidence alone – i.e., the relative improbability of random strikes producing the result that occurred here – was enough to prove racial motivation. Nor do Smith and amici establish any pretext in the government's strikes. They misconstrue the record in arguing that the

government's desire for jurors best equipped to evaluate the scientific evidence was pretextual; in fact, scientific evidence was central to the case and most of it was hotly contested. Similarly, the trial court did not clearly err in accepting the government's explanation that two jurors' professions, one juror's "disrespectful" clothing, and a third juror's misunderstanding of a voir dire question were the race-neutral bases for its strikes. Finally, Smith's argument that the government's failure to strike a white nanny proves that the profession-based concerns were pretextual fails to establish error. It is not self-evident that the nanny was at all comparable to that of the three stricken jurors, and the failure to make the comparison is attributable to Smith, who did not raise this argument in the trial court. Smith's remaining attempts at retroactive side-by-side comparisons also do not establish clear error.

ARGUMENT

The Trial Court Did Not Clearly Err in Crediting the Government's Race-Neutral Explanations for the Challenged Peremptory Strikes.

A. Standard of Review and Applicable Legal Principles

In *Batson v. Kentucky*, 476 U.S. 79, 88 (1986), the Supreme Court held that challenging potential jurors on account of race violates the Equal Protection Clause, emphasizing that "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." *Batson* outlined a "three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race."

Snyder v. Louisiana, 552 U.S. 472, 476-477 (2008). "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Id*. at 476. "[S]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question." *Id.* at 476 477. The reason given need not be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*. "[T]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder*, 552 U.S. at 477.

At the third stage, "the defendant is required to prove that the neutral reason offered is pretextual." *Haney v. United States*, 206 A.3d 854, 862 (D.C. 2019) (internal quotation marks and citation omitted). The Supreme Court has identified several categories of evidence that a defendant may present in support of a *Batson* challenge, including (1) "statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case"; (2) "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case"; (3) "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;" (4) "a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing"; (5) the "relevant

history of the State's peremptory strikes in past cases"; and (6) "other relevant circumstances that bear upon the issue of racial discrimination." *Flowers v. Mississippi*, 588 U.S. 284, 301-02 (2019). "The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual[,]" i.e., it must "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Id.* at 302-03. In conducting that evaluation, the trial court's "assessment of the prosecutor's credibility is often important[,]" because "'the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises'" the peremptory strike. *Id.* (quoting *Snyder*, 552 U.S. at 477). "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the [peremptory] strike." *Purkett*, 514 U.S. at 768; *see Haney*, 206 A.3d at 860 (same).

On appeal, "if the record indicates that race was a consideration in the prosecution's decision to strike even one black juror, appellant is entitled to reversal of his convictions." *Harris v. United States*, 260 A.3d 663, 669 (D.C. 2021). The reviewing court "looks at the same factors as the trial judge, but is necessarily doing so on a paper record." *Flowers*, 588 U.S. at 303. Because "the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Id.* (citation

omitted); *see also id.* (appellate review of the trial court's factual determinations in a *Batson* hearing is "'highly deferential'") (quoting *Snyder*, 552 U.S. at 479). Thus, "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, 552 U.S. at 477; *see also (Bobby) Johnson v. United States*, 107 A.3d 1107, 1112 (D.C. 2015) (same).

B. The Trial Court Properly Found No *Batson* Violation.

Judge Motley committed no procedural error in evaluating Smith's *Batson* challenge and did not clearly err in crediting the government's race-neutral reasons for its peremptory strikes. After Smith raised his *Batson* challenge, the trial court stopped the proceedings and asked the defense to clarify the scope of and basis for its challenge (12/4/12 Tr. 125-28). The defense then (1) affirmatively narrowed its challenge to the strikes of the three Black prospective jurors and one Black alternate, abandoning any challenge to the Asian and Hispanic prospective jurors; and (2) explained that the basis for the challenge was that the government had struck all of the remaining Black members of the panel (*id.* at 127-28).

Although the trial court "question[ed]" whether the defense had actually made out a prima facie case of racial discrimination, it nevertheless proceeded to the second step of *Batson* (12/4/12 Tr. 128, 135-36). The government then gave its reasons for each strike still subject to defense challenge (*id.* at 129-131). Each of

those reasons has been repeatedly recognized by this and other courts as a legitimate, race-neutral basis on which to exercise a peremptory strike.

First, the government gave a race-neutral reason when it expressed concerns about the "profession[s]" of Jurors 238 (the former plumber's assistant) and 254 (the cashier and former hotel breakfast attendant), in light of the scientific evidence in the case (12/4/12 Tr. 129). *See Nelson v. United States*, 649 A.2d 301, 311-12 (D.C. 1994) (affirming trial court's rejection of defense argument that government's "employment-related reasons" for peremptory strikes were pretextual); *see also, e.g.*, *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987) ("[e]xcluding jurors because of their profession . . . is wholly within the prosecutor's prerogative"); *Hall v. Leubbers*, 341 F.3d 706, 713 (8th Cir. 2003) (occupation is a permissible reason to defend against a *Batson* challenge); *Stanley v. State*, 582 A.2d 532, 537 (Md. Ct. Spec. App. 1990) (upholding government strikes based on jurors' occupations); *People v. Chism*, 324 P.3d 183, 221 (Cal. 2014) (a prosecutor "can challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected") (citation omitted); *see also (Edwin) Smith v. United States*, 966 A.2d 367, 381 (D.C. 2009) (rejecting defendant's argument that government's proffered desire for sophisticated jurors was pretextual in context of case, where charges involved potentially complex issues like constructive

possession and control of premises); *Williams v. State*, 991 S.W.2d 565, 572 (Ark. 1999) (prosecution "stated race-neutral bases for the challenges," which "were made to obtain a jury capable of understanding the complex evidence, particularly, DNA evidence"; state supreme court upheld trial court's finding that prosecutor's explanations were credible).

Second, the government gave a race-neutral reason in expressing additional concern about the "dress" of Juror 254, which the government described as "very disrespectful to the [c]ourt" (12/4/12 Tr. 129). *See, e.g., United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011) (such "trivial race-neutral criteria as hair length, facial hair, tattoos, or piercings" are legitimate under *Batson*'s second step) (citing *Purkett*, 514 U.S. at 768–69 (prosecution's reason for striking juror based on juror's appearance (i.e., long, unkempt hair, mustache and beard) was race neutral; such characteristics are not peculiar to any race)); *United States v. Swinney*, 970 F.2d 494, 496-97 (8th Cir. 1992) (no clear error in district court's finding that government's strike of juror based on his style of dress was race-neutral and not pretextual).

Third, the government appropriately expressed concern that Juror 683 (who worked for DPW) "didn't understand the law enforcement question[,]" which the government "felt . . . was not showing a level of understanding of even that fairly basic question" (12/4/12 Tr. 129-30). *See, e.g., Messiah v. Duncan*, 435 F.3d 186, 200 (2d Cir. 2006) ("A prosecutor may reasonably have qualms about a panelist who

fails to pay attention during voir dire."); *Wade v. Cain*, 372 F. App'x 549, 554 (5th Cir. 2010) (state court reasonably credited prosecutor's race-neutral reason for striking juror who failed to fill out questionnaire form and whose answers indicated that he "might not have been paying attention" to the court's voir dire questions); *United States v. Rodriguez*, 302 F. App'x 468, 470 (7th Cir. 2008) (discerning no clear error in district court's decision to credit the prosecutor, who "said [a] prospective [B]lack juror's inconsistent and repetitive answers during voir dire suggested he would have difficulty paying attention").[15]

And fourth, with respect to the first alternate, Juror 721, the government explained that it believed the strike would bring "into the number one position" in the panel Juror 839, who had a friend in the Maryland prosecutor's office, worked in energy security, and apparently was "affiliat[ed]" with Brown University (12/4/12

[15] Although LDF cites (at 10-17) numerous cases in which these or similar factors were held to be pretextual, that could be true of *any* facially race-neutral reason given for a peremptory strike. The fact that a reason was found to be pretextual in a different case does not mean that the same reason will be pretextual in all other cases.

We further note that LDF cites with approval the decisions of courts and legislatures in some states to ban entirely peremptory strikes based on reasons that LDF believes are too easily used as a cover for racial discrimination (see LDF Br. 10-13, 15, 17). Such a policy decision is best dealt with by this Court's rules committee or by the D.C. Council, after receiving comments from, e.g., members of the defense and civil bars as to the impact of such rules on their clients and practices. Moreover, it would be wholly inappropriate to retroactively impose such a rule in this case, where Smith has failed to show discriminatory purpose behind the government's strikes.

Tr. 130-31).[16] That too was a race-neutral reason. *See Haney*, 206 A.3d at 864 n.8 (finding "nothing inherently suspect about striking into the panel" to prevent "other people who[m] [the prosecutor] liked less . . . [from] moving into [the jury box]"); *see also, e.g., Harley v. State*, 671 A.2d 15, 19 (Md. 1996) (no clear error in trial court's crediting prosecutor's explanation that she struck two jurors in order to reach prospective jurors "further down on the venire whom the [s]tate preferred[,]" including a police officer).

Judge Motley carefully evaluated the government's articulated reasons under *Batson*'s third step, both by giving the defense a full opportunity to rebut the government's reasons, and by making key factual and credibility findings (12/4/12 Tr. 131-35). As to the former, defense counsel contested none of the government's factual assertions and did not cite any actual evidence that they were pretextual. Instead, after the government offered to withdraw the alternate strike – while continuing to insist that its reasoning was not racially motivated – the court asked defense counsel whether he objected, and counsel replied that he did not (*id.* at

[16] As PDS notes (at 7), Juror 839 did not orally state her connection to Brown University. Neither Judge Motley nor defense counsel objected or sought to correct the record on that point, however, suggesting that the government had inferred the connection to the school from something the parties and court had observed during individual voir dire (e.g., an item of clothing or water bottle with college logo), an observation that an appellate court is unable to discount on the cold transcript.

131).[17] For the remaining three strikes, defense counsel simply accused the government of "saying that [the jurors] were too unintelligent to serve on a jury," which counsel did not "think" was "an effective reason" (*id.*).

The court, however, noted that the government's stated concern was the "scientific testimony," and found ("[y]ou have to admit") that Juror 683's answer to the law-enforcement question indicated that he "did not understand" it (12/4/12 Tr. 131-32). Far from contesting that finding, defense counsel affirmatively admitted – twice – that "[i]ndividually" the government had a basis for the strike (*id*. at 132). Similarly, when the court asked about the remaining, profession-based strikes – which it correctly found were "racial[ly] neutral" – counsel again conceded that "individually" there was a "reason" for them, but retreated to the defense's "prima facie case" "based upon the totality of the strikes" (*id.* at 132-33). After confirming with defense counsel that the "prima facie case" was simply the bare fact that all of the Black jurors had been struck, the court correctly noted that *Batson* was not intended to "guarantee" the racial makeup of the jury (*id*. at 135). The court thus 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 (*id*). Given that

[17] Although defense counsel suggested that the court had found that the government's strike of the alternate juror was unjustified, the court corrected him, noting that the government's stated reason was simply that it had wanted a different juror "more amenable to the [g]overnment's rationale" (12/4/12 Tr. 131, 135-36).

such "determinations of credibility and demeanor lie 'peculiarly within a trial judge's province,'" *(Bobby) Johnson*, 107 A.3d at 1113 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)), and are "accorded significant deference," *Miller-El*, 537 U.S. at 339, the trial court's considered judgment must be affirmed. *See also United States v. Reynoso*, 38 F.4th 1083, 1098 (D.C. Cir. 2022) (affirming denial of *Batson* challenge where district court credited the government's explanation for its peremptory strike after giving appellant's trial counsel a chance to respond, and citing the fact that trial counsel "recognized the government's 'verifiable and legitimate explanation for striking'" three other struck jurors as "evidence of [the government's] sincerity in asserting its race-neutral reasons").

C. Smith's and Amici's Various Challenges Do Not Justify Reversal.

Smith, supported by amici, contends that Judge Motley clearly erred, because this was a "racially charged" case requiring "heightened scrutiny," and the judge failed to "participate actively" in *Batson*'s third step (Smith Br. 15, 19, 21, 25, 34-35, 40; see also PDS Br. 1, 9-20; LDF Br. 2-4, 6-7, 17-20, 24-25). Had it done so, Smith and amici assert, the trial court would have concluded that "the numbers" alone – primarily the statistical improbability that ten random strikes would have removed the four Black and/or the six non-white jurors – were "sufficient" to prove the government's racial motivation, or at least significantly undermine its race-

neutral reasons (Smith Br. 9-10, 15, 18, 23-31, 40-41; PDS Br. 18-19; LDF Br. 20-21 & Addendum A). They claim further that the government's proffered race-neutral reasons were pretextual, because (A) scientific evidence was largely uncontested or unimportant in this case, the government did not ask any jurors about their scientific knowledge, and it struck two jurors (Nos. 721 and 802) who were well-educated (Smith Br. 8-9, 15, 32-34; PDS Br. 1-5, 17, 21-23; LDF Br. 4, 10-15, 22-25); (B) the DPW employee's confusion about the law-enforcement question was understandable in light of its purported complexity (Smith Br. 11-12, 31; PDS Br. 24-25; LDF Br. 14-15); (C) the trial court made no specific finding about the cashier's dress (LDF Br. 3, 16-17, 23-24); (D) the government failed to strike a white nanny, whose profession Smith and amici argue was similar to that of the former plumber's assistant and cashier (Smith Br. 31-32; PDS Br. 22-23; LDF Br. 1, 14); and (E) the government's strike of the alternate juror did not actually move up the juror it said it would, but instead a white "barista," further casting doubt on the government's motives (Smith Br. 12-13; PDS Br. 7-8, 23-24; LDF Br. 1, 14).

At the outset, we question the weight given to the label "racially charged" in this case. Although the Division opined that this was a "racially charged" case, because it involved a white female victim and a Black male defendant in a rape case, *(Glenn) Smith*, 288 A.3d at 777, we note that science (i.e., Smith's own DNA), not V.F., identified Smith as the assailant. Moreover, this was not a case in which the

offense at issue involved allegations of racial animus or tension. *Compare, e.g., Tursio v. United States*, 634 A.2d 1205, 1210 (D.C. 1993) (charged offenses arose from fight between Black and Hispanic men); *Harris*, 260 A.3d at 676 (trial evidence included body-work camera footage showing interaction between white police officer and Black defendant, who accused the officer of illegally searching him and referenced his race during the interaction). Instead, the only basis in the record for concluding that the case was "racially charged" was the fact that Smith and the victim were of different races. In a city where the population is increasingly multiracial, that fact alone should not carry significant weight.[18]

---

[18] As the Division noted, there has been a "sordid history of racism in rape prosecutions" in our nation, *(Glenn) Smith*, 288 A.3d at 777; see Smith Br. 19; PDS Br. 19-20; LDF Br. 20 n.32, and thus the historical context of rape charges may be viewed as an additional source of concern. That said, the District in 2012 was far removed from the world of "Jim Crow" expressly invoked by Smith here (see Smith Br. 38-39), in which Blacks were systematically excluded from positions of authority within the justice system and thus Black defendants were especially vulnerable to baseless and retaliatory charges. The police force (MPD) that investigated the crime in this case was nearly 60 percent Black, *see* Metropolitan Police Dept., Annual Report 2012, at 2, 34, available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/2012_AR_1.pdf (last visited April 23, 2024), and the first responding police officer and responding detective in this case were Black. The U.S. Attorney for the District of Columbia at the time was Black, *see* List of U.S. Attorneys for the District of Columbia, available at https://en.wikipedia.org/wiki/United_States_Attorney_for_the_District_of_Columbia (last visited April 23, 2024), as were the trial judge in this case, one of the prosecutors, and one of Smith's trial attorneys. *Cf. (Edwin) Smith*, 966 A.2d at 379 ("The race of the parties and their counsel is one factor pertinent to whether a case is racially-charged."). Thus, although it is certainly true that *Batson* applies equally

(continued . . .)

In any event, Smith and amici each misapprehend Smith's burden, fail to identify any similar jurors that Judge Motley should have sua sponte compared one-by-one, and fail to show any clear error.

1. The Reliance by Smith and Amici on New Factual Challenges Is Inconsistent with Smith's Burden and the Clear-Error Standard of Review.

As the Division recognized, Smith presented to the trial court essentially *none* of the statistical evidence, side-by-side comparisons, and other factual arguments described supra (e.g., the nanny; the purported unimportance of scientific evidence; Smith's view of the DPW employee's answer; the lack of explanation as to the strikes of the Asian and Hispanic jurors; etc.) that he now presses on appeal. *(Glenn) Smith*, 288 A.3d at 778-779. Smith, of course, *could* have presented these issues, which would have permitted the government to respond and the court to make findings and resolve any factual disputes. Having failed to raise, much less establish, his current fact-based challenges in the trial court, Smith unsurprisingly cannot show clear error on appeal. *See (David) Brown v. United States*, 128 A.3d 1007, 1012 (D.C. 2015) (where defense counsel "merely made 'conclusory statements' that most

---

to the District as to "a Southern setting with a history of racial discrimination," *see Tursio*, 634 A.2d at 1211, Smith's case did not present the same degree of risk of racial injustice as the historical cases identified by the Division, Smith, and amici.

of the prosecutor's strikes were against [B]lack people" in response to government's race-neutral reasons, appellant "did not meet his burden under *Batson* to materially rebut the race-neutral explanations"); *Walker v. United States*, 982 A.2d 723, 732 (D.C. 2009) (although appellant was correct that the "record does show that the factual premise for some portions of the prosecutor's explanations was incorrect . . . [appellant's] counsel pointed out none of these discrepancies, and thus did not alert the trial court that further probing might be required. [Appellant] could not meet his burden at *Batson* step three . . . without challenging the factual basis of the prosecutor's explanations and pointing out inconsistencies."); *Nelson v. United States*, 649 A.2d 301, 311-12 (D.C. 1994) (defendant who failed to argue in the trial court that prosecutor's race-neutral reasons for a strike were "inconsistent with each other and unsupported by the record," but instead made only a "conclusory" argument below, failed to show clear error).

Supported by amici, however, Smith insists that he was under no obligation to fill in factual gaps because this was "a racially charged case," and hence the *trial court* had the burden to take steps to develop the record in support of his challenge (Smith Br. 34-35; PDS Br. 14-16; LDF Br. 17-19). He cites (at 34-35) this Court's decision in *Harris*, which held that in such a case, the trial court is required to "evaluate[ ] the prosecutor's explanations for her strikes with heightened scrutiny by examining each challenge in the entire context of the case and by probing the

prosecutor regarding why similarly situated persons were treated differently and assessing whether the differences highlighted by the prosecutor provided a 'sufficient, nondiscriminatory explanation, taking into account the strength of the prima facie showing of discrimination.'" *Harris*, 260 A.3d at 676-77 (quoting *Tursio*, 634 A.2d at 1212).

Even assuming arguendo that this was a "racially charged" case (but see 35-36, supra), Smith and amici err in suggesting that the "heightened scrutiny" called for by *Harris* operates as an escape hatch from Smith's burden of persuasion and the clear-error standard of review. *Harris* did not hold that a defendant may obtain reversal of his convictions merely because the trial court did not expressly conduct side-by-side comparisons of jurors that were never requested or address factual arguments that were never made. Rather, consistent with the applicable standard of review, *Harris* held that a trial court's factual finding of no discriminatory purpose as to a strike may be clearly erroneous where the existing record obviously refuted the prosecutor's proffered reasons and a side-by-side comparison based on that record revealed that the reasons applied equally to non-struck jurors who were otherwise similar. *See* 260 A.3d at 678-80 (noting that prosecutor's description of interaction with struck juror was incorrect; prosecutor did not explain why the message she noted on one struck juror's t-shirt was problematic; and her proffered description of a struck juror's voir dire responses appeared to apply equally to similar

non-struck jurors). By contrast, *Harris* upheld the trial court's finding as to a strike where, inter alia, a side-by-side comparison with an unstruck juror suggested that the government's proffered reason was equally applicable to that juror, but an additional (albeit unstated) reason why the government might have preferred the unstruck juror was "apparent on the record." *See id.* at 677 (no "clear err[or]" where, although government's proffered reason – the struck juror worked for a public school – might have applied to an unstruck juror, that unstruck juror also had a sister who was a police officer).

That approach is fully consistent with the clear-error standard of review, under which this Court defers to the trial judge's factual findings and the inferences drawn from those facts, and "the facts and all reasonable inferences therefrom must be viewed in the light most favorable to the party that prevailed in the trial court." *Jones v. United States*, 779 A.2d 277, 281 (D.C. 2001) (en banc) (citations omitted; cleaned up). *Harris* thus confirmed that the burden remains on "the defendant to prove that the [government's] proffered explanation is a pretext for discrimination[,]" and that on appeal, "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." 260 A.3d at 674-75 (citations omitted).

Smith's and amici's approach, by contrast, would upend the clear-error standard of review and shift the burden of persuasion to the trial judge. First, they essentially ask this Court to draw inferences from the existing record *against* the

prevailing party. For example, they seek to have this Court construe the lack of an on-the-record explanation as to the Asian and Hispanic juror strikes as implying the government had no legitimate basis for them; the absence of an express finding as to the cashier's dress as implying it was not disrespectful; and the fact that the government did not strike the nanny as implying the decision was motivated by race. But, as we demonstrate infra, the record provides greater support for the opposite implications, and in any event, all inferences must be drawn in favor of affirmance, not reversal. *See Jones*, 779 A.2d at 281.

Second, Smith expressly argues that, under *Harris*, "[i]n a racially charged case *the trial court*" (Smith Br. 34 (emphasis in original)) has the burden of challenging the government's proffered reasons and developing a record that undermines them. As justification for his inaction,[19] Smith complains (at 34) that "[i]t is a lot to require defense trial counsel, on the fly," to defend the constitutional rights protected by *Batson*. Smith does not explain why the trial judge, who is acting

[19] Smith asserts (at 34) that his trial counsel "did at least as much as counsel in *Harris*," but the record of the two cases belies that claim. In *Harris*, defense counsel disputed some of the government's factual claims about jurors' responses, even asking the trial court to look back at the transcript to verify them; noted that some struck jurors had not responded to any voir dire questions; and made a side-by-side comparison of a struck and unstruck juror as to one of the government's proffered reasons. *See* 260 A.43d at 672-73. Thus, in *Harris* the defense had at least alerted the trial court that the record might not support the government's claims. Smith's counsel did nothing of the kind, instead conceding the "individual[ ]" validity of the government's reasons and contesting only the ultimate effect of the strikes.

equally "on the fly," should have to do counsel's work for him, and in any event the Supreme Court could not have been more clear: "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the [peremptory] strike." *Purkett*, 514 U.S. at 768. Moreover, even in a *Batson* case, "[r]equiring the court to develop the defendant's arguments through examination of the prosecutor would make the judge an advocate rather than a neutral arbiter." *United States v. Houston*, 456 F.3d 1328, 1339 (11th Cir. 2006).[20]

Unsurprisingly, it appears that the vast majority of courts in other jurisdictions have declined to adopt Smith's and amici's approach, under which a defendant may

[20] Notably, this and other courts have declined to require trial courts to serve as both advocate and judge in criminal proceedings. *See, e.g., Ruffin v. United States*, 219 A.3d 997, 1010 (D.C. 2019) ("The responsibility to identify the risk and raise the issue of unfair prejudice [from challenged evidence] with specificity for the judge's consideration is on the party seeking protection from it . . . . It is not the judge's role to assume that responsibility, snoop out the facts, and construct the argument for the litigant."); *In re Jackson*, 51 A.3d 529, 531, 541 (D.C. 2012) (holding that trial judge may not prosecute an indirect criminal contempt case; it would be "tall order" even for "the most conscientious trial judge" to safeguard defendant's rights while simultaneously prosecuting him); *Williams v. Dieball*, 724 F.3d 957, 963 (7th Cir. 2013) ("It is not the district court's job to flesh out every single argument not clearly made. . . . Judges are not clairvoyant, and if they were required to go out of their way to analyze every conceivable argument not meaningfully raised, their work would never end."); *Stafford v. Ford Motor Co.*, 790 F.2d 702, 706 (8th Cir. 1986) ("The trial judge should not have to assume the role of an advocate on behalf of a litigant whose counsel has failed to assert a legal theory or argument that might be helpful to the litigant's case."); *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945) (district judge "must not take on the role of a partisan; he must not enter the lists") (Hand, L., J.); *Carpenter v. Vaughn*, 888 F. Supp. 635, 648 (M.D. Pa. 1994) ("It is the litigants' role to present their case to the court, not vice versa.").

obtain reversal simply by pointing to questions the trial court failed sua sponte to ask, or comparative-juror analyses the court did not conduct. *See, e.g., United States v. Atkins*, 843 F.3d 625, 634 (6th Cir. 2016) ("[T]he district court's failure to conduct its own comparative juror analysis is not sufficient to require reversal."). Rather, where a defendant has failed to request a comparative juror analysis, or raise some other factual argument, many courts, including the D.C. Circuit, have held that the trial court's alleged error in failing to take the step on behalf of the defense should be treated as waived or reviewed, at most, for plain error. *See, e.g., United States v. Gooch*, 665 F.3d 1318, 1324–25 (D.C. Cir. 2012) (applying plain-error standard to defendant's unpreserved claim that government failed to strike white jurors who were similarly situated to stricken Black jurors); *United States v. Baskerville*, 448 F. App'x 243, 247 (3d Cir. 2011) (reviewing for plain error only claim that district court should have sua sponte compared jurors before ruling on credibility of government's race-neutral reasons); *United States v. Chapman*, 209 F. App'x 253, 264 (4th Cir. 2006) (declining to decide whether failure to request juror comparisons in district court would constitute waiver or merely forfeiture, because even under plain-error review defendant's claim failed to show obvious error); *Chamberlin v. Fisher*, 885 F.3d 832, 843-44 (5th Cir. 2018) (en banc) (state court not required to conduct comparative juror analysis sua sponte); *United States v. Hill*, 31 F.4th 1076, 1083 (8th Cir. 2022) (applying plain-error review to "similarly situated" *Batson*

arguments raised for first time on appeal); *Houston*, 456 F.3d at 1339 (declining to address argument that district court should have conducted comparative juror analysis that defendant failed to request); *State v. Porter*, 491 P.3d 1100, 1107 (Ariz. 2021) (defendant waived claim that comparative juror analysis would have supported his *Batson* claim by failing to request it in trial court; that failure "deprived the prosecutor of the opportunity to distinguish allegedly similarly situated jurors and divested the trial court of the occasion to conduct an in-depth comparison of the jurors"); *Addison v. State*, 962 N.E.2d 1202, 1213 (Ind. 2012) (reviewing unpreserved claim that trial court should have conducted side-by-side juror comparisons under "fundamental error doctrine," which was state-law equivalent of plain-error rule). There is merit to this approach, as the plain-error rule is designed to give litigants an incentive to raise timely objections in the trial court. *See United States v. McAllister*, 693 F.3d 572, 588 (6th Cir. 2012) (McKeague, J., concurring). But even those courts that do not treat unrequested side-by-side juror comparisons as waived or forfeited will decline to reverse based on such comparisons unless they establish *clear* error based on the existing record. *See, e.g., Atkins*, 843 F.3d at 636-37 (permitting comparative juror analysis for the first time on appeal only where "the basis for comparison has been sufficiently explored" in the district court such "that the analysis will not be unfair to the government"); *People v. Beauvais*, 393 P.3d 509, 523 (Colo. 2017) (although defendant may raise comparative juror

analysis that was not requested in trial court, "[s]uch a failure results in a record that is unlikely to support" defendant's argument on review; "Absent a developed record, we cannot compare the challenged jurors to empaneled jurors in this material respect and cannot therefore conclude that the trial court clearly erred.").[21] This is consistent with guidance from the Supreme Court, which has cautioned:

> a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.

Snyder, 552 U.S. at 483.

There is accordingly no basis for Smith to obtain, by procedural sleight-of-hand, automatic reversal for gaps in the record that were his burden to fill. *See Gooch*, 665 F.3d at 1332. Clear-error review should not be distorted to reward the defense for its own inaction, or blame the trial court for defense counsel's omissions.

---

[21] We note that under both plain-error and clear-error review the burden of showing actual error is essentially the same, *cf. United States v. Schenian*, 847 F.3d 422, 424 (7th Cir. 2017) (noting that "[t]he 'clear error' standard of Rule 35(a) and the 'plain error' standard of Rule 52(b) may well be the same thing"), and a finding of "plain" error in the context of an otherwise preserved *Batson* challenge might well meet the third and fourth prongs of the plain-error test, i.e., substantial prejudice and a miscarriage of justice. It is accordingly unclear whether there is a practical difference between the two tests in the *Batson* context. *See United States v. Whiteside*, 747 F. App'x 387, 396 n.6 (6th Cir. 2018) (interpreting "plain-error and clear-error review to have 'no practical difference' in the context of *Batson* challenges"). There is no need for the Court to decide that question here, however, because Smith cannot show clear or plain error.

And basing clear error on a trial court's failure to delve into matters not raised by the defense is also entirely unfair to the government, which would be forced to guess in advance what hidden "side-by-side comparisons" or other factual issues the defense might raise on appeal should the trial not go its way. *See Chamberlin*, 885 F.3d at 843 (noting that permitting side-by-side comparisons to be raised for the first time on appeal would force the government to explain in advance why it kept every unstruck juror, but give the defense an incentive not to raise its claims in the trial court so as to limit the ability of the government to provide explanations on appeal). *Cf. Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) ("Litigants should not be permitted to keep some of their objections in their hip pockets and to disclose them only to the appellate tribunal[.]").[22]

---

[22] Although *Harris* should not be read in the manner Smith and amici promote, this Court should clarify that "heightened scrutiny" is not a fourth procedural "step" in *Batson* analysis (for which noncompliance obtains automatic reversal) but rather an additional consideration that bears on the trial court's evaluation of the evidence. As *Harris* noted, in "racially charged" cases "more so than in many others, there [i]s a danger that race could insinuate itself into the lawyers' strikes by both sides, as each side s[eeks] jurors sympathetic to their perspective." 260 A.3d at 677. In short, the degree to which a case is "racially charged" is more accurately viewed as *motive* evidence that a proffered race-neutral reason may be pretextual, just as witness bias may be evidence that impeaches the witness's testimony. *See Tursio*, 634 A.2d at 1211 (racially charged nature of case helped strengthen the defendant's prima face showing, which in turn required the court to scrutinize the government's stated reasons more closely); *(Edwin) Smith*, 966 A.2d at 375 n.12 (racially charged nature of prosecution may bolster strength of prima facie case of discrimination); *State v. Cuthbertson*, 886 S.E.2d 882, 895 (N.C. Ct. App. 2023) (if case "is susceptible to racial discrimination in jury selection," that fact "favors a finding of purposeful

(continued . . .)

2. Smith's and Amici's Statistical Arguments Do Not Establish Clear Error.

Smith and amici argue (Smith Br. 9-10, 15, 18, 23-31, 40-41; PDS Br. 18-19; LDF Br. 20-21 & Addendum A) that the statistical evidence they have submitted to this Court establishes, or at least is highly significant evidence of, the alleged racial motivation for the government's exercise of strikes against the four Black jurors and/or the other two non-white jurors. They primarily cite (see *id.*) the (1) very small numerical probability that a random strike of 11 people from the 36-person qualified juror pool would have eliminated all four Black, and each of the Asian and Hispanic, jurors; and (2) the disparity between the percentage of non-white individuals in the qualified jury pool (i.e., six out of 36, or one-sixth) and the percentage of non-white jurors in the government's strikes (i.e., six out of 11, or slightly more than one-half).[23] Statistical disparities in the striking of jurors is highly relevant at step one of

---

discrimination"). The burden, however, remains on the defense to show a racial motivation, and the trial court's findings are subject to the "highly deferential" standard of clear-error review, *see Flowers*, 588 U.S. at 303, i.e., they will not be overturned unless the Court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *(Tyrell) Johnson v. United States*, 232 A.3d 156, 167 (D.C. 2020); *see Evans v. United States*, 682 A.2d 644, 650-51 (D.C. 1996) (although case was "racially charged" and required "closer scrutiny[,]" "[t]he ultimate burden of persuasion is always with the opponent of the strike[,]" and "we follow the standard set forth by the Supreme Court and give 'great deference' to the trial court's findings on discriminatory intent") (citations omitted).

[23] Smith also continues to insist on comparing the proportion of non-white individuals in the District's overall population – which he estimates was about 61.5 (continued . . .)

Batson (i.e., the making of a prima facie case of racial motivation) and may be relevant at step three as well. *See, e.g., Beasley v. United States*, 219 A.3d 1011, 1015 (D.C. 2019); *Tursio*, 634 A.2d at 1210; *Harris*, 260 A.3d at 675 n.5. But we are aware of no case in which this Court has held that statistical disparity *alone* was enough to carry a defendant's burden at step three, or that it compelled a trial court to reject the government's race-neutral reasons in spite of contrary evidence. *See Evans v. United States*, 682 A.2d 644, 649 (D.C. 1996) ("The trial court may examine statistical disparities as one factor in assessing whether a prima facie showing has been made. . . . Statistical numbers alone, however, are not enough to establish or negate a prima facie showing."); *State v. Inman*, 760 S.E.2d 105, 109 n.6 (S.C. 2014) ("[S]tatistical evidence, standing alone, is not sufficient to establish purposeful discrimination."); *cf. International Broth. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (although statistics are "competent in proving employment discrimination . . . statistics are not irrefutable; they come in infinite variety and, like

---

percent in 2012 – to the absence of non-white persons from the final jury (Smith Br. 18, 40-41). The Division was correct to hold that that comparison was not relevant to his *Batson* claim, but rather the comparison "between the jury and the pool of eligible jurors." *(Glenn) Smith*, 288 A.3d at 777. In any event, Smith's complaint (at 36) that the Division "lacked sufficient concern regarding the backdrop of this case" is unwarranted; the Division found it "quite concerning – especially in a racially charged case – that all non-white jurors were initially struck[,]" but ultimately concluded that the trial court had conducted an adequate inquiry and found no racial motive in the government's strikes. *(Glenn) Smith*, 288 A.3d at 777-78.

any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.").

There is a good reason for that, as this case illustrates. The sample size here (a mere four Black jurors, one Asian juror, and one Hispanic juror out of a group of 36 qualified jurors) is simply too small to draw definitive conclusions. *See* Joseph L. Gastwirth, Statistical Testing of Peremptory Challenge Data for Possible Discrimination, 69 Vand. L. Rev. En Banc 51, 87-88 (2016) ("Statistical tests have *low* power in small data sets, regardless of whether the data refers to a small random sample from a large population or a small sample of a modest fraction of a small population. . . . This problem is more acute in situations where minority groups form a small fraction of the overall data, as the set of possible outcomes is very small[,]" such as in cases where "the possible numbers of African-Americans that could be struck were only 0-4.") (emphasis in original); *cf. Kennedy v. Cain*, 624 F. App'x 886, 892 (5th Cir. 2015) ("The Supreme Court has explained that sample size is an important consideration when courts weigh the significance of a given absolute disparity.") (citing *Rose v. Mitchell*, 443 U.S. 545, 571 (1979)).[24] Or, as the en banc Fifth Circuit has explained, although it is true "that, if the strikes were made at

[24] By contrast, in *Flowers* the state attempted to strike all 36 Black prospective jurors that it could across the defendant's first four trials, before striking five of six Black jurors at his most recent trial. *See* 588 U.S. at 305-07.

random, the probability that eight [B]lack jurors would be struck is low . . . All this proves, however, is that the jury strikes were not random. Since strikes are made by human choice (that is to say, for specific reasons), this is not a surprising revelation. It only seems so if one equates random selection with race-neutral selection. But random selection is neutral as to any potential reason for a strike – from race, to clothing, to (more importantly) positions on the death penalty." *Chamberlin*, 885 F.3d at 839 n.3.[25] Indeed, that is the purpose of steps two and three of *Batson*: to determine whether seemingly improbable results during jury selection had benign or prohibited causes.[26] *See* Gastwirth, 69 Vand. L. Rev. En Banc at 64 (when there is

[25] It is accordingly unsurprising that, as LDF notes, "[i]f the prosecutor struck the panel at random or while wearing a blindfold, the removal of every Black person would have been highly unlikely, and constructing an all-white jury would have been even more so" (LDF Br. 24). That is because the probability that any specific set of six members of a group of 36 will be drawn as part of 11 random selections is mathematically quite low – as the "numbers" listed in Smith's brief (Smith Br. 18) and the calculations contained in the appendix to LDF's brief (LDF Br., Addendum A) attest. That does not mean, however, that such real-world results cannot occur without racial discrimination.

[26] This is among the many reasons why, if Smith and LDF believe statistical analysis should have near-determinative effect, that analysis ought to have been presented in the trial court in the first instance. The weight to be assigned to such evidence is a factual question, to be determined by the finder of fact. *See, e.g., Contreras v. City of Los Angeles*, 656 F.2d 1267, 1273 (9th Cir. 1981) (in employment-discrimination case, "[i]t is for the [d]istrict [c]ourt, in the first instance, to determine whether these statistics appear sufficiently probative[,]" and noting the competing expert testimony at trial as to the significance of the plaintiffs' statistical evidence in light of the small sample size). Although it may seem unrealistic to expect counsel to present this kind of evidence during jury selection, it is even more unrealistic to fault the trial court for not considering it sua sponte.

"a statistically significant excess of minorities among those challenged by the prosecutor and other evidence supports this conclusion, the trial judge should decide that the defendant established a prima facie case, and allow the prosecution to argue that the minority venire members were challenged for appropriate reasons").[27]

[27] Likely recognizing that the peremptory strikes were not the principal cause of the jury composition in this case, Smith seeks to add, as "context" for his *Batson* claim, complaints about the original venire (because it was less than 50 percent Black) and the strikes for cause, which resulted in some Black prospective jurors being removed because of their answers to questions (like bias against police officers) that Smith asserts "serve[ ] as racial discrimination" (Smith Br. 36-39). A defendant challenging the jury venire must show, inter alia, that a group is not merely underrepresented but that the underrepresentation "is due to systematic exclusion of the group in the jury-selection process." *See Diggs v. United States*, 906 A.2d 290, 296 (D.C. 2006). As defense counsel acknowledged in the trial court, however, the defense did not believe there was any problem with the original panel, and did not object to any of the removals for cause (12/4/12 Tr. 127-28, 137). Although Smith later argued that his trial counsel was ineffective for failing to challenge the venire on fair cross-section grounds (see R.117 at 14; 12/20/17 Tr. 29-30), he has dropped that claim on appeal in favor of the *Batson* claim.

Smith nevertheless accuses the trial judge of having been "unbothered" by the fact that "an all-white jury in a [B]lack majority city decid[ed] the fate of a [B]lack man charged with raping a white woman[,]" asserting that Judge Motley "should have been concerned about the Jim Crow outcome" (Smith Br. 38-39). We respectfully submit that this is a not a fair characterization of what happened in this case, the administration of justice in the District, or the attitude of the trial judge – who, it should be noted, spent over five years entertaining Smith's post-trial claims.

3. The Trial Court Did Not Clearly Err in Crediting the Government's Proffered Race-Neutral Reasons.

a. The government legitimately wanted jurors well-equipped to evaluate the scientific evidence.

Smith, echoed by amici, insists that the primary reason for most of the government's challenged peremptory strikes – the desire for the jurors likeliest to be able to follow and understand complex scientific evidence – was a pretext, because identity was uncontested, rendering the DNA evidence unimportant, and the competing expert testimony of Dr. Wilk and Dr. Devore was "minimal" or "straightforward" (Smith Br. 15, 32; PDS Br. 3-4; LDF Br. 21-22). The record does not support this revisionist history.

First, although before trial the defense waived its right to independent DNA testing and indicated that it was likely to pursue a consent defense rather than contest Smith's identity as the rapist, it never offered to stipulate to identity, or forego any challenge or argument as to the validity of the DNA testing. The government thus was not required to approach jury selection on the assumption that it did not matter if the jurors understood the complex forensic evidence; as this Court has noted, "a defendant or his lawyer can always have a change of strategy during the trial." *Durham v. United States*, 743 A.2d 196, 206-07 (D.C. 1999); *see Moghalu v. United States*, 263 A.3d 462, 465 (D.C. 2021) (defendant need not inform government in

advance of intent to raise third-party perpetrator defense). Indeed, the government's presentation of the DNA evidence to the jury in this case showed that it was taking nothing for granted; as noted supra, the government's DNA expert used a 20-slide PowerPoint presentation to explain DNA and how DNA testing worked, as well as multiple slides showing the DNA results and the statistical significance of the profile matches in this case.[28] Because the DNA evidence was the government's sole proof of Smith's identity as the rapist, which the government had to prove beyond a reasonable doubt, the jury's acceptance of this evidence was crucial.

Second, the government knew that Dr. Wilk's expert testimony about V.F.'s injuries, or purported lack thereof, was likely to be the heart of the defense case. As the pretrial hearings concerning that testimony indicated, the government was quite concerned about the nature, scope, and basis for Wilk's expert testimony, pressing for more information to allow it to prepare.[29] On the day before jury selection the

[28] That caution was amply justified. Around the time of the trial in this case, some defense attorneys were actively pursuing extensive challenges to the validity of random-match calculations. *See, e.g., Young v. United States*, 63 A.3d 1033, 1049-50 (D.C. 2013). As it happened, Smith's counsel forewent any extensive questioning of the government's DNA expert, but the government had no assurances of that before trial. The defense decision to forgo independent DNA testing did not preclude the defense from challenging the government's DNA results through cross-examination of its experts.

[29] The government's uncertainty was only heightened by the fact that the defense did not provide the government with a detailed proffer of Dr. Wilk's testimony until December 10, nearly a week after jury selection (see 12/10/12 Tr. 21).

parties engaged in two lengthy, hotly contested hearings before both Judges Morin and Motley concerning Dr. Wilk's testimony. Far from simple testimony about "skin tears" (Smith Br. 15), going into trial it was clear that (1) Wilk's testimony would be nothing less than a full-blown effort by an experienced medical surgeon to explain away the victim's injuries and even the debris left behind by the attack as pre-existing conditions; and (2) the government would have to cross-examine Wilk very cautiously, given the risk that it might open the door to Wilk's inflammatory testimony about the victim's alleged sexual history. Indeed, the government's concern about the possible impact of Wilk's testimony was amply confirmed by its decision to call Dr. Devore as a rebuttal witness, to ensure the jury heard a competing medical expert discuss the victim's condition.

There is accordingly no merit to Smith's argument that, at the time of jury selection, science was unlikely to play a significant role.[30] This Court rejected a

[30] PDS's characterization of how the trial appeared likely to play out at the time of jury selection – namely, that "the case would not involve any contested complex forensic issues" and instead "the central question for the jury was whether to believe the Black defendant or the white" victim (PDS Br. 2-3) – is thus entirely at odds with the record. The parties' extensive pretrial litigation over the scope of Dr. Wilk's expert testimony showed that the "forensic" evidence about the victim's injuries would be the heart of the defense case, whereas it was not at all clear that Smith himself would ever take the stand in light of his numerous prior convictions and videotaped statement to the police. Indeed, trial counsel Gross confirmed this understanding during the post-trial litigation, testifying that by November 2012 (a month before trial) Smith had decided not to testify and did not change his mind until after the government had rested its case (7/18/14 Tr. 52, 54-55).

similar argument in *(Edwin) Smith*, 966 A.2d at 381-82. In *(Edwin) Smith*, the defendant argued that the government's proffered reason for its strikes – a desire for more "sophisticated" jurors – made little sense in the case, which involved drug and gun possession charges only. *Id.* at 381. Because the case was "not complex," the defendant asserted that the government had no genuine need for "jurors of special intelligence." *Id.* The Court, however, found no clear error in the trial court's decision to accept the prosecutor's explanation, because "[t]he record shows [ ] that – as the parties certainly would have anticipated on the facts of this case – jurors were instructed on the concept of constructive possession, 'a more complex concept' than is entailed in cases involving actual possession." *Id.* (further noting that the "jury also had to grapple with the similarly difficult concept of what constitutes possession and control of premises for purposes of the crime of CPWL"). If the concept of constructive possession was enough to justify peremptory strikes, then testimony about the medical cause and nature of V.F.'s injuries – in addition to the DNA evidence – surely was as well.[31]

---

[31] Smith and amici nevertheless argue (Smith Br. 15, 32-33; PDS Br. 17; LDF Br. 22) that the government's reason still must have been pretextual, because it did not directly ask any jurors about their scientific proficiency. They do not describe what, precisely, the prosecutors should have asked each prospective juror during a fast-paced jury selection. It is hardly surprising that the prosecutors would rely on jurors' professions as a reasonable method of inferring educational background and aptitude for understanding complex evidence. As for Smith's assertion (at 33) that the government only struck non-white jurors who did not answer "yes" to any of the

(continued . . .)

b. The government properly based its strikes on jurors' professions.

As noted supra at 29-30, this and other courts have recognized that peremptory strikes based on a juror's profession are entirely legitimate. *See also, e.g., McGee v. Kirkland*, 506 F. App'x 588, 590 (9th Cir. 2013) (prosecutor's reasons for striking juror were race-neutral, including, inter alia, "her job as a 'substitute cafeteria helper,' from which the prosecutor inferred she might lack the education and ability to understand fully a complex murder trial; and [ ] that she 'demonstrated . . . that she was timid, . . . not detail oriented, and potentially unable to contribute to the jury deliberations"). Smith nonetheless argues (at 32-33) that the government's strikes were "facially suspect[.]" Specifically, he asserts (at 32) that because plumbing involves "things like geometry, measurement, chemistry, corrosion, pressure, adhesion, and thermo-dynamics[,]" and being a vehicle mechanic "requires mechanical, electrical, and computer sciences[,]" it is unclear why the government would not want Jurors 238 and 683 on the jury. We note, however, that Juror 238 described his former job (he had not worked for six years) as "plumbing *assistant*," not licensed plumber or master plumber; and Juror 683 did not say he was a trained mechanic, merely that he "[h]elp[ed] keep the vehicles going" at DPW – a general

---

voir dire questions, this is incorrect; the government also struck Juror 258B, a white retired musician who did not answer "yes" to any questions (12/4/12 Tr. 118).

description that could have covered a number of different jobs (see 12/4/12 Tr. 61, 117). Moreover, even if plumbers and mechanics receive training in each of the subjects listed above (an assumption that is hardly obvious), this case did not involve any of those subjects. In any event, that Smith can imagine how a plumber, mechanic, or anyone else might "be intelligent, have an interest in science, and read or watch scientifically educational materials" (Smith Br. 32) does not establish that the government's more skeptical view was pretextual. As the Supreme Court has explained, valid race-neutral reasons need not be "persuasive, or even plausible[,]" so long as they are not "inherent[ly]" racially discriminatory. *Purkett*, 514 U.S. at 768; *see also United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987) ("Such reasons may not be logical, but that's what peremptory challenges are all about."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n. 14 (1994) ("The popular refrain is that *all* peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. [ ] But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from

voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.") (emphasis in original; internal citation omitted).[32]

c. The government reasonably struck Juror 683 based on his misunderstanding of the law-enforcement question.

As described supra, Juror 683 was struck because – as the prosecutor noted and Judge Motley found – he misunderstood the question asking for the juror's connection to law-enforcement agencies as including all government agencies, including his own employer, DPW, which was a municipal services agency.[33] A prosecutor may permissibly strike a juror based on a belief that the juror was not paying attention or not following voir dire questioning (see supra at 30-31 (citing cases)). *See also William v. Norris*, 576 F.3d 850, 864 (8th Cir. 2009) ("Ability to understand complex evidence, like intelligence, is a factor 'that can be appraised by the trial judge who questioned those jurors during voir dire (or who watched them

[32] PDS asserts (at 20) that the prosecutor "had little choice but to" identify the professions of Jurors 238 and 254, and Juror 683's confused answer as the reasons for the strikes, because the government had no other information about them. This argument, of course, assumes its conclusion: that the government's "real" reason for the strike was the jurors' race, and thus the government must have been looking for pretexts to remove them.

[33] PDS characterizes (at 8) Judge Motley as merely having "mused" that the proffered reason for the strike of Juror 683 was valid; it is clear from the record that the court *found* that it was, based on having heard the juror's answer in person.

being questioned by counsel).'") (quoting *Olson v. Ford Motor Co.*, 481 F.3d 619, 623 (8th Cir. 2007)).

Amici suggest that this strike was nevertheless unjustified, because the question was "long and confusing," with "multiple subjects" (PDS Br. 24-25; see LDF Br. 14-15).[34] But this reinforces rather than undermines the government's point: DNA and expert medical testimony can also be long, confusing, and complex. A juror having difficulty grasping the point of a voir dire question may also have difficulty following and understanding expert scientific testimony.[35] *See Caldwell v.*

---

[34] PDS asserts (at 25) that the government accepted another juror, Juror 362, who gave a similarly "overinclusive" answer to the same question. On closer inspection, however, the answers of Jurors 683 and 362 were not comparable. The question called not simply for connections to law enforcement agencies, but also to criminal defense attorneys and those who worked for them (12/4/12 Tr. 27-28). Juror 362 stated that she had a friend who was an attorney, but on her own initiative immediately qualified her answer by acknowledging that she "th[ought]" the friend was a "civil attorney though" (*id.* at 46). In other words, Juror 362 fully understood the question and what it called for; she was simply unsure whether her friend did criminal defense work. Juror 683, by contrast, knew he worked for a government agency – but he had not properly understood the question and thus believed that it referred to all government agencies rather than only law enforcement agencies. In any event, Juror 362's profession also set her apart from Juror 683: she taught elementary school children to read (*id.* at 46-47), reflecting an educated background as well as likely qualities such as empathy.

[35] LDF claims that the government asserted that Juror 683 "lacked the intellectual capacity to serve as a juror in the D.C. courts" (LDF Br. 2; see also *id.* at 21 (characterizing the government has having "claim[ed]" that Black jurors "were not smart enough to serve")). At no time did the government make any such statement as to Juror 683 or any other member of the venire. The question at hand was not whether Juror 683 was capable of serving as a juror, intellectually or otherwise – if

(continued . . .)

Maloney, 159 F.3d 639, 653 (1st Cir. 1998) (noting that trial judge "had an opportunity contemporaneously to observe [the juror's] responses, and [the judge] apparently saw no reason to question the prosecutor's assertion that the juror was hesitating and equivocating in her answers"). In any event, if the trial court's view of the evidence "is plausible in light of the record viewed in its entirety" – as it certainly was here – "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

d. Juror 254's clothing was a racially neutral reason for the strike.

As also noted supra at 30 (citing cases), a juror's clothing may be a lawful basis for a peremptory strike. *See United States v. Banks*, 10 F.3d 1044, 1049 (4th Cir. 1993) (ruling that reasons offered by the government for its peremptory strikes, including "shabby dress suggesting irresponsible attitude toward jury service," were

---

the government had believed he was not, it would have moved to strike him for cause. The question was, which jurors in the qualified pool did the government believe were *best* suited to evaluate the scientific evidence in the case. That is precisely what peremptory strikes are for.

"not intrinsically suspect, were adequately supported by observable fact and were therefore properly determined by the court to be race-neutral").

LDF argues, however, that the trial court clearly erred in accepting the prosecutor's description of the juror's dress as an additional reason to strike her, without making an express finding confirming it (LDF Br. 23). But as this Court has explained, even where a "cold transcript cannot tell us whether" a visual reason was apparent to the trial judge, if that judge had the opportunity to observe the juror and did not correct the prosecutor this Court may infer that the judge dd not "deem the prosecutor's explanation implausible," *(Edwin) Smith*, 966 A.2d at 382 (citing *Smulls v. Roper*, 535 F.3d 853, 861 (8th Cir. 2008) ("by denying the *Batson* challenge, the trial court implicitly found that the prosecution's proffered nondiscriminatory reasons were credible. No further fact-finding was required[.]")); *Messiah v. Duncan*, 435 F.3d 186, 198 (2d Cir. 2006) ("As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his *Batson* ruling on the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a *Batson* challenge")). Here, Juror 254 was still in the courtroom when the government made its observation, because the stricken jurors had not yet been excused (12/4/12 Tr. 129, 144-45). Had the court or defense counsel disagreed with the government's assessment, one would have expected them to say something – and they did not. *Cf. Reynoso*, 38 F.4th at 1098

("This case is not one in which the trial judge accepted the prosecutor's version of events in the face of the judge's own conflicting observations.").[36]

e. The fact that the government did not strike Juror 916, the nanny, does not establish discriminatory intent.

Smith and amici argue that the government's failure to use a strike on Juror 916 demonstrates that the strikes of Jurors 238 and 254 were pretextual, asserting that the job of a nanny is the functional equivalent of a plumber's assistant and cashier in terms of education and scientific knowledge (Smith Br. 11, 31-32; PDS Br. 22-23; LDF Br. 22-23). The profession of child-care provider is not "otherwise similar" to the jobs of plumber's assistant or cashier, certainly not so self-evidently similar as to render it error for the trial court not to raise it sua sponte.[37] As a child-

[36] Smith and PDS also assert that none of the four Black jurors answered "yes" to the court's initial voir dire questions, whereas most of the stricken white jurors had answered "yes" to at least one question (Smith Br. 33; PDS Br. 20). The former assertion is not, in fact, accurate: Juror 683 responded "yes" to the law-enforcement question, albeit erroneously (12/4/12 Tr. 117). In any event, it is unclear why the alleged disparity is significant. The general voir dire questions were, for the most part, designed to discover reasons why a juror might have to be struck for cause (see *id.* at 25-30 (e.g., prior knowledge of the case, parties, or witnesses; inability to apply certain legal principles; strong feelings about the nature of the charge; difficulty evaluating a police officer's testimony fairly)). Although peremptory strikes could be based on information learned from responses to those questions, the questions certainly did not exhaust the possible grounds for such strikes.

[37] *See, e.g., United States v. Alston*, 895 F.2d 1362, n.5 (11th Cir. 1990) ("It is of course true that comparing the attributes of the [B]lack and white venirepersons will aid the trier of fact and a reviewing court in determining whether the asserted reasons (continued . . .)

care provider, a nanny often has responsibilities and performs work requiring significantly more training and education,[38] and needs a more compassionate, empathetic disposition compared to workers in many vocational industries. Moreover, even assuming arguendo that the professions had similarities in the eyes of the defense sufficient to raise a challenge to the government's explanation, Smith never pointed out the alleged disparity and thus the government had no occasion to

---

are pretextual or not. The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared, however, and often require an evaluation of the degree to which the prospective juror manifests the stated attribute.").

[38] *Cf. Sanchez v. Office of State Superintendent of Educ.*, 45 F.4th 388, 393, 397 (D.C. Cir. 2022) (upholding regulation requiring certain child care workers to attain associates' degrees in early childhood education "to support children's healthy development and future academic achievement and success," and to benefit individuals tasked with the educational development of young children); *see also* "Recommended Practices," International Nanny Association, at 2 (undated) (recommending that nannies attend "child development courses, seminars, and training programs on the care of children"; take a certification examination; and learn signs of child abuse and neglect), available at https://nanny.org/support/recommended-practices/ (last visited April 24, 2024); "How to Become a Childcare Worker," Occupational Outlook Handbook – Childcare Workers (noting that higher education is often preferred for full-time nannies and other childcare workers), available at https://www.bls.gov/ooh/personal-care-and-service/childcare-workers.htm#tab-4 (last visited April 24, 2024); Careers in Early Childhood Education, A Maryland Guide, Maryland State Department of Education, available at https://earlychildhood.marylandpublicschools.org/system/files/filedepot/4/careersinec_ed_april_14_2016_final.pdf (detailing education and credentialing pathway for various careers in early childhood care including family child care provider) (last visited April 24, 2024).

further explain it or note additional reasons it preferred Juror 916.[39] That gap in the record is chargeable to Smith, not the trial court. *See Walker*, 982 A.2d at 732 (defendant did not meet his burden at *Batson* step three, where he claimed on appeal that government did not strike similarly situated white jurors, but "pointed out none of these discrepancies [below], and thus did not alert the trial court that further probing might be required"); *Gooch,* 665 F.3d at 1332 (holding that a defendant "raising 'similarly situated' arguments for the first time on appeal" establishes plain error only by showing that "discriminatory intent was manifest in the government's peremptory strikes"). In sum, the nanny was not so similar either in profession or

[39]Juror 916 also had a grandfather who was a judge – suggesting that she may have been exposed to the law for much of her life – and a friend who was a public defender; neither Juror 238 nor 254 indicated any association with legal professionals (12/4/12 Tr. 97-98). *See Harris*, 260 A.3d at 677 (where government struck a black juror who worked at a school based on reluctance to retain jurors who worked in public schools, but kept a white high school teacher, the fact that the latter juror had a sister who was a police officer "plausibly explains why . . . the prosecutor likely found him acceptable as a juror"); *cf. Chapman*, 209 F. App'x at 264 (noting that "there is nothing inherently pretextual about trading off one factor for another – for example, accepting a younger but more educated juror"); *Beauvais*, 393 P.3d at 523-24 (error to compare jurors "with regard to individual traits rather than comparing them in all material circumstances that bear on whether two jurors are similarly situated"). Moreover, Juror 916 had worked at her job for four years (see 12/4/12 Tr. 97-98); by contrast, the plumber's assistant had not worked for six years, and the cashier had just completed her 90th day at that job. *See United States v. Lambert*, 858 F. App'x 608, 609-10 (4th Cir. 2021) (district court did not clearly err in rejecting *Batson* challenge where prosecutor indicated, inter alia, that struck juror's "sporadic work history . . . made the prosecutor concerned that she could not pay attention to the testimony").

other background factors that the trial court should have obviously compared the cashier or the plumber's assistant to her or that the court's failure to do so was clear error. *Cf. United States v. Clark*, 747 F.3d 890, 895 (D.C. Cir. 2014) (finding "no 'unmistakable' evidence of the government's discriminatory intent" and thus no clear or plain error in denying *Batson* challenge in light of subtle differences among struck and non-struck jurors as to the possible impact of their professional backgrounds on their approach to the government's evidence, e.g., struck software tester might have been more likely to second-guess evidence related to accounting software than non-struck juror who worked on computer hardware, not software).

f. The strike of Juror 721 because the government believed it would move up Juror 839 did not show discriminatory intent.

As noted supra, before withdrawing the strike of the alternate, Juror 721, the government offered a race-neutral reason: the government believed it would move up, into the "first position" in the panel, Juror 839 (12/4/12 Tr. 130).[40] As Smith and

[40] In its brief, LDF twice purports to quote the transcript as establishing that the prosecutor "provided 'no basis for striking" Juror 721 "except [she] wanted the other [white] alternate" (LDF Br. 1 n.2; *id.* at 23 (citing 12/4/12 Tr. 130)). Through its use of bracketed words, LDF seems to imply that the prosecutor actually made reference to the white race of the alternate juror the government preferred. That implication is not accurate. The quote purports to be drawn from the following exchange between the court and the prosecutor: "The Court: So there was no basis for the striking that alternate number one except you wanted the other alternate? Ms. Zubrensky: Yes, (continued . . .)

amici note, however, Juror 839 would actually end up in the deliberating jury (Smith Br. 12-13; PDS Br. 7-8, 23-24; LDF Br. 1, 14). PDS argues that this "misstatement" by the prosecutor is "another clue" that "racial bias was at play" (PDS Br. 24). The more reasonable explanation, however, is entirely benign: during the extremely hurried process of peremptory strikes, the prosecutors had simply miscounted how far into the panel the court would be drawing replacements for struck jurors and were off by one. Moreover, even the person the government mistakenly would have brought into the jury box – Juror 899 – had a professional background much different from the jurors the government struck based on their occupations.

First, as illustrated in Addendum B to this brief, at the conclusion of strikes for cause and the twenty peremptory strikes of non-alternate jurors by the parties, Juror 839 would be the fourteenth and last juror moved into the jury box; Juror 899 was immediately behind her. That the government was mistaken as to where Juror 839 would be placed after jury strikes is hardly surprising, however. The peremptory-strike process was quite hurried; the trial judge told the parties that it should take them only 10 minutes to complete, and at one point admonished the parties "to move a little bit quicker" (12/4/12 Tr. 123-24). The clerk did not actually move any jurors into their new seats until after all of the strikes for cause and

---

Your Honor." (12/4/12 Tr. 130.) At no time did either prosecutor state a preference for a juror in terms of that juror's race.

peremptory strikes (including the *Batson* challenge itself) had concluded, meaning it would not have been visually apparent to the parties where the unstruck prospective jurors were relative to the jury box (see *id.* at 139-43). By the late rounds of peremptory strikes both parties clearly were unsure which jurors would be moved from the panel to the jury box, because each party struck two prospective jurors (Jurors 683 and 258B by the government, and Jurors 907 and 181 by the defense) who were at the end of the qualified juror list and would not have entered the jury box even if they had never been struck – indeed, the defense struck the juror in the last position in the panel with its final strike (see Addendum B; SR.1). When the clerk directed the 20 jurors who had been struck by the parties to stand, both the government and the defense initially indicated that they were unsure if those jurors were the ones they had actually removed (12/4/12 Tr. 140-41). Finally, the clerk initially directed Juror 899, not Juror 839, to seat 14 in the jury box; Juror 839 apparently had returned to the jury office and had to be called back to the courtroom to be seated in Juror 899's place (*id.* at 143-44). In light of that rapid and confusing process it was entirely understandable that the government's count was off by one.[41]

---

[41] Additionally, there was confusion at the start of voir dire about how the court would be filling vacant seats on the jury. Before individual voir dire began, Judge Motley informed the parties that the jurors in seats one and two would be the alternate jurors (12/4/12 Tr. 34). After questioning Juror 721 (who was seated in the first seat), the court questioned and excused for cause the juror in seat two (*id.* at 39-42). The prosecutor then asked "what the next alternate number would be or" if "that

(continued . . .)

Second, the juror who would have moved into the first position if Juror 721 had been struck, Juror 899, was not merely a "barista"; she was actually a retired lifelong bookkeeper for a medical office (12/4/12 Tr. 112-13). Her professional background was accordingly quite different from that of the jurors the government struck on account of their occupations. Thus, it was hardly clear error for the trial court not to view sua sponte the government's mistake as evidence that the government's occupation-based reason was mere pretext.

g. The strikes of the Asian and Hispanic jurors do not establish clear error.

Finally, as he did before the Division, Smith seeks to reincorporate his withdrawn challenges to the strikes of the Asian and Hispanic jurors back into his *Batson* claim, on the ground that *Batson* requires trial judges to inquire about strikes the defense no longer challenges (Smith Br. 35-36). Smith also cursorily asserts (at 10) that his *Batson* claim was "based upon all persons of color being removed," and that the defense never "accept[ed]" the strikes of the Asian or Hispanic jurors. The

---

[was] still the alternate seat?" (*Id.* at 42.) Judge Motley replied, "The next alternate will be the next person that comes up. . . . [T]he alternate is the next person." (*Id.*) That "next person that c[a]me[ ] up" was Juror 450, who had been sitting in seat three (*id.*). Under Judge Motley's explanation of the process, then, Juror 450 should have been moved up one seat, to seat two, and become the "next alternate." However, Juror 450 – like every juror in the "box" who remained after strikes for cause and peremptory strikes, was left in his original seat – seat three – and another juror, Juror 327, was moved from the panel outside the box into seat two, thereby becoming the second alternate (see SR.2).

record belies that claim. As explained supra, when the trial court asked defense counsel whether he was raising a *Batson* challenge as to all six non-white jurors, counsel affirmatively narrowed his challenge to "just the four" Black jurors (12/4/12 Tr. 127), and never demanded that the government give race-neutral reasons for the other strikes. The Division accordingly was correct in refusing to permit Smith to include those two strikes in his *Batson* claim on appeal. *See (Glenn) Smith*, 288 A.3d at 774 n.3; *(Thomas) Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993) ("We have repeatedly held that a defendant may not take one position at trial and a contradictory position on appeal."); *Wright v. Harris County*, 536 F.3d 436, 438 (5th Cir. 2008) (where defendant fails to rebut or contest a race-neutral reason given by the government for a peremptory strike, he waives his *Batson* challenge on appeal) (citing *United States v. Arce*, 997 F.3d 1123, 1126-27 (5th Cir. 1993)).

Nor is it self-evident on the existing record that the government lacked legitimate, race-neutral reasons to strike them. The Hispanic juror was employed as a café server and attended a for-profit technical school instead of college; the Asian-American juror apparently could be heard by the trial judge only with difficulty, English was not her primary language, and she was a retired housekeeper (12/4/12 Tr. 85-86, 91-92). *See (Bobby) Johnson*, 107 A.3d at 1112 (holding that, inter alia, "being soft-spoken" is a "race-neutral explanation[ ]"). In short, the government had readily apparent explanations in the record for these strikes. Moreover, there may

have been additional factors observable by the parties and the trial judge that could have been put on the record had the defense maintained its challenge to those two jurors. Finally, it is unclear why the government would have had any particular race-based incentive to strike the jurors, as they did not share Smith's racial background and neither's racial background had an obvious historical connection to the type of case to be tried. In any event, the trial court did not clearly err in failing sua sponte to demand further explanation when defense counsel no longer requested it.

* * *

We fully agree that racial discrimination "is especially pernicious in the administration of justice[,]" (LDF Br. 25 (citing *Buck v. Davis*, 580 U.S. 100, 124 (2017)), and take seriously our obligation to promote the ideals of equal justice under the law. In this case, no violation of those ideals took place. Smith received a fair trial, was convicted by a properly selected jury of his peers, and is serving the sentence that was justly imposed for his crimes. This Court should affirm.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

BRIDGET M. FITZPATRICK
Principal Assistant United States Attorney

ELIZABETH H. DANELLO
AMY H. ZUBRENSKY
Assistant United States Attorneys

__/s/_____
NICHOLAS P. COLEMAN
D.C. Bar #460109
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Nicholas.Coleman@usdoj.gov
(202) 252-6829

Addendum A – Juror Information

Orig. Pos.	Juror No.	Tr. Pages*	Profession	Govt. asked question?**	Excused for cause?	Peremptory strike (party)?	Final jury box no.
				No			
1	721	39-40	IT marketing	No	No	Yes (govt), but w/drawn	1 (1st alt.)
2	110	40-42	Not stated	No	Yes	N/A	N/A
3	450	42-43	Govt. contracting	No	No	No	3
4	331	44-45	Economist	No	No	Yes (def)	N/A
5	227	45-46	Real estate	No	No	Yes (def)	N/A
6	362	46-47	Education	No	No	No	6
7	811	47-48	Cong. chief of staff	Yes	No	Yes (def)	N/A
8	684	48-52	Lawyer	No	No	Yes (govt)	N/A
9	053	52-54. 60-61	Professor (retired)	Yes	Yes	N/A	N/A
10	743	54-56	Lawyer; real estate	Yes	No	Yes (govt)	N/A
11	298	56-59	Lawyer	No	No	No	11
12	800	59-60	Assist. Sec'y of Agriculture	No	No	No	12
13	238	61-62	Former plumber's assistant	No	No	Yes (govt)	N/A
14	603	62-65	Lawyer	No	No	Yes (govt)	N/A
15	164	65-66	Teacher	No	No	Yes (def)	N/A
16	491	66-70	College admissions officer	No	No	Yes (govt)	N/A
17	327	70	Retired healthcare consultant	No	No	No	2 (2nd alt.)
18	688	70-73	Foreign service officer & economist	No	No	No	4
19	272	73-74	Counter-terrorism analyst	No	No	No	5
20	760	74-75	Not stated	No	Yes	N/A	N/A
21	995	75-76	Not stated	No	Yes	N/A	N/A
22	217	76-78	Retired historian at ATF	No	No	Yes (def)	N/A
23	101	78-80	Lawyer	No	No	Yes (def)	N/A
24	180A	81-82	Not stated	No	Yes	N/A	N/A
25	149	82-83	Lawyer	Yes	Yes	N/A	N/A
26	733	83-84	Nurse practitioner	No	No	No	7
27	429	85	Not stated	No	Yes	N/A	N/A
28	565	85-87	Retired house-keeper	No	No	Yes (govt)	N/A
29	393	87-88	Not stated	Yes	Yes	N/A	N/A
30	361	88-91	DOD cyber policy analyst	No	No (def mtn denied)	Yes (def)	N/A

* References are to the December 14, 2012, transcript.

** Defense counsel did not ask any questions of any jurors during individual voir dire.

31	802	91-92	Café server; ITT Tech student	No	No	Yes (govt)	N/A
32	563	92-93	Not stated	No	Yes	N/A	N/A
33	987	93-96	Not stated	No	Yes	N/A	N/A
34	254	96-97	Cashier; former hotel breakfast attendant	No	No	Yes (govt)	N/A
35	916	97-98	Nanny	No	No	No	8
36	753	98-99	Not stated	No	Yes	N/A	N/A
37	511	99-100	Telecom trainer for executives at Sprint	No	No	No	9
38	165	100-01	Self-employed	No	Yes	N/A	N/A
39	792	101	Not stated	No	Yes	N/A	N/A
40	193	101-02	Not stated	Yes	Yes	N/A	N/A
41	212	103-04	Licensed private investigator	No	No	No	10
42	607	104-06	Former member of presidential commission on nuclear waste and Cong. staff member	No	No	Yes (def)	N/A
43	231	106	Not stated	No	Yes	N/A	N/A
44	625	107	Policy advocacy for NGO	No	No	No	13
45	839	107-09	VP for energy security nonprofit org.	Yes	No	No	14
46	180	109-12	Commercial banking	Yes	Yes	N/A	N/A
47	899	112-13	Barista; retired bookkeeper for medical office	No	No	No	N/A
48	866	113-14	Not stated	No	Yes	N/A	N/A
49	951	114-15	Lawyer	No	Yes	N/A	N/A
50	417	115	Not stated	No	Yes	N/A	N/A
51	039	115-16	Not stated	No	Yes	N/A	N/A
52	467	116	College student	No	Yes	N/A	N/A
53	683	116-18	Vehicle maint. for D.C. DPW	No	No	Yes (govt)	N/A
54	258B	118	Retired musician	Yes	No	Yes (govt)	N/A
55	156	118-20	Trainer of dept. store workers	No	No	No	N/A
56	907	120-22	IT support	No	No	Yes (def)	N/A
57	181	122-23	Children’s behavioral therapist	No	No	Yes (def)	N/A

Addendum B – Juror Position in Venire

The first 14 seats were in the jury box (two alternates in seats 1-2, and 12 deliberating jurors in seats 3-14). Strikes for cause are highlighted in yellow; first 20 (total) peremptory strikes in green:

Seat/Position	Juror Number	Seat/Position	Juror Number	Seat/Position	Juror Number
1 (Alt. 1)	721	20	~~760~~	39	~~792~~
2 (Alt. 2)	~~327~~	21	~~995~~	40	~~193~~
3 (Juror 1)	450	22	~~217~~	41	212
4 (Juror 2)	~~331~~	23	~~101~~	42	~~607~~
5 (Juror 3)	~~227~~	24	~~180A~~	43	~~231~~
6 (Juror 4)	362	25	~~149~~	44	625
7 (Juror 5)	~~811~~	26	733	45	839
8 (Juror 6)	~~684~~	27	~~429~~	46	~~180~~
9 (Juror 7)	~~053~~	28	~~565~~	47	899
10 (Juror 8)	~~743~~	29	~~393~~	48	~~866~~
11 (Juror 9)	298	30	~~361~~	49	~~951~~
12 (Juror 10)	800	31	~~802~~	50	~~417~~
13 (Juror 11)	~~238~~	32	~~563~~	51	~~039~~
14 (Juror 12)	~~603~~	33	~~987~~	52	~~467~~
15	~~164~~	34	~~254~~	53	~~683~~
16	~~491~~	35	916	54	~~258B~~
17	327	36	~~753~~	55	156
18	688	37	511	56	~~907~~
19	272	38	~~165~~	57	~~181~~

After strikes for cause and peremptory strikes, the 16 jurors were left in the following raw order of precedence:

Position	Juror Number
1	721
2	450
3	362
4	298
5	800
6	327
7	688
8	272
9	733
10	916
11	511
12	212
13	625
14	839
15	899
16	156

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for Smith, Sean R. Day, Esq.; counsel for amicus curiae Public Defender Service, Stefanie Schneider, Jaclyn Frankfurt, and Samia Fam, Esqs.; and counsel for amicus curiae the NAACP Legal Defense & Education Fund, Christopher Kemmitt, Adam Murphy, Michele St. Julien, and Devin McCowan, Esqs., on this 3rd day of January, 2025.

__/s/_____
NICHOLAS P. COLEMAN
Assistant United States Attorney