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IN THE SUPREME COURT FOR THE STATE OF DELAWARE

ISAIAH W. MCCOY,	)	**Nos. 558, 2012 and 595, 2012**
Appellant,	)	**(CONSOLIDATED)**
	)	
	)	**Court Below: Superior Court**
V.	)	**of the State of Delaware, in and for**
	)	**Kent County**
	)	
	)	**Cr. ID. No. 1005008059A**
STATE OF DELAWARE,	)	
Appellee.	)	
	)	

APPELLANT'S REPLY SUPPLEMENTAL MEMORANDUM

Batson's first prong requires an analysis of _all relevant facts_ to determine a showing of _disproportionate_ use of peremptory strikes based on race, not merely a showing of strikes of only one particular race.

The burden at step one of *Batson v. Kentucky*, 476 U.S. 79 (1986) is to "show[ ] that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Miller-El v. Dretke*, 545 U.S. 231 (2005) (defendant can make out a *prima facie* case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial"). The State cites *United States v. Thompson*, 528 F.3d 110,115 (2d Cir. 2008) and asks the Court to compare that case for the proposition that striking a particular percentage of members of one particular race is a *prima facie* showing under a

reverse *Batson* challenge. That case, however, only confirms the law in this area (and Appellant's argument) that a *prima facie* case under *Batson's* first prong requires, at the very least, a showing of discriminatory intent based on *all available evidence*.

Moreover, if, as here, statistical evidence is the basis for the finding of the first prong, that evidence requires a showing that defendant's strikes were somehow racially disproportionate. *See, e.g., United States v. Alvarado*, 923 F.2d 253, 255-56 (2d Cir.1991) ("[o]nly a rate of minority challenges significantly higher than the minority percentage of the venire would support a statistical inference of discrimination."). For the statistical evidence to be relevant, data concerning the entire jury pool is necessary. *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008). "[T]he mere fact of striking a juror or a set of jurors of a particular race does not necessarily create an inference of racial discrimination." *United States v. Lowder*, 236 F.3d 629, 636 (11th Cir. 2000). While statistical evidence may support an inference of discrimination, it can do so "only" when placed "in context." *Lowder*, 236 F.3d at 638. For example, "the number of persons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck." *Lowder*, 236 F.3d at 636-37; *see also United States v. Novaton*, 271 F.3d 968, 1002 (11th Cir. 2001);

United States v. Allen-Brown, 243 F.3d 1293, 1298 (evaluating the strike pattern in light of the racial composition of remaining potential jurors); *United States v. Stewart*, 65 F.3d 918, 925 (11th Cir. 1995) (stating that "no particular number of strikes against blacks automatically indicates the existence of a prima facie case," and considering, inter alia, the number of struck black jurors as a percentage of the black venire members).

In determining whether the totality of the circumstances and statistics show a "pattern" that creates an inference of discrimination, courts have first considered whether members of the relevant racial or ethnic group served unchallenged on the jury. *See Lowder*, 236 F.3d at 638 ("[T]he unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a prima facie case of discrimination in the peremptory striking of jurors of that race."). Second, courts have considered whether there is a substantial disparity between the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire. *Lowder*, 236 F.3d at 637. And finally, courts have considered "whether there is a substantial disparity between the percentage of jurors of one race [or ethnicity] struck and the percentage of their representation on the jury." *Lowder*, 236 F.3d at 637.

In *Thompson*, the case relied upon by the State, "[s]ixty-five percent of the original members of the panel were white. In response to the Government's reverse

Batson challenge, the District Court determined that there was a *prima facie* case of discrimination because over 85% of the challenges exercised by defense counsel were against white jurors while no challenges were exercised against African American jurors." Here, the trial court finds a *prima facie* case based solely on the rate of white potential jurors struck without any comparison to the number of African Americans struck, seated, or an analysis of the racial composition of the original jury pool: "With regard to the first prong, a prima facie showing was made that Defendant exercised a peremptory challenge on the basis of race when he attempted to strike a 15th Caucasian juror, Mr. Hickey." Superior Court's Findings at 11; State's Response at 4. This analysis is legally flawed, insufficient, and entitled to no deference.

The trial court inexplicably rejects its own reasoning as "weak" and fails to fully analyze Appellant's race-neutral reasons.

Under *Batson's* third prong, the burden shifts to the party objecting to the peremptory challenge to show the reasons stated are pretext for a discriminatory purpose and the trial court must make an analysis. Here, where Appellant continues to argue *Batson* was not raised, it is significant that the State makes no argument against Appellant's peremptory in the face of its burden. The court's own *sua sponte* analysis is unpersuasive and incomplete.

Throughout voir dire both the trial court and the State repeatedly expressed the opinion that a juror who is related to a corrections employee may be excused *for cause.* The court struck four such jurors when Appellant had counsel. CITE. The court even made a point of checking with counsel, to make sure it was okay with Appellant, when the *very first juror seated was a white male* who had an uncle who worked corrections at Smyrna. Appellant's counsel even advised him on the record not to seat a juror whose wife retired from Smyrna. Finally, the State even argued that it "stra[ins] credulity" that a juror whose uncle was a retired prison guard would have no biases. *See* A00270 at 53; A00275 at 72. In all these circumstances, *for cause* strikes were obvious, but after Appellant exercising his right to proceed *pro se,* the same reasoning became "weak." Such a conclusion fails scrutiny particularly considering this was not Appellant's sole reason for challenging the juror.

The trial court must analyze *each* reason given for and all relevant circumstances surrounding a peremptory strike. *See Miller-El v. Dretke*, 545 U.S. 231 (2005); *see also Snyder v. Louisiana,* 128 S. Ct. 1203 (2007). Here, the trial court completely ignores Appellant's additional, significant reason for striking Mr. Hickey: a sexual assault of another counselor by an inmate at the time his wife worked at the facility where Appellant is currently housed. If they were to be dismissed by the trial court, these two reasons -- (1) Mr. Hickey's wife's

employment at the Smyrna correctional facility and (2) her possible experience of a colleague's sexual assault by an inmate near the time of her leaving -- required more explanation and analysis than provided. They certainly could not be dismissed simply on the basis of supposed "behavior" of "smirking" at the prosecutor.

CONCLUSION

Wherefore, again for the reasons set forth previously and above, this Court should reverse Appellant's convictions and sentence.

Respectfully submitted,

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