No.

IN THE

# Supreme Court of the United States

HOZIE ROWELL, PETITIONER

*v.*

POLICE OFFICER JOAN FERREIRA, SERGEANT SHANE KILLILEA AND LIEUTENANT CHRISTOPHER POPOVIC, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION(S) PRESENTED

Did the court of appeals contravene *Batson v. Kentucky*, 476 U.S. 79 (1986) when in affirming the peremptory striking of the only qualified African-American on the jury panel it wrongly focused on whether defense counsel had credibly described the juror's physical movements instead of whether the juror's physical movements had truly motivated defense counsel to strike this juror?

## PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

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## OPINIONS BELOW

The unpublished Summary Order of the United States Court of Appeals for the Second Circuit in *Hozie Rowell v. Joan Ferreira et al.*, C.A. No.19-3469, decided and filed December 10, 2020, and reported at 839 Fed. App'x 698 (2nd Cir. 2020), affirming the district court's denial of petitioner's new trial motion based upon the trial judge's decision to credit respondents' allegedly race-neutral explanation for striking peremptorily the only African-American juror on the jury panel, is set forth in the Appendix hereto (App. 1-5).

The unpublished Opinion and Order of the United States District Court for the Southern District of New York in *Hozie Rowell v. Joan Ferreira et al.*, C.A. No. 16-cv-6598 (AJN), filed September 19, 2019, and reported at 2019 WL 4509048 (S.D.N.Y. 2019), denying petitioner's new trial motion based upon respondents' failure to adduce a race-neutral explanation for striking peremptorily the only African-American juror on the jury panel as required by *Batson v. Kentucky*, 476 U.S. 79 (1986), is set forth in the Appendix hereto (App. 6-19).

The unpublished Order by the United States Court of Appeals for the Second Circuit in *Hozie Rowell v. Joan Ferreira et al.*, C.A. No.19-3469, dated January 26, 2021, denying petitioner's petition for rehearing or, in the alternative, for rehearing *en banc*, is set forth in the Appendix hereto (App. 20).

## JURISDICTION

The unpublished Order by the United States Court of Appeals for the Second Circuit in *Hozie Rowell v. Joan*

*Ferreira et al.*, C.A. No.19-3469, denying petitioner's petition for rehearing or, in the alternative, for rehearing *en banc* was filed on January 26, 2021 (App. 20).

In addition, on March 19, 2020, in light of the ongoing public health emergency caused by COVID-19, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and by this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

**United States Constitution, Amendment V:**

> No person shall...be deprived of life, liberty, or property, without due process of law....

**United States Constitution, Amendment VII:**

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

**28 U.S.C. § 1331:**

The district courts shall have original jurisdictn of all civil actions arising under the Constitution, laws, or treaties of the United States.

**28 U.S.C. §§ 1343(a)(3) & (4):**

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
...
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United tates;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

**Civil Rights Act–42 U.S.C. § 1983:**

Every person who under color of any statute, ordinance, regula-tion, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress....

## STATEMENT

On June 5, 2014, petitioner Hozie Rowell ("petitioner") was a 55-year-old African-American man living with his wife and her granddaughters in an apartment located in a housing community in Harlem, New York City, controlled by the New York City Housing Authority. In the twenty years petitioner and his wife had lived there, there had been no illicit drug activity of any kind carried on inside their apartment or even associated with their home. In fact, petitioner as an active community member fought to keep his building free of drug activity; and he was also a vocal critic of certain unethical police officers in the neighborhood, resulting in discipline for some of these officers.

In response to petitioner's criticism of police officers, respondents Police Officer Joan Ferreira ("respondent" or "Ferreira"), Sergeant Shane Killilea ("respondent" or "Killilea") and Lieutenant Christopher Popovic ("respondent" or "Popovic"), all police officers employed by the New York City Police Department, executed a plan to raid petitioner's home, arrest him and prosecute him for possession of drugs. To this end, Ferreira and Killilea obtained a search warrant from a Judge of the New York County Criminal Court based upon a fabricated affidavit of probable cause.

At 5:30 in the morning of June 5, 2014, respondents together with other police officers executed the warrant and searched petitioner's home without discovering any drugs or other evidence of illegal activity. In order to

justify their search, Killilea left petitioner's apartment, entered an unmarked vehicle and drove off, returning to petitioner's home fifteen minutes later. He then entered petitioner's bedroom and announced that he had found cocaine in plain view on petitioner's dresser together with zip-lock bags (used by petitioner as packaging in his jewelry business) in a drawer, evidence respondents claimed was of drug dealing.

Petitioner was arrested and charged with criminally using drug paraphernalia and criminal possession of a controlled substance, both misdemeanors under New York Penal Law. Over the course of nineteen months, petitioner appeared numerous times in New York County Criminal Court incident to these charges. On January 21, 2016, the prosecution of petitioner was dismissed based on speedy trial grounds.

Later in 2016, petitioner brought this civil rights action in the federal district court for the Southern District of New York under 42 U.S.C. § 1983 against respondents as well as the City of New York. Positing jurisdiction on 28 U.S.C. §§ 1331 and 1343(a)(3) & (4), he claimed that respondents in their individual and official capacities had carried out an unlawful search, fabricated evidence and falsely prosecuted him for illegal drug activity, violating his civil rights. He alleged that respondents had also committed the torts of false arrest, malicious prosecution, and using excessive force in conducting their search; and that Killilea had violated his right to a fair trial. Finally, he claimed that Ferreira and Popovic each failed to intervene on his behalf to prevent the violation of his constitutional rights even though they had a realistic opportunity to do so.

Invoking the district court's supplemental jurisdiction under 28 U.S.C. § 1367(a), petitioner further alleged that respondents committed analogous torts under New York state law arising from the same facts. He further claimed that the City of New York was liable for respondents' misconduct under theories founded upon its negligent hiring/training/retention of these officers or via *respondeat superior*. He demanded a jury trial, sought compensatory as well as punitive damages and an award of his attorney's fees under 42 U.S.C. § 1988.

On February 25, 2019, a four-day trial commenced on petitioner's claims that Killilea denied him a fair trial by fabricating evidence and that Ferreira and Popovic each had failed to intervene to prevent the violation of his constitutional rights by properly supervising Killilea even though they had a realistic opportunity to do so. During jury selection, after all challenges for cause were made, the panel of remaining fourteen qualified jurors included one African-American male, Juror No. 12 ("Juror No. 12") (App. 8 ). Petitioner, his wife and their two granddaughters----all of whom testified at trial----are also African-American while none of respondents or their witnesses was African-American.

Before peremptory challenges to these jurors were exercised, one of respondents' trial attorneys (Ms. Alison Mitchell) told the trial judge that she had observed Juror No. 12 "during the course of [the Court's] reading [a] summary of the case, shaking his head and reacting physically in some way" (App. 8-9). Because "no one else reported having witnessed these movements by Juror No. 12," the trial judge asked Ms. Mitchell to describe what she saw. She replied that during the trial court's summary of the case, he "lean[ed] back in the chair and

tilt[ed] his head back and his eyes rolled back, and his head, with his head down, and he shook his head back and forth, side to side" (App. 9). She added: "And again, I do not know if that reaction was in favor of plaintiff or in defendants' favor....I don't know what the reaction was; so that's why we sought to clarify and question from Your Honor."

Over petitioner's objection, the trial court inquired of this juror "that an attorney witnessed him shaking his head during [the Court's] reading of the summary of the case and wanted to confirm if he had...anything that he's heard about the case and wanted to confirm if he had...anything that he's heard about the case that he thought would interfere with his ability to be fair and impartial" (*Id.*). Juror No. 12 answered unequivocally "No" and that he had no concerns" (*Id.*). Neither party requested any additional follow-up questions for this juror (*Id.*).

Upon the trial court's questioning of each member of the venire, Juror No. 12 indicated that he had previously served as a juror on three previous occasions. Juror No. 8, a white woman who was ultimately selected as a juror, had also previously served on a jury. Neither party requested any follow-up questions to these jurors about their prior jury service.

Respondents then exercised one of their three peremptory strikes on Juror No. 12. Petitioner challenged this peremptory strike under *Batson v. Kentucky*, 476 U.S. 79 (1986), asserting that respondents had struck the only African-American on the jury panel (*Id.*). In *Batson*, the Court set forth the three-step procedure to assess whether an attempt to strike peremptorily a black juror

is based on invidious discrimination in violation of the Equal Protection Clause. First, petitioner must establish that he is a member of a cognizable racial group and that opposing counsel is exercising a peremptory challenge to remove from the venire a member of petitioner's race; if the facts and all other relevant circumstances raise the inference that opposing counsel is using the peremptory challenge "to exclude [a] veniremen from the petit jury on account their race," a prima facie showing of discrimination has been made. *Id.* at 96.

Once petitioner makes this showing, respondents' counsel must come forward with a neutral explanation for challenging the black juror. *Id.* at 97. While it may not amount to a challenge for cause, it cannot rest on the juror's race and it cannot consist of merely a denial of a discriminatory motive. *Id.* at 97-98. Instead, respondents' counsel at this second step "must articulate a neutral explanation related to the particular case to be tried." *Id.* at 98. In an accompanying footnote, the *Batson* Court explained that counsel must give "a clear and reasonably specific" explanation of his legitimate reasons" for exercising the challenges." *Id.* at n. 20 quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

The trial judge at the third step then has the duty to determine if petitioner has demonstrated purposeful discrimination by a preponderance of all the evidence. *Id.* The trial judge's findings in this context "largely will turn on evaluation of credibility...," *id.* at n. 21, i.e., is the neutral explanation proffered by counsel for the challenge credible when based upon all the facts and circumstances attendant to the trial at hand? As the Court later amplified, during this third step,"[t]he trial judge must determine whether the [proponent's] proffered reasons

are the actual reasons [for the strike], or whether the proffered reasons are pretextual and the [proponent] instead exercised peremptory strikes on the basis of race." *Flowers v. Mississippi*, ___ U.S. ___, ___; 139 S.Ct. 2228, 2244 (2019).

Faced with petitioner's *Batson* challenge to the peremptory striking of Juror No. 12, the trial judge first found that petitioner who is African American had made a prima facie showing that this juror was struck because of his race since he was the sole juror who appeared to be African American and had given no answers which raised concerns about his impartiality (App. 10). In response to the court's request to explain their strike, respondents' other trial counsel (Ms. Speight), after first admitting that Juror No. 12 was African American, then questioned whether he was black at all:

> MS. SPEIGHT: We actually don't know if he is African-American. He is a male with brown skin. There is a woman sitting next to him who also appears to have brown skin.
> So if the suggestion that he is definitely African-American and we struck him on that basis, is unfair because he could be any number of----
> THE COURT: He is black.
> MS. SPEIGHT: He has brown skin, but he could be Dominican. He could be any number of things. We don't know. We didn't ask. We don't have any basis to reach that conclusion just by seeing him. He has a complexion that could be African-American. It could be any number of things.

(Tr. at 27:14-28:4).

When asked again to explain the strike, Ms. Speight proffered various justifications: (1) Juror No. 12's head movements during the trial court's summary of the case; (2) his failure to respond "Yes" to general panel questions; (3) his prior service on three other juries; and (4) because when questioned privately, he did not acknowledge his physical movements which Ms. Mitchell said she saw and he did not say that he had any particular feeling about the case (App. 11).

Petitioner's counsel responded by noting that Juror No. 8, a white woman who had served previously as a juror, was *not* stricken by respondents despite her prior jury service; and he found "problematic" that respondents' attorney continued to deny that Juror No. 12 was "clearly African-American or black." Ms. Speight responded that making generalizations based on skin color is "presumptive" and that it was "absurd...to say that [Juror No. 12] has a dignified background and no qualifications that are not dignified that would exclude him."

Despite being "troubled" and "concerned," the trial judge concluded that respondents had given a credible, race-neutral basis for the strike, i.e., Juror No. 12's head movements,"based on Ms. Mitchell's demeanor" (App. 11-12). As she saw it, petitioner had not carried his burden of proof of demonstrating purposeful discrimination by a preponderance of the evidence "in light of 'counsel's representation made to this Court, as an officer of the court, with obviously very serious repercussions if anything she said to me was not true'" (App. 12). The trial judge thus found respondents' counsel's explanation to be a "*credible representation about Juror No. 12's behavior*," ignoring the totality of the circumstances, some

suspicious, which surrounded respondents' strike (*Id.* ) (emphasis supplied). She therefore denied petitioner's *Batson* challenge (*Id.*).

On February 28, 2019, the jury returned with a verdict in respondents' favor on petitioner's three claims that Killilea denied him a fair trial by fabricating evidence and that Ferreira and Popovic each had failed to intervene to prevent the violation of his constitutional rights (App. 7). Due to administrative delay, judgment did not enter until June 4, 2019 (*Id.*).

On June 21, 2019, petitioner sought a new trial under Fed. R. Civ. P. 59(a) claiming *inter alia* that the trial judge erroneously denied his *Batson* challenge to respondents' striking of Juror No. 12 prior to the taking of evidence (App. 6;8-12). The district court denied the motion in an Opinion and Order on September 19, 2019, once again relying solely on respondents' counsel's credible representation about Juror No. 12's physical movements and once again overlooking the totality of circumstances supporting petitioner's claim that this strike was based on race (App.11-12 ). As the trial judge wrongly concluded, "[t]he central issue was whether Ms. Mitchell's representations regarding Juror No. 12's head movements were credible" (App. 11).

Petitioner appealed and on December 10, 2020, the court of appeals unanimously affirmed the district court's ruling in a Summary Order (App. 1-5). The Panel found "no basis to disturb the district court's decision to credit [respondents'] race-neutral explanation concerning the juror's physical movements" (App. 3-4). Nor did it determine that the district judge failed to consider the

totality of the circumstances in denying petitioner's *Batson* challenge (App. 4).

Even though the trial judge had concluded only that "a *credible*, race-neutral reason [had] been proffered" for the strike, this was sufficient under the Circuit's precedents (*Id.*) (emphasis in original) . As it explained, the trial judge need not engage in a "talismanic recitation of specific words," and she unambiguously rejected the challenge with sufficient clarity to show that petitioner had failed to carry his burden to show that respondents' proffered race-neutral explanation was pretextual (*Id.*).

On January 26, 2021, the court of appeals denied petitioner's petition for rehearing or, in the alternative, for rehearing *en banc* (App. 20).

## REASONS FOR GRANTING THE PETITION

**The Court Of Appeals Contravened *Batson v. Kentucky*, 476 U.S. 79 (1986) When In Affirming The Peremptory Striking Of The Only Qualified African-American On The Jury Panel It Wrongly Focused On Whether Defense Counsel Had Credibly Described The Juror's Physical Movements Instead Of Whether The Juror's Physical Movements Had Truly Motivated Defense Counsel To Strike This Juror.**

"[B]ased on [respondents' counsel's] demeanor" and the "very serious repercussions" if her representations to the court were not true, the trial judge concluded at step three of the *Batson* inquiry that trial counsel's description of Juror No. 12's head movements was a "credible representation about Juror No. 12's behavior," and for this reason alone denied petitioner's

challenge under *Batson* to respondents' peremptory striking of this black juror (App. 11-12). As she wrongly concluded, "[t]he central issue was whether Ms. Mitchell's representations regarding Juror No. 12's head movements were credible" (App. 11). In so ruling, the district judge contrary to her duty under *Batson* failed to consider the totality of the circumstances surrounding the strike in order to determine whether it was based on race.

First, the district court answered the *wrong* credibility question, i.e., the one which focused on whether defense counsel had credibly described the juror's head movements. Instead, under *Batson*, the crucial credibility question is whether this juror's head movements *truly* motivated defense counsel's striking of that juror, whether those head movements were the actual reason for the strike and whether this reason was pretextual in that it was an excuse to strike this juror because of his race. That respondents' counsel credibly described the juror's head movements answers *none* of these crucial inquiries under *Batson's* third step and fails to fulfill that decision's promise to prevent discrimination based on race in the selection of jurors.

Second, the district judge failed to assess the totality of the circumstances surrounding the striking of Juror No. 12, as *Batson* requires, circumstances which support the inference that Juror No. 12's physical movements were not the real reason for respondents' strike but rather a pretext for purposeful discrimination. They are: (1) counsel's remarkable denial of Juror No. 12's race as African American after she had already admitted this fact and when it was clear to the judge that "[h]e is black;" (2) their questionable reliance on his prior jury service as a reason to strike while at the same time

refusing to strike Juror No. 8, a white woman, because of her prior jury service; (3) their failure to inquire of Juror No. 12 about his prior jury service, a purported reason for striking him; (4) their counsel's statements evincing unfounded hostility toward Juror No. 12, suggesting at one point that there was something nefarious or "undignified" about his background as a reason to strike him; (5) their reliance on his failure to answer "Yes" to questions seeking bias and his denial of personal feelings about the case, both indicia of neutrality and fairness rather than reasons for striking him; and (6) their reliance on his failure to acknowledge the physical movement observed by counsel *when he was never asked about his physical movement(s)* .

All these relevant circumstances substantially undermined respondents' claim that Juror No. 12's physical movements had truly motivated defense counsel to strike this juror. The trial court contravened *Batson* by refusing to harmonize these circumstances with its analysis, resting its denial of petitioner's *Batson* motion instead on the sole reason that respondents' counsel had credibly described Juror No. 12's physical movements. That defense counsel's description of Juror No. 12's physical movements is credible does *not* mean it was the motivating factor for the peremptory strike and by conflating these two concepts of a race-neutral *description* with a race-neutral *motivation* while ignoring circumstances of a purposeful design to discriminate is clear error undermining *Batson* and denying petitioner the equal protection of the laws.

That the trial court later found in its Opinion and Order that it "took all of the circumstances into account" does not excuse the reality that it failed to do so both at

trial and upon deciding the new trial motion. Each ruling was bereft of any analysis of the circumstances which led it to believe that Juror No. 12's movements were the authentic reason for the strike, the very core of *Batson's* third-step inquiry. The six aforementioned circumstances supporting the inference of pretext were left entirely unaddressed by the trial court, leaving the record unmistakably clear that it had overlooked these important facts germane to the motivation inquiry under *Batson's* third step, i.e., whether Juror No. 12's physical movements truly motivated respondents' peremptory strike.

The court of appeals ratified the lower court's flawed decisionmaking when it affirmed the "district court's conclu[sion] that 'a *credible*, race-neutral reason [had] been proffered' for the strike" and was thus sufficient under *Batson* (App. 4). This ruling is infirm for the same reason as the ruling by the district court, i.e., it erroneously focuses only on whether defense counsel had credibly described Juror No. 12's head movements while ignoring the crucial inquiry under *Batson's* third step of whether this juror's head movements had truly motivated defense counsel to strike this juror, whether those head movements were the actual reason for the strike and whether this reason was merely an excuse to strike this juror because of his race.

Because neither court faithfully executed *Batson's* third-step adjudication aimed at ferreting out discrimination based on race in the selection of jurors, the court of appeals "has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question

in a way that conflicts with relevant decisions of th[e] Court." Supreme Court Rule 10(c).

The question of racial discrimination in jury selection is one of exceptional importance. What difference does *Batson's* important prophylactic procedure make if trial and appellate courts can ignore the requirements of its third step and then absolve its own noncompliance in a Summary Order of no precedential effect? Without a duty to examine all the relevant circumstances at *Batson's* third step, *any* facially neutral reason for the strike would suffice and *Batson's* procedure would amount to no more than the decision it overruled, i.e., *Swain v. Alabama*, 380 U.S. 202, 223(1965), where relief for purposeful discrimination in jury selection was provided only where the proponent of the strike had a demonstrable history of perverting the peremptory challenge system in other cases.

This is not the law after *Batson*; a "talismanic recitation of specific words" will not suffice at its third step; instead, *Batson* requires an adjudication of credibility taking into account the totality of the circumstances; and certiorari should be granted in order to mandate this credibility adjudication at its third step. Because both courts below failed in this regard, the judgment should be vacated and the matter remanded to the district court so that it may expressly determine in a reconstruction hearing whether under all the relevant circumstances respondents' proffered race-neutral explanation for the striking of this lone African-American juror was a pretext for racial discrimination; or, if the district court determines that it is no longer possible to effectively make such an adjudication, a new trial should be ordered. See, e.g., *Barnes v. Anderson*, 202 F.3d 150,

157 (2nd Cir. 1999) (remanding for a reconstruction hearing or new trial).

In *Batson*, the Court reaffirmed the long-standing principle that the Equal Protection Clause is violated when prosecutors challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the government's case against a black defendant in a criminal case. 476 U.S. at 89. In successive opinions, the Court has extended *Batson's* rule and its three-step protocol to situations where criminal defendants exercise peremptory challenges in a racially discriminatory manner, *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); where Hispanic jurors are deliberately stricken solely because of their ethnicity, *Hernandez v. New York*, 500 U.S. 352, 355 (1991); where women are systematically excluded from juries based on gender, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); and where plaintiffs or defendants in civil cases purposefully strike potential jurors because of their race. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-625;631 (1991).

In whatever setting, the Court after *Batson* has emphasized that the ultimate inquiry in its third step is to determine whether the proponent of the strike is "motivated in substantial part by discriminatory intent." *Foster v. Chatman*, 578 U.S. ___, ___; 136 S. Ct. 1737, 1754 (2016) quoting *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008). In *Miller-El v. Dretke*, 545 U.S. 231, 239; 251-252 (2005), the Court made clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be a *Batson* error, both the trial judge and the appellate curt are required during this third step "to assess the plausibility of the reason [for striking the juror] in light of

*all the evidence with a bearing on it.*" *Id.* citing *Batson*, 476 U.S. at 96-97 and *Miller -El v. Cockrell*, 537 U.S. 322, 339 (2003) (emphasis supplied). See *Snyder*, 552 U.S. at 478.

As the *Miller-El* Court noted, central to *Batson* is the idea that the trial judge will closely scrutinize the authenticity of the proponent's reason(s) for the strike by measuring it not just by its objective *reasonableness* but rather by its subjective *genuineness* measured by the totality of the relevant circumstances in the case, factors which may raise an inference of purposeful discrimination. 545 U.S. at 239-240. Accord, *Flowers v. Mississippi*, ___ U.S. ___, ___; 139 S. Ct. 2228, 2244 (2019) citing *Foster v. Chatman*, 578 U.S. at ___; 136 S. Ct. at 1754.

In this sense, a "legitimate reason" for a challenge is not one "that makes sense;" it means a reason that does not deny the equal protection of the laws. *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (*per curiam*) citing *Hernandez v. New York*, 500 U.S. at 359. Only a rigorous examination of the relevant circumstances where the credibility of the proponent's reason(s) for the strike is truly tested will discover the difference between a race-neutral excuse and a design to discriminate.

Circumstances relevant to measure the credibility of a proponent's reason(s) for the strike include the demeanor of the attorney proponent (*Flowers*, *supra*; *Snyder*, 552 U.S. at 477); the juror's demeanor (*Snyder*, *supra*); how reasonable or how improbable the proponent's explanations are (*Flowers*, ___ U.S. at ___; 139 S. Ct. at 2250; *Foster*, 578 U.S. at ___; 136 S. Ct. at 1753; *Snyder*, 552 U.S. at 482 n. 1; *Dolphy v. Mantello*, 552 F.3rd 236, 239 (2nd Cir. 2009)); the questions and answers

during *voir dire* examination of the jurors (*Miller-El*, 545 U.S. at 252-253; *Batson*, 476 U.S. at 97); statistical data of peremptory strikes used against black jurors (*Miller-El*, 545 U.S. at 241; 265); comparative juror analysis for disparate treatment (*Miller-El*, 545 U.S. at 248; *Foster*, 578 U.S. at ___; 136 S. Ct. at 1754; *Jordan v. Lefevre*, 206 F.3rd 196, 201 (2nd Cir. 1999)); and the quantity and quality of questions posed to juror(s) sought to be stricken (*Miller-El*, 545 U.S. at 255).

The totality of the relevant circumstances in this case---- *all* of them left entirely unaddressed by either court below----show by a preponderance of the evidence that respondents' striking of Juror No. 12 was truly motivated by a purposeful design to discriminate on the basis of race. The demeanor of the attorneys proposing the strike became antagonistic and then hostile toward Juror No. 12 for no reasons on the record. Seeing head movement by this juror which no one else saw, Ms. Mitchell intuited a precarious correlation between this movement and his fitness for jury duty in this civil rights case; and Ms. Speight escalated the challenge by first admitting that he was African-American, then denying this known fact that "[h]e is black," and finally insinuating that there may be something nefarious or "undignified" about his background as a reason to strike him. All this combative demeanor, including the very denial of Juror No. 12's race, bespeak spur-of-the-moment invention rather than serious forethought founded on observable facts.

Their stated reasons for the strike similarly "reek of [pretextual] afterthought," *Miller-El*, 545 U.S. at 246; 250. They were ultimately inconsistent, improbable and hard to fathom on this record. The juror's head

movements alone were inconclusive and were never shown to be probative of prejudgment or bias, especially in view of Juror No. 12's assertion upon questioning by the judge that he could fairly and impartially serve as a juror in this case. His failure to answer the general panel questions and his prior jury service were innocuous, benign factors which cut neither way in finding a route to disqualify him; and his failure to acknowledge the physical movement observed by counsel ring hollow when he was *never asked* by counsel or the court about his physical movement. *Id.*, 545 U.S. at 250 n. 8 ("[T]he failure to ask [follow-up questions] undermines the persuasiveness of the claimed concern.").

Moreover, his prior jury service could not reasonably have presented a genuine cause for striking him in view of the fact that respondents refused to strike Juror No. 8, a white woman, because of her prior jury service; and when given the opportunity, defense counsel *never* asked him about his prior jury service or its effect on his asserted ability to fairly and impartially hear the evidence. See *id.* at 241 ("If a...proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.").

In the meantime, Juror No. 12's demeanor was unremarkable. His unchallenged assertion of fairness and impartiality and his denial of personal feelings about the case presented persuasive indicia of neutrality and fairness instead of reasons for striking him. As for a statistical analysis of peremptory strikes used against black jurors on this venire, it was 100%, owing to the fact that Juror No. 12 was the only African American on this

panel. Respondents peremptorily challenged 14% of the qualified nonblack panelists. In addition, a comparative juror analysis shows that while Juror No. 12 and Juror No. 8, a white woman, both had prior jury service, only Juror No. 12, the lone African American on this panel, was stricken peremptorily for this reason.

Under *Batson* and its progeny, the trial judge was obligated to go beyond simply assessing the truthfulness of the actual reason given by respondents for striking Juror No. 12. She was bound instead to further adjudicate explicitly the question of whether those head movements truly motivated the peremptory strike. By accepting as true respondents' race-neutral explanation about this juror's physical movements without further explicitly adjudicating whether those movements truly motivated the peremptory strike, the trial court failed to perform its fundamental *Batson* obligations. A reconstruction hearing to adjudicate this issue of respondents' true motivation should be ordered; or, if such a hearing would now be ineffective, a new trial should be ordered.

## CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit and, ultimately, to vacate and reverse the judgment and remand the matter to the district court for that court to determine in a reconstruction hearing whether respondents' proffered race-neutral explanation for striking this lone African-American juror on the panel was a pretext for racial discrimination; or, if the district court determines that it is no longer possible to effectively make such an adjudication, a new trial should be ordered; or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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United States Court of Appeals, Second Circuit.

Hozie ROWELL, Plaintiff-Appellant,

v.

Police Officer Joan FERREIRA, individually and in her official capacity, Shane Killilea, individually and in his official capacity, Christopher Popovic, individually and in his official capacity, Defendants-Appellees,

City of New York, John Doe, individually and in his official capacity, Defendants.

**19-3469**
December 10, 2020

Appeal from an order of the United States District Court for the Southern District of New York (Nathan, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the district court's order is **AFFIRMED.**

**Attorneys and Law Firms**

For Plaintiff-Appellant: Cyrus Joubin, New York, NY.
For Defendants-Appellees: Philip W. Young (Richard P. Dearing, Scott N. Shorr, Jonathan A. Popolow, on the brief), New York City Law Department, for James E. Johnson, Corporation Counsel of the City of New York, New York, NY.

Present: JOHN M. WALKER, JR., ROBERT A. KATZMANN, RICHARD C. WESLEY, Circuit Judges.

**SUMMARY ORDER**

Plaintiff-appellant Hozie Rowell appeals from an order of the district court entered September 18, 2019 denying his motion for a new trial under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), after the defendants used a peremptory challenge to strike the only qualified African American juror on the panel. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Rowell argues that the district court clearly erred in crediting the defendants' reasons for striking the juror. These reasons were (1) the fact that the juror was "shaking his head" while the district court summarized

the case, (2) his failure to respond "yes" to general panel questions, and (3) his prior service on three juries. In *Batson*, the Supreme Court held that the state may not use its peremptory challenges to exclude potential jurors on the basis of their race. *See id.*; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (extending *Batson*'s holding to the exclusion of prospective jurors in civil cases). To establish a *Batson* violation, "[f]irst, a [movant] must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the [proponent] must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the [movant] has shown purposeful discrimination." *Foster v. Chatman*, —— U.S. ——, 136 S. Ct. 1737, 1747, 195 L.Ed.2d 1 (2016).[1] During the third step of the inquiry, "[t]he trial judge must determine whether the [proponent's] proffered reasons are the actual reasons [for the strike], or whether the proffered reasons are pretextual and the [proponent] instead exercised peremptory strikes on the basis of race." *Flowers v. Mississippi*, —— U.S. ——, 139 S. Ct. 2228, 2244, 204 L.Ed.2d 638 (2019). "The trial court must consider the [proponent'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 2243. Because a trial court's finding as to the intent underlying the use of a peremptory challenge rests principally ***700** upon a credibility assessment that lies "peculiarly within a trial judge's province," we accord that determination "great deference" and review it only for clear error. *Id.* at 2244.

We affirm the district court's denial of Rowell's motion for a new trial because we have no basis to

disturb the district court's decision to credit the defendants' race-neutral explanation concerning the juror's physical movements. *See McCrory v. Henderson*, 82 F.3d 1243, 1248 (2d Cir. 1996) ("[An attorney's] explanation that a venireperson was excluded because he or she seemed, for example, inattentive or hostile ... if credible, is sufficient."). Nor can we conclude that the district court failed to consider the totality of the circumstances in denying Rowell's *Batson* challenge. The district court concluded that "a *credible*, race-neutral reason [had] been proffered" for the strike. J.A. 64 (emphasis added). While that brief statement does not provide a full analysis that would have had to inform the district court's judgment, we cannot conclude that it was inadequate under our precedents. A district court need not engage in a "talismanic recitation of specific words" to satisfy *Batson*, *Galarza v. Keane*, 252 F.3d 630, 640 n.10 (2d Cir. 2001); instead, "unambiguous rejection of a *Batson* challenge will demonstrate with sufficient clarity that a trial court deems the movant to have failed to carry his burden to show that the [proponent's] proffered race-neutral explanation is pretextual," *Messiah v. Duncan*, 435 F.3d 186, 198 (2d Cir. 2006). And while a district court may not evade its obligation to "make clear whether it credits the non-moving party's race-neutral explanation for striking the relevant panelist," *Dolphy v. Mantello*, 552 F.3d 236, 239 (2d Cir. 2009), here we conclude that the district court did make that clear, *see* J.A. 64.

In light of those standards, we cannot say that the district court clearly erred in its determination that Rowell failed to show purposeful discrimination on the part of the defendants. We have considered Rowell's remaining arguments on appeal and have found in them

no basis for reversal. For the foregoing reasons, the order of the district court is **AFFIRMED**.

## Footnotes

1Unless otherwise indicated, in quoting cases, we omit all internal citations, quotation marks, footnotes, and alterations.

2019 WL 4509048
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Hozie ROWELL, Plaintiff,

v.

Police Officer Joan FERREIRA et al., Defendants.

16-cv-6598 (AJN)
Signed 09/18/2019Filed 09/19/2019

**Attorneys and Law Firms**

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Alison Sue Mitchell, Kavin Suresh Thadani, Melanie Mary Speight, Brian Christopher Francolla, New York City Law Department, New York, NY, for Defendants.

OPINION & ORDER

ALISON J. NATHAN, District Judge:

Plaintiff Hozie Rowell brings this motion for a new trial under Rule 59(a) of the Federal Rules of Civil Procedure. Mr. Rowell contends that the verdict was seriously erroneous or a manifest injustice because the sole juror of African-American appearance was struck. He also alleges that Defendants' counsel suborned perjury and made improper statements during her summation. Defendants oppose and move for sanctions. For the reasons given below, both parties' motions are DENIED.

## I. BACKGROUND

The Court presumes the parties' familiarity with the facts of the case. Beginning on February 25, 2019, this Court held a four-day jury trial on Mr. Rowell's claim that Defendant Officer Shane Killilea had denied him the right to a fair trial by fabricating evidence and that Defendants Officers Joan Ferreira and Christopher Popovic had failed to supervise Defendant Killilea.

On February 28, 2019, the Jury entered a verdict in Defendants' favor on all three claims. Dkt. No. 120. Due to an administrative delay, judgment was only entered on June 4, 2019. Dkt. No. 130. On June 21, 2019, Mr. Rowell filed the instant motion for a new trial under Rule 59(a). Dkt. No. 131. Attached to this motion was a declaration from Mr. Rowell's counsel, Mr. Joubin, describing the origin of certain NYPD lab reports he had attempted to introduce at trial as well as copies of those reports. Dkt. No. 132. In their opposition, Defendants sought sanctions against Mr. Joubin. Dkt. No. 137.

## II. LEGAL STANDARD

"[A] motion for a new trial pursuant to Fed. R. Civ. P. 59 may be granted by the district court, although there is evidence to support the jury's verdict, so long as the district court determines that, in its independent judgment, the jury has reached a seriously erroneous result or its verdict is a miscarriage of justice." *Nimely v. City of New York*, 414 F.3d 381, 392 (2d Cir. 2005) (internal quotation marks and brackets omitted). As a result, "on a motion for a new trial, the moving party bears a heavy burden." *Lopez v. Ramirez*, No. 11-cv-0474 (PGG), 2019 WL 3779277, at *9 (S.D.N.Y. Aug. 12, 2019) (quoting *Prendergast v. Pac. Ins. Co.*, No. 09-cv-6248 (MWP), 2013 WL 5567656, at *5 (W.D.N.Y. Sept. 25, 2013) (internal brackets omitted)); *see also Spinelli v.*

*City of New York*, No. 02-cv-8967 (RWS), 2011 WL 2802937, at *1 (S.D.N.Y. July 12, 2011). Finally, "[i]t is well-settled that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.' " *Zargary v. City of New York*, No. 00-cv-897, 2010 WL 329959, at *1 (S.D.N.Y. Jan. 26, 2010), *aff'd*, 412 F. App'x 339 (2d Cir. 2011) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)).

## III. DISCUSSION

### A. Mr. Rowell's Motion for a New Trial Based on *Batson* is Denied

Mr. Rowell's first challenge to the integrity of his trial focuses on Defendants' peremptory strike of Juror No. 12, the sole juror who appeared to be black. During jury selection, the Court held that Defendants provided a credible, race-neutral explanation of the strike and Plaintiff had not shown purposeful racial discrimination. The Court describes the circumstances surrounding the strike, provides the Court's *Batson* analysis during jury selection, and concludes that Mr. Rowell has not carried his burden of showing that the Court should reconsider this conclusion.

During jury selection, the panel of fourteen qualified jurors included only one individual, Juror No. 12, who appeared to be black. Dkt. No. 121, at 27:7-13. During voir dire, Juror No. 12 had provided minimal information about himself. *Id.* at 26:9-10. Before peremptories were exercised, one of Defendants' attorneys, Ms. Mitchell, represented to the Court that she had observed Juror No. 12 "during the course of [the

Court's] reading summary of the case, shaking his head and reacting physically in some way." *Id.* at 26:9-15. The Court's description of the case included Plaintiff's allegation that Defendants had fabricated evidence. Besides Ms. Mitchell, no one else reported having witnessed these movements by Juror No. 12. *Id.* at 30:8-12. Based on this observation, Defendants requested that the Court ask follow-up questions of Juror No. 12 to ensure there was no basis for a cause strike. The Court granted this request over Plaintiff's objection. *Id.* at 26:16-25, 27:1-2. The Court informed Juror No. 12 "that an attorney witnessed him shaking his head during [the Court's] reading of the summary of the case and wanted to confirm if he had ... anything that he's heard about the case that he thought would interfere with his ability to be fair and impartial." *Id.* 26:20-25. On the Court's perception, Juror No. 12 "answered readily 'no,' that he had no concerns." *Id.* at 26:24-25, 27:1-2. No additional requests were made regarding Juror #12 before the parties exercised peremptory strikes. *Id.*

Defendants then exercised one of their three peremptory strikes on Juror No. 12. Plaintiff then raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). In evaluating a *Batson* challenge, a trial court employs a "three-part burden-shifting framework to assess whether the challenged peremptory strike is based on an impermissible discriminatory motive." *United States v. Martinez*, 621 F.3d 101, 108 (2d Cir. 2010) (citing *Batson*, 476 U.S. at 93-98). First, "the objecting party must make a prima facie case that opposing counsel exercised a peremptory challenge on the basis of a protected class." *Id.* (citing *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991)). Second, "if a prima facie case is established, the burden shifts to the challenged party to present a nondiscriminatory reason

for striking the jurors in question." *Id.* at 109 (citing *Batson*, 476 U.S. at 97). And third, "if a valid reason is articulated, the trial court considers the totality of the circumstances to determine whether the objecting party has carried its burden of proving purposeful discrimination by a preponderance of the evidence." *Id.* (citing *Hernandez*, 500 U.S. at 363-64). The Court applied that framework at trial.

First, the Court concluded that Mr. Rowell raised a prima facie case that Juror No. 12 was struck because of his race. "To establish a prima facie case of purposeful discrimination, the objecting party must show that the other party challenged members of a specific group and that the totality of the circumstances raises an inference of discriminatory motive." *Id.* (citing *Batson*, 476 U.S. at 96-97). The striking of the lone individual who appeared black on the panel lent some support to Mr. Rowell's argument. As the Supreme Court has held, when "peremptory strikes ... exclude 91% of the eligible African–American venire members," then "[h]appenstance is unlikely to produce this disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003); *see also Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005). Here, Defendants struck the sole juror who appeared to be black. They did so despite the fact that he had not given any answers that raised concerns about his impartiality. Dkt. No. 121, at 26:9-10. And while Ms. Mitchell represented that she had seen him make certain head movements during the Court's reading of a summary of the case, upon follow-up questioning by the Court, Juror No. 12 answered "readily" that he had no concerns about his impartiality. *Id.* at 26:24-25, 27:1-2. While it is more difficult to draw statistical inferences from a sample size of one, Defendants' striking of the sole member of the panel who appeared black was sufficient to make a prima

facie case that Juror No. 12 had been struck because of his race.

As to the second step, Defendants then provided three race-neutral justifications. At this step, "proffered explanations are deemed valid unless discriminatory intent is inherent in the challenged party's explanation." *Martinez*, 621 F.3d at 109. Indeed, the explanation need not be "persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." *Id.* (internal quotation marks omitted). Defendants offered three justifications: (1) Juror No. 12's reaction to the Court's statement of the case and his answer that he did not have any particular feeling about the case despite that reaction; (2) his zero "yes" answers to the voir dire questions, which sought to elicit any basis for a cause strike; (3) and the fact that he had previously served on three different juries. Dkt. No. 121 at 28:17-19. All three reasons were race-neutral and not inherently discriminatory.

Finally, Mr. Rowell failed to meet his burden at the third step. The central issue was whether Ms. Mitchell's representations regarding Juror No. 12's head movements were credible. Peremptory challenges "may legitimately be based not only on answers given by the prospective juror to questions posed on voir dire, but also on the prosecutor's observations of the prospective juror." *McCrory v. Henderson*, 82 F.3d 1243, 1247-48 (2d Cir. 1996). The Court required that Ms. Mitchell provide "a representation to the Court" as "the only witness of the conduct that forms the basis of this strike." Dkt. No. 121 at 30:6-12. Ms. Mitchell then represented that she observed Juror No. 12 "lean back in the chair and tilt his head back and his eyes rolled back, and his head, with his head down, and he shook his head back and forth, side to side." *Id.* at 30:13-21. The Court held that in light of

"counsel's representation made to this Court, as an officer of the court, with obviously very serious repercussions if anything that she said to me was not true," Defendants had given a credible, race-neutral basis for the strike. *Id.* at 31:1-7, 21-25, 32:1. Taking all of the circumstances into account, including numerical disparity and the fact that Defendants had not struck another juror who had also sat on a jury before, the credible representation about Juror No. 12's behavior led the Court to deny the *Batson* challenge.

Mr. Rowell has not met his heavy burden of showing that the Court's decision on his *Batson* challenge warrants reconsideration. A Rule 59 motion "is not a vehicle for relitigating old issues." *Zargary*, 2010 WL 329959, at *1 (quoting *Sequa Corp.*, 156 F.3d at 144). In his motion, Mr. Rowell seeks to relitigate the Court's *Batson* ruling based on similar arguments to those he already made during jury selection. None of these arguments are sufficient to warrant reconsideration of the Court's contemporaneous conclusion, based on Ms. Mitchell's representation to the Court and the Court's observation of Ms. Mitchell's demeanor, that Juror No. 12 was not struck based on his race. Accordingly, Mr. Rowell's motion for a new trial based on Defendants' strike of Juror No. 12 is denied.

**B. Mr. Rowell's Motion for a New Trial Based on Alleged Perjury is Denied**

Turning to his second challenge, Mr. Rowell argues that the verdict was tainted through perjury by one of the arresting officers, Mr. Killilea, and Defendants' counsel's suborning of that perjury. Mr. Rowell contends that evidence he did not introduce at trial shows that Mr. Killilea lied on the stand about

having conducted field tests of substances that a confidential informant purchased from Mr. Rowell. For the reasons below, Mr. Rowell has failed to carry his heavy burden of showing that perjury occurred and so tainted the trial that he was entitled to a new one. The Court first describes the substance of Mr. Killilea's relevant testimony and then addresses Mr. Rowell's challenge.

During the trial, Mr. Killilea testified that he had supervised a confidential informant who made six or seven controlled buys of drugs from Mr. Rowell. Dkt. No. 125, at 433:24-25, 434:1. Mr. Killilea further testified that for nearly all of those controlled buys, on that same day he conducted field tests of the substances purchased and found that they contained cocaine. Dkt. No. 123, at 423:15-25, 424:1-13; Dkt. No. 125, at 434:1-5; Dkt. No. 132, Ex. G. Mr. Killilea then testified that he filled out field test reports with the results of those tests. Dkt. No. 123, at 443:23-25, 444:1. Mr. Rowell sought to show the opposite: that Mr. Killilea had not filled out the field test reports contemporaneously with the controlled buys, but had done so afterwards and then back dated them. Defendants argued that back dating these reports would have been impossible since these reports were placed in a packet alongside the narcotics and sent off to the NYPD crime lab. Dkt. No. 127,684:17-21. Mr. Killilea testified that while he did not specifically remember whether he had sent the field test reports in question to the NYPD lab, it was his practice to do so. Dkt. No. 125, at 545:18-25, 546:1-9.

During Mr. Killilea's cross-examination, Mr. Rowell sought to introduce documents that purportedly showed that Mr. Killilea had not, in fact, placed the field test reports in the envelope that was sent to the NYPD crime lab. The documents in question are lab reports

from the NYPD crime lab stating that field reports were not present in the envelopes with the drugs from the controlled buys. Dkt. No. 125, at 547:20-25, 548:1-5. Mr. Rowell first attempted to present these documents to Mr. Killilea to refresh his recollection, then asked to be allowed to lay a foundation for these documents through Mr. Killilea, despite the fact that Plaintiff's counsel acknowledged that Mr. Killilea had never seen the documents before. *Id.* at 546:14-22, 547:1-25, 548:1-25, 549:1-22. Plaintiff's counsel also conceded that he would have needed to have an employee from the NYPD crime lab come in to lay the foundation, but that he had not done so. *Id.* at 549:16-18. Defendants objected and the Court sustained the objection. *Id.* at 549:21-22.

Turning now to Mr. Rowell's arguments, he contends that the unadmitted NYPD lab reports show that Mr. Killilea perjured himself. Yet at base, Mr. Rowell is attempting to impeach Mr. Killilea with evidence that could have been introduced at trial but was not. The evidence was not introduced at trial because no witness was called who could properly authenticate it. A Rule 59(a) motion is not a vehicle for "taking a 'second bite at the apple.' " *Zargary*, 2010 WL 329959, at *1 (quoting *Sequa Corp.*, 156 F.3d at 144). And a court will not generally grant a new trial to remedy the consequences of decisions made by the moving parties' counsel at trial. *See Pace v. Nat'l R.R. Passenger Corp.*, 291 F. Supp. 2d 93, 102 (D. Conn. 2003) ("Defense counsel cannot make a strategic decision to present testimony on an issue, then *post-hoc* seek a new trial based on its own strategy."); *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 674 F. Supp. 1074, 1075 (S.D.N.Y. 1987) (finding "significant merit" to the contention that a party may not seek "a new trial to submit evidence it could have introduced before," although ultimately granting

motion for other reasons). The proper avenue for Mr. Rowell's argument was to introduce the NYPD lab reports during trial. Indeed, by his own admission, Mr. Rowell's counsel, Mr. Joubin, could have called an employee from the NYPD lab to lay the foundation for the lab reports. Dkt. No. 125, at 549:16-18. Instead, he sought to introduce the documents through a witness who had never seen them before. *Id.* at 546:14-25, 547:1-25, 548:1-25, 549:1-22. Having failed to introduce the NYPD lab reports at trial as evidence of the falsity of Mr. Killilea's testimony, Mr. Rowell now seeks a second opportunity to introduce these documents to this Court for the same purpose. This is precisely the sort of "second bite at the apple" that cannot sustain a Rule 59(a) motion.

Furthermore, even if the Court were to consider Mr. Rowell's accusation of perjury on the merits, it is unavailing. "Without clear and convincing evidence of false testimony, accusations of perjury are insufficient to disturb the jury's verdict." *Uzoukwu v. Krawiecki*, No. 10-cv-4960 (RA), 2016 WL 6561300, at *8 (S.D.N.Y. Nov. 4, 2016) (citing cases); *see also Ricciuti v. New York City Transit Auth.*, 70 F. Supp. 2d 300, 314 (S.D.N.Y. 1999) ("[I]n the context of a civil action, perjury must be demonstrated by clear and convincing evidence.") (citing *Barr Rubber Prods. Co. v. Sun Rubber Co.*, 425 F.2d 1114 (2d Cir. 1970)). As an initial matter, while Mr. Joubin testified as to the creation of the NYPD crime lab reports, Dkt. No. 132 ¶¶ 6-8, Mr. Rowell has not provided sufficient evidence as to NYPD crime lab processes to show by clear and convincing evidence that absence of field tests in the envelopes prove the field tests were never sent to the lab. And even if the field test reports were not sent to the NYPD lab, this is not clear and convincing evidence of perjury by Mr. Killilea.

Mr. Killilea testified that he did not specifically remember whether or not he had sent these particular field test reports to the NYPD lab, but that it was his practice to do so. Dkt. No. 125, at 545:18-25, 546:1-9. This testimony would not be perjury even if it turned out that he had not, in these specific cases, sent the reports to the lab.

As to Mr. Killilea's testimony that he did not back date the field test reports, this too would not necessarily be perjury if he had not sent the reports to the lab. Defendants argued that sending the field tests to the lab would have made it impossible for Mr. Killilea to back date them. *Id.* at 445:5-7, 11-15. But it does not follow that if Mr. Killilea had not sent the documents to the lab, then he must have backdated them. At most the new evidence would simply take one piece of evidence in Mr. Killilea's favor off the table, but it would not prove that he was lying. Finally, while Mr. Rowell also points out that Mr. Killilea made the same mistake on three of the reports, which could tend to show they were filled out on the same day and back dated, *id.* at 436:15-20; 437:2-10; 441:10-17; 443:16-22, even when combined with evidence that Mr. Killilea did not send these reports to the NYPD this does not rise to the level of clear and convincing evidence that Mr. Killilea backdated the reports and perjured himself about it.

Mr. Rowell's argument that Defendants' counsel suborned perjury is based on the same accusation, it fails as well. Accordingly, Mr. Rowell has failed to meet his heavy burden of showing that Mr. Killilea perjured himself and that this so tainted the trial that Mr. Rowell is entitled to a new one.

### C. Mr. Rowell's Motion for a New Trial Based on Ms. Speight's Summation is Denied

Mr. Rowell's third argument, that Defendants' counsel's comments during summation denied him a fair trial, fails as well.

On February 28, 2019, counsel for the parties delivered their closing arguments. One of Defendants' counsel, Ms. Speight, delivered a summation in which she repeatedly compared Mr. Rowell's lawsuit to his past practice of selling fake drugs. Dkt. No. 127, at 679:8-14, 685:21-23, 691:9-13. For example, Ms. Speight described Mr. Rowell's past sales of fake drugs thusly:

> Plaintiff's routine is to take something fake, sprinkle just enough of the real thing—'crumbs,' he said—to trick the customer, then make money. That is how he operates. For him, he called it selling dummies. For the customer, he said they were buying garbage, and every time, he was getting paid.

*Id.* at 679:8-12. Ms. Speight then compared this to Mr. Rowell's claims in the case: "That's this trial for plaintiff. He's selling you garbage. He's hoping it pays." *Id.* at 679:12-14. Mr. Rowell did not raise an objection at the time to Ms. Speight's summation.

The standard for granting a new trial based on improper remarks during a summation is demanding. "[A] party seeking a new trial on the basis of opposing counsel's improper statements to the jury faces a heavy burden, as rarely will an attorney's conduct so infect a trial with undue prejudice or passion as to require reversal." *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 124 (2d Cir. 2005) (internal quotation marks and brackets omitted). "In particular, where the jury's verdict finds substantial support in the evidence, counsel's improper statements will frequently be *de*

*minimis* in the context of the entire trial." *Id.* Here, Ms. Speight's references to Mr. Rowell's past sales of fake drugs were amply supported by the evidence adduced at trial. Dkt. No. 127, at 679:8-12. And Ms. Speight's various comments to the effect that he was "selling [the jury] garbage" and "hoping it pays" were not so prejudicial as to require a new trial. *Id.* 679: 12-14. Comments by an attorney on summation that a party is "a disgrace," a "schmuck," a "scam artist," and a "con man" who is "fundamental[ly] dishonest" are insuffcient to warrant a new trial. *See Air China, Ltd. v. Kopf*, 473 F. App'x 45, 51 (2d Cir. 2012). The same is true of "repeated[ ] suggest[ions]" that the "case was fraudulent and brought for financial motive." *Marcic*, 397 F.3d at 125. Finally, as here, a "claim to have been prejudiced by the summation is considerably undermined by [a party's] failure to object to the statements in question at trial." *Malmsteen v. Berdon, LLP*, 595 F. Supp. 2d 299, 310 (S.D.N.Y. 2009); *Guzman v. Jay*, 303 F.R.D. 186, 195 (S.D.N.Y. 2014) ("even if the remarks were improper, the Court finds that it had no more than a *de minimis* effect on the trial, and that Defendant's arguments to the contrary are seriously undercut, if not waived, by," *inter alia*, "counsel's failures to lodge a contemporaneous objection"). Accordingly, Mr. Rowell has failed to carry his heavy burden of showing that Ms. Speight's un-objected-to remarks were so inflammatory that a new trial is necessary.

**D. Defendants' Motion for Sanctions is Denied**

In their opposition to Plaintiff's motion, Defendants move for sanctions against Plaintiff's counsel for his "baseless but serious attack on Lieutenant Killilea and defense counsel, in relation to

both his *Batson* challenge and his summation remarks." Dkt. No. 137 at 18-19. Defendants request sanctions under Rule 11, yet have filed to follow even the basic requirement that "a motion for sanctions must be made separately from any other motion." Fed. R. Civ. Pro. 11(c). Furthermore, "[t]he standard for Rule 11 sanctions is quite rigorous and very rarely succeeds in cases where evidence of bad faith or aggravated misconduct is not apparent." *Indoafric Exports Private Ltd. Co. v. Citibank, N.A.*, No. 15-CV-9386 (VM), 2016 WL 6820726, at *4 (S.D.N.Y. Nov. 7, 2016), *aff'd*, 696 F. App'x 551 (2d Cir. 2017). That standard is not met here. Finding no merit to Defendants' procedurally improper sanctions request, it is denied.

## IV. Conclusion

For the reasons given above, Mr. Rowell's motion for a new trial is hereby DENIED. Defendants' request for sanctions is hereby DENIED. This resolves docket item number 131.

SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No: 19-3469

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of January, two thousand twenty-one.

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Hozie Rowell, Plaintiff - Appellant, v. Police Officer Joan Ferreira, individually and in her official capacity, Shane Killilea, individually and in his official capacity, Christopher Popovic, individually and in his official capacity, Defendants – Appellees, City of New York, John Doe, individually and in his official capacity, Defendants.

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ORDER

Appellant, Hozie Rowell, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc. IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk