

06/11/21

No. 20-1799

---

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**

---

CYRUS JOUBIN  
*Counsel of Record*

*43 West 43<sup>rd</sup> Street  
New York, NY 10036  
cyrus.joubin@gmail.com  
(703) 851-2467*

**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?

## TABLE OF CONTENTS

	Page
QUESTION(S) PRESENTED.....	i
PARTIES TO THE PROCEEDING .....	ii
STATEMENT OF RELATED CASES.....	ii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	1
JURISDICTION .....	1
RELEVANT PROVISIONS INVOLVED.....	2
STATEMENT.....	4
REASONS FOR GRANTING THE PETITION .....	12
CONCLUSION .....	22
 APPENDIX	
The court of appeals' Summary Order affirming the district court's denial of petitioner's motion for a new trial based upon its decision to credit respondents' allegedly race-neutral explanation for striking peremptorily the only African-American juror on the panel .....	1a
The Opinion and Order of the district court denying petitioner a new trial motion based upon respondents' failure to adduce a race-neutral explanation for striking peremptorily the only African-American juror on the panel as required by <i>Batson v. Kentucky</i> , 476 U.S. 79 (1986) .....	6a
The Order of the court of appeals, dated January 26, 2021, denying petitioner's petition for rehearing or,	

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
ANDERSON V. BESSEMER CITY, 470 U.S. 564, 573 (1985).....	8
BARNES V. ANDERSON, 202 F.3D 150, 157 (2ND CIR. 1999) .....	17
BATSON V. KENTUCKY, 476 U.S. 79 (1986) .....	PASSIM
DOLPHY V. MANTELLO, 552 F.3RD 236, 239 (2ND CIR. 2009).....	18
EDMONSON V. LEESVILLE CONCRETE CO., 500 U.S. 614, 621-625.....	17
FLOWERS V. MISSISSIPPI, ____ U.S. ___, 139 S.CT. 2228, 2244 (2019).....	9, 11, 18
FOSTER V. CHATMAN, 578 U.S. ___, 136 S. CT. 1737, 1754 (2016) .....	17, 18, 19
GEORGIA V. MCCOLLUM, 505 U.S. 42, 59 (1992).....	17
HERNANDEZ V. NEW YORK, 500 U.S. 352, 355 (1991).....	17, 18
J.E.B. V. ALABAMA EX REL. T.B., 511 U.S. 127, 129 (1994).....	17
JORDAN V. LEFEVRE, 206 F.3RD 196, 201 (2ND CIR. 1999) .....	19
MILLER-EL V. COCKRELL, 537 U.S. 322, 339 (2003) .....	18
MILLER-EL V. DRETKE, 545 U.S. 231, 239 (2005) .....	17, 18, 19, 20
PURKETT V. ELEM, 514 U.S. 765, 769 (1995) (PER CURIAM).....	18
SNYDER V. LOUISIANA, 552 U.S. 472, 485 (2008).....	17, 18
SWAIN V. ALABAMA, 380 U.S. 202, 223(1965).....	16
<b>STATUTES</b>	
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1331 .....	3, 5
28 U.S.C. § 1343(a)(3) .....	3
28 U.S.C. § 1367(a).....	6
28 U.S.C. § 2101(c).....	2
42 U.S.C. § 1983 .....	3, 5

---

**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 (2<sup>nd</sup> 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 jurisdiction 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 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 States;

(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, regulation, 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. § 1337(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

*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. Elemen*, 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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,

Cyrus Joubin  
*Counsel of Record*  
43 West 43<sup>rd</sup> Street  
New York, New York 10036  
(703) 851-2467  
[cyrus.joubin@gmail.com](mailto:cyrus.joubin@gmail.com)