UNITED STATES SUPREME COURT

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| SHERMAN JOHNSON, JR., | ) | Docket No. _____ |
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| Petitioner, | ) | United States Court of Appeal Case No. 18-2929 |
| | ) | |
| vs. | ) | |
| | ) | United States District Court No. 8:16-CR-00241-RFR-1 |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |
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PETITION FOR WRIT OF CERTIORARI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Michael S. Evans, Esq.
California State Bar No. 146748
714 W. Olympic Boulevard
Suite 915
Los Angeles, California 90015
(310) 545-8192
criminaldf@aol.com

Attorney for Petitioner
SHERMAN JOHNSON, JR.

## QUESTION PRESENTED FOR REVIEW

Whether the District Court and United States Court of Appeals for the Eighth Circuit considered the full context of the other evidence of discrimination by the prosecutor during voir dire to determine whether the factually incorrect statements by the prosecutor for excusing prospective Juror No. 7, an African American female, were proof of the Government's discriminatory intent in striking this juror and a violation of the Petitioner's right to Equal Protection under the Fifth Amendment as required by this Court's decisions in Flowers v. Mississippi, 508 U.S. ---, 139 S.Ct. 2228 (2019), Foster v. Chatman, 578 U.S. ---, 136 S.Ct. 1737, 195 L.Ed.2d 1, 12-13, 17 (2016) and Miller-El v. Dretke, 545 U.S. 231 (2005)?

## PARTIES TO THIS PROCEEDING

The Petitioner is Sherman Johnson, Jr.

The Respondent is the United States of America.

No corporate disclosure statement is not required as Petitioner is not a nongovernmental corporation.

## COURT PROCEEDINGS RELATED TO THIS CASE

On April 2, 2020, The United States Court of Appeals for the Eighth Circuit in United States v. Sherman Johnson, Jr., Case No. 18-2929, affirmed the Petitioner's conviction. A copy of the Eighth Circuit's opinion is included in the Appendix filed along with this Petition. On June 5, 2020, the United States Court of Appeals for the Eighth Circuit denied the petition for rehearing en banc and petition for rehearing by the panel.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### UNITED STATES CONSTITUTION



### UNITED STATES STATUTES



### MISCELLANEOUS

## CITATIONS TO THE OFFICIAL REPORTS OF OPINIONS

This decision of the United States Court of Appeals for the Eighth Circuit is reported at 954 F. 3d 1106 (8th Cir. 2020).

## STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS AT ISSUE

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." United States Constitution, Amendment V.

## STATEMENT OF THE CASE

On March 22, 2017, Respondent United States of America filed a two count superseding indictment charging Petitioner Sherman Johnson, Jr., an African American male, and co-defendant Sarkis Labachyan in Count One with knowingly and intentionally distributing 5 kilograms or more of cocaine on or about June 21, 2016 in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1) and in Count Two that on or about April 14, 2016 and continuing to on or about June 21, 2016, Petitioner and Labachyan knowingly and intentionally conspired together and with other persons

to distribute and possess with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1), and 846. (Appendix at 2).

During jury selection, the prosecutor exercised three peremptory challenges which resulted in all of the minorities, two African American jurors and one Latino juror, being removed from the jury panel,. Petitioner's counsel made a Batson motion. (Appendix at 115).

The District Court found that Petitioner made a prima facia case for a Batson violation requiring the prosecutor to provide race neutral reasons for striking the minorities from the jury. Regarding prospective Juror No. 7, an African American female, he initially stated: "actually I flagged [her] before I even knew who she was." (Appendix at 118). After making this statement, the prosecutor relied on two factually incorrect statements to justify striking Juror No. 7.

First, the prosecutor proffered that he struck Juror No. 7 because she only attained a GED or high school education. (Appendix at 118). Yet, the juror questionnaire that she filled out indicated that Juror No. 7 in fact finished college. (Appendix at 120).

Second, the prosecutor proffered that he struck Juror No. 7 because she did not provide any information on her juror questionnaire. After making this

statement, the prosecutor admitted he used responses from her questionnaire as the basis for a number of his proffered reasons to strike her from the jury. (Appendix at 119). Her questionnaire showed that Juror No. 7 filled out her jury questionnaire completely. (Appendix at 8).

The prosecution proffered six additional reasons why he removed Juror No. 7. He initially indicated that he struck Juror No. 7 because she was young. (Appendix at 119). Yet, four other white jurors were also young and in the same age group as Juror No. 7, but were allowed to remain on the jury. (Appendix at 40, 41, 48 and 53).

The prosecutor then proffered that Juror No. 7 was struck because she was a single parent. (Appendix at 119). Two white jurors who served on the jury were both single parents. (Appendix at 34, 56).

The prosecutor also indicated he removed Juror No. 7 because she rented and lived there for only one month. (Appendix at 119). Yet, a white juror who served on this jury also rented his residence and lived there for only six months prior to his jury service. Two other white jurors who served on the panel also rented and did not own the places they lived in. (Appendix at 34, 55, 56).

The prosecutor then proffered that he struck Juror No. 7 because she had an 18 month child. (Appendix at 119). Yet, one white juror had a child the exact

same age and was allowed to serve on the panel. (Appendix at 40). Two other white jurors who served on the jury had children younger than Juror No. 7. (Appendix at 48, 53).

The prosecutor added that he struck Juror No. 7 because she did not volunteer any answers to the questions posed to whole panel by the Court and counsel during voir dire. (Appendix at 119). Yet, nine of the white jurors or three fourths of the jury panel did not volunteer any answers to questions posed to whole panel and served on the jury. (Appendix at 15-126).

The prosecutor then stated that Juror No. 7 indicated on her questionnaire that her father was killed and did not respond to any questions posed to the panel regarding this incident. The prosecutor was worried that she may hold a grudge because her father was murdered. (Appendix at 119).

Juror No. 17, a white juror, was the victim of a sexual assault. The perpetrator of the sexual assault in his case was never charged because the statute of limitations had expired. This white juror did not respond to the District Court's inquiry as to whether anyone had been involved in any court in a criminal matter and yet he was allowed to serve on the jury. (Appendix at 12).

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The District Court denied Appellant's Batson motion finding the prosecutor provided race neutral reasons for striking Juror No. 7. (Appendix at 121). The jury found the Appellant and Labachyan guilty of both counts. (Appendix at 3).

**ARGUMENT**

**A. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS IN FLOWERS v. MISSISSIPPI, FOSTER v. CHATMAN AND MILLER-EL v. DRETKE IN THAT THE EIGHTH CIRCUIT AFFIRMED THE DISTRICT COURT'S FINDING THAT THE PROSECUTION'S PROFERRED FACTUALLY INCORRECT STATEMENTS FOR STRIKING A BLACK JUROR DID NOT SHOW RACIAL DISCRIMINATION WITHOUT CONSIDERING THE OTHER EVIDENCE OF DISCRIMINATION BY THE PROSECUTOR DURING VOIR DIRE.**

"The Constitution forbids striking a single prospective juror for a discriminatory purpose." Snyder v. Louisiana, 552 U.S. 472, 478 (2008). Under Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court has provided a three-step process to determine whether a peremptory challenge is discriminatory. First, a defendant must make a prima facia showing that the strike was based upon race. If the defendant meets his burden, then the prosecution must provide a race neutral reason for striking the prospective juror. The trial court first **must** look to the reasons provided by the prosecution to determine if the reasoning is grounded in fact to assess whether the reasons stated

by the prosecution are pretextual and thus show purposeful discrimination. Foster v. Chatman, 578 U.S. ---, 136 S.Ct. 1737, 195 L.Ed.2d 1, 12-13, 17 (2016); Snyder v. Louisiana, 552 U.S. at 476-477 (emphasis added).

Factually incorrect statements by the prosecution to justify the exercise of the peremptory challenge show that the prosecution intended to keep black jurors off the jury. Foster v. Chatman, 195 L.Ed.2d at 13, 21; Miller-El v. Dretke, 545 U.S. 231, 240, 245 (2005). The back and forth of a Batson hearing can be hurried, and prosecutors can make mistakes when providing explanations. But when considered with other evidence of discrimination by a prosecutor during voir dire, a series of factual misrepresentations for striking the prospective black jurors no longer can be overlooked or explained away. Flowers v. Mississippi, 508 U.S. ---, 139 S.Ct. 2228, 2250 (2019). This inquiry must include a determination whether the prosecution struck all of the prospective black jurors or the majority of them, whether the prosecution kept white jurors who had the same issues as the reasons stated for striking the black jurors and allowed them to serve on the jury, and whether the prosecution failed to engage in any meaningful voir dire to address the issues he raised to strike the black jurors. Flowers v. Mississippi, 139 S.Ct. 2243; Miller-El v. Dretke, 545 U.S. at 246.

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The striking of a black juror cannot be considered in isolation, but rather must be examined in the context of all facts and circumstances during voir dire. When the prosecutor provided inaccurate statements to justify striking a prospective black juror as the prosecutor did in this case, the Court of Appeal must consider the context of other facts and circumstances which show racial discrimination on the part of the prosecution during jury selection to determine whether a Batson violation has occurred and whether the trial court decision to deny a Batson violation was clearly erroneous.

The Eighth Circuit Court of Appeal failed to do so in this case in direct conflict with this Court's holdings and mandates in Flowers v. Mississippi, Foster v. Chatman and Miller-El v. Dretke. The panel acknowledged the prosecutor proffered two factually incorrect statements to justify striking Juror No. 7 from the jury panel. First, the prosecutor misstated Juror No. 7's level of education by telling the District Court she only had achieved a GED level of education when in fact Juror No. 7 finished college. The prosecutor also mistakenly indicated Juror No. 7 had not fully completed her jury questionnaire when in fact she had done so. (Appendix at 7-9).

Despite acknowledging the factually inaccurate statements by the prosecutor, the Eighth Circuit did not examine or consider the other evidence of

discrimination by the prosecutor during voir dire. If the Eighth Circuit had done so, the panel would have found the other evidence of racial discrimination during jury selection verified that the factual misstatements proffered to justify the striking of Juror No. 7 and the removal of all black and minority jurors from the jury panel were based upon race and a Batson violation in this case.

First, the prosecutor used three peremptory challenges to strike two black jurors and one Latino juror from the panel. At that point, all of the minorities were removed from the jury panel.

After defense counsel presented a prima facia case of racial discrimination by the prosecution during jury selection, the District Court required the prosecution to present race neutral reasons for striking Juror No. 7. The prosecutor initially responded: "actually I flagged [her] before I even knew who she was." Without any knowledge of this juror's background, the prosecutor at that time only had Juror No. 7's appearance as an African American female to base his decision to strike her. This response provides further proof that the prosecutor's decision to strike this juror was based solely upon her race thereby violating Petitioner's Equal Protection rights guaranteed under the Fifth Amendment.

The prosecutor proffered six additional reasons to support a finding that his decision to strike Juror No. 7 were based upon race neutral criterion. Instead, his

responses were further evidence that he struck Juror No. 7 based upon her race because the prosecutor allowed white jurors to serve on the jury who had the same issues that were stated for striking Juror No. 7.

Specifically, the prosecution proffered that he struck Juror No. 7 because she was young. Yet, four other white jurors were also young and in the same age group as Juror No. 7 but were allowed to remain on the jury.

The prosecutor then proffered that Juror No. 7 was struck because she was single and a parent. Two white jurors who served on the jury were both single parents.

Circuit Judge Kelly concurred in the Panel's decision but wrote separately because "the government's use of a peremptory challenge to strike Juror No. 7 presents a close call." In response to the prosecutor's claim that jury service would be a burden for a single parent, Judge Kelly questioned "whether it is reasonable to infer a person who is working full-time and raising a child would suffer an unusual burden. Those circumstances do not appear to be out of the ordinary." The prosecutor did not clarify what he meant, but if it was childcare, the District Court already addressed that issue with no concern raised by Juror No. 7. In addition, Judge Kelly noted that the prosecutor also assumed that Juror No. 7 was single, which was not set forth in the record below. (Appendix at 10).

The prosecutor also struck Juror No. 7 because she rented and lived there for only one month. Yet, a white juror who served on this jury also rented his residence and lived there for only six months prior to his jury service. Two other white jurors who served on the panel also rented and did not own the places they lived in.

Judge Kelly also criticized the prosecutor for this stated reason which implied a concern that Juror No. 7 lacked community attachment. This reason is completely undermined by the fact every potential juror had to live in Nebraska for at least one year to be eligible to serve on the jury. (Appendix at 10-11).

The prosecutor then proffered that he struck Juror No. 7 because she had an 18 month child. Yet, one white juror had a child the exact same age and was allowed to serve on the panel. Two other white jurors who served on the jury had children younger than Juror No. 7.

The prosecutor added that he struck Juror No. 7 because she did not volunteer any answers to the questions posed to whole panel by the Court and counsel during voir dire. Yet, nine of the white jurors or three fourths of the jury panel did not volunteer any answers to questions posed to whole panel.

Finally, the prosecutor stated that Juror No. 7 was hiding resentment about law enforcement and the criminal justice system's handling of her father's murder

since she did not respond when the panel was asked whether any member of their family had ever been involved in a criminal court proceeding. There is no factual support in the record below for this statement.

Again, the prosecutor assumed her father was murdered, that law enforcement was involved in the investigation of his death, that law enforcement's performance during the investigation was unsatisfactory, that the criminal charges were filed, and the criminal justice system did not resolve this matter favorably to her family. There is absolutely no factual support in the record below for any of these assumptions. Juror No. 7 was two years old when her father died so it is highly unlikely she had a recollection of the circumstances surrounding his death, a fact pointed out by Judge Kelly in her concurrence. (Appendix at 12). In addition, he could have died in an accident or by means that were not criminally motivated. The prosecution made no effort to clarify the circumstances of his death, which also shows his racial discriminatory purpose.

More importantly, Juror No. 17, one of the white jurors, was a victim of sexual assault, and he was allowed to serve on the jury. The perpetrator of the sexual assault in his case was never charged because the statute of limitations had expired. Juror No. 17 did not respond to the District Court's inquiry as to whether anyone had been involved in any court in a criminal matter, and unlike

Juror No. 7, was allowed to serve on the jury, as noted by Judge Kelly. (Appendix at 12-13).

The prosecutor did not have to make any assumptions or fill in any missing facts to draw the reasonable conclusion that this white juror was hiding resentment toward law enforcement or the criminal justice system. As the victim of a serious crime who could not obtain justice from the criminal justice system, he more than Juror No. 7 had good reason to be resentful toward law enforcement and the criminal justice system. His failure to respond to the District Court's inquiry points to the very real possibility that he was hiding resentment toward law enforcement and the criminal justice system. Yet, the prosecutor did not strike him from the jury panel.

All of the reasons proffered by the prosecution to strike Juror No. 7 either were factually incorrect or also applied to white jurors who were allowed to serve on the jury. Thus, the "race neutral" reasons proffered by the prosecution actually further highlighted his racial discrimination during jury selection.

Finally, the prosecutor failed to engage in any meaningful voir dire to address the issues he raised to strike Juror No. 7. In fact, the prosecutor did not ask any questions of Juror No. 7, despite raising nine issues for striking Juror No. 7 with the District Court.

The Eighth Circuit's published opinion stands in direct contradiction to this Court's established precedents in Flowers v. Mississippi, Miller-El v. Dretke, and Foster v. Chatman and now can be used as binding precedent to allow a trial court to ignore the full record of the voir dire and other evidence of racial discrimination by a prosecutor when a showing has been made that the same prosecutor struck all or the majority of black jurors from the panel and provided factually incorrect statements to justify his decision. This Court should grant the Petition for Writ of Certiorari to resolve this conflict and prevent future courts from ignoring the rule of law established by this Court when undertaking a Batson analysis. Alternatively, this Court should grant the Petition and remand the case to the Eighth Circuit ordering the court to consider the context of all facts and circumstances of racial discrimination by the prosecutor during voir dire.

**CONCLUSION**

For the above reasons, this Court should grant the Petition for Writ of Certiorari to resolved the conflict between the Eighth Circuit's decision in this case and the established precedents of this Court in Flowers v. Mississippi, Foster v. Chatman and Miller-El v. Dretke. Alternatively, this Court should grant the Petition for Writ of Certiorari and remand this case back to the Eighth Circuit with directions for the lower court to consider the mandates set forth in Flowers v.

Mississippi, Foster v. Chatman and Miller-El v. Dretke which require the Court of Appeal to consider the full context of the prosecutor's actions during voir dire when determining whether a Batson violation occurred in this case.

Dated: November 2, 2020

Respectfully submitted,

s/Michael S. Evans
Attorney for Petitioner
SHERMAN JOHNSON, JR.

## CERTIFICATE OF COMPLIANCE

I, Michael S. Evans, state that I am the attorney who was appointed per the Criminal Justice Act by the United States Court of Appeals for the Eighth Circuit to represent Sherman Johnson, Jr. on appeal. I certify that the foregoing petition uses a proportional space, 14 point New Times Roman font. Based upon the word count of my computer program, Microsoft Word, the Opening Brief in this matter contains a total of 4881 words, and thus does not exceed the 9000 word limit per Rules of the Supreme Court of the United States, Rule 33.1, subdivision (g) (Effective July 1, 2019).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd Day of November, 2020 at Los Angeles, California.

s/Michael S. Evans
Attorney for Petitioner
SHERMAN JOHNSON, JR.

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing Petition for Writ of Certiorari along with the Appendix and Motion for Leave to Proceed In Forma Pauperis with the Clerk of the Court for the United States Supreme Court on November 2, 2020. I certify that all participants in the case are registered users of this Court's electronic filing system and that service will be accomplished using this system. I also certify that on November 2, 2020 I placed a copy of the Petition for Writ of Certiorari in the United States Mail, postage prepaid addressed to the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001.

s/Michael S. Evans