No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MALIK BREYON HOLLIS,

Petitioner,

v.

MATTHEW MAGNUSSON, Warden, Maine State Prison,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
For the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether peremptory challenges of racial minorities during jury selection in criminal trials should be subjected to a heightened judicial inquiry of strict scrutiny.

2. Whether peremptory challenges in the jury selection process should be eliminated altogether.

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TABLE OF AUTHORITIES

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PARTIES TO THE PROCEEDING

Malik Breyon Hollis, petitioner on review, was the petitioner-appellant below. Matthew Magnusson, Warden, Maine State Prison, respondent on review, was the respondent-appellee below.

RELATED PROCEEDINGS

Proceedings pertaining to the underlying judgment:

Jury Trial: *State of Maine v. Malik B. Hollis,* Docket No.: ANDCD-CR-2016-01677, judgment entered on July 21, 2017.

Defendant's Motion for New Trial, or, in the Alternative, for Judgment of Acquittal. *State of Maine v. Malik B. Hollis,* Docket No.: ANDCD-CR-2016-01677, Decision and Order denying Defendant's Motion entered on October 6, 2017.

State of Maine v. Malik B. Hollis, 2018 ME 94, 189 A.3d 244 (Me. 2018). Opinion of the Maine Supreme Judicial Court, Sitting as the Law Court, dated July 10, 2018, denying Defendant's appeal of conviction.

Malik Hollis v. Matthew Magnusson, Warden, Maine State Prison, Case No.: 1:19-cv-00322-JAW. Magistrate Judge's Recommended Decision on 28 U.S.C. sec. 2254 Petition dated December 6, 2019, denying petitioner's request for relief.

Malik Hollis v. Matthew Magnusson, Warden, Maine State Prison, Case No.: 1:19-cv-00322-JAW. Order Affirming the Recommended Decision of the Magistrate Judge, dated January 9, 2020.

Malik Hollis v. Matthew Magnusson, Warden, Maine State Prison, Case No.: 20-1160. Decision of the United States First Circuit Court of Appeals denying the petitioner's appeal, dated April 19, 2022.

PETITION FOR A WRIT OF CERTIORARI

Malik Breyon Hollis, a resident of the State of Maine, by and through undersigned counsel, respectfully petitions this court for a writ of certiorari to review the judgments of the United States Court of Appeals for the First Circuit; the United States District Court, District of Maine; the Maine Supreme Judicial Court, Sitting as the Law Court; and the Maine Unified Criminal Court.

INTRODUCTION

Malik Hollis, an African-American, was convicted of two felony charges by an all-white jury in Androscoggin County, Maine. At jury selection, approximately 107 citizens of the county responded to summonses to appear. All of them were Caucasian except for one -- Juror 71 -- who was black. In violation of United States Supreme Court precedent in *Batson* and subsequent cases[1], the prosecutor moved to exclude Juror 71. Over the defendant's objection, the trial judge granted the State's peremptory challenge. The prosecutor's proffered explanation -- that the juror had "only" an eleventh grade education (as opposed to the twelfth grade educations of other jurors) -- was pretextual and unsupported by the record. The trial judge himself noted that he had erred, and courts at the state appellate and federal district and appellate court levels expressed skepticism. The facts of the case were racially charged, with four white men, by their own admission, threatening and beating up on Malik with weapons. Exclusion of the lone black juror was a gross violation of the defendant's constitutional rights under the circumstances of this case.

Judges at all levels in this case – including the trial judge himself – have expressed dismay at the conduct of the prosecutor at trial in this case. The trial judge acknowledged that he did not adhere to the requirements of *Batson* and its

[1] Subsequent to the conviction in this case, the United States Supreme Court has endorsed the principles of *Batson* in *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019).

related cases. First Circuit Judge Kermit Lipez, in an opinion concurring with his own majority opinion for the Court, noted that this case "raise[s] the judicial antennae," and acknowledged that "every court that has considered this case, including the Superior Court itself, has expressed concerns about what transpired at jury selection." (See Judge Lipez's concurring opinion in the decision of the United States First Circuit Court of Appeals, at pages 16-22, attached hereto.)

Since the *Batson* decision in 1986, the United States Supreme Court has spoken loudly against discrimination in the jury selection process. This Court's decision in *Flowers* is a ringing endorsement of the principles of *Batson.* Unfortunately, as this case points out, the dictates of the U.S. Supreme Court are simply not being followed by judges and prosecutors at the trial court level. It is time for a stricter scrutiny of peremptory strikes of minority jurors in criminal trials, and for the elimination of peremptory challenges altogether.

OPINIONS BELOW

The decision of the United States Court of Appeals, No. 20-1160, was issued on April 19, 2022.

The Order Affirming the Recommended Decision of the Magistrate Judge, No. 1:19-cv-00322-JAW, was issued by the United States District Court, District of Maine, on January 9, 2020.

The Recommended Decision on 28 U.S.C. sec. 2254 Petition, No. 1:19-cv-00322-JAW, was issued on December 6, 2019.

The Maine Supreme Court's decision is reported at 2018 ME 94, 189 A.3d 244 (Me. 2018) and was decided on July 10, 2018.

The Decision and Order denying the Defendant's Motion for a New Trial, or, in the Alternative, for New Trial, was entered by the Maine Unified Criminal Court on December 6, 2017.

All of the aforementioned decisions have been attached hereto in the appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the First Circuit issued the decision below on April 19, 2022. The Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction, the equal protection of the laws.

STATEMENT OF THE CASE

A. Trial litigation.

On the morning of May 21, 2016, an altercation occurred on the outskirts of downtown Lewiston, Maine, near the corner of Bartlett and College streets. Four white men came into contact with Malik Hollis. Malik is an African American.

There was a dispute at trial as to who initiated the altercation. There is no dispute, however, that, during the altercation, the four white men each had weapons. As the altercation progressed Malik retreated into a building on Bartlett Street and came out with a handgun. He fired several rounds in the vicinity of the four men.

Officers and detectives of the Lewiston Police Department responded to the incident. They interviewed witnesses and took photographs of evidence from the scene, including the various weapons involved. They arrested Malik. He was subsequently charged with Reckless Conduct with a Dangerous Weapon (Class C)(17-A M.R.S.A. sec. 211(1)) and Criminal Threatening with a Dangerous Weapon (Class C)(17-A M.R.S.A. sec. 209(1)).

A jury trial was scheduled to be held in July 2017. The parties appeared in court for jury selection on July 6, 2017. At jury selection, upwards of 107 residents of Androscoggin County responded to summonses to appear for jury

duty. All of the residents in the jury pool were Caucasian except for one, Juror 71, who was African American.

Juror 71 was part of the final pool of 32 jurors from which the petit jury and alternates were to be chosen. On its sixth peremptory strike, the prosecution struck Juror 71. The defense objected, and the following discussion occurred at sidebar:

> MR. HOWANIEC: I just -- I guess I'll put on the record that I object, and I have some objection to that. It's the only person of color on the jury, just for the record.
>
> THE COURT: I'm sorry, I got distracted. You're objecting because number 71 is a man of color and you're --
>
> MR. HOWANIEC: As it's --
>
> THE COURT: Hasn't been systemic.
>
> MR. HOWANIEC: Yeah.
>
> THE COURT: I can't make any findings.
>
> MR. HOWANIEC: No, I know. I understand. We're trying to explore here in Androscoggin County why we're not seeing more people of color on our juries and not seeing people of Muslim faith. We have a large Somali population. We have one person of color in the entire jury pool. I just wanted to put that on the record.
>
> MS. BOZEMAN: Would the Court like any response from me --
>
> THE COURT: You may.

MS. BOZEMAN: -- or is that necessary?

THE COURT: If you want to respond.

MS. BOZEMAN: I would just put that his ethnicity had no bearing in regards to why I struck him. I was looking for his level of education and other various factors that were provided in the list from the court.

THE COURT: I mean, I guess the only observation I would make is that we're looking at a -- sort of a systemic -- where the State was systematically excluding someone because of either race or gender or I don't know whether it's -- I'm not sure whether the State was talking about that but I can't make that -- I can't certainly make that finding based upon --

MR. HOWANIEC: Totally understand.

THE COURT: One, because there could be other legitimate factors, as Kate points out, as to why this particular juror would be struck by the State.

(Transcript of Jury Selection in *State v. Malik Hollis*, hereinafter referred to as "Hollis Jury Selection Transcript," at 59-61.)

Superior Court Justice William Stokes – a highly experienced and well-regarded jurist in the State of Maine – struck the lone minority juror.

A two day jury trial was held on July 13-14, 2017. The state produced evidence that Malik fired several rounds from a handgun in the vicinity of four white men near the corner of College and Bartlett streets in Lewiston. The

evidence at trial indicated that the men, respectively, were in possession of a baseball bat, an iron pipe, an expandable police baton, and a rock.

The State called one of the four white men -- Dillon Howes -- as a witness. He was the one with the iron pipe in his hands. Mr. Howes testified that it was "a metal piece of [bicycle] handlebar." (Trial Transcript, hereinafter referred to as "T," at 115.) Mr. Howes struck Malik with the metal pipe/handlebar: "I thought I broke his wrist, to be honest with you…." (Id.)

Mr. Howes testified that, during the altercation, he "called him [Malik] the N word and told him I was going to fucking kill him." (T. at 125.)[2]

Malik testified in his own defense. He said that, on the morning of the incident, Mr. Howes confronted him with a metal pipe and said: "Nigga, what is you doing around here?" (T. at 394.) One of the other men present picked up a rock and hit him in the neck with it. (T. at 397-398.) Mr. Howes and the others chased Malik back to Malik's residence: "He was just -- he had just called me the N word, called me a gorilla. You know, they was chasing me, cussing at me." (T. at 399.)

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[2] Mr. Howes elaborated later in his testimony on the racial nature of the altercation:

MR. HOWANIEC: But at this point you've used the N word towards him, right?

MR. HOWES: Yup. No different than calling me a cracker and white trash and saying he's going to rape my family, you know what I mean. If you ask me, that's a little worse. But, no, it wasn't right to call him that, no.

(T. at 141.)

Malik, who was 20 years old at the time of the incident, testified that he had grown up in Philadelphia, Pennsylvania, and lived in a primarily African-American community. (Id.) Malik testified that, as the men were chasing after him with weapons and calling him racial slurs, he believed them when they said that they were going to kill him. (T. at 399-400.) Malik testified that the color of their skins had an impact on the way he perceived the danger he may have been confronting.[3]

After the close of presentation of evidence, the trial court ruled that the defense had generated an instruction on self-defense and the use of deadly force by the Defendant. He instructed the jury accordingly.

After a two day trial, the all white jury convicted Malik Hollis on both counts alleged in the indictment. He was subsequently sentenced to a term of three years in the Maine Department of Corrections, concurrent on both counts.

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[3] MR. HOWANIEC: [I]f you can answer it, do you feel -- you've testified that you were -- you had a fear at the point that those fellows are out there with the various weapons, right? Right?

MR. HOLLIS: Yes.

MR. HOWANIEC: Did the color of their skins have anything to do with it?

MR. HOLLIS: Well, I would think so because they was calling me all my names and calling me a gorilla. They called me the N word a few times.

MR. HOWANIEC: Yup. And might that have had an impact on -- on why you didn't do the things you should have done, which was not fire the gun, call the police, stuff like that?

MR. HOLLIS: Yup.

(T. at 410.)

B. Post-trial litigation.

The defense thereafter timely filed a Motion for Judgment of Acquittal or, in the Alternative, for New Trial. In its motion, the defense argued, *inter alia*, that the prosecution had improperly moved to strike the lone potential black juror in the pool in violation of the equal protection and due process requirements imposed by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), and subsequent cases.

In its written response, the prosecution for the first time in the entire process brought up new alleged grounds for moving to strike the lone African-American member of the jury pool. The prosecutor first pointed out that, at sidebar during the jury selection in the *Hollis* matter, she addressed "*some* of the race-neutral reasons for striking the proposed juror," [emphasis added] and proceeded to quote her words at sidebar following the defense objection to her peremptory challenge. (See State's Response to Motion for Judgment of Acquittal and New Trial, hereinafter referred to as "State's Response," at paragraph 4.) The prosecution continued on, however, and alleged new information that was brought up for the first time:

> Specifically, the proposed juror had only attained a high school education, a fact that the State became aware of when the juror was brought to sidebar for *voir dire* during a previous jury selection on the same date.

(Id.) Thus, for the first time, the prosecution now argued that it had relied on information gathered during jury selection from a *prior* case, one in which the Hollis defense had not participated.

In her response, the prosecutor provided additional new information that had not been produced to date:

> Additionally, the State chose to exercise a peremptory strike on this juror based on answers given in the *voir dire* during the above-referenced previous jury selection. During that *voir dire* in response to a domestic violence questionnaire, the juror indicated to the Court that he had experienced domestic violence between family members while growing up, and was at times present while this violence was occurring in the home.

(See State's Response at paragraph 5.) Again, this was information that the prosecution never brought up at the sidebar during the Hollis jury selection. The Hollis case, of course, had nothing to do with domestic violence. Malik and the four white men were not in any way domestic partners. Up to this point well after trial, the state had raised absolutely no concerns about domestic violence in this case.

The previously undisclosed concerns of the state, however, did not end there. In its response the prosecution brought up even more new information:

> The case which was tried against this Defendant had to do with a violent episode where a firearm was used against a group of people. The State anticipated, based on conferences with defense counsel prior to jury selection, that the affirmative defense of self-defense would be raised at trial. Given the complicated concept and instructions that would follow should

> self-defense be (and was) generated at trial, in addition to the juror's exposure to violence as a child that the State felt might make it difficult to be fair and impartial in a violent case, the State elected to use a peremptory challenge on this juror.

(See State's Response at paragraph 6.)

These concerns that the lone black juror might not be intelligent enough to understand the straightforward concepts involved in a self-defense instruction were not raised by the prosecution at jury selection sidebar. No request for individual *voir dire* on the issue was raised by the prosecution. No evidence was presented by the prosecution to indicate that the state had conducted *any* investigation into the intelligence levels of any of the potential jurors -- including the college-educated jurors struck by the prosecution -- in an effort to determine whether such jurors could understand the "complicated concept" of self-defense.

Following the filing of memoranda by the state and defense, a hearing was held on the Defendant's motion on September 15, 2017. At the hearing the state brought up yet even more new information that was not brought up at either jury selection or in the state's reply memorandum.

At the outset of her argument at the hearing on the Defendant's motion, the prosecution repeatedly acknowledged that it "did put some very limited reasoning on the record," but seems to be blaming the trial judge for that *Batson* violation: "...but that was on my own accord and not at the direction of the Court."

(Transcript of Hearing on Defendant's Motion for Judgment of Acquittal or, in the

Alternative, for New Trial, hereinafter referred to as "Motion Hearing Transcript," at 17.)

The prosecutor then went on to provide first-time information that her recollection of Juror 71 from the *voir dire* in the prior case was that he had

> a fairly nonchalant attitude towards violence that he had experienced, there was violence among some of his family members in a domestic violence situation, some of which I believe he said he had been witness to. He had a fairly nonchalant attitude about that, which was somewhat concerning to the State given that this was going to be a case that was entirely revolving around a violent episode.

(Motion Hearing Transcript at 19-20.)

As it turned out, the prior jury selection to which the prosecutor was referring was in the matter of *State v. Riad Dawood*, Docket No. AUBSC-CR-15-297. Prosecutor Bozeman and Justice Stokes had participated in the *voir dire* of Juror 71 in the *Dawood* case, along with Mr. Dawood's attorney, Allan Lobozzo. Neither undersigned counsel nor anyone else associated with the Malik Hollis defense had participated in that prior *voir dire.*

The *Dawood* case involved allegations of domestic violence. Justice Stokes indicated that while he did have a recollection of that juror in another case involving domestic violence, he had "no memory of what he actually said…." (Motion Hearing Transcript at 5.)

On his own initiative, Justice Stokes ordered a copy of the transcript of the jury selection in the *Dawood* case. A copy of the entire transcript was made a part of the record. The portion of the jury selection that dealt with the individual *voir dire* of Juror 71 reads as follows:

THE COURT: No. 71.

(Juror No. 71 approached sidebar.)

THE COURT: Juror no. 71, first of all, let me thank you for your patience I know it's a long morning.

JUROR NO. 71: That's fine.

THE COURT: We appreciate it. The reason I asked you to step up -- I'm trying to find your questionnaire. I think you answered -- on your questionnaire you answered the first question, Do you have a friend or close friend or relative who is the victim of domestic violence, wanted to get more information about that.

JUROR NO. 71: It was my grandmother.

THE COURT: It was your grandmother who was the victim?

JUROR NO. 71: Yeah.

THE COURT: At the hands of your grandfather?

JUROR NO. 71: No, boyfriend.

THE COURT: A boyfriend. Okay. And you were a child at the time?

JUROR NO. 71: Yeah.

THE COURT: How many -- how many years ago would that

have been?

JUROR NO. 71: I'm 28 now so 7 or 8 maybe.

THE COURT: You remember it? Did you actually witness it?

JUROR NO. 71: Yeah. I was in the middle of it.

THE COURT: Do you still feel that that -- that you could be fair and impartial in a case that involves allegations of domestic violence?

JUROR NO. 71: Would that bother me?

THE COURT: Would you be fair and impartial?

JUROR NO. 71: Oh, yeah, yeah, of course.

THE COURT: Miss Bozeman, do you have any questions you want to follow up?

MS. BOZEMAN: I don't.

MR. LOBOZZO: You saying -- does that mean you were in the household?

JUROR NO. 71: I was in the house but I witnessed it. I witnessed everything.

THE COURT: Thanks very much. You can go back to your seat.

(Juror no. 71 left sidebar.)

THE COURT: What do you think?

MR. LOBOZZO: Well, I liked him a lot. He had a lot of good.

THE COURT: Good qualities. That's the -- you don't know?

MR. LOBOZZO: I'm not going to strike him for cause.

(The bench conference was concluded.)

(Transcript of Jury Selection in *State v. Riad Dawood*, hereinafter referred to as "Dawood Jury Selection Transcript," at 74-76.)

A review of the individual *voir dire* of Juror 71 in the *Dawood* case indicates that the prosecutor raised absolutely no concerns about the juror in that domestic violence case. There is nothing in the record that indicated Juror 71 had a "nonchalant" attitude towards domestic violence. The prosecutor did not mention Juror 71's "somewhat concerning" attitude toward domestic violence in that domestic violence case. When offered the opportunity to ask questions of the juror, she declined. When the Court asked what the lawyers thought about Juror 71, the prosecutor said nothing. The prosecutor made no mention of Juror 71's attitude or demeanor toward domestic violence during the Hollis jury selection. Juror 71, as Justice Stokes noted, had a lot of "[g]ood qualities." (Dawood Jury Selection Transcript at 76.)

The prosecutor's arguments that there was a legitimate basis for striking Juror 71 because of his "level of education" is not only unsupported by the record, it is *refuted* by the record. At the hearing on the Defendant's motion, the prosecutor attempted to argue that Juror 71's eleventh grade level of education was a concern due to the "fairly complicated" issue of self-defense. (Motion Hearing

Transcript at 18-19.) Again, this concern was not articulated on the record -- certainly not to the extent required by *Batson* and related cases -- at the time of jury selection. There was nothing articulated in the record or evident from the *voir dire* in the *Dawood* case that indicated that Juror 71 suffered from any sort of intellectual deficits. Moreover, the prosecutor struck jurors with *higher* levels of education -- including college-level -- than Juror 71. Presumably, under the prosecutor's rationale, these higher-educated and thus apparently more intelligent potential jurors would have better understood the concept of reasonable force in the use of self-defense by a black man against four white adversaries with baseball bats and pipes in their hands.

The record indicates that at least three of the jurors struck by the prosecution had college-level education. Of the 14 jurors selected, six had grade 12 levels of education. Of the 107 jurors in the pool, 55 -- over half -- reported education of 12th grade or less. Nine potential jurors did not indicate their grade level. (Motion Hearing Transcript at 6.) Despite the fact that most of the jury pool had education levels approximating that of Juror 71, the prosecutor raised absolutely no concerns about the education levels of any jurors other than Juror 71. Nor was any evidence produced that this prosecutorial district has *ever* struck jurors because of high school levels of education in Androscoggin County.

At the hearing on the Defendant's motion, the prosecutor represented to the Court for the first time that she had struck potential jurors with higher levels of education because "they also all had records of some sort…." (Motion Hearing Transcript at 22.) Yet again, this was a point that the prosecutor had failed to make at either the jury selection or in her reply memorandum submitted weeks after the trial. We heard about these higher-educated jurors with "records of some sort" for the first time at the motion hearing. There was absolutely no evidence presented at any point by the prosecutor as to which of these jurors had (presumably criminal) records, what their records were, when the prosecutor discovered these prior offenses, the seriousness of any such offenses, etc. The prosecutor provided absolutely no evidence to support her claims, even months after the trial.

At the hearing on the Defendant's motion, Justice Stokes acknowledged that he had not complied with the requirements of *Batson*:

> In some ways I guess -- perhaps I should have probed more thoroughly on Ms. Bozeman at the time to say expand upon what her rationale was for striking the juror. To some extent I take the blame for not being more inquiring, I guess, as to what the State's purported reason was for striking. I know now.

(Motion Hearing Transcript at 14-15.)

Justice Stokes made the point again later in the hearing: "I did not probe you as much as perhaps I should have at the time with respect to Mr. Hollis's case and

so may not have given you the fullest opportunity to expand upon your -- your reasons." (Motion Hearing Transcript at 20.)

Regardless of whether it was the prosecutor or the judge who was to blame for the lack of a record justifying the striking of the lone black juror in a racially charged criminal trial, the mandates of *Batson* and its progeny were not satisfied.

In his Decision and Order dated October 6, 2017, Justice Stokes acknowledged yet again that the Court "erred in its handling of the *Batson* challenge in this case." (See Decision and Order of Justice William R. Stokes dated October 6, 2017, hereinafter referred to as "Decision and Order," at 6.) Justice Stokes recognized that he improperly focused on whether there had been "systemic" or "systematic" discrimination by the prosecution, and that he had insufficiently challenged the prosecutor to articulate her reasons for moving to strike Juror 71 on the record at the time of trial. (Id.) As Justice Stokes correctly stated in his decision: "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." (Decision and Order at 6, citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008), and *City of Seattle v. Erickson,* 398 P.3d 1124 (2017).) Despite the fact that he "erred by not applying the *Batson* three-step analysis" at the time of trial, however, Justice Stokes concluded that he could correct his error, more than two months later, by hearing new evidence from the

prosecutor and "engaging in an appropriate *Batson* analysis now." (Decision and Order at 7.)

Justice Stokes's conclusion that the prosecutor's challenge to Juror 71 on the basis of his eleventh-grade education level was unsupported on the record at the trial and was refuted by the evidence that the trial court improperly solicited months after the trial. The prosecutor excluded jurors with *higher* levels of education than Juror 71, and provided absolutely no evidence, either before, during, or after the trial, as to why they were excluded. Most of the jurors in the 107 person pool had education levels approximating or lower than that of Juror 71.

Some of the evidence that the Court considered was based on a jury selection in which the judge and prosecutor -- but not Hollis defense counsel -- participated. The defense did not even know that there had been a prior *voir dire* of Juror 71 until more than a month after the trial, when the state filed its reply memorandum. Undersigned counsel had no opportunity to assess what Juror 71's demeanor was at the time of the *Dawood* jury selection, whether he was "nonchalant" about domestic violence, or what the prosecutor's demeanor was like at the time.

In his order, Justice Stokes cited no authority that authorized him to make a months-later, post-trial analysis of the *Batson* three-step analysis. Courts, to the

contrary, have ruled *against* such after-the-fact "corrections" by the Court of its errors made at trial.

Justice Stokes seemed to be saying that the error would not have been corrected if the defense had not filed a new trial motion. Making a *Batson* determination contingent upon a post-conviction "correction" hearing improperly shifts the burden to the defense and improperly hamstrings defendants from presenting all of its arguments at the trial level before proceeding to an appeal. The overwhelming body of case law indicates that it is the *prosecution's* burden, at the time of jury selection, to articulate non-racial rationales for striking such potential jurors.

In his Decision and Order, Justice Stokes relied on his "first-hand observation of the prosecutor" in concluding that the peremptory challenge was not pretextual. (Decision and Order at 10.) He apparently reached this conclusion despite spending considerable time in his decision focused on the record of a prior jury selection in the *Dawood* case that he had ordered *sua sponte,* that did not involve the participation of the *Hollis* defense, and of which he had a "vague recollection."[4] (Decision and Order at 5.) He cited nothing specific in the record

[4] In a footnote in his decision, Justice Stokes himself seems to have trouble with post-trial review of the *Batson* criteria: "While it may be arguable whether after-the-fact explanations/reasons are allowable in a *Batson* challenge, the court wanted to examine the individual *voir dire* of Juror 71 as part of the totality of the circumstances." (Decision and Order at 2, footnote 2.)

Justice Stokes later continued on about his recollection of the *voir dire* in the "unrelated" *Dawood* case: "The court has a vague recollection of the individual *voir dire* of Juror 71 in the *Dawood* case, but no specific memory of the juror's demeanor. The court's recollection, refreshed by reading the transcript, is that defense counsel [Allan Lobozzo] liked the juror, but there was some hesitation about the juror on the

about the prosecutor's demeanor that supported his conclusions. In a final footnote he stated that he had not relied upon the *voir dire* in the *Dawood* case "or the state's additional explanation in reaching its decision." (Decision and Order at 10, footnote 3.) Justice Stokes made this assertion despite the fact that he spent most of his decision analyzing the data of college-educated versus non-college-educated potential jurors, the discussion with Attorney Lobozzo at sidebar in the *Dawood* case, and discussion of the new information submitted by the state after the trial.

Justice Stokes spoke of considering "the totality of the circumstances" in one part of his decision (see Decision and Order at 2), but then said at the end that he considered only the one-sentence explanation by the prosecutor at sidebar in the Hollis jury selection (see Decision and Order at 10) -- even though he previously said that he had "erred by not applying the *Batson* three-step analysis" at sidebar. (See Decision and Order at 7.) This reasoning is inconsistent at best.

On appeal, the Maine Supreme Court affirmed the decision of the Superior Court, while expressing skepticism of the prosecutor's motives: "Although we may be skeptical of a proffered explanation for striking a juror based on low education level without individual voir dire on intelligence or education, *see Miller-El v. Dretke*, 545 U.S. 231, 246 (2005), 'the trial court's decision on the ultimate

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part of defense counsel that was not sufficient to prompt a challenge for cause." In other words, Justice Stokes talks about Allan Lobozzo's demeanor in his decision, but mentions nothing about the demeanors of Juror 71 or Attorney Bozeman. Attorney Lobozzo's demeanor in a separate, completely unrelated case has no relevance to the Hollis proceedings.

question of discriminatory intent represents a finding of fact of the court of the sort accorded great deference on appeal.'" *State v. Malik Hollis,* 189 A.3d 244 (Me. 2018), citing *Hernandez v. New York*, 500 U.S. 352, 364 (1991) (plurality opinion). There is nothing in the record of this case that supports the prosecutor's "motives," and no such finding was made by the Superior Court justice.

Habeas appeals to the United States District Court for the District of Maine and on to the United States Court of Appeals for the First District Court were unsuccessful. Like at the state level, however, judges at the federal court level recognized the "utter flimsiness" of the prosecutor's arguments and held their noses at the State's behavior.

REASONS FOR GRANTING THE PETITION

In his concurring opinion in *Batson,* Justice Thurgood Marshall identified the problem we are facing decades later:

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case"?

Batson, supra, at 106.

The principles of *Batson* have been strengthened by the United States Supreme Court over the last 36 years, most recently in the case of *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). As Justice Kavanaugh stated:

> Equal justice under the law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread Practice in which prosecutors could (and often would) routinely Strike all black prospective jurors in cases involving black defendants. By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. *Batson* Immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States.
>
> In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding. [Citations omitted.] moreover, the Court has extended *Batson* in certain ways. A defendant of any race may

> raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races. [Citations omitted.] Moreover, *Batson* now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases. [Citations omitted.]

Flowers, supra, at 2242-43.

Maine Federal District Court Judge John Woodcock, Jr., scolded the prosecutor in the case at bar and reiterated the skepticism of not only the Maine Supreme Court but the trial judge himself:

> *Batson v. Kentucky*, 476 U.S. 79 (1986) is not new law. As the United States Supreme Court reiterated on June 21, 2019, the *Batson* Court "ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019). It has also long been fabric of the criminal law in the state of Maine. *State v. Holland*, 2009 ME 72, par. 43, 976 A.2d 227; *Smart v. Shakespeare*, No. CV-95-39, 1997 Me. Super. LEXIS 148 (Me. Super Ct. May 5, 1997). During oral argument in Superior Court, the Superior Court Justice noted to the Assistant District Attorney:
>
> The Court: I guess my only concern is that you're sort of opening yourself up to a challenge when you have a black member of the jury pool.
>
> Assistant District Attorney: I guess I wasn't thinking far ahead to that.
>
> Tr. Mot. for J. of acquittal at 23:16-24. *State v. Hollis* (No. CR-2016-01677) (Me. Super. Ct. Androscoggin Cty.). In its opinion, the Maine Supreme Judicial Court observed that it might have been skeptical of the proffered explanation. *Hollis*, 2018 ME 94, par. 14.
>
> The Court echoes the Law Court and the Superior Court

> Justice. When using a peremptory challenge to strike the only African-American from a jury pool in a case where the defendant is African-American, the state prosecutor should have been cognizant of *Batson* and, before exercising the peremptory challenge, should have considered whether the explanation, namely that Juror #71 had a one-year difference in education from other prospective jurors, would satisfy the *Batson* requirement of a facially-neutral explanation when challenged.

Order Affirming the Recommended Decision of the Magistrate Judge at 7, at footnote 4.

In his concurring opinion of his own opinion, Circuit Judge Lipez exposed the "utter flimsiness" of the bogus claims of the prosecution that there was any sort of rational basis for excluding a black man with an eleventh grade education ahead of white peers with twelfth grade educations. (See Judge Lipez's concurring opinion at 19.) Judge Lipez resurrected Justice Marshall's warnings from 1986:

> Beyond the specific troubling aspects of this case, there are the problematic limitations of the *Batson* framework more generally. As Justice Marshall noted in his concurring opinion in *Batson,* the *Batson* inquiry can only go so far in rooting out peremptory strikes based on race because "trial courts are ill-equipped to second-guess th[e] reasons" for a strike asserted by the prosecutor, and "unconscious racism" may result in the proffer and acceptance of a "racially neutral" reason for a strike that is in fact rooted in racial bias." *Batson*, 476 U.S. at 16 (Marshall, J., concurring).

Judge Lipez's concurring opinion goes on to outline the continuing problem of "implicit bias," and the limitations of relying on demeanor in assessing a litigator's intent, notwithstanding *Batson* safeguards. Judge Lipez noted that

"[t]here is simply no indication in the record that this was an especially complex case. And strikes based on a juror's level of education in the absence of a clear connection to the case's complexity may come perilously close to resembling strikes on amorphous concepts of 'intelligence' that have been rejected by courts, and that perpetuate deplorable and wholly unjustified racist stereotypes about Black mental acuity." See Justice Lipez's concurring opinion at 17, citing *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1267 (11th Cir. 2009), and Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1098 & n. 136 (2011).

In citing the "utter flimsiness" of the prosecutor's purported concerns about a "nonchalant attitude towards violence" that appears nowhere in the record, Judge Lipez takes on the issue of "unconscious racism" and "implicit bias" recognized by this Court and others for decades. *See, e.g., Miller-El v. Dretke,* 545 U.S. 231, 268 (2005). Likewise, as in the case at bar, reliance on demeanor can make the problem worse: "[D]emeanor can itself be a problematic basis for believing a proffered racially neutral reason for the strike where unconscious bias is at work and the party exercising the strike may even be "l[ying] to himself in an effort to convince himself that his motives are legal." *Hollis, supra,* Lipez, J., concurring,

at 21, citing *Batson,* 476 U.S. at 106 (Marshall, J., concurring) (quoting *King v. Nassau Cnty.,* 581 F. Supp. 493, 502 (E.D.N.Y. 1984)).

All of these issues and problems were on full display in the present case of Malik Hollis. This case is a prime example of the limitations of *Batson*, and calls out for further action by this Court to better ensure fair treatment of minority defendants and jurors in our trial courts.

CONCLUSION

For the foregoing reasons, Mr. Hollis respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Dated: July 13, 2022

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APPENDICES

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