

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
‘ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE 615Z (KSM)

Motion to be Heard

March 22, 2019

1. Timeliness

This motion is timely filed.

2. Relief Sought

Mr. Mohammad requests that the Military Judge hear his arguments regarding the ethical basis for his position that counsel have a potential conflict of interest that has not yet been resolved by the information provided by the government nor the Military Judge.

3. Overview

Despite numerous requests, the Military Judge has refused to allow Mr. Mohammad to be heard prior to rulings that are inimical to his Constitutional right to counsel. Specifically, in AE 613G/615Y CONSOLIDATED RULING (the “Ruling”),¹ the Military Judge denied requested oral argument on Mr. Mohammad’s motion to compel discovery and his motion to reconsider prior orders that were premised on how the history of investigations of defense counsel in this case have had a cumulative impact on the ethical obligations of counsel. Nowhere in the

¹ AE 613G/615Y CONSOLIDATED RULING, Mr. Mohammad’s Motion to Reconsider AE 613E/615P Ruling; Mr. Mohammad’s Motion to Compel Discovery from Special Trial Counsel; And Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation, 20 March 2019.

Military Judge’s orders or findings is that history truly acknowledged, much less analyzed, for its potential impact on the request for discovery or the need for an “inquiry on the record.”²

Nor does the Ruling address how the history of intrusions, investigations, and threats of possible prosecutions has affected the ethical obligations of counsel in this “unusual” case. As Chief Justice Roberts observed during oral argument in a separate case just this week, “the case is unusual because you have the extensive history [of misconduct].”³ And, as Justice Alito noted: “The history of the case prior to this trial is very troubling, and you’ve summarized that. And it is --it is cause for concern *and is certainly relevant to the decision that ultimately has to be made* in the case.”⁴ Justice Kavanaugh also stressed the importance of history in addressing the effect of prior misconduct.⁵ While *Flowers* addresses government misconduct in the *Batson*⁶ context, the focus on the history of misconduct is instructive for the present case – here, as there, the history of misconduct is critical and raises what might otherwise be isolated incident of misconduct to a potential due process violation. *See also Swain v. Alabama*, 380 U.S. 202, 224 (1965) (due process is violated when history of discriminatory misconduct can be shown).

For these reasons, Mr. Mohammad seeks, again, the opportunity to be heard on the record to both explain the ethical advice he received regarding the potential conflict, and explain why the information provided by the government so far does not ameliorate his concerns.

² AE 613G/615Y at 7, citing to *United States v. Watkins*, No. 201700246, 2019 WL 937192 (N.M.C.C.A. 21 February 2019) which, unlike the present case, involved an inquiry regarding a conflict that was conducted on the record (rather than in *ex parte* proceedings) and which had resulted from a single incident of a potential threat of investigation rather than, like here, one piece of a long history of threats to investigate and actual investigations.

³ *See* Transcript of Oral Argument, *Flowers v. Mississippi*, No. 17-9572, United States Supreme Court, March 20, 2019, Attachment B at 18.

⁴ *Id.*, Attachment B at 4. Emphasis added.

⁵ *Id.*, Attachment B at 23.

⁶ *Batson v. Kentucky*, 476 US 79 (1986).

4. Burden of Proof

As the moving party, the defense carries the burden of persuasion.

5. Facts

The factual and procedural history is set forth in AE 615R (KSM) and AE 615S,⁷ and by this reference fully incorporated herein.

6. Law and Argument

In the Ruling, “[t]he Commission notes that Counsel for Mr. Mohammad did not disclose from whom they have received said ‘advice,’ nor what facts the advisor was provided and/or which served as the basis for said advice.” This alone should have led the Military Judge to grant the request for oral argument.⁸ The Fifth, Sixth, and Eighth Amendments to the United States Constitution require in this capital case that the defense have the meaningful opportunity to be heard after receiving notice of the issues in question. *See Powell v. Alabama*, 287 U.S. 45 (1932) and *Lankford v. Idaho*, 500 U.S. 110 (1991).

After noting that Mr. Mohammad had not disclosed the identity of the advisor, and finding that information relevant to the resolution of the issue, the Military Judge had many options: grant oral argument so the question could be answered, request additional briefing, or, as the Military Judge did when he had questions regarding the initial pleadings by the government in this very matter, set an *ex parte* hearing with counsel. Instead, the Ruling notes

⁷ AE 615R (KSM), Mr. Mohammad’s Motion to Reconsider AE 613E/615P Ruling, 26 February 2019; and AE 615S (KSM), Mr. Mohammad’s Motion to Compel Discovery from Special Trial Counsel, 26 February 2019.

⁸ See Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!* 70 ABA J. 68, 69 (1984) (“I thus look to oral argument to sharpen my undefined impressions and to clarify unclear issues—usually through counsel’s responses to questions from the bench.”) Emphasis added.

the question but fails to give Mr. Mohammad the opportunity to provide the answer. Granting this Motion to be Heard would resolve that question. Granting Mr. Mohammad an opportunity to be heard would also provide an opportunity to perfect the record as to the “unusual” history of investigations in this case and the impact of that history on the ethical question left unresolved.

At every critical stage, defense counsel have been denied the opportunity meaningfully to be heard on this matter. This is both because information to which the defense is entitled has not been provided, and because the Military Judge has knowingly ruled under such circumstances and without oral argument, despite having identified, and leaving unanswered, questions for counsel relevant to resolution of the issue. In light of such holes in the record, the Ruling cannot be said to appropriately resolve the questions.

7. Conference

The government opposes the motion.

8. Oral Argument:

Oral argument is requested.

9. Witness and Evidence:

None at this time.

10. Additional Information:

None.

11. List of attachments:

- A. Certificate of Service
- B. Transcript of Oral Argument, *Flowers v. Mississippi*, No. 17-9572, United States Supreme Court, March 20, 2019.

Respectfully submitted,

//s//

DAVID Z. NEVIN
Learned Counsel

//s//

GARY D. SOWARDS
Defense Counsel

//s//

DEREK A. POTEET
LtCol, U.S. Marine Corps
Defense Counsel

//s//

RITA J. RADOSTITZ
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 22nd day of March 2019, I electronically filed AE 615Z (KSM), Mr. Mohammad's Motion to be Heard, with the Chief Clerk of the Military Commissions Trial Judiciary and delivered the foregoing on all parties by electronic mail, serving only Special Trial Counsel on behalf of the prosecution..

//s//
DAVID Z. NEVIN
Learned Counsel

ATTACHMENT B

1 IN THE SUPREME COURT OF THE UNITED STATES

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4 CURTIS GIOVANNI FLOWERS,)

5 Petitioner,)

6 v.) No. 17-9572

7 MISSISSIPPI,)

8 Respondent.)

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Washington, D.C.

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Wednesday, March 20, 2019

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The above-entitled matter came on for

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oral argument before the Supreme Court of the

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United States at 10:16 a.m.

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APPEARANCES:

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SHERI LYNN JOHNSON, ESQ., Ithaca, New York; on behalf

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of the Petitioner.

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JASON DAVIS, Special Assistant Attorney General,

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Jackson, Mississippi; on behalf of the Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF: PAGE:

3 SHERI LYNN JOHNSON, ESQ.

4 On behalf of the Petitioner 3

5 ORAL ARGUMENT OF:

6 JASON DAVIS, ESQ.

7 On behalf of the Respondent 30

8 REBUTTAL ARGUMENT OF:

9 SHERI LYNN JOHNSON, ESQ.

10 On behalf of the Petitioner 57

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 17-9572, Flowers versus Mississippi.

Ms. Johnson.

ORAL ARGUMENT OF SHERI LYNN JOHNSON

ON BEHALF OF THE PETITIONER

MS. JOHNSON: Mr. Chief Justice, and may it please the Court:

The only plausible interpretation of all of the evidence viewed cumulatively is that Doug Evans began jury selection in Flowers VI with an unconstitutional end in mind, to seat as few African American jurors as he could.

The numbers alone are striking. In the first four trials, Mr. Evans exercised 36 peremptory challenges, all of them against African American jurors. In the sixth trial, he exercised five out of six of his challenges against African American jurors.

If we look at the numbers of his -- regarding his questioning, they are likewise stark. He asked of the struck African American jurors an average of 29 questions. He asked of

1 the seated white jurors an average of 1.1
2 questions.

3 But these numbers do not stand alone.
4 Mr. Evans was twice found to have discriminated
5 on the basis of race in the exercise of his
6 peremptory challenges against African American
7 defendants in trials of the same case against
8 the same defendant.

9 There is no one who has a record of
10 discrimination, adjudicated discrimination,
11 like that of Mr. Evans.

12 JUSTICE ALITO: The history of the
13 case prior to this trial is very troubling, and
14 you've summarized that. And it is -- it is
15 cause for concern and is certainly relevant to
16 the decision that ultimately has to be made in
17 the case.

18 But if we were -- and I'm not
19 suggesting that this is the way it should be
20 analyzed; this is not the way it should be
21 analyzed -- but, if we were to disregard
22 everything that happened before this trial, and
23 we looked at the strikes of the black
24 prospective jurors as we would in any other
25 Batson case, do you think you'd have much

1 chance of winning?

2 MS. JOHNSON: The evidence still is
3 clear and convincing that Mr. Evans acted with
4 discriminatory motivation in this case, even if
5 we set aside his history and his -- the reasons
6 that he was unwilling to tell the truth in
7 previous cases.

8 JUSTICE ALITO: I mean, if we look at
9 -- at the jurors in question one by one, there
10 are aspects that I think would cause any
11 prosecutor anywhere to want to get that jury --
12 that juror off the jury. You know, there's a
13 juror who said that she -- she couldn't view
14 the evidence objectively. She couldn't make a
15 decision based just on the evidence.

16 There's one who said that she --
17 because of her acquaintance with members of the
18 Flowers family, she would lean toward the
19 defendant. Another one who admitted that she
20 made a false statement on her juror
21 questionnaire because she'd say anything to get
22 off the jury.

23 I mean, do you think those are --
24 those are Batson claims that would likely
25 succeed if this troubling history had not

1 preceded this case?

2 MS. JOHNSON: This Court has demanded
3 a sensitive inquiry into all of the
4 circumstances that prove racial discrimination.
5 And, again, even setting aside his history,
6 there are many circumstances here that suggest
7 racial -- racial motivation.

8 First, as I already said, there is an
9 extraordinary record of disparate questioning.
10 And the disparate questioning is not limited to
11 those numbers but to the tone of his
12 questioning. I believe that one of the -- the
13 responses that you quoted came from an
14 extremely aggressive pursuit of an African
15 American juror who initially said she would not
16 be troubled and ultimately said it's possible.

17 Now, of course, a prosecutor could
18 take that approach with every juror. If he
19 took that aggressive approach with every juror,
20 then there would be nothing to complain about.
21 But he did not take that approach with white
22 jurors.

23 And then there is his out-of-court
24 investigation of three African American jurors.
25 And then there are --

1 JUSTICE ALITO: But what -- what's
2 wrong with that? Again, putting aside the
3 reasons to be suspicious, if a juror says, I
4 don't -- I didn't work -- I don't work closely
5 with the defendant's sister, I don't work close
6 to the defendant's sister, and the prosecutor
7 has reason to suspect that's not true, is there
8 something wrong with the prosecutor going to
9 the human relations person at that place of
10 employment and bringing that person in to
11 testify they actually work nine to ten inches
12 apart? Is something wrong with that?

13 MS. JOHNSON: There's nothing wrong
14 with that if there was reason to disbelieve the
15 juror. The juror volunteered that she knew
16 her, that she worked in that place. There --
17 Mr. Evans cited no reason that he should not
18 believe her.

19 But, also, what happens after that is
20 somewhat suspicious, which is he brings someone
21 in to say: Well, they worked very close
22 together. And that someone says: And I could
23 produce the evidence. And when asked to
24 produce the evidence of that, the records that
25 produce it, he doesn't come back with that

1 evidence.

2 So I think we could certainly -- a
3 prosecutor could --

4 JUSTICE SOTOMAYOR: Wait.

5 MS. JOHNSON: -- and a rich prosecutor
6 might investigate all --

7 JUSTICE ALITO: What is your strongest
8 --

9 JUSTICE SOTOMAYOR: Did he -- did he
10 have that witness ready that same day, or did
11 --

12 MS. JOHNSON: No, he brought the
13 witness back the next day.

14 JUSTICE SOTOMAYOR: The next day,
15 okay.

16 JUSTICE ALITO: What is your strongest
17 strike?

18 MS. JOHNSON: I -- I think the most --
19 the clearest case is that of Carolyn Wright.
20 Carolyn Wright -- about Carolyn Wright, he made
21 three false statements. The first statement he
22 made was that her wages were garnished. That
23 was not --

24 JUSTICE ALITO: Well, actually, we
25 have found that, in the record with a state

1 exhibit on it, a judgment that shows that her
2 wages were garnished.

3 MS. JOHNSON: No, the wages -- there's
4 a mark that shows that there was such a
5 request, but both the trial court and the
6 Mississippi Supreme Court looked at that record
7 and found that her wages had not been
8 garnished. And in --

9 JUSTICE ALITO: Well, we can look at
10 that. We can look at the judgment. But the
11 fact remains that she was -- this was -- one of
12 the victims was the proprietor of -- of a
13 family-owned store, right? That's a
14 family-owned store?

15 MS. JOHNSON: Correct.

16 JUSTICE ALITO: And the store -- the
17 store sued her?

18 MS. JOHNSON: Well, the store sued
19 her. The victim herself had not sued her.

20 JUSTICE ALITO: Well, but the store
21 did.

22 MS. JOHNSON: It's the son-in-law
23 later that sued her.

24 JUSTICE ALITO: But, normally,
25 wouldn't that -- you know, again, put aside the

1 history. We -- but we can't -- in the end, we
2 can't do it, but if you did, don't you think a
3 prosecutor or any attorney would be very wary
4 of having a -- a juror who had been sued by one
5 of the parties?

6 MS. JOHNSON: I think that if this
7 prosecutor had pursued bias with respect to
8 white jurors as well as African American
9 jurors, and then made that strike, then that
10 would be a strike that would be a permissible
11 strike. But, in fact, he didn't do that.

12 So, first of all, I do want to notice
13 that this was one of four victims. It does
14 seem rather unlikely that a person in a
15 quadruple homicide case would be biased by a
16 subsequent suit of one of the relatives. But,
17 even if we thought that that were true, one
18 would have imagined that the prosecutor would
19 have inquired about bias with respect to the
20 other victims.

21 JUSTICE GINSBURG: Wasn't there a
22 question asked of the entire array of whether
23 they had any debts to the -- to the store?

24 MS. JOHNSON: Yes, but there was no
25 question asked about suits or disputes with

1 other -- with the other three victims, nor was
2 there an inquiry into bias that I think any
3 rational prosecutor would have made if
4 concerned, truly, about bias, which was
5 lawsuits, prosecutions of the jurors and their
6 close relatives by his office.

7 The prosecutor made no inquiry about
8 that. If you were worried about bias, you
9 would be worried about that. If you were --

10 JUSTICE SOTOMAYOR: Did he even ask
11 Ms. Wright how she felt about that suit and
12 whether it would affect her in this case?

13 MS. JOHNSON: In fact, she was asked
14 about the suit. And when she was asked about
15 that suit, what she said is that she had paid
16 the debt and that she had no ill will toward
17 the Tardys.

18 And, indeed, if we follow up on this
19 reason, I think this reason is especially
20 suspicious because he cited the same reason
21 with respect to Edith Burnside.

22 So, first of all, he said -- with
23 respect to Edith Burnside, he repeated the
24 false statement that her wages had been
25 garnished, despite the fact of having been

1 called by the trial court on it the first time,
2 and then he said that he was striking her in
3 part on that basis.

4 But Ms. Burnside had --

5 JUSTICE SOTOMAYOR: Can you go back,
6 and -- and just slow down a second? You said
7 to Justice Alito that that record in -- that
8 state record that says something about
9 garnishment, that the state courts found that
10 that was not adequate.

11 Could you explain why not?

12 MS. JOHNSON: Well --

13 JUSTICE SOTOMAYOR: That judgment in
14 the record, what is it or --

15 MS. JOHNSON: The judgment --

16 JUSTICE SOTOMAYOR: -- that -- it's
17 not a -- it's a form in the record, but what
18 does it mean?

19 MS. JOHNSON: The form in the record
20 reflects a suit, and there's a little check by
21 garnishment. But, if you look at the order at
22 the end, there is no garnishment order.

23 The trial court looked at that and the
24 Mississippi Supreme Court looked at that. And
25 I think they are the experts about what their

1 documents mean. And they said there was no
2 garnishment.

3 JUSTICE GORSUCH: What if -- what if
4 it turned out there were a garnishment? How
5 would that affect your argument, if at all?

6 MS. JOHNSON: Well -- well, then that
7 would mean that he only made two false
8 statements about Juror Wright. The two false
9 statements were that she knew Flowers' sister,
10 Cora, and that she knew Flowers' sister,
11 Sherita. So then there would be two.

12 But, if I could go back for a moment
13 to Ms. Burnside, when he repeated the story, I
14 think the -- the pretext of this reason is
15 apparent when we look at Ms. Burnside.
16 Ms. Burnside worked for Ms. Tardy.
17 Ms. Burnside worked for Ms. Tardy, caring for
18 her mother. Ms. Burnside was helped during her
19 divorce by Ms. Tardy.

20 So whatever she might have felt
21 negative about the son-in-law, the feelings she
22 would have had about the victim herself could
23 only have been positive. And yet he cited this
24 same reason.

25 When we look at that, what we see --

1 JUSTICE ALITO: Didn't Juror Burnside
2 also say repeatedly she didn't want to judge
3 anybody?

4 MS. JOHNSON: No, she did not -- oh,
5 Juror Burnside said --

6 JUSTICE ALITO: Yes.

7 MS. JOHNSON: -- that she did not want
8 to judge anyone. She did say that. But I
9 think what's --

10 JUSTICE ALITO: And you think that's
11 not a legitimate reason for -- for striking a
12 juror who's going to have to judge whether
13 someone who's accused of a serious crime is
14 guilty or not?

15 MS. JOHNSON: That is a legitimate
16 reason for striking a judge -- I'm sorry, for
17 striking a juror.

18 (Laughter.)

19 MS. JOHNSON: But the problem -- the
20 problem isn't whether the reason is a
21 legitimate reason but whether the reason was
22 pretext.

23 And when we look at what he did with
24 respect to citing the relationship having been
25 sued by the Tardys, it looks like everything

1 he's saying is pretext.

2 And if I could also go back to the
3 rest of your question about Juror Wright. So
4 there were three misrepresentations with
5 respect to Juror Wright.

6 There was also -- they also cited the
7 number of defense witnesses that she knew. But
8 the prosecutor, Doug Evans, did not question
9 prospective white jurors Waller, Lester,
10 Blaylock, and Fields about their relationships
11 with witness -- with white -- with defense
12 witnesses, nor did he strike them when he had
13 an opportunity to do so.

14 JUSTICE ALITO: But isn't it true she
15 also worked with the defendant's father?

16 MS. JOHNSON: She worked in the same
17 location as the defendant's father, but --

18 JUSTICE ALITO: She worked in the same
19 store, right?

20 MS. JOHNSON: She worked in the same
21 store.

22 JUSTICE ALITO: At the world's
23 smallest Walmart.

24 MS. JOHNSON: That's what the --

25 JUSTICE ALITO: That's what they said.

1 MS. JOHNSON: -- that's what the trial
2 court described it as. But -- but it is
3 important to notice that when she was asked
4 does he still work there, she didn't even know
5 if he still worked there.

6 So there's really --

7 JUSTICE ALITO: Yeah, but did she
8 still work there?

9 MS. JOHNSON: She did.

10 JUSTICE ALITO: I thought she had
11 left?

12 MS. JOHNSON: No, that's another juror
13 with respect to -- I believe with respect to
14 Cora Flowers. But what I wanted to -- she
15 didn't know if he still worked there, but --

16 JUSTICE SOTOMAYOR: Compare her with
17 Pamela Chesteen. That comparison is the one
18 that I'm most interested in.

19 MS. JOHNSON: I was about to do that.
20 And so I think that it's true that working with
21 someone under some circumstances might produce
22 bias.

23 It is interesting that the only thing
24 she said that might suggest the closeness of
25 the relationship is that she didn't know

1 whether he still worked, and the -- and Evans
2 did not ask about the closeness of the
3 relationship.

4 Nor did he worry about the closeness
5 of the relationship with Juror Chesteen and
6 four or I think it's maybe even five of
7 Flowers' family members. Juror Chesteen worked
8 as a teller in a bank where all five of them
9 came and she waited --

10 JUSTICE SOTOMAYOR: She said that she
11 knew the father as well.

12 MS. JOHNSON: Yes, she knew the father
13 and the mother and two sisters and a brother.
14 And Doug Evans --

15 JUSTICE GINSBURG: But isn't --

16 MS. JOHNSON: -- was not interested in
17 pursuing --

18 JUSTICE GINSBURG: -- isn't that --
19 that relationship of a bank teller to someone
20 who comes to make a deposit different from
21 someone who is a coworker and it would
22 encounter someone in the work set -- setting on
23 a daily basis?

24 MS. JOHNSON: It is a different
25 relationship or it could be a very different

1 relationship. We can't actually even know the
2 closeness of either relationship unless there
3 was inquiry.

4 But Doug Evans did not make that kind
5 of an inquiry. Indeed, what he said to Juror
6 Chesteen is -- and that was a purely
7 professional relationship. He didn't ask
8 whether she had a close relationship, whether
9 she was worried. He instead presumed,
10 reassured, everyone that she did not.

11 CHIEF JUSTICE ROBERTS: All the -- all
12 the -- the questions that we've been addressing
13 here are the same sort of questions you would
14 get in a typical Batson case, looking at the
15 circumstances of the potential jurors that were
16 struck in this case.

17 But, I mean, of course, as -- as my
18 colleagues have recognized, the case is unusual
19 because you have the extensive history. And I
20 think that's probably why the case is here for
21 -- for review.

22 And I'm interested, because,
23 obviously, the rule we adopt will apply in
24 other cases, how far your argument that we need
25 to look at the past history is -- is pertinent.

1 If -- if the prosecutor had -- had one
2 Batson violation in his 30-year career, 20
3 years ago, is that something that should be
4 brought out and pertinent in the assessment of
5 the current Batson challenges?

6 MS. JOHNSON: Mr. Chief Justice, may I
7 say one thing about Carolyn Wright that I don't
8 want to forget?

9 CHIEF JUSTICE ROBERTS: Sure.

10 MS. JOHNSON: The other thing that's
11 noteworthy about her is that she put on her
12 death penalty questionnaire that she was
13 strongly in favor of the death penalty.

14 So, when we look at her as a whole, a
15 -- a -- a prosecutor who was looking in a
16 colorblind way would have been attracted to
17 her.

18 CHIEF JUSTICE ROBERTS: Now for my
19 question?

20 MS. JOHNSON: But now -- now for your
21 question. And I apologize, but I was worried I
22 would not get back to that.

23 So I think this is an extraordinary
24 case. I have combed the cases and I cannot
25 find any case --

1 CHIEF JUSTICE ROBERTS: No, no, I know
2 it's -- you're -- you're fighting the
3 hypothetical.

4 My question is 30 years, a Batson
5 violation 20 years ago, is that pertinent to
6 the consideration in the current case?

7 MS. JOHNSON: I'm sorry, I didn't
8 understand the question then. Yes, it is
9 pertinent, but it's weakly probative.

10 So I think, when we conduct a
11 consensitive inquiry, we look, as we would in a
12 criminal case, we look at how recent a
13 fabrication has been, whether it's on a
14 relatively similar matter, whether the person
15 has the same motive.

16 So a case that occurred 30 years ago
17 would be very different in terms of motive. It
18 also would be quite different in terms of the
19 established law of this Court.

20 CHIEF JUSTICE ROBERTS: Well --

21 MS. JOHNSON: So someone who violates
22 Batson before it's announced or someone who
23 violates Batson immediately thereafter, that's
24 less probative than someone who has done so
25 repeatedly.

1 CHIEF JUSTICE ROBERTS: So -- so what
2 is -- what is the rule you would have us adopt
3 as a general rule, not just in a particular
4 case as extreme as this one?

5 MS. JOHNSON: The general rule is a
6 rule that you have already adopted, which is
7 that, in Stage 3, every factor that bears upon
8 credibility is relevant.

9 So that's the general rule. And I
10 suppose if we say that in another way, the
11 Mississippi Supreme Court asked only the
12 question of is there a juror left -- is there a
13 reason for this juror left standing that is not
14 contradicted by the record and exactly matched
15 by a white juror.

16 And that's not the right rule. The
17 right rule is a sensitive inquiry.

18 JUSTICE KAVANAUGH: Even --

19 JUSTICE GORSUCH: Go ahead. Your
20 turn.

21 JUSTICE KAVANAUGH: No, you go first.

22 (Laughter.)

23 JUSTICE GORSUCH: All right, all
24 right.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

2 JUSTICE GORSUCH: All right. I want
3 to pursue the Chief Justice's question just a
4 little bit further so I can understand what
5 you'd have us do in the next case.

6 Let's just suppose this case, trial 6,
7 was perfect and the strikes were without taint
8 otherwise, but we have this history with this
9 prosecutor.

10 Would that be a problem still, or
11 would there be no Batson violation in those
12 circumstances?

13 MS. JOHNSON: If there weren't eight
14 misrepresentations of fact --

15 JUSTICE GORSUCH: Right.

16 MS. JOHNSON: -- disparate questioning
17 --

18 JUSTICE GORSUCH: Right, right.

19 MS. JOHNSON: -- all that stuff --

20 JUSTICE GORSUCH: Right. You're
21 fighting the hypothetical again.

22 MS. JOHNSON: -- and there's only the
23 history --

24 JUSTICE GORSUCH: Yeah, yeah. The
25 hypothetical is let's suppose that this case,

1 there were strikes, but they were explained by
2 non-discriminatory reasons. Yet we have --

3 MS. JOHNSON: And there were no other
4 --

5 JUSTICE GORSUCH: -- yet we have this
6 prosecutor with this history. What then? How
7 should the Court assess a case like that?

8 MS. JOHNSON: If there are no other
9 indicia of discrimination, then the defendant
10 has not met his burden of proof by proving
11 prior discrimination.

12 JUSTICE GORSUCH: Okay. So we need
13 discrimination in this trial in order to have a
14 Batson violation?

15 MS. JOHNSON: Yes.

16 JUSTICE GORSUCH: Okay. All right.
17 That's helpful. Thank you.

18 JUSTICE KAVANAUGH: My question was
19 about the history. I thought that Swain had
20 said that the history was relevant. In fact,
21 Swain said history was the only way you could
22 prove a violation. What Batson did was to say
23 no, you can look even at the individual case.
24 But Batson, as I read it, did not say you no
25 longer take account of the history.

1 Your reading of Swain and how Swain
2 and Batson interact?

3 MS. JOHNSON: I think that's entirely
4 correct, Your Honor. Even in Swain, history
5 was relevant. And to look more broadly, in
6 Arlington Heights, this Court said that history
7 is relevant. So -- and in Miller-El said that
8 history was relevant.

9 So there isn't a new rule about
10 history being relevant. The Mississippi
11 Supreme Court ignored what this Court has
12 already said about history being relevant. And
13 --

14 JUSTICE GINSBURG: The court -- the
15 court --

16 MS. JOHNSON: -- the broader point,
17 that everything --

18 JUSTICE GINSBURG: -- the court said
19 it took account of the history. So what are we
20 to make of that?

21 MS. JOHNSON: Well, if there were --
22 if the court had taken account of its -- of the
23 history, it couldn't have come to this
24 conclusion. And I think there's many reasons
25 in the opinion to believe that they did not.

1 They said, considering the history, it
2 doesn't alter our opinion, and they pasted in
3 their prior opinion that was history blind.
4 They also said his -- his history does not
5 undermine his stated reasons.

6 That's wrong. It undermines those
7 reasons. It may or may not be sufficient, but
8 a history of will -- of a desire for a -- an
9 all-white jury, a history of willingness to
10 violate the Constitution, and a history of
11 willingness to make false statements to a trial
12 court, those things in the past with respect to
13 at least three other jurors, that does
14 undermine it.

15 And then I think, when we look at what
16 they actually did, there is no point in which
17 they say: Yes, we are more skeptical of the
18 reasons that he stated because he was dishonest
19 before, or, yes, when I look at -- at the false
20 statements he made here, the eight false
21 statements he made here, those match with false
22 statements that he made before.

23 They never did that. So I think they
24 did not consider his history, nor did they
25 consider anything else that would be consistent

1 with this Court's insistence that we look at
2 the totality of the circumstances and conduct a
3 sensitive inquiry into.

4 JUSTICE KAGAN: Ms. Johnson --

5 JUSTICE GINSBURG: You say your
6 strongest case is Juror, potential juror,
7 Wright. One of your complaints is that there
8 were many more questions asked of African
9 American potential jurors, but that wasn't so
10 in Wright's case, that she was asked, I think,
11 only three questions. Is that --

12 MS. JOHNSON: That's correct.

13 JUSTICE GINSBURG: Yes.

14 MS. JOHNSON: But I think, you know,
15 it is -- actually, the relevance of the
16 disparate questioning is not merely to ask how
17 many questions this juror was asked. So it
18 might indeed be as the Mississippi Supreme
19 Court said that, with respect to some African
20 American jurors, it was legitimate to ask them
21 more questions because more of them knew
22 Flowers' family.

23 But the -- the point still remains --
24 and this is the point that this Court made in
25 Miller-El -- disparate questioning of even

1 another juror is relevant. It does suggest
2 that the prosecutor is looking for reasons to
3 strike an African American juror, as opposed to
4 being interested in bias or death penalty
5 attitudes or anything else.

6 JUSTICE KAGAN: Ms. Johnson, some time
7 ago Justice Alito asked you about the
8 prosecutor's investigation of certain potential
9 jurors. And how many jurors did the prosecutor
10 separately investigate and were --

11 MS. JOHNSON: Three.

12 JUSTICE KAGAN: And all African
13 American?

14 MS. JOHNSON: All of them were African
15 American. And when defense counsel said he's
16 investigating African American jurors, there's
17 no evidence that he investigated anyone else.
18 He said nothing.

19 So he had an opportunity to say, oh,
20 I've investigated everyone, and he did not say
21 that.

22 JUSTICE KAGAN: And can I ask you
23 about the disparate questioning? Because you
24 referred to something which struck me when --
25 as I read through all of this. This is --

1 unlike some Batson cases you see, it's a very
2 small town where everybody knows everybody,
3 apparently, or many people know many people,
4 and it's a largely segregated town, where you
5 might think that African Americans knew more
6 African Americans than they would whites or
7 vice versa.

8 So does that account for some of the
9 differential questioning? In other words, just
10 sort of looking at the environment and saying,
11 I have to push more on whether X knew Y
12 because, given the circumstances of the town, X
13 might very well have known Y?

14 MS. JOHNSON: The Mississippi Supreme
15 Court said that it accounted for some of the
16 differential questioning, and I think that's
17 correct. There are more African American
18 jurors who report relationships with defense
19 witnesses or the defense family members.

20 But there are five -- five white
21 jurors who report such relationships and whom
22 the prosecutor did not ask questions about
23 those relationships. So --

24 JUSTICE GINSBURG: Such -- when you
25 say "such relationships," were they

1 relationships because of working at the same
2 place or living in the same neighborhood, in
3 the case of the white jurors?

4 MS. JOHNSON: They were -- none of the
5 relationships were working at the same place.
6 But when -- when he was asked -- when -- when
7 they were asked in group voir dire about whom
8 they knew, white jurors responded that they
9 knew defense witnesses, and they were not
10 questioned about those witnesses.

11 So we can't really know what the
12 nature of those relationships are if we don't
13 ask questions.

14 JUSTICE ALITO: Do you -- do you have
15 those names or is -- is that in your brief
16 someplace? I don't remember.

17 MS. JOHNSON: It is in the brief, but
18 it is Waller, Lester, Blaylock, and Fields, as
19 well as Chesteen.

20 JUSTICE SOTOMAYOR: I found it
21 strange, but maybe you can -- or unusual, I
22 should say, not strange -- unusual that there
23 were some white jurors who had people accused
24 of crimes in jail, relatives accused of crimes
25 in jails. Were there any questions about how

1 that affected those white jurors?

2 MS. JOHNSON: No, there were no
3 questions about that at all of three of them
4 and I think a very brief question about -- for
5 two of them. And I think that goes to the
6 question of, was he really investigating bias
7 when he asked this question about being sued by
8 Tardy Furniture?

9 If you're really investigating bias,
10 you would be concerned about bias against your
11 office. And he was not interested in that.

12 With the Court's permission, I will
13 reserve the rest of my time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 ORAL ARGUMENT OF JASON DAVIS
17 ON BEHALF OF THE RESPONDENT

18 MR. DAVIS: Mr. Chief Justice, and may
19 it please the Court:

20 The history in this case is troubling,
21 but the history is confined to this case, and,
22 as Mr. Chief Justice pointed out, it is
23 unusual.

24 There are -- this is the sixth trial
25 in this small town, a small town of

1 approximately 5,000 individuals. The
2 questioning of whether the makeup or the
3 limited number of individuals in the town was
4 one of the reasons for follow-up questions is
5 accurate.

6 At the outset, let me say that the
7 Mississippi Supreme Court's decision in this
8 case was commensurate with Batson and its
9 progeny. And I would return to Justice
10 Gorsuch's question of if we disengage this
11 troubling history -- and I agree, I'm not
12 suggesting that, as Justice Alito said --
13 however, if we take that out of the case, we --
14 we don't have any taints.

15 JUSTICE ALITO: Could I just ask --

16 JUSTICE KAVANAUGH: We can't be --

17 JUSTICE ALITO: -- a question of the
18 Mississippi law? Could the attorney general
19 have said, you know, enough already, we're
20 going to send one of our own people to try this
21 case, preferably in a different county, where
22 so many people don't know so many other people?
23 Could he have done that?

24 MR. DAVIS: Statutorily, the Attorney
25 General's Office is allowed to assist, is

1 allowed to take over, but only upon request by
2 that district attorney. So that was not an
3 option in this case. We were not so requested.

4 JUSTICE KAVANAUGH: You -- you said if
5 -- if we take the history out of the case. We
6 can't take the history out of the case.

7 MR. DAVIS: No, Justice Kavanaugh.
8 I'm not saying that's what I'm saying exactly
9 happened --

10 JUSTICE KAVANAUGH: It was 42 -- 42
11 potential African American Americans and 41 are
12 stricken, right?

13 MR. DAVIS: Yes, Your Honor, that is
14 correct.

15 JUSTICE KAVANAUGH: We have to --
16 that's relevant, correct?

17 MR. DAVIS: That is relevant, yes,
18 Your Honor. The -- as this Court has held in
19 Miller-El, history is part of the
20 consideration.

21 JUSTICE KAGAN: So you agree that it's
22 not only the adjudicated Batson violations that
23 are relevant but also the number of strikes
24 such as Justice Kavanaugh listed?

25 MR. DAVIS: I do with qualification.

1 There -- the strikes were unique. The strikes
2 in this case are supported in the record.

3 Each of the jurors that were struck
4 either worked with a relative, were related, or
5 knew, intimately, family members, the defendant
6 or his family members, up to and including one
7 juror who lied on her questionnaire and then
8 admitted to lying on the stand.

9 JUSTICE GINSBURG: You have a very
10 strange position on potential jurors who lied
11 because there was the case of white juror,
12 Huggins, who said he had no knowledge of the
13 Flowers case when, in fact, he was on a 2007
14 voir dire panel.

15 And you say: Oh, well, that doesn't
16 matter that -- that he lied because he didn't
17 admit to lying.

18 I think if someone lied and didn't
19 admit to it, that would be a count against that
20 person, rather than in that person's favor.

21 MR. DAVIS: And -- and the trial court
22 in this case made the distinction that the
23 juror who was struck for lying on her
24 questionnaire admitted on the stand that she
25 lied intentionally, which was not the case with

1 Juror Huggins.

2 And it would seem, it appeared, that
3 he -- his participation in the panel, and he
4 was dismissed long before he got anywhere near
5 selection, that he either forgot that or it
6 completely left his mind at the time he was
7 initially questioned.

8 JUSTICE SOTOMAYOR: But let's go back
9 to that. If we're looking at whether this is
10 pretext, Mr. Evans was willing to give an
11 excuse to this juror and keep him, despite the
12 fact that there was direct evidence that he
13 knew about the case. He was willing to accept
14 a white lie, but not a truthful answer under
15 oath in front of a judge.

16 Doesn't that suggest pretext to you?

17 MR. DAVIS: Again, Justice Sotomayor,
18 the -- the issue as it reads from the record is
19 that the juror who lied on her questionnaire
20 expressly admitted that she lied for the sole
21 purpose of getting off the jury.

22 JUSTICE SOTOMAYOR: Well --

23 MR. DAVIS: And -- and that doesn't --

24 JUSTICE SOTOMAYOR: -- I have to tell
25 you, if that were the case, I -- I don't think

1 one could take one juror and not push them on
2 those questionnaires and come up to an
3 intentional understatement or overstatement.

4 MR. DAVIS: Again, Your Honor, that
5 was -- and this is one of the issues with this
6 case, is that each one of these strikes that we
7 have, we don't have one single reason. We have
8 numerous --

9 JUSTICE SOTOMAYOR: That --

10 JUSTICE BREYER: All right. Let --
11 let's look at them. But you do have history.
12 Trial 1: Five black juror possibles, uses
13 peremptories, strikes all five.

14 Trial two: Five black jurors
15 possible, uses all five, strikes all five
16 blacks. Okay.

17 Trial number three: There were 17
18 black possible. He uses only 15 this time.
19 Why? Because he ran out of peremptories. He
20 only had 15. All right.

21 Fourth trial: 16 black. He only
22 struck 11. That's because he only had 11
23 peremptories perhaps. All right?

24 Now we come to this trial with that
25 background. Okay. And I don't think it's

1 going to take much once you have that
2 background.

3 So now let's look at one black juror,
4 one white one, potential. Okay? Let's call
5 them 1 and 2. Both are women. Both are in
6 their mid-40s. Both have some college
7 education. Both strongly favor the death
8 penalty.

9 Now the potential black actually has a
10 brother serving as a prison guard. Now you
11 would have thought that might have favored the
12 prosecution in the prosecutor's mind. Okay.
13 So that's one difference. I don't think that
14 cuts in your favor.

15 Then have they ever had anybody
16 arrested, you know? No, neither has. And do
17 they know people in the case? Yeah. They each
18 know something over 30 people, same, same,
19 same, same.

20 Now is there a connection with the
21 Flowers family? Well, the black juror did, in
22 fact, possibly work at some distance, we don't
23 know quite what, with the father at Walmart,
24 and the white one knew his father, mother,
25 sister, cousin, through her work as a bank

1 teller.

2 And then we get the last thing, which
3 the Mississippi Supreme Court thought was so
4 crucial, is that the -- the black potential
5 juror was sued for overdue credit, and maybe
6 she paid the garnishment of \$30. I don't know.

7 But the white juror had been a friend
8 of the victim's daughter in high school. Okay?
9 There we have it. Potential black, potential
10 white. And we have the whole background.

11 Now, looking at that, you tell me,
12 what was the difference as to why he could
13 strike, if that background, Carolyn Wright, the
14 potential African American juror who was Number
15 4, and Pamela Chesterton, the potential white
16 American juror who was Number 17.

17 What's the difference? What's the
18 difference given all those similarities?

19 MR. DAVIS: Juror 14, Carolyn Wright,
20 was struck because she was sued by Tardy.

21 JUSTICE BREYER: Yeah.

22 MR. DAVIS: Juror 14, Carolyn Wright,
23 worked with the defendant's father, Archie, at
24 Walmart.

25 JUSTICE BREYER: Yep.

1 MR. DAVIS: The distinction would be
2 the --

3 JUSTICE BREYER: Wait, wait. You
4 didn't add that Juror Number 17 had been a
5 friend of the victim's daughter in high school
6 and also knew Flowers' father, mother, sister,
7 and a cousin through her work as a teller at
8 the bank.

9 MR. DAVIS: Wright's relationship with
10 the father was a work relationship, an
11 employee/employee relationship. Chesteen was a
12 bank teller, admitted that she just saw them
13 coming in through the bank. So this was a --
14 an employee and customer relationship, which
15 the Mississippi Supreme Court made a
16 distinction.

17 JUSTICE BREYER: In other words, it
18 was closer, the first relationship?

19 MR. DAVIS: Well, the --

20 JUSTICE BREYER: And the record when I
21 read that will bear out that the first one
22 really was a closer relation than seeing them
23 every week or whatever as a bank teller.

24 MR. DAVIS: Well, the record --

25 JUSTICE BREYER: Will -- will it say

1 that? I don't think it will because I think
2 they said, well, how closely physically did you
3 work with the -- the father? And there was no
4 answer to that question.

5 MR. DAVIS: The -- the record will
6 bear out that the district attorney only struck
7 those individuals that worked with members of
8 his family. And that was consistent.

9 JUSTICE BREYER: Okay. So that's the
10 reason. The distinction is when I go back in
11 the record, I have to say, knowing Flowers'
12 father, mother, sister, cousin through the work
13 as a bank teller is not a good reason for
14 striking somebody. But working with Flowers'
15 father at some unknown distance at Walmart is.
16 And that's the crucial difference I will find.

17 There is a difference there, but is
18 there anything else? Because, after all, I
19 have the history, plus -- plus now I've
20 narrowed it down -- that's why I asked -- I've
21 narrowed it down to that being the difference.

22 MR. DAVIS: Again, Justice Breyer, I
23 would also say that one of the differing things
24 was that she was sued by Tardy.

25 JUSTICE BREYER: Yes.

1 MR. DAVIS: Which was a theme with at
2 least one other --

3 JUSTICE BREYER: Right. And so I also
4 should look at that and then decide whether
5 that really is more significant than the fact
6 that Number 17 was friends with the victim's
7 daughter in high school.

8 You know, sometimes you're friends
9 with your high school -- your high school pals
10 you don't forget.

11 So -- so I -- so those are the two
12 things I should look at. Is there anything
13 else?

14 MR. DAVIS: I think that's enough,
15 Your Honor.

16 JUSTICE KAGAN: I mean, in many --

17 JUSTICE BREYER: Well, I do too.

18 (Laughter.)

19 JUSTICE ALITO: Is there any --

20 JUSTICE KAGAN: -- in many respects,
21 Mr. Davis, Ms. Wright is a -- is a perfect
22 juror for a prosecutor. Right? She is -- she
23 strongly favors the death penalty. Her uncle
24 is a prison security guard. Her relative is
25 the victim of a violent crime.

1 Except for her race, you would think
2 that this is a juror that a prosecutor would
3 love when she walks in the door. Isn't she?

4 MR. DAVIS: Not if she works with the
5 defendant's family and not if she was sued by
6 the workplace of one of the victims. And --
7 and that's the distinguishing factor here.

8 JUSTICE GORSUCH: Counsel --

9 JUSTICE BREYER: I don't want to
10 imply, I'm sorry, that you have directed me to
11 the two relevant parts of the record, and
12 before I make up my mind definitely, I will
13 read those two relevant parts, both sides.
14 Okay?

15 CHIEF JUSTICE ROBERTS: Again --
16 counsel, again, we're sort of conducting this
17 as if it were one -- one case. And in terms of
18 a broader rule, do you -- do you recognize or
19 do we recognize in our precedent any
20 restriction on the prior history that can be
21 brought up with respect to a current -- current
22 case?

23 MR. DAVIS: No, Your Honor. And --
24 and far be it from me to presume the full basis
25 for the grant, but I certainly see that as one

1 of the issues before the Court, is, as Your
2 Honor asked, how far are we to go? And -- and
3 -- and what does it matter? What -- what part
4 does that history play?

5 CHIEF JUSTICE ROBERTS: But my point
6 is do you -- is there anything in our precedent
7 that suggests that there ought to be a
8 limitation on looking to the history of the
9 prosecutor involved?

10 MR. DAVIS: There's no limitation on
11 the history. I think certainly the precedent
12 says that you have to consider it. I'm not
13 aware of any language in Batson and its progeny
14 for this particular circumstance where we have
15 six trials by the same district attorney. I'm
16 not aware of any. This is a unique situation
17 in that regard.

18 JUSTICE GORSUCH: And -- and along
19 those lines, Justice Breyer's pointed out a
20 dichotomy that in other circumstances might be
21 explicable by an innocent reason.

22 But, if all of the history is
23 relevant, as you acknowledged, how -- does that
24 -- what light does that shed on what otherwise
25 might appear to be an innocent strike?

1 And when -- when should -- what rule
2 would you lay down -- I know that's hard to do,
3 but we're presumably taking cases to guide
4 future disputes, not just to resolve this one.

5 How -- how would you -- how would you
6 write that rule as to the relevance of the past
7 information with -- when we're looking at the
8 current trial?

9 MR. DAVIS: In responding to that,
10 Your Honor, let me say that when we use the
11 word "history," we are limiting it to this
12 case, this district attorney and his over 25
13 years of experience, having searched for
14 additional cases and no cases cited by the
15 Petitioner, outside of this case, in regards to
16 a Batson violation.

17 So the history is limited here. The
18 question then is what to do in a case like
19 this. How much does the specter of those two
20 prior violations come into play in the -- in
21 the analysis in this?

22 I think it certainly has to be looked
23 at. I believe the trial judge --

24 JUSTICE SOTOMAYOR: Is it just the
25 specter of the two violations? Weren't there

1 two cases that were overturned or -- in which
2 prosecutorial misconduct -- at least the first
3 was overturned on prosecutorial misconduct.
4 They didn't even reach the Batson challenge.

5 MR. DAVIS: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: But doesn't that
7 tell you something about this man's passion for
8 this case? I -- I don't even need to call it
9 anything else, but doesn't that tell you how
10 you should be looking at this case?

11 MR. DAVIS: I -- I can't speak to his
12 passion for the case, Your Honor. I can speak
13 to his pursuit of conviction in this in the
14 sense of the six trials, which -- in which
15 there -- there were --

16 JUSTICE SOTOMAYOR: But he didn't -- I
17 understand he didn't ask the attorney general
18 to step in, which he could have, to prosecute
19 the case. But I understand he lobbied two
20 legislators to try to change the venue,
21 legislatively. Is that correct?

22 MR. DAVIS: That's my understanding,
23 Your Honor.

24 JUSTICE SOTOMAYOR: So he could try
25 the case?

1 MR. DAVIS: Well, try the case outside
2 of Montgomery County.

3 JUSTICE SOTOMAYOR: Instead of getting
4 the attorney general to try the case?

5 MR. DAVIS: And -- and I would again
6 reiterate --

7 JUSTICE SOTOMAYOR: In his own county?

8 MR. DAVIS: Yes, Your Honor. And --
9 and we are strictly prohibited from inter --
10 interjecting ourselves in cases we tried, not
11 in this case but in another case, and our
12 supreme court --

13 JUSTICE KAVANAUGH: In Batson --

14 MR. DAVIS: -- said you can't do that.

15 JUSTICE KAVANAUGH: Sorry, in Batson,
16 we held that a prosecutor cannot state merely
17 that he challenged jurors in the defendant's
18 case -- of the defendant's race on the
19 assumption or his intuitive judgment that they
20 would be partial to the defendant because of
21 their shared race.

22 That was really the critical sentence
23 in Batson, and the dissent disagreed with that.
24 The critical change. You can't just assume
25 that someone's going to be favorable to someone

1 because they share the same race.

2 And when you look at the 41 out of 42,
3 how do you look at that and not come away with
4 thinking what was going on there was what the
5 dissent in Batson said was permissible, that
6 the majority said was not permissible, that
7 there's a stereotype that you're just going to
8 favor someone because they're the same race as
9 the defendant?

10 MR. DAVIS: I respectfully, in this
11 case, in no way agree that there was some prior
12 determination made by the district attorney
13 that -- that because of this person's race,
14 they were not going to be favorable.

15 Again, this case has spanned some 23
16 years now in this small community. One of the
17 inherent problems that --

18 JUSTICE KAGAN: But I -- I guess I
19 don't understand how you can say this. In this
20 case, there were three adjudicated Batson
21 violations.

22 MR. DAVIS: Two.

23 JUSTICE KAGAN: Okay, two.

24 (Laughter.)

25 MR. DAVIS: Two. The -- Flowers III

1 and Flowers II both had adjudicated Batson
2 issues. That the trial court was aware of that
3 was evident. The same trial judge presided
4 over the fifth trial. And in this case, we had
5 the same defense counsel. Counsel moved in
6 motions that were offered in the fifth trial up
7 to and including, in Joint Appendix 42, Motion
8 Number 57, which was a motion to bar
9 prosecution from exercising peremptory strikes
10 at all or at least from exercising them against
11 non-white minority members.

12 Judge Loper adopted his prior rulings.
13 His ruling on that motion also included
14 caution, caution to both parties that if
15 there's any objections or challenges based on
16 demeanor or based on a juror's appearance, that
17 if it wasn't in the record, he was not going to
18 consider it.

19 JUSTICE ALITO: Did we have some --

20 JUSTICE SOTOMAYOR: I'm sorry,
21 counsel, did you just --

22 JUSTICE ALITO: -- couldn't we say of
23 this -- go ahead.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Did you just say
2 that the same judge who tried the fifth trial
3 also tried the sixth -- the sixth trial?

4 MR. DAVIS: Yes, Your Honor.

5 JUSTICE SOTOMAYOR: And wasn't he the
6 judge that ordered Mr. Evans to prosecute the
7 sole holdout juror in the fifth trial?

8 MR. DAVIS: There --

9 JUSTICE SOTOMAYOR: And didn't
10 Mr. Evans do that?

11 MR. DAVIS: There --

12 JUSTICE SOTOMAYOR: And the attorney
13 general take over the case and say there was no
14 basis for that prosecution?

15 MR. DAVIS: There were two jurors that
16 were bound over to the grand jury on the basis
17 of perjury. One pleaded guilty to that, and
18 the other was nolle-prossed. Again -- and that
19 was handled by the Attorney General's Office,
20 not my division but another.

21 JUSTICE SOTOMAYOR: But I think the
22 attorney general nolle-prossed it because there
23 was no basis for that prosecution.

24 MR. DAVIS: I don't know that there
25 was not a basis. I just know that it was

1 nolle-prossed.

2 JUSTICE KAGAN: May -- may I ask you
3 about --

4 JUSTICE ALITO: Well, could we say in
5 -- in this case, because of the unusual and
6 really disturbing history, this case just could
7 not have been tried this sixth time by the same
8 prosecutor? That he -- that he just cannot --
9 in light of the history, you just can't
10 untangle what happened before from the
11 particular strikes in this case?

12 MR. DAVIS: But, again, Your Honor,
13 you know, hindsight is 20/20. I -- I was not
14 involved in any consideration on that. Had I
15 been, it -- it might have been a suggestion of
16 mine that that be the case, but that wasn't.

17 And -- however, the record in this
18 case by no means supports the conclusion that
19 the Mississippi Supreme Court's decision ran
20 afoul of Batson or its progeny.

21 And -- and if I may, I'd like to
22 return to what I was saying about the trial
23 judge's being aware of the history.
24 Specifically, Judge Loper said, at -- the
25 transcript at page 314, "I know what Flowers

1 III said." He then cautioned the state: "I'm
2 going to look very closely at this case."
3 Again, the judge acknowledging that he would be
4 diligent in making sure the same type of error
5 did not occur again.

6 JUSTICE KAGAN: But what -- well, how
7 closely did he look? I mean, let's talk --
8 talk just about the questioning in this case.

9 The numbers themselves are staggering,
10 the number of questions that were asked to
11 African Americans versus whites. But more than
12 the numbers, if you look at the -- the way --
13 what these questions were targeted to do, let's
14 take, for example, the questions on the death
15 penalty. This prosecutor would question a
16 white person who said that he or she had
17 reservations about the death penalty, and the
18 questions are all designed to rehabilitate the
19 person. You know, the prosecutor would say:
20 Well, if the law required you to do it, you
21 could follow the law, couldn't you? And then
22 the person would say yes.

23 But if an African American said that
24 -- that he or she had qualms about the death
25 penalty, the prosecutor would say the exact

1 opposite. The prosecutor would say something
2 like, well, it would be really hard for you to
3 apply the death penalty then, wouldn't it?

4 So, in every case, this kind of
5 disparate questioning, you know, it -- it looks
6 as though he's -- he's designing, he's trying
7 to create a record for striking black jurors
8 that -- and -- and -- and for distinguishing
9 black jurors from white jurors by means of his
10 questioning, which is sort of, you know,
11 completely opposite from the questioning that
12 he gives to whites.

13 MR. DAVIS: I think the questions that
14 the district attorney asked were a direct
15 result of those responses these particular
16 jurors provided in general voir dire. And --

17 JUSTICE KAGAN: Well, I think what I'm
18 saying is it's not two jurors, one white, one
19 black, says, I have reservations about the
20 death penalty, and he says to the white one:
21 But you could follow the law. And he says to
22 the black one: Well, I don't know, I guess you
23 can't follow the law.

24 MR. DAVIS: Respectfully, Your Honor,
25 that's not the case as I read the record. The

1 -- each juror that indicated they were against
2 the death penalty is certainly one that, in a
3 general context, that a prosecutor would not
4 want to be on the jury.

5 And, of course, we had in this case
6 vacillation amongst these jurors, for example,
7 Flancie Jones, who on her juror questionnaire
8 said she was strongly against the death penalty
9 and then, during questioning, said she could
10 consider it, but then went on to admit that she
11 lied on her juror questionnaire.

12 So the questions that the district
13 attorney asked were to follow up on what was on
14 the juror questionnaire with regard to their
15 statements therein regarding the death penalty.

16 In this case, the record itself shows
17 that the district attorney offered valid
18 race-neutral reasons for each strike.

19 Each strike was considered by the
20 trial court, who had made aware -- made the
21 parties aware of -- that he was aware of the
22 history of the case, and the record supports
23 that all the jurors that were struck were
24 struck because they were either sued by Tardy
25 Furniture, they were either related to the

1 defendant, or friends with, or had worked with
2 members of the defendant's family.

3 And these are all valid race-neutral
4 reasons.

5 JUSTICE GINSBURG: But there were no
6 questions of white jurors who said they had a
7 relationship with defense witnesses. There
8 were no follow-up questions for them. They
9 just said, yes, they knew defense witnesses.

10 MR. DAVIS: The only -- to my
11 recollection, Justice Ginsburg, is Pamela
12 Chesteen, who indicated that she knew Flowers'
13 family but only because she was a bank teller
14 and she'd seen them come in. Again, that was a
15 general question.

16 JUSTICE GINSBURG: But we didn't -- we
17 don't know what the relationship of the others
18 were because they weren't asked. They said
19 they had a relationship with defense witnesses,
20 but they weren't asked what is the
21 relationship.

22 MR. DAVIS: I -- I'm sorry, I
23 misunderstood. Regarding the ones that said
24 they knew these witnesses in the case, Your
25 Honor, yes.

1 And the Mississippi Supreme Court
2 noted that, that they were. And, again, this
3 is part and parcel of the issue with this
4 unique case, is that, you know, 5,000 people in
5 a town, everybody knows everybody, and
6 everybody knew everything about the case.

7 And the Mississippi Supreme Court
8 noted that these witnesses on both sides knew
9 numerous witnesses for both the prosecution and
10 the defense. And that is, of course, but one
11 part of the analysis.

12 You have to look at the reasons that
13 the -- that were offered by the district
14 attorney. And in this case, they all support
15 the strikes that were made.

16 JUSTICE KAVANAUGH: Well, the -- part
17 of Batson was about confidence of the community
18 and the fairness of the criminal justice
19 system, right?

20 MR. DAVIS: Yes, Your Honor.

21 JUSTICE KAVANAUGH: And that was
22 against a backdrop of a lot of decades of
23 all-white juries convicting black defendants.
24 Swain said let's put a stop to that but really
25 didn't give the tools for eradicating

1 discrimination, so you had another 21 years of
2 that, until Batson.

3 And then Batson said: We're going to
4 give you the tools to eradicate that so that
5 the -- not just for the fairness to the
6 defendant and to the juror, but that the
7 community has confidence in the fairness of the
8 system.

9 And can you say, as you sit here
10 today, confidently you have confidence in the
11 -- how this all transpired in this case?

12 MR. DAVIS: I have confidence in this
13 record, Justice Kavanaugh. I have confidence
14 in the strikes that this district attorney made
15 based on the four corners of this record.

16 I have confidence that, if reviewed
17 with an eye towards what actually transpired,
18 it supports the Mississippi Supreme Court's
19 decision in this case. That I have confidence
20 in.

21 JUSTICE KAVANAUGH: Thank you.

22 JUSTICE SOTOMAYOR: Do you have
23 confidence in how this case was prosecuted?

24 MR. DAVIS: Based on this record, yes,
25 Your Honor, I do.

1 JUSTICE SOTOMAYOR: You know, I -- one
2 of the first things I did when I found this
3 case was to try to do some research because at
4 least my former state prosecutor's office would
5 have substituted attorneys long before the
6 fifth, sixth trial.

7 Regrettably, I don't -- wasn't able to
8 find any formalized guidance on that. But it
9 does seem odd to me that any prosecutor would
10 continue to try a case with this history.

11 MR. DAVIS: And, again, I would agree
12 completely, Justice Sotomayor, that we have an
13 unusual circumstance, an unusual case with
14 these six trials having been all tried by the
15 same prosecutor.

16 But I would resubmit, again, that the
17 decision of the Mississippi Supreme Court in
18 this instance was not violative of Batson and
19 its progeny.

20 Thank you, Mr. Chief Justice.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 You have four minutes remaining, Ms.
24 Johnson.

25

1 REBUTTAL ARGUMENT OF SHERI LYNN

2 JOHNSON ON BEHALF OF THE PETITIONER

3 MS. JOHNSON: Unless this Court has
4 further questions, I will waive rebuttal.

5 JUSTICE THOMAS: Ms. Johnson, did you
6 -- would you be kind enough to tell me whether
7 or not you exercised any peremptories?

8 MS. JOHNSON: I was not the trial
9 lawyer.

10 JUSTICE THOMAS: Well, did your --
11 were any peremptories exercised by the
12 defendant?

13 MS. JOHNSON: They were.

14 JUSTICE THOMAS: And what was the race
15 of the jurors struck there?

16 MS. JOHNSON: She only exercised
17 peremptories against white jurors.

18 But I would add that the motive -- her
19 motivation is not the question here. The
20 question is the motivation of Doug Evans.

21 JUSTICE SOTOMAYOR: She didn't have
22 any black jurors to exercise peremptories
23 against -- except the first one?

24 MS. JOHNSON: Except the first one.

25 JUSTICE SOTOMAYOR: But so did the

1 prosecutor, except that one?

2 MS. JOHNSON: Correct.

3 JUSTICE SOTOMAYOR: After that, every
4 black juror that was available on the panel was
5 struck --

6 MS. JOHNSON: Yes.

7 JUSTICE SOTOMAYOR: -- by --

8 MS. JOHNSON: He struck one -- he
9 seated one African American juror, and at the
10 very end struck one white juror.

11 When all of the evidence in this case
12 is considered, just as in Foster versus
13 Chapman, the conclusion that race was a
14 substantial part of Evans' motivation is
15 inescapable, and the Mississippi Supreme
16 Court's conclusion to the contrary is clearly
17 erroneous. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 11:09 a.m., the case
21 was submitted.)

22

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\$			
\$30 [1] 37:6			
1			
1 [2] 35:12 36:5	47:1	Attorney [19] 1:21 10:3 31:18,24	call [2] 36:4 44:8
1.1 [1] 4:1	admit [3] 33:17,19 52:10	32:2 39:6 42:15 43:12 44:17 45:4	called [1] 12:1
10:16 [2] 1:16 3:2	admitted [5] 5:19 33:8,24 34:20	46:12 48:12,19,22 51:14 52:13,17	came [3] 1:14 6:13 17:9
11 [2] 35:22,22	38:12	54:14 55:14	cannot [3] 19:24 45:16 49:8
11:09 [1] 58:20	adopt [2] 18:23 21:2	attorneys [1] 56:5	career [1] 19:2
14 [2] 37:19,22	adopted [2] 21:6 47:12	attracted [1] 19:16	caring [1] 13:17
15 [2] 35:18,20	affect [2] 11:12 13:5	available [1] 58:4	Carolyn [7] 8:19,20,20 19:7 37:13, 19,22
16 [1] 35:21	affected [1] 30:1	average [2] 3:25 4:1	Case [90] 3:4 4:7,13,17,25 5:4 6:1
17 [4] 35:17 37:16 38:4 40:6	afoul [1] 49:20	aware [7] 42:13,16 47:2 49:23 52: 20,21,21	8:19 10:15 11:12 18:14,16,18,20
17-9572 [1] 3:4	African [22] 3:15,19,21,24 4:6 6:14, 24 10:8 26:8,19 27:3,12,14,16 28: 5,6,17 32:11 37:14 50:11,23 58:9	away [1] 46:3	19:24,25 20:6,12,16 21:4 22:5,6, 25 23:7,23 26:6,10 29:3 30:20,21 31:8,13,21 32:3,5,6 33:2,11,13,22, 25 34:13,25 35:6 36:17 41:17,22 43:12,15,18 44:8,10,12,19,25 45:1, 4,11,11,18 46:11,15,20 47:4 48:13 49:5,6,11,16,18 50:2,8 51:4,25 52: 5,16,22 53:24 54:4,6,14 55:11,19, 23 56:3,10,13 58:11,19,20
2	ago [4] 19:3 20:5,16 27:7	B	cases [9] 5:7 18:24 19:24 28:1 43: 3,14,14 44:1 45:10
2 [1] 36:5	agree [4] 31:11 32:21 46:11 56:11	back [8] 7:25 8:13 12:5 13:12 15:2 19:22 34:8 39:10	cause [2] 4:15 5:10
20 [3] 1:12 19:2 20:5	ahead [2] 21:19 47:23	backdrop [1] 54:22	caution [2] 47:14,14
20/20 [1] 49:13	ALITO [29] 4:12 5:8 7:1 8:7,16,24 9:9,16,20,24 12:7 14:1,6,10 15:14, 18,22,25 16:7,10 27:7 29:14 31: 12,15,17 40:19 47:19,22 49:4	background [4] 35:25 36:2 37:10, 13	cautioned [1] 50:1
2007 [1] 33:13	all-white [2] 25:9 54:23	bank [9] 17:8,19 36:25 38:8,12,13, 23 39:13 53:13	certain [1] 27:8
2019 [1] 1:12	allowed [2] 31:25 32:1	bar [1] 47:8	certainly [6] 4:15 8:2 41:25 42:11 43:22 52:2
21 [1] 55:1	alone [2] 3:16 4:3	based [5] 5:15 47:15,16 55:15,24	challenge [1] 44:4
23 [1] 46:15	already [4] 6:8 21:6 24:12 31:19	basis [8] 4:5 12:3 17:23 41:24 48: 14,16,23,25	challenged [1] 45:17
25 [1] 43:12	alter [1] 25:2	Batson [30] 4:25 5:24 18:14 19:2,5 20:4,22,23 22:11 23:14,22,24 24: 2 28:1 31:8 32:22 42:13 43:16 44: 4 45:13,15,23 46:5,20 47:1 49:20 54:17 55:2,3 56:18	challenges [5] 3:18,20 4:6 19:5 47:15
29 [1] 3:25	American [20] 3:15,19,21,24 4:6 6: 15,24 10:8 26:9,20 27:3,13,15,16 28:17 32:11 37:14,16 50:23 58:9	bear [2] 38:21 39:6	chance [1] 5:1
3	Americans [4] 28:5,6 32:11 50:11	bears [1] 21:7	change [2] 44:20 45:24
3 [2] 2:4 21:7	amongst [1] 52:6	began [1] 3:13	Chapman [1] 58:13
30 [4] 2:7 20:4,16 36:18	analysis [2] 43:21 54:11	behalf [8] 1:19,22 2:4,7,10 3:8 30: 17 57:2	check [1] 12:20
30-year [1] 19:2	analyzed [2] 4:20,21	believe [5] 6:12 7:18 16:13 24:25 43:23	Chesteen [7] 16:17 17:5,7 18:6 29: 19 38:11 53:12
314 [1] 49:25	announced [1] 20:22	bias [10] 10:7,19 11:2,4,8 16:22 27: 4 30:6,9,10	Chesterton [1] 37:15
36 [1] 3:17	Another [7] 5:19 16:12 21:10 27:1 45:11 48:20 55:1	biased [1] 10:15	CHIEF [20] 3:3,9 18:11 19:6,9,18 20:1,20 21:1,25 22:3 30:14,18,22 41:15 42:5 47:24 56:20,21 58:18
4	answer [2] 34:14 39:4	bit [1] 22:4	circumstance [2] 42:14 56:13
41 [2] 32:11 46:2	anybody [2] 14:3 36:15	black [17] 4:23 35:12,14,18,21 36: 3,9,21 37:4,9 51:7,9,19,22 54:23 57:22 58:4	circumstances [6] 6:4,6 16:21 18: 15 22:12 26:2 28:12 42:20
42 [4] 32:10,10 46:2 47:7	apart [1] 7:12	blacks [1] 35:16	cited [5] 7:17 11:20 13:23 15:6 43: 14
5	apologize [1] 19:21	Blaylock [2] 15:10 29:18	citing [1] 14:24
5,000 [2] 31:1 54:4	apparent [1] 13:15	blind [1] 25:3	claims [1] 5:24
57 [2] 2:10 47:8	apparently [1] 28:3	both [10] 9:5 36:5,5,6,7 41:13 47:1, 14 54:8,9	clear [1] 5:3
6	appear [1] 42:25	bound [1] 48:16	clearest [1] 8:19
6 [1] 22:6	appearance [1] 47:16	BREYER [13] 35:10 37:21,25 38:3, 17,20,25 39:9,22,25 40:3,17 41:9	clearly [1] 58:16
A	APPEARANCES [1] 1:18	Breyer's [1] 42:19	close [4] 7:5,21 11:6 18:8
a.m [3] 1:16 3:2 58:20	appeared [1] 34:2	brief [3] 29:15,17 30:4	closely [4] 7:4 39:2 50:2,7
able [1] 56:7	Appendix [1] 47:7	bringing [1] 7:10	closeness [4] 16:24 17:2,4 18:2
above-entitled [1] 1:14	apply [2] 18:23 51:3	brings [1] 7:20	closer [2] 38:18,22
accept [1] 34:13	approach [3] 6:18,19,21	broader [2] 24:16 41:18	colleagues [1] 18:18
account [4] 23:25 24:19,22 28:8	approximately [1] 31:1	broadly [1] 24:5	college [1] 36:6
accounted [1] 28:15	Archie [1] 37:23	brother [2] 17:13 36:10	colorblind [1] 19:16
accurate [1] 31:5	argument [10] 1:15 2:2,5,8 3:4,7 13:5 18:24 30:16 57:1	brought [3] 8:12 19:4 41:21	combed [1] 19:24
accused [3] 14:13 29:23,24	Arlington [1] 24:6	burden [1] 23:10	come [7] 7:25 24:23 35:2,24 43:20 46:3 53:14
acknowledged [1] 42:23	array [1] 10:22	Burnside [10] 11:21,23 12:4 13:13, 15,16,17,18 14:1,5	comes [1] 17:20
acknowledging [1] 50:3	arrested [1] 36:16	C	coming [1] 38:13
acquaintance [1] 5:17	aside [4] 5:5 6:5 7:2 9:25		commensurate [1] 31:8
acted [1] 5:3	aspects [1] 5:10		
actually [7] 7:11 8:24 18:1 25:16 26:15 36:9 55:17	assess [1] 23:7		
add [2] 38:4 57:18	assessment [1] 19:4		
additional [1] 43:14	assist [1] 31:25		
addressing [1] 18:12	Assistant [1] 1:21		
adequate [1] 12:10	assume [1] 45:24		
adjudicated [4] 4:10 32:22 46:20	assumption [1] 45:19		
	attitudes [1] 27:5		

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Official - Subject to Final Review

<p>community ^[3] 46:16 54:17 55:7 Compare ^[1] 16:16 comparison ^[1] 16:17 complain ^[1] 6:20 complaints ^[1] 26:7 completely ^[3] 34:6 51:11 56:12 concern ^[1] 4:15 concerned ^[2] 11:4 30:10 conclusion ^[4] 24:24 49:18 58:13, 16 conduct ^[2] 20:10 26:2 conducting ^[1] 41:16 confidence ^[8] 54:17 55:7,10,12, 13,16,19,23 confidently ^[1] 55:10 confined ^[1] 30:21 connection ^[1] 36:20 consensitive ^[1] 20:11 consider ^[5] 25:24,25 42:12 47:18 52:10 consideration ^[3] 20:6 32:20 49:14 considered ^[2] 52:19 58:12 considering ^[1] 25:1 consistent ^[2] 25:25 39:8 Constitution ^[1] 25:10 context ^[1] 52:3 continue ^[1] 56:10 contradicted ^[1] 21:14 contrary ^[1] 58:16 convicting ^[1] 54:23 conviction ^[1] 44:13 convincing ^[1] 5:3 Cora ^[2] 13:10 16:14 corners ^[1] 55:15 Correct ^[8] 9:15 24:4 26:12 28:17 32:14,16 44:21 58:2 couldn't ^[5] 5:13,14 24:23 47:22 50:21 counsel ^[9] 27:15 30:15 41:8,16 47:5,5,21 56:22 58:19 count ^[1] 33:19 county ^[3] 31:21 45:2,7 course ^[4] 6:17 18:17 52:5 54:10 COURT ^[37] 1:1,15 3:10 6:2 9:5,6 12:1,23,24 16:2 20:19 21:11 23:7 24:6,11,11,14,15,18,22 25:12 26:19,24 28:15 30:19 32:18 33:21 37:3 38:15 42:1 45:12 47:2 52:20 54:1,7 56:17 57:3 Court's ^[6] 26:1 30:12 31:7 49:19 55:18 58:16 courts ^[1] 12:9 cousin ^[3] 36:25 38:7 39:12 coworker ^[1] 17:21 create ^[1] 51:7 credibility ^[1] 21:8 credit ^[1] 37:5 crime ^[2] 14:13 40:25 crimes ^[2] 29:24,24 criminal ^[2] 20:12 54:18 critical ^[2] 45:22,24 crucial ^[2] 37:4 39:16 cumulatively ^[1] 3:12</p>	<p>current ^[5] 19:5 20:6 41:21,21 43:8 CURTIS ^[1] 1:4 customer ^[1] 38:14 cuts ^[1] 36:14</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[1] 1:11 daily ^[1] 17:23 daughter ^[3] 37:8 38:5 40:7 DAVIS ^[52] 1:21 2:6 30:16,18 31:24 32:7,13,17,25 33:21 34:17,23 35:4 37:19,22 38:1,9,19,24 39:5, 22 40:1,14,21 41:4,23 42:10 43:9 44:5,11,22 45:1,5,8,14 46:10,22, 25 48:4,8,11,15,24 49:12 51:13,24 53:10,22 54:20 55:12,24 56:11 day ^[3] 8:10,13,14 death ^[13] 19:12,13 27:4 36:7 40:23 50:14,17,24 51:3,20 52:2,8,15 debt ^[1] 11:16 debts ^[1] 10:23 decades ^[1] 54:22 decide ^[1] 40:4 decision ^[6] 4:16 5:15 31:7 49:19 55:19 56:17 defendant ^[9] 4:8 5:19 23:9 33:5 45:20 46:9 53:1 55:6 57:12 defendant's ^[9] 7:5,6 15:15,17 37:23 41:5 45:17,18 53:2 defendants ^[2] 4:7 54:23 defense ^[11] 15:7,11 27:15 28:18, 19 29:9 47:5 53:7,9,19 54:10 definitely ^[1] 41:12 demanded ^[1] 6:2 demeanor ^[1] 47:16 deposit ^[1] 17:20 described ^[1] 16:2 designed ^[1] 50:18 designing ^[1] 51:6 desire ^[1] 25:8 despite ^[2] 11:25 34:11 determination ^[1] 46:12 dichotomy ^[1] 42:20 difference ^[7] 36:13 37:12,17,18 39:16,17,21 different ^[6] 17:20,24,25 20:17,18 31:21 differential ^[2] 28:9,16 differing ^[1] 39:23 diligent ^[1] 50:4 dire ^[3] 29:7 33:14 51:16 direct ^[2] 34:12 51:14 directed ^[1] 41:10 disagreed ^[1] 45:23 disbelieve ^[1] 7:14 discriminated ^[1] 4:4 discrimination ^[7] 4:10,10 6:4 23:9,11,13 55:1 discriminatory ^[1] 5:4 disengage ^[1] 31:10 dishonest ^[1] 25:18 dismissed ^[1] 34:4 disparate ^[7] 6:9,10 22:16 26:16,</p>	<p>25 27:23 51:5 disputes ^[2] 10:25 43:4 disregard ^[1] 4:21 dissent ^[2] 45:23 46:5 distance ^[2] 36:22 39:15 distinction ^[4] 33:22 38:1,16 39:10 distinguishing ^[2] 41:7 51:8 district ^[10] 32:2 39:6 42:15 43:12 46:12 51:14 52:12,17 54:13 55:14 disturbing ^[1] 49:6 division ^[1] 48:20 divorce ^[1] 13:19 documents ^[1] 13:1 done ^[2] 20:24 31:23 door ^[1] 41:3 Doug ^[5] 3:13 15:8 17:14 18:4 57:20 down ^[4] 12:6 39:20,21 43:2 during ^[2] 13:18 52:9</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>Each ^[6] 33:3 35:6 36:17 52:1,18, 19 Edith ^[2] 11:21,23 education ^[1] 36:7 eight ^[2] 22:13 25:20 either ^[5] 18:2 33:4 34:5 52:24,25 employee ^[1] 38:14 employee/employee ^[1] 38:11 employment ^[1] 7:10 encounter ^[1] 17:22 end ^[4] 3:14 10:1 12:22 58:10 enough ^[3] 31:19 40:14 57:6 entire ^[1] 10:22 entirely ^[1] 24:3 environment ^[1] 28:10 eradicate ^[1] 55:4 eradicating ^[1] 54:25 erroneous ^[1] 58:17 error ^[1] 50:4 especially ^[1] 11:19 ESQ ^[4] 1:19 2:3,6,9 established ^[1] 20:19 Evans ^[14] 3:13,17 4:4,11 5:3 7:17 15:8 17:1,14 18:4 34:10 48:6,10 57:20 Evans' ^[1] 58:14 even ^[13] 5:4 6:5 10:17 11:10 16:4 17:6 18:1 21:18 23:23 24:4 26:25 44:4,8 everybody ^[5] 28:2,2 54:5,5,6 everyone ^[2] 18:10 27:20 everything ^[4] 4:22 14:25 24:17 54:6 evidence ^[10] 3:12 5:2,14,15 7:23, 24 8:1 27:17 34:12 58:11 evident ^[1] 47:3 exact ^[1] 50:25 exactly ^[2] 21:14 32:8 example ^[2] 50:14 52:6 Except ^[4] 41:1 57:23,24 58:1 excuse ^[1] 34:11 exercise ^[2] 4:5 57:22</p>	<p>exercised ^[5] 3:17,20 57:7,11,16 exercising ^[2] 47:9,10 exhibit ^[1] 9:1 experience ^[1] 43:13 experts ^[1] 12:25 explain ^[1] 12:11 explained ^[1] 23:1 explicable ^[1] 42:21 expressly ^[1] 34:20 extensive ^[1] 18:19 extraordinary ^[2] 6:9 19:23 extreme ^[1] 21:4 extremely ^[1] 6:14 eye ^[1] 55:17</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fabrication ^[1] 20:13 fact ^[10] 9:11 10:11 11:13,25 22:14 23:20 33:13 34:12 36:22 40:5 factor ^[2] 21:7 41:7 fairness ^[3] 54:18 55:5,7 false ^[9] 5:20 8:21 11:24 13:7,8 25:11,19,20,21 family ^[11] 5:18 17:7 26:22 28:19 33:5,6 36:21 39:8 41:5 53:2,13 family-owned ^[2] 9:13,14 far ^[3] 18:24 41:24 42:2 father ^[12] 15:15,17 17:11,12 36:23,24 37:23 38:6,10 39:3,12,15 favor ^[5] 19:13 33:20 36:7,14 46:8 favorable ^[2] 45:25 46:14 favored ^[1] 36:11 favours ^[1] 40:23 feelings ^[1] 13:21 felt ^[2] 11:11 13:20 few ^[1] 3:15 Fields ^[2] 15:10 29:18 fifth ^[5] 47:4,6 48:2,7 56:6 fighting ^[2] 20:2 22:21 find ^[3] 19:25 39:16 56:8 first ^[13] 3:17 6:8 8:21 10:12 11:22 12:1 21:21 38:18,21 44:2 56:2 57:23,24 five ^[10] 3:20 17:6,8 28:20,20 35:12,13,14,15,15 Flancie ^[1] 52:7 FLOWERS ^[10] 1:4 3:4,13 5:18 16:14 33:13 36:21 46:25 47:1 49:25 Flowers' ^[8] 13:9,10 17:7 26:22 38:6 39:11,14 53:12 follow ^[5] 11:18 50:21 51:21,23 52:13 follow-up ^[2] 31:4 53:8 forget ^[2] 19:8 40:10 forgot ^[1] 34:5 form ^[2] 12:17,19 formalized ^[1] 56:8 former ^[1] 56:4 Foster ^[1] 58:12 found ^[6] 4:4 8:25 9:7 12:9 29:20 56:2 four ^[5] 3:17 10:13 17:6 55:15 56:23 Fourth ^[1] 35:21</p>
--	---	---	---

Heritage Reporting Corporation

Sheet 2

community - Fourth

Official - Subject to Final Review

<p>friend [2] 37:7 38:5 friends [3] 40:6,8 53:1 front [1] 34:15 full [1] 41:24 Furniture [2] 30:8 52:25 further [2] 22:4 57:4 future [1] 43:4</p>	<p>Huggins [2] 33:12 34:1 human [1] 7:9 hypothetical [3] 20:3 22:21,25</p>	<p>12,19 17:12,16,24 19:6,10,20 20:7, 21 21:5 22:13,16,19,22 23:3,8,15 24:3,16,21 26:4,12,14 27:6,11,14 28:14 29:4,17 30:2 56:24 57:2,3,5, 8,13,16,24 58:2,6,8</p>	<p>language [1] 42:13 largely [1] 28:4 last [1] 37:2 later [1] 9:23 Laughter [4] 14:18 21:22 40:18 46:24 law [6] 20:19 31:18 50:20,21 51:21, 23 lawsuits [1] 11:5 lawyer [1] 57:9 lay [1] 43:2 lean [1] 5:18 least [5] 25:13 40:2 44:2 47:10 56: 4</p>
<p style="text-align: center;">G</p> <p>garnished [4] 8:22 9:2,8 11:25 garnishment [6] 12:9,21,22 13:2, 4 37:6 General [12] 1:21 21:3,5,9 31:18 44:17 45:4 48:13,22 51:16 52:3 53:15 General's [2] 31:25 48:19 getting [2] 34:21 45:3 GINSBURG [12] 10:21 17:15,18 24:14,18 26:5,13 28:24 33:9 53:5, 11,16 GIOVANNI [1] 1:4 give [3] 34:10 54:25 55:4 given [2] 28:12 37:18 gives [1] 51:12 GORSUCH [14] 13:3 21:19,23 22: 1,2,15,18,20,24 23:5,12,16 41:8 42:18 Gorsuch's [1] 31:10 got [1] 34:4 grand [1] 48:16 grant [1] 41:25 group [1] 29:7 guard [2] 36:10 40:24 guess [2] 46:18 51:22 guidance [1] 56:8 guide [1] 43:3 guilty [2] 14:14 48:17</p>	<p style="text-align: center;">I</p> <p>ignored [1] 24:11 II [1] 47:1 III [2] 46:25 50:1 ill [1] 11:16 imagined [1] 10:18 immediately [1] 20:23 imply [1] 41:10 important [1] 16:3 inches [1] 7:11 included [1] 47:13 including [2] 33:6 47:7 indeed [3] 11:18 18:5 26:18 indicated [2] 52:1 53:12 indicia [1] 23:9 individual [1] 23:23 individuals [3] 31:1,3 39:7 inescapable [1] 58:15 information [1] 43:7 inherent [1] 46:17 initially [2] 6:15 34:7 innocent [2] 42:21,25 inquired [1] 10:19 inquiry [8] 6:3 11:2,7 18:3,5 20:11 21:17 26:3 insistence [1] 26:1 instance [1] 56:18 instead [2] 18:9 45:3 intentional [1] 35:3 intentionally [1] 33:25 inter [1] 45:9 interact [1] 24:2 interested [5] 16:18 17:16 18:22 27:4 30:11 interesting [1] 16:23 interjecting [1] 45:10 interpretation [1] 3:11 intimately [1] 33:5 intuitive [1] 45:19 investigate [2] 8:6 27:10 investigated [2] 27:17,20 investigating [3] 27:16 30:6,9 investigation [2] 6:24 27:8 involved [2] 42:9 49:14 isn't [6] 14:20 15:14 17:15,18 24:9 41:3 issue [2] 34:18 54:3 issues [3] 35:5 42:1 47:2 Ithaca [1] 1:19 itself [1] 52:16</p>	<p>Joint [1] 47:7 Jones [1] 52:7 judge [12] 14:2,8,12,16 34:15 43: 23 47:3,12 48:2,6 49:24 50:3 judge's [1] 49:23 judgment [5] 9:1,10 12:13,15 45: 19 juries [1] 54:23 juror [57] 5:12,13,20 6:15,18,19 7: 3,15,15 10:4 13:8 14:1,5,12,17 15: 3,5 16:12 17:5,7 18:5 21:12,13,15 26:6,6,17 27:1,3 33:7,11,23 34:1, 11,19 35:1,12 36:3,21 37:5,7,14, 16,19,22 38:4 40:22 41:2 48:7 52: 1,7,11,14 55:6 58:4,9,10 juror's [1] 47:16 jurors [42] 3:15,19,21,25 4:1,24 5: 9 6:22,24 10:8,9 11:5 15:9 18:15 25:13 26:9,20 27:9,9,16 28:18,21 29:3,8,23 30:1 33:3,10 35:14 45: 17 48:15 51:7,9,9,16,18 52:6,23 53:6 57:15,17,22 jury [8] 3:13 5:11,12,22 25:9 34:21 48:16 52:4 JUSTICE [155] 3:3,9 4:12 5:8 7:1 8:4,7,9,14,16,24 9:9,16,20,24 10: 21 11:10 12:5,7,13,16 13:3 14:1,6, 10 15:14,18,22,25 16:7,10,16 17: 10,15,18 18:11 19:6,9,18 20:1,20 21:1,18,19,21,23,25,25 22:2,15,18, 20,24 23:5,12,16,18 24:14,18 26:4, 5,13 27:6,7,12,22 28:24 29:14,20 30:14,18,22 31:9,12,15,16,17 32:4, 7,10,15,21,24 33:9 34:8,17,22,24 35:9,10 37:21,25 38:3,17,20,25 39:9,22,25 40:3,16,17,19,20 41:8, 9,15 42:5,18,19 43:24 44:6,16,24 45:3,7,13,15 46:18,23 47:19,20,22, 24,24 48:1,5,9,12,21 49:2,4 50:6 51:17 53:5,11,16 54:16,18,21 55: 13,21,22 56:1,12,20,21 57:5,10,14, 21,25 58:3,7,18 Justice's [1] 22:3</p>	<p>left [4] 16:11 21:12,13 34:6 legislatively [1] 44:21 legislators [1] 44:20 legitimate [4] 14:11,15,21 26:20 less [1] 20:24 Lester [2] 15:9 29:18 lie [1] 34:14 lied [8] 33:7,10,16,18,25 34:19,20 52:11 light [2] 42:24 49:9 likely [1] 5:24 likewise [1] 3:23 limitation [2] 42:8,10 limited [3] 6:10 31:3 43:17 limiting [1] 43:11 lines [1] 42:19 listed [1] 32:24 little [2] 12:20 22:4 living [1] 29:2 lobbied [1] 44:19 location [1] 15:17 long [2] 34:4 56:5 longer [1] 23:25 look [27] 3:22 5:8 9:9,10 12:21 13: 15,25 14:23 18:25 19:14 20:11,12 23:23 24:5 25:15,19 26:1 35:11 36:3 40:4,12 46:2,3 50:2,7,12 54: 12 looked [5] 4:23 9:6 12:23,24 43:22 looking [9] 18:14 19:15 27:2 28: 10 34:9 37:11 42:8 43:7 44:10 looks [2] 14:25 51:5 Loper [2] 47:12 49:24 lot [1] 54:22 love [1] 41:3 lying [3] 33:8,17,23 LYNN [5] 1:19 2:3,9 3:7 57:1</p>
<p style="text-align: center;">H</p> <p>handled [1] 48:19 happened [3] 4:22 32:9 49:10 happens [1] 7:19 hard [2] 43:2 51:2 hear [1] 3:3 Heights [1] 24:6 held [2] 32:18 45:16 helped [1] 13:18 helpful [1] 23:17 herself [2] 9:19 13:22 high [5] 37:8 38:5 40:7,9,9 hindsight [1] 49:13 history [48] 4:12 5:5,25 6:5 10:1 18:19,25 22:8,23 23:6,19,20,21,25 24:4,6,8,10,12,19,23 25:1,3,4,8,9, 10,24 30:20,21 31:11 32:5,6,19 35:11 39:19 41:20 42:4,8,11,22 43:11,17 49:6,9,23 52:22 56:10 holdout [1] 48:7 homicide [1] 10:15 Honor [18] 24:4 32:13,18 35:4 40: 15 41:23 42:2 43:10 44:5,12,23 45:8 48:4 49:12 51:24 53:25 54: 20 55:25 however [2] 31:13 49:17</p>	<p style="text-align: center;">J</p> <p>Jackson [1] 1:22 jail [1] 29:24 jails [1] 29:25 JASON [3] 1:21 2:6 30:16 JOHNSON [74] 1:19 2:3,9 3:6,7,9 5:2 6:2 7:13 8:5,12,18 9:3,15,18, 22 10:6,24 11:13 12:12,15,19 13: 6 14:4,7,15,19 15:16,20,24 16:1,9,</p>	<p style="text-align: center;">K</p> <p>KAGAN [12] 26:4 27:6,12,22 32:21 40:16,20 46:18,23 49:2 50:6 51: 17 KAVANAUGH [15] 21:18,21 23:18 31:16 32:4,7,10,15,24 45:13,15 54:16,21 55:13,21 keep [1] 34:11 kind [3] 18:4 51:4 57:6 knowing [1] 39:11 knowledge [1] 33:12 known [1] 28:13 knows [2] 28:2 54:5</p>	<p style="text-align: center;">M</p> <p>made [19] 4:16 5:20 8:20,22 10:9 11:3,7 13:7 25:20,21,22 26:24 33: 22 38:15 46:12 52:20,20 54:15 55: 14 majority [1] 46:6 makeup [1] 31:2 man's [1] 44:7 many [11] 6:6 24:24 26:8,17 27:9 28:3,3 31:22,22 40:16,20 March [1] 1:12 mark [1] 9:4</p>

Heritage Reporting Corporation

Sheet 3

friend - mark

Official - Subject to Final Review

<p>match ^[1] 25:21 matched ^[1] 21:14 matter ^[4] 1:14 20:14 33:16 42:3 mean ^[8] 5:8,23 12:18 13:1,7 18:17 40:16 50:7 means ^[2] 49:18 51:9 members ^[8] 5:17 17:7 28:19 33:5,6 39:7 47:11 53:2 merely ^[2] 26:16 45:16 met ^[1] 23:10 mid-40s ^[1] 36:6 might ^[11] 8:6 13:20 16:21,24 26:18 28:5,13 36:11 42:20,25 49:15 Miller-El ^[3] 24:7 26:25 32:19 mind ^[4] 3:14 34:6 36:12 41:12 mine ^[1] 49:16 minority ^[1] 47:11 minutes ^[1] 56:23 misconduct ^[2] 44:2,3 misrepresentations ^[2] 15:4 22:14 MISSISSIPPI ^[19] 1:7,22 3:5 9:6 12:24 21:11 24:10 26:18 28:14 31:7,18 37:3 38:15 49:19 54:1,7 55:18 56:17 58:15 misunderstood ^[1] 53:23 moment ^[1] 13:12 Montgomery ^[1] 45:2 morning ^[1] 3:4 most ^[2] 8:16 18 mother ^[5] 13:18 17:13 36:24 38:6 39:12 Motion ^[3] 47:7,8,13 motions ^[1] 47:6 motivation ^[5] 5:4 6:7 57:19,20 58:14 motive ^[3] 20:15,17 57:18 moved ^[1] 47:5 Ms ^[80] 3:6,9 5:2 6:2 7:13 8:5,12,18 9:3,15,18,22 10:6,24 11:11,13 12:4,12,15,19 13:6,13,15,16,17,17,18,19 14:4,7,15,19 15:16,20,24 16:1,9,12,19 17:12,16,24 19:6,10,20 20:7,21 21:5 22:13,16,19,22 23:3,8,15 24:3,16,21 26:4,12,14 27:6,11,14 28:14 29:4,17 30:2 40:21 56:23 57:3,5,8,13,16,24 58:2,6,8 much ^[3] 4:25 36:1 43:19</p> <hr/> <p style="text-align: center;">N</p> <p>names ^[1] 29:15 narrowed ^[2] 39:20,21 nature ^[1] 29:12 near ^[1] 34:4 need ^[3] 18:24 23:12 44:8 negative ^[1] 13:21 neighborhood ^[1] 29:2 neither ^[1] 36:16 never ^[1] 25:23 New ^[2] 1:19 24:9 next ^[3] 8:13,14 22:5 nine ^[1] 7:11 nolle-prossed ^[3] 48:18,22 49:1</p>	<p>non-discriminatory ^[1] 23:2 non-white ^[1] 47:11 none ^[1] 29:4 nor ^[4] 11:1 15:12 17:4 25:24 normally ^[1] 9:24 noted ^[2] 54:2,8 noteworthy ^[1] 19:11 nothing ^[3] 6:20 7:13 27:18 notice ^[2] 10:12 16:3 number ^[10] 15:7 31:3 32:23 35:17 37:14,16 38:4 40:6 47:8 50:10 numbers ^[6] 3:16,22 4:3 6:11 50:9,12 numerous ^[2] 35:8 54:9</p> <hr/> <p style="text-align: center;">O</p> <p>oath ^[1] 34:15 objections ^[1] 47:15 objectively ^[1] 5:14 obviously ^[1] 18:23 occur ^[1] 50:5 occurred ^[1] 20:16 odd ^[1] 56:9 offered ^[3] 47:6 52:17 54:13 office ^[5] 11:6 30:11 31:25 48:19 56:4 okay ^[11] 8:15 23:12,16 35:16,25 36:4,12 37:8 39:9 41:14 46:23 once ^[1] 36:1 one ^[52] 4:9 5:9,16,19 6:12 9:11 10:4,13,16,17 16:17 19:1,7 21:4 26:7 31:4,20 33:6 35:1,1,5,6,7 36:3,4,4,13,24 38:21 39:23 40:2 41:6,17,17,25 43:4 46:16 48:17 51:18,18,20,22 52:2 54:10 56:1 57:23,24 58:1,8,9,10 ones ^[1] 53:23 only ^[18] 3:11 13:7,23 16:23 21:11 22:22 23:21 26:11 32:1,22 35:18,20,21,22 39:6 53:10,13 57:16 opinion ^[3] 24:25 25:2,3 opportunity ^[2] 15:13 27:19 opposed ^[1] 27:3 opposite ^[2] 51:1,11 option ^[1] 32:3 oral ^[5] 1:15 2:2,5 3:7 30:16 order ^[3] 12:21,22 23:13 ordered ^[1] 48:6 other ^[15] 4:24 10:20 11:1,1 18:24 19:10 23:3,8 25:13 28:9 31:22 38:17 40:2 42:20 48:18 others ^[1] 53:17 otherwise ^[2] 22:8 42:24 ought ^[1] 42:7 ourselves ^[1] 45:10 out ^[2] 3:20 13:4 19:4 30:22 31:13 32:5,6 35:19 38:21 39:6 42:19 46:2 out-of-court ^[1] 6:23 outset ^[1] 31:6 outside ^[2] 43:15 45:1 over ^[6] 32:1 36:18 43:12 47:4 48:13,16 overdue ^[1] 37:5</p>	<p>overstatement ^[1] 35:3 overturned ^[2] 44:1,3 own ^[2] 31:20 45:7</p> <hr/> <p style="text-align: center;">P</p> <p>PAGE ^[2] 2:2 49:25 paid ^[2] 11:15 37:6 pals ^[1] 40:9 Pamela ^[3] 16:17 37:15 53:11 panel ^[3] 33:14 34:3 58:4 parcel ^[1] 54:3 part ^[7] 12:3 32:19 42:3 54:3,11,16 58:14 partial ^[1] 45:20 participation ^[1] 34:3 particular ^[4] 21:3 42:14 49:11 51:15 parties ^[3] 10:5 47:14 52:21 parts ^[2] 41:11,13 passion ^[2] 44:7,12 past ^[3] 18:25 25:12 43:6 pasted ^[1] 25:2 penalty ^[13] 19:12,13 27:4 36:8 40:23 50:15,17,25 51:3,20 52:2,8,15 people ^[9] 28:3,3 29:23 31:20,22,22 36:17,18 54:4 peremptories ^[7] 35:13,19,23 57:7,11,17,22 peremptory ^[3] 3:18 4:6 47:9 perfect ^[2] 22:7 40:21 perhaps ^[1] 35:23 perjury ^[1] 48:17 permissible ^[3] 10:10 46:5,6 permission ^[1] 30:12 person ^[8] 7:9,10 10:14 20:14 33:20 50:16,19,22 person's ^[2] 33:20 46:13 pertinent ^[4] 18:25 19:4 20:5,9 Petitioner ^[7] 1:5,20 2:4,10 3:8 43:15 57:2 physically ^[1] 39:2 place ^[4] 7:9,16 29:2,5 plausible ^[3] 3:11 play ^[2] 42:4 43:20 pleaded ^[1] 48:17 please ^[2] 3:10 30:19 plus ^[2] 39:19,19 point ^[5] 24:16 25:16 26:23,24 42:5 pointed ^[2] 30:22 42:19 position ^[1] 33:10 positive ^[1] 13:23 possible ^[3] 6:16 35:15,18 possibles ^[1] 35:12 possibly ^[1] 36:22 potential ^[13] 18:15 25:6,9 27:8 32:11 33:10 36:4,9 37:4,9,9,14,15 preceded ^[1] 6:1 precedent ^[3] 41:19 42:6,11 preferably ^[1] 31:21 presided ^[1] 47:3 presumably ^[1] 43:3 presume ^[1] 41:24 presumed ^[1] 18:9</p>	<p>pretext ^[5] 13:14 14:22 15:1 34:10,16 previous ^[1] 5:7 prior ^[7] 4:13 23:11 25:3 41:20 43:20 46:11 47:12 prison ^[2] 36:10 40:24 probably ^[1] 18:20 probative ^[2] 20:9,24 problem ^[3] 14:19,20 22:10 problems ^[1] 46:17 produce ^[4] 7:23,24,25 16:21 professional ^[1] 18:7 progeny ^[4] 31:9 42:13 49:20 56:19 prohibited ^[1] 45:9 proof ^[1] 23:10 proprietor ^[1] 9:12 prosecute ^[2] 44:18 48:6 prosecuted ^[1] 55:23 prosecution ^[5] 36:12 47:9 48:14,23 54:9 prosecutions ^[1] 11:5 prosecutor ^[32] 5:11 6:17 7:6,8 8:3,5 10:3,7,18 11:3,7 15:8 19:1,15 22:9 23:6 27:2,9 28:22 40:22 41:2 42:9 45:16 49:8 50:15,19,25 51:1 52:3 56:9,15 58:1 prosecutor's ^[3] 27:8 36:12 56:4 prosecutorial ^[2] 44:2,3 prospective ^[2] 4:24 15:9 prove ^[2] 6:4 23:22 provided ^[1] 51:16 proving ^[1] 23:10 purely ^[1] 18:6 purpose ^[1] 34:21 pursue ^[1] 22:3 pursued ^[1] 10:7 pursuing ^[1] 17:17 pursuit ^[2] 6:14 44:10 33 push ^[2] 28:11 35:1 put ^[3] 9:25 19:11 54:24 putting ^[1] 7:2</p> <hr/> <p style="text-align: center;">Q</p> <p>quadruple ^[1] 10:15 qualification ^[1] 32:25 qualms ^[1] 50:24 question ^[23] 5:9 10:22,25 15:3,8 19:19,21 20:4,8 21:12 22:3 23:18 30:4,6,7 31:10,17 39:4 43:18 50:15 53:15 57:19,20 questioned ^[2] 29:10 34:7 questioning ^[16] 3:23 6:9,10,12 22:16 26:16,25 27:23 28:9,16 31:2 50:8 51:5,10,11 52:9 questionnaire ^[8] 5:21 19:12 33:7,24 34:19 52:7,11,14 questionnaires ^[1] 35:2 questions ^[22] 3:25 4:2 18:12,13 26:8,11,17,21 28:22 29:13,25 30:3 31:4 50:10,13,14,18 51:13 52:12 53:6,8 57:4 quite ^[2] 20:18 36:23 quoted ^[1] 6:13</p>
--	---	---	---

Official - Subject to Final Review

R			
race [9] 4:5 41:1 45:18,21 46:1,8, 13 57:14 58:13	requested [1] 32:3	she'd [2] 5:21 53:14	story [1] 13:13
race-neutral [2] 52:18 53:3	required [1] 50:20	shed [1] 42:24	strange [3] 29:21,22 33:10
racial [3] 6:4,7,7	research [1] 56:3	SHERI [5] 1:19 2:3,9 3:7 57:1	stricken [1] 32:12
ran [2] 35:19 49:19	reservations [2] 50:17 51:19	Sherita [1] 13:11	strictly [1] 45:9
rather [2] 10:14 33:20	reserve [1] 30:13	shows [3] 9:1,4 52:16	strike [10] 8:17 10:9,10,11 15:12 27:3 37:13 42:25 52:18,19
rational [1] 11:3	resolve [1] 43:4	sides [2] 41:13 54:8	strikes [13] 4:23 22:7 23:1 32:23 33:1,1 35:6,13,15 47:9 49:11 54:15 55:14
reach [1] 44:4	respect [1] 10:7,19 11:21,23 14:24 15:5 16:13,13 25:12 26:19 41:21	significant [1] 40:5	striking [7] 3:16 12:2 14:11,16,17 39:14 51:7
read [5] 23:24 27:25 38:21 41:13 51:25	respectfully [2] 46:10 51:24	similar [1] 20:14	strongest [3] 8:7,16 26:6
reading [1] 24:1	respects [1] 40:20	similarities [1] 37:18	strongly [4] 19:13 36:7 40:23 52:8
reads [1] 34:18	responded [1] 29:8	single [1] 35:7	struck [14] 3:24 18:16 27:24 33:3, 23 35:22 37:20 39:6 52:23,24 57:15 58:5,8,10
ready [1] 8:10	Respondent [4] 1:8,22 2:7 30:17	sister [7] 7:5,6 13:9,10 36:25 38:6 39:12	stuff [1] 22:19
really [10] 16:6 29:11 30:6,9 38:22 40:5 45:22 49:6 51:2 54:24	responding [1] 43:9	sisters [1] 17:13	submitted [2] 58:19,21
reason [18] 7:7,14,17 11:19,19,20 13:14,24 14:11,16,20,21,21 21:13 35:7 39:10,13 42:21	responses [2] 6:13 51:15	sit [1] 55:9	subsequent [1] 10:16
reasons [12] 5:5 7:3 23:2 24:24 25:5,7,18 27:2 31:4 52:18 53:4 54:12	rest [2] 15:3 30:13	situation [1] 42:16	substantial [1] 58:14
reassured [1] 18:10	restriction [1] 41:20	six [4] 3:20 42:15 44:14 56:14	substituted [1] 56:5
REBUTTAL [4] 2:8 30:13 57:1,4	resubmit [1] 56:16	sixth [6] 3:19 30:24 48:3,3 49:7 56:6	succeed [1] 5:25
recent [1] 20:12	result [1] 51:15	skeptical [1] 25:17	sued [12] 9:17,18,19,23 10:4 14:25 30:7 37:5,20 39:24 41:5 52:24
recognize [2] 41:18,19	return [2] 31:9 49:22	slow [1] 12:6	sufficient [1] 25:7
recognized [1] 18:18	review [1] 18:21	small [4] 28:2 30:25,25 46:16	suggest [4] 6:6 16:24 27:1 34:16
recollection [1] 53:11	reviewed [1] 55:16	smallest [1] 15:23	suggesting [2] 4:19 31:12
record [26] 4:9 6:9 8:25 9:6 12:7,8, 14,17,19 21:14 33:2 34:18 38:20, 24 39:5,11 41:11 47:17 49:17 51:7,25 52:16,22 55:13,15,24	rich [1] 8:5	sole [2] 34:20 48:7	suggestion [1] 49:15
records [1] 7:24	ROBERTS [14] 3:3 18:11 19:9,18 20:1,20 21:1,25 30:14 41:15 42:5 47:24 56:21 58:18	somebody [1] 39:14	suggests [1] 42:7
referred [1] 27:24	rule [12] 18:23 21:2,3,5,6,9,16,17 24:9 41:18 43:1,6	someone [13] 7:20,22 14:13 16:21 17:19,21,22 20:21,22,24 33:18 45:25 46:8	suit [5] 10:16 11:11,14,15 12:20
reflects [1] 12:20	ruling [1] 47:13	someone's [1] 45:25	suits [1] 10:25
regard [2] 42:17 52:14	rulings [1] 47:12	someplace [1] 29:16	summarized [1] 4:14
regarding [3] 3:23 52:15 53:23	S	sometimes [1] 40:8	support [1] 54:14
regards [1] 43:15	same [26] 4:7,8 8:10 11:20 13:24 15:16,18,20 18:13 20:15 29:1,2,5 36:18,18,19,19 42:15 46:1,8 47:3, 5 48:2 49:7 50:4 56:15	somewhat [1] 7:20	supported [1] 33:2
Regrettably [1] 56:7	saw [1] 38:12	son-in-law [2] 9:22 13:21	supports [3] 49:18 52:22 55:18
rehabilitate [1] 50:18	saying [6] 15:1 28:10 32:8,8 49:22 51:18	sorry [6] 14:16 20:7 41:10 45:15 47:20 53:22	suppose [3] 21:10 22:6,25
reiterate [1] 45:6	says [7] 7:3,22 12:8 42:12 51:19, 20,21	sort [4] 18:13 28:10 41:16 51:10	SUPREME [18] 1:1,15 9:6 12:24 21:11 24:11 26:18 28:14 31:7 37:3 38:15 45:12 49:19 54:1,7 55:18 56:17 58:15
related [2] 33:4 52:25	school [5] 37:8 38:5 40:7,9,9	SOTOMAYOR [35] 8:4,9,14 11:10 12:5,13,16 16:16 17:10 29:20 34:8,17,22,24 35:9 43:24 44:6,16,24 45:3,7 47:20,25 48:1,5,9,12,21 55:2 56:1,12 57:21,25 58:3,7	suspect [1] 7:7
relation [1] 38:22	schooled [1] 43:13	spanned [1] 46:15	suspicious [3] 7:3,20 11:20
relations [1] 7:9	seat [1] 3:14	Special [1] 1:21	Swain [6] 23:19,21 24:1,1,4 54:24
relationship [19] 14:24 16:25 17:3, 5,19,25 18:1,2,7,8 38:9,10,11,14, 18 53:7,17,19,21	seated [2] 4:1 58:9	specially [1] 49:24	system [2] 54:19 55:8
relationships [8] 15:10 28:18,21, 23,25 29:1,5,12	second [1] 12:6	specter [2] 43:19,25	T
relative [2] 33:4 40:24	security [1] 40:24	Stage [1] 21:7	taint [1] 22:7
relatively [1] 20:14	see [3] 13:25 28:1 41:25	staggering [1] 50:9	taints [1] 31:14
relatives [3] 10:16 11:6 29:24	seeing [1] 38:22	stand [3] 4:3 33:8,24	Tardy [7] 13:16,17,19 30:8 37:20 39:24 52:24
relevance [2] 26:15 43:6	seem [3] 10:14 34:2 56:9	standing [1] 21:13	Tardys [2] 11:17 14:25
relevant [15] 4:15 21:8 23:20 24:5, 7,8,10,12 27:1 32:16,17,23 41:11, 13 42:23	seen [1] 53:14	stark [1] 3:24	targeted [1] 50:13
remaining [1] 56:23	segregated [1] 28:4	state [6] 8:25 12:8,9 45:16 50:1 56:4	teller [8] 17:8,19 37:1 38:7,12,23 39:13 53:13
remains [2] 9:11 26:23	selection [2] 3:13 34:5	stated [2] 25:5,18	ten [1] 7:11
remember [1] 29:16	send [1] 31:20	statement [3] 5:20 8:21 11:24	terms [3] 20:17,18 41:17
repeated [2] 11:23 13:13	sense [1] 44:14	statements [8] 8:21 13:8,9 25:11, 20,21,22 52:15	testify [1] 7:11
repeatedly [2] 14:2 20:25	sensitive [3] 6:3 21:17 26:3	STATES [2] 1:1,16	theme [1] 40:1
report [2] 28:18,21	sentence [1] 45:22	Statutorily [1] 31:24	themselves [1] 50:9
request [2] 9:5 32:1	separately [1] 27:10	step [1] 44:18	there's [12] 5:12,16 7:13 9:3 12:20 16:6 22:22 24:24 27:16 42:10 46:7 47:15
	serious [1] 14:13	stereotype [1] 46:7	thereafter [1] 20:23
	servicing [1] 36:10	still [8] 5:2 16:4,5,8,15 17:1 22:10 26:23	therein [1] 52:15
	set [2] 5:5 17:22	stop [1] 54:24	
	setting [2] 6:5 17:22	store [9] 9:13,14,16,17,18,20 10:23 15:19,21	
	share [1] 46:1		
	shared [1] 45:21		

Official - Subject to Final Review

<p>thinking ^[1] 46:4 THOMAS ^[3] 57:5, 10, 14 though ^[1] 51:6 three ^[10] 6:24 8:21 11:1 15:4 25:13 26:11 27:11 30:3 35:17 46:20 today ^[1] 55:10 together ^[1] 7:22 tone ^[1] 6:11 took ^[2] 6:19 24:19 tools ^[2] 54:25 55:4 totality ^[1] 26:2 toward ^[2] 5:18 11:16 towards ^[1] 55:17 town ^[7] 28:2, 4, 12 30:25, 25 31:3 54:5 transcript ^[1] 49:25 transpired ^[2] 55:11, 17 trial ^[30] 3:19 4:13, 22 9:5 12:1, 23 16:1 22:6 23:13 25:11 30:24 33:21 35:12, 14, 17, 21, 24 43:8, 23 47:2, 3, 4, 6 48:2, 3, 7 49:22 52:20 56:6 57:8 trials ^[5] 3:17 4:7 42:15 44:14 56:14 tried ^[5] 45:10 48:2, 3 49:7 56:14 troubled ^[1] 6:16 troubling ^[4] 4:13 5:25 30:20 31:11 true ^[4] 7:7 10:17 15:14 16:20 truly ^[1] 11:4 truth ^[1] 5:6 truthful ^[1] 34:14 try ^[7] 31:20 44:20, 24 45:1, 4 56:3, 10 trying ^[1] 51:6 turn ^[1] 21:20 turned ^[1] 13:4 twice ^[1] 4:4 two ^[18] 13:7, 8, 11 17:13 30:5 35:14 40:11 41:11, 13 43:19, 25 44:1, 19 46:22, 23, 25 48:15 51:18 type ^[1] 50:4 typical ^[1] 18:14</p> <hr/> <p style="text-align:center">U</p> <p>ultimately ^[2] 4:16 6:16 uncle ^[1] 40:23 unconstitutional ^[1] 3:14 under ^[2] 16:21 34:14 undermine ^[2] 25:5, 14 undermines ^[1] 25:6 understand ^[5] 20:8 22:4 44:17, 19 46:19 understanding ^[1] 44:22 understatement ^[1] 35:3 unique ^[3] 33:1 42:16 54:4 UNITED ^[2] 1:1, 16 unknown ^[1] 39:15 unless ^[2] 18:2 57:3 unlike ^[1] 28:1 unlikely ^[1] 10:14 untangle ^[1] 49:10 until ^[1] 55:2 unusual ^[7] 18:18 29:21, 22 30:23</p>	<p>49:5 56:13, 13 unwilling ^[1] 5:6 up ^[7] 11:18 33:6 35:2 41:12, 21 47:6 52:13 uses ^[3] 35:12, 15, 18</p> <hr/> <p style="text-align:center">V</p> <p>vacillation ^[1] 52:6 valid ^[2] 52:17 53:3 venue ^[1] 44:20 versa ^[1] 28:7 versus ^[3] 3:5 50:11 58:12 VI ^[1] 3:13 vice ^[1] 28:7 victim ^[3] 9:19 13:22 40:25 victim's ^[3] 37:8 38:5 40:6 victims ^[5] 9:12 10:13, 20 11:1 41:6 view ^[1] 5:13 viewed ^[1] 3:12 violate ^[1] 25:10 violates ^[2] 20:21, 23 violation ^[6] 19:2 20:5 22:11 23:14, 22 43:16 violations ^[4] 32:22 43:20, 25 46:21 violative ^[1] 56:18 violent ^[1] 40:25 voir ^[3] 29:7 33:14 51:16 volunteered ^[1] 7:15</p> <hr/> <p style="text-align:center">W</p> <p>wages ^[5] 8:22 9:2, 3, 7 11:24 Wait ^[3] 8:4 38:3, 3 waited ^[1] 17:9 waive ^[1] 57:4 walks ^[1] 41:3 Waller ^[2] 15:9 29:18 Walmart ^[4] 15:23 36:23 37:24 39:15 wanted ^[1] 16:14 wary ^[1] 10:3 Washington ^[1] 1:11 way ^[7] 4:19, 20 19:16 21:10 23:21 46:11 50:12 weakly ^[1] 20:9 Wednesday ^[1] 1:12 week ^[1] 38:23 whatever ^[2] 13:20 38:23 Whereupon ^[1] 58:20 whether ^[15] 10:22 11:12 14:12, 20, 21 17:1 18:8, 8 20:13, 14 28:11 31:2 34:9 40:4 57:6 white ^[25] 4:1 6:21 10:8 15:9, 11 21:15 28:20 29:3, 8, 23 30:1 33:11 34:14 36:4, 24 37:7, 10, 15 50:16 51:9, 18, 20 53:6 57:17 58:10 whites ^[3] 28:6 50:11 51:12 who's ^[2] 14:12, 13 whole ^[2] 19:14 37:10 whom ^[2] 28:21 29:7 will ^[12] 11:16 18:23 25:8 30:12 38:21, 25, 25 39:1, 5, 16 41:12 57:4 willing ^[2] 34:10, 13</p>	<p>willingness ^[2] 25:9, 11 winning ^[1] 5:1 without ^[1] 22:7 witness ^[3] 8:10, 13 15:11 witnesses ^[11] 15:7, 12 28:19 29:9, 10 53:7, 9, 19, 24 54:8, 9 women ^[1] 36:5 word ^[1] 43:11 words ^[2] 28:9 38:17 work ^[13] 7:4, 4, 5, 11 16:4, 8 17:22 36:22, 25 38:7, 10 39:3, 12 worked ^[16] 7:16, 21 13:16, 17 15:15, 16, 18, 20 16:5, 15 17:1, 7 33:4 37:23 39:7 53:1 working ^[4] 16:20 29:1, 5 39:14 workplace ^[1] 41:6 works ^[1] 41:4 world's ^[1] 15:22 worried ^[4] 11:8, 9 18:9 19:21 worry ^[1] 17:4 Wright ^[13] 8:19, 20, 20 11:11 13:8 15:3, 5 19:7 26:7 37:13, 19, 22 40:21 Wright's ^[2] 26:10 38:9 write ^[1] 43:6</p> <hr/> <p style="text-align:center">Y</p> <p>years ^[7] 19:3 20:4, 5, 16 43:13 46:16 55:1 Yep ^[1] 37:25 York ^[1] 1:19</p>
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Sheet 6

thinking - York