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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 55

FREDDIE T. WRIGHT,

Appellant.

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20 Eagle Street  
Albany, New York  
April 18, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUSTICE STAN PRITZKER

Appearances:

CHELSEA F. LOPEZ, ESQ.  
APPELLATE ADVOCATES  
Attorney for Appellant  
111 John Street  
9th Floor  
New York, NY 10038

DANIELLE O'BOYLE, ADA  
QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorney for Respondent  
125-01 Queens Blvd.  
Kew Gardens, NY 11415

Cathy L. Kleinbart  
Official Court Transcriber



1 CHIEF JUDGE WILSON: People v. Wright.

2 MS. LOPEZ: Good afternoon, Your Honors. Chelsea  
3 Lopez on behalf of Freddie T. Wright. May I reserve three  
4 minutes for rebuttal?

5 CHIEF JUDGE WILSON: Three?

6 MS. LOPEZ: Three minutes, yes.

7 CHIEF JUDGE WILSON: Yes.

8 MS. LOPEZ: Thank you. So even one peremptory  
9 challenge based on race violates Batson, and in this case  
10 we have two. By the second round of jury selection, all  
11 three African-American panelists were removed from serving  
12 on Mr. Wright, a black man's jury. This is troubling.

13 Starting with C.C., he was a black man, who very  
14 clearly said his cousin, who had been arrested about  
15 fifteen years ago for marijuana possession, would not  
16 affect his ability to be fair and impartial juror in this  
17 case. When the prosecutor decided a single amount and  
18 questioned him, and in her own words, pick on C.C., the  
19 black man, she decided to ask him about this - - - this - -  
20 - his cousin's arrest. He confirmed at that time that he  
21 had no pre-judgments towards police. He confirmed that  
22 he'd be able to listen to police testimony before making  
23 any conclusions.

24 He was a suitable juror in this case. He also  
25 said that testimonial evidence would be enough, and yet,

1 the prosecutor removed him from serving on the jury for  
2 three reasons, three pretextual reasons: one, he had  
3 cousins who had been arrested; two, she - - -

4 JUDGE SINGAS: On page - - - I don't know the  
5 exact page, but during the questioning of C.C., the people  
6 say, so you have a negative feeling about how the police  
7 got there and their approach in going inside? And he says,  
8 well, yeah. The way - - - just the fact that they took  
9 everybody. I didn't know that they had to take everybody,  
10 but that was it.

11 You don't think that's a reason for the  
12 prosecution to think that maybe his feelings toward the  
13 police as a result of that incident might cause him to view  
14 the evidence in a way that is affected by that?

15 MS. LOPEZ: No. For two reasons, one, he only  
16 said that after she kept pushing him, and she put those  
17 words basically in his mouth by saying, so you don't have  
18 negative feelings about the police? And all he says is  
19 that he only has a negative feeling after repeatedly being  
20 asked about the way he treated his grandma in the  
21 situation. He never said I have a problem with police in -  
22 - - generally. And then when she followed up and asked, do  
23 you have any negative feelings from that incident with your  
24 family that may make it so that when those police officers  
25 testify, you may have a pre-judgment about them? Not at

1 all. She presses him again, and she says, can you listen  
2 to the police - - -

3 JUDGE GARCIA: That goes, it seems to me, to  
4 whether they're qualified to be jurors and could be  
5 stricken - - the juror could be stricken for cause. We are  
6 looking for support in the record for the judge's  
7 determination that this was not pretextual. And as I  
8 understand that whole series of answers, that was raised by  
9 C.C. in response to a question, do you have relatives who  
10 were victims of crimes? And he says, yeah. I had these  
11 cousins or whatever who were arrested for marijuana  
12 charges, right?

13 MS. LOPEZ: So he act - - it was actually in  
14 response to whether you're a victim of a crime - - - this  
15 is on Appendix Page 130, 193 - - - or if you've witnessed a  
16 crime. So no. It wasn't just being a victim of a crime.  
17 And also this court's analysis of the step two reason  
18 should be what the - - -

19 JUDGE GARCIA: So he was mean - - - he meant he  
20 witnessed them smoking marijuana? Is that why you think he  
21 raised it in response to that question?

22 MS. LOPEZ: No. So what happened was that his  
23 cousin had been arrested for marijuana possession fifteen  
24 years ago, but generally, this court's analysis should not  
25 be on whether he had these, what the respondent calls

1 lingering negative feelings, because that's not the reason  
2 that was given at step two, and we should be careful  
3 because what's being asked is what's the subjective intent  
4 of the trial prosecutor at the time - - -

5 JUDGE GARCIA: Right. So we provide a lot of  
6 deference to the trial court in determining that, right,  
7 and our review standard is is there support in the record  
8 for the court's conclusion that this was not pretextual - -  
9 -

10 MS. LOPEZ: Well - - -

11 JUDGE GARCIA: - - - and I think then we can  
12 look at the record to see what was surrounding that - - -  
13 those answers that were problematic to the prosecutor.

14 MS. LOPEZ: So in Hecker, this court made clear  
15 that your review power is limited to the examination of  
16 pretext determination in light of the reasons placed on the  
17 record. In this case, it was a reverse Batson so by  
18 defense counsel, but the reasons placed on the record by  
19 the nonmovant, and here, all she said was he had cousins  
20 who had been arrested. This was pretextual because it  
21 applied to other jurors that she chose not to single out.

22 Uneven questioning is proof of pretext - - - of  
23 discrimination - - -

24 JUDGE GARCIA: Both those jurors didn't raise  
25 those issues in response to that question. As I read the

1 record on that question, the responses all talked about  
2 victims of crimes, and this juror raises, I had relatives  
3 who were arrested.

4 MS. LOPEZ: Well, that's her reason, right? Her  
5 reason is he had cousins who had been arrested, and C.C.,  
6 yeah, he had a cousin who had been arrested fifteen years  
7 ago for marijuana possession.

8 JUDGE GARCIA: Presume the judge is also familiar  
9 with the record in that exchange, right? I mean, it's  
10 really the judge's determination that we're reviewing of  
11 that reason and whether that reason is pretextual given the  
12 record here?

13 MS. LOPEZ: Correct. So given the record, it's  
14 not supported because there are other panelists who had  
15 friends or family members that were arrested. Based on the  
16 record, we know that there's a non-African-American  
17 panelist, whose younger brother was not only arrested, but  
18 convicted of robbery, which is the case that the - - what  
19 Mr. Wright was charged for in this case, and yet, the  
20 prosecutor didn't follow up - - -

21 JUDGE SINGAS: But that wasn't the only reason  
22 that was given that they had a family member who was  
23 arrested, right - - -

24 MS. LOPEZ: No - - -

25 JUDGE SINGAS: As I recall - - -



1 MS. LOPEZ: No. But - - -

2 JUDGE SINGAS: - - - record regarding C.C., there  
3 were four issues: the family member arrested, renter,  
4 unmarried, no children. And were any other jurors who have  
5 those four criteria - - -

6 MS. LOPEZ: Yes.

7 JUDGE SINGAS: - - - on the jury?

8 MS. LOPEZ: So those are also - - - they're all  
9 pretextual reasons. The - - -

10 JUDGE SINGAS: What I'm saying is there anyone  
11 else who had that - - -

12 MS. LOPEZ: The three - - -

13 JUDGE SINGAS: - - - conglomeration of those four  
14 factors?

15 MS. LOPEZ: Yes. Two seated jurors, and we know  
16 one of them, Juror 7, is not Africa-American, and yet, they  
17 weren't struck. So again, it's uneven application of this  
18 criteria, and it couldn't be a strategy because for those  
19 three criterias, renting in an expensive place, like New  
20 York City, being unmarried and having no children,  
21 factually irrelevant to the facts of the case or an ability  
22 to serve nor did the prosecutor provide any conceivable  
23 relationship between those factors and being a jury in this  
24 case.

25 JUDGE CANNATARO: Counsel, I'd like to go back

1 for one second to the statement by C.C. that he had  
2 negative feelings towards the police, which I understand  
3 you to say, and I believe you're right, that that wasn't  
4 argued as a nonpretextual reason when a justification was  
5 asked for, but is it your testimony, having said that and  
6 being part of the record of what happened, that the court  
7 was not entitled or permitted to even consider that  
8 statement in determining whether or not nonpretextual  
9 reasons had been given?

10 MS. LOPEZ: Yes. Because that wasn't a reason  
11 provided at step two. We are looking at the trial  
12 prosecutor's subjective intent at the time it was given,  
13 and just - - - this just wasn't a reason given, and the  
14 reasons that were given are pretextual, and because at step  
15 two the prosecutor gave a whole laundry list of reasons  
16 that are unevenly applied or unsupported by the record - -  
17 -

18 JUDGE CANNATARO: I'm having a little difficulty  
19 squaring that with this idea of deference being made to the  
20 determination of the court as to whether or not the reasons  
21 given were nonpretextual because it seems as if you're  
22 asking for the court to willfully disregard something. I  
23 mean, yes. That statement would be great to use in a for-  
24 cause challenge, but I also think it could be very  
25 animating towards the prosecutor's decision to strike the



1 juror peremptorily if you don't get a cause challenge.

2 So it seems to me is if you're - - artificially  
3 limits the universe of available information for the court  
4 to use in deciding whether or not the reasons are  
5 nonpretextual.

6 MS. LOPEZ: I'm just asking this court to apply  
7 the analysis that it's done in Hecker, which is to look at  
8 the step two reasons provided and see if there's record  
9 support for it.

10 JUDGE GARCIA: But do they have to list every  
11 nuance of that reason? If it's this exchange over victims,  
12 do they have to then say that he said they just raided the  
13 house and took them all out, they barged in, that he  
14 changed his story later, and said he wasn't actually there?  
15 Do they have to list all those sub-reasons in the record  
16 for the overall - - - this issue of victim of crime? Do  
17 they have to each of those things - - -

18 MS. LOPEZ: For the prosecutor - - -

19 JUDGE GARCIA: - - - for us to be able to find -  
20 - -

21 MS. LOPEZ: Yeah - - -

22 JUDGE GARCIA: - - - support in the record?

23 MS. LOPEZ: Yes. The prosecutor has to clearly  
24 state their step two reasons. That's what this court and  
25 the Supreme Court - - -

1 JUDGE GARCIA: To that degree of specificity?

2 MS. LOPEZ: Yes. Because in Miller L., the  
3 Supreme Court clearly stated a nonmovant must stand or fall  
4 on the plausibility of the reasons provided at step two are  
5 current - - -

6 CHIEF JUDGE WILSON: But if the prosecutor had -  
7 - - prosecutor didn't hearsay this, but the prosecutor had  
8 said, there was an exchange in which the juror said that he  
9 harbored negative feelings towards the police, wouldn't  
10 that be enough to bring in the colloquy about that? Are  
11 you really saying he needs to recite - - or she in this  
12 case needs to recite the entire colloquy to preserve it?

13 MS. LOPEZ: Yes. Because we're looking at the  
14 subjective intent of - - -

15 CHIEF JUDGE WILSON: Right. But - - -

16 MS. LOPEZ: - - - of the prosecutor - - -

17 CHIEF JUDGE WILSON: - - - the prosecutor says -  
18 - - the prosecutor says, the reason - - - so you're going  
19 after the prosecutor's subjective intent. I take your  
20 point. The reason is because this potential juror said he  
21 still harbors negative views towards the police. Isn't  
22 that enough?

23 MS. LOPEZ: But he didn't - - -

24 CHIEF JUDGE WILSON: Can't we then just look at  
25 the record to see if there's support for that?

1 MS. LOPEZ: No. Just based on this analysis, it  
2 has to be the step two reasons. It's a subjective intent,  
3 and basically, we - - -

4 JUDGE TROUTMAN: Well, with respect to you're  
5 saying it's uneven - - with respect to the nonminority  
6 jurors that were selected and seated, did they respond in a  
7 way indicating that they had some negative or hurt feelings  
8 with respect to the police, the relative convictions, et  
9 cetera?

10 MS. LOPEZ: No. But it's because - -

11 JUDGE TROUTMAN: But doesn't that matter?

12 MS. LOPEZ: It doesn't - - - it doesn't matter  
13 because it's the reasons that are provided, and if there  
14 was a reason to now look at the record and conjure up new  
15 reasons to remove C.C., that's just - - -

16 JUDGE TROUTMAN: No. But - - -

17 MS. LOPEZ: - - - inappropriate.

18 JUDGE TROUTMAN: - - - aren't - - - if there is  
19 an interaction and the juror says, I had relatives, there  
20 was an arrest, happened a long time ago, and that's it,  
21 it's over and done with. That is one thing. But if they  
22 express some concerns or negative feelings, are you saying  
23 that is not relevant?

24 MS. LOPEZ: It's not relevant to this court under  
25 the current Batson framework of looking at the subjective

1 intent, and we should really scrutinize what the reasons  
2 are provided. It is so easy to think of new reasons now  
3 that we've sat with the record - - -

4 JUDGE GARCIA: I think to the Chief Judge's  
5 point, it's not a new reason. It's how specific do you  
6 have to be in giving your reason. So if, let's say, the  
7 prosecutor had said here, the job this person has, I really  
8 think they harbor, you know, a bias, they may be  
9 sympathetic, and then later, we try to look at the record  
10 and say, but look at this answer they gave to the victim  
11 question where they talk about relatives being arrested for  
12 marijuana, I think you clearly can't do that.

13 But where you give a more general answer in terms  
14 of what your reason is, but specific enough, do you really  
15 have to get into the nuances of the back and forth of what  
16 was said, or can we see, because the judge has obviously  
17 heard that colloquy, if it supports that view?

18 MS. LOPEZ: Under the current Batson framework,  
19 no. It has to be specific to the reasons that are  
20 provided, especially where C.C. unequivocally and clearly  
21 says that he would not - - - has no prejudgments towards  
22 police in general. If the prosec - - -

23 JUDGE PRITZKER: Counsel, if we didn't agree with  
24 that - - - just go with me for a minute. Hypothetically,  
25 if it was fair game, if it was a reasonable inference, for

1 example, that what he said would make him a juror that the  
2 people didn't want for a nondiscriminatory reason, namely,  
3 maybe he harbors hostility, if we could reach that, would  
4 you agree then that it was nonpretextual?

5 MS. LOPEZ: No. Because there were other  
6 pretextual reasons provided. So even if - - - she should  
7 have made a for-cause challenge if she believed this to be  
8 true, but she didn't. But because there were reasons that  
9 provided, especially the one about having a note that she  
10 had other friends involved in multiple arrests, the  
11 respondent concedes that this doesn't exist, not once, but  
12 twice misstating the record to remove two African-American  
13 panelists is extremely concerning in a Batson analysis.

14 JUDGE PRITZKER: So do you have to have a  
15 nonpretextual reason, right, at step two? It has to be the  
16 only reason? Like, what if it's mixed? What if there's  
17 mixed reasons?

18 MS. LOPEZ: Then even if it's - - even if there's  
19 one reason that's pretextual and one reason it's not, I  
20 would - - - I would - - - this court should find a Batson  
21 violation because peremptory challenges based on race, even  
22 if it's a little bit based on race or a lot of it based on  
23 race, Batson needs to - - -

24 JUDGE GARCIA: Do you have a case that says that?

25 MS. LOPEZ: I don't. But I do - - - but based on

1 the totality of the facts and circumstances is what this  
2 court's consideration is so I think that fits squarely in  
3 that is when you look at the - - -

4 JUDGE TROUTMAN: What about K.C.?

5 MS. LOPEZ: K.C. K.C., she was an African-  
6 American woman, who was also a suitable juror. She said  
7 that she worked for the Department of Probation. She  
8 aligned herself as a member of law enforcement, and she  
9 didn't describe her employment as being this sympathy,  
10 diverting juveniles - - -

11 JUDGE TROUTMAN: However, it was relevant that  
12 her job did involve supervising and interacting with  
13 juvenile - - -

14 MS. LOPEZ: She actually described her employment  
15 as evidence based, which would make her a great juror  
16 because that's what jurors' roles are.

17 JUDGE TROUTMAN: However, the reality is there is  
18 police officers outside arresting people, and there's  
19 supervision, and how one would supervise a juvenile  
20 offender versus arresting adults, that's not exactly the  
21 same.

22 MS. LOPEZ: It - - - whether different minds can  
23 think of K.C. as more similar to a police officer or not,  
24 it doesn't - - - I think the strongest evidence here was  
25 like - - -

1 JUDGE TROUTMAN: Let me try it this way - - -

2 MS. LOPEZ: Um-hum.

3 JUDGE TROUTMAN: - - - as a probation officer,  
4 the person is put on probation. What is the purpose of  
5 probation to you?

6 MS. LOPEZ: The purpose of probation is to  
7 essentially still punish someone for something they did.

8 JUDGE TROUTMAN: It's not to supervise and make  
9 sure that they take part - - -

10 MS. LOPEZ: It's - - -

11 JUDGE TROUTMAN: - - - that measures to avoid  
12 them continuing on in a path that rehabilitation, that has  
13 no relevant factor - - -

14 MS. LOPEZ: Well - - -

15 JUDGE TROUTMAN: - - - it's not?

16 MS. LOPEZ: Well, not here. There's no children  
17 involved. Mr. Wright is an adult man. There's no children  
18 witnesses.

19 JUDGE TROUTMAN: The family - - - with teachers,  
20 prosecutors have struck jurors, potential jurors because  
21 they're teachers, because they're social workers. They've  
22 given a reason as a concern, not that it would rise to a  
23 level for cause. You're saying that can't be done here?

24 MS. LOPEZ: Maybe. I don't know the facts of  
25 that record or what the voir dire looks like, but here, she

1 said that - - - she never said sympathy plays a role in her  
2 employment, and it's also concerning, this strike because  
3 again the prosecutor claims she never asked her any  
4 questions about it.

5 JUDGE TROUTMAN: Do you recognize that a  
6 prosecutor or a defense attorney can reject a  
7 characterization given in response to questioning and still  
8 - - - and not - - - as a result not accept that juror? Do  
9 you believe that?

10 MS. LOPEZ: I believe that if that's - -

11 JUDGE TROUTMAN: Okay.

12 MS. LOPEZ: - - - if that's what the prosecutor  
13 said, but she didn't. She said I believe - - - I don't - -  
14 - I didn't question her about this and thinks that sympathy  
15 might play a role, but she did - - -

16 JUDGE CANNATARO: I don't think that was a  
17 question, though. If she affirmatively said that she  
18 thinks of herself, K.C., as a - - - law enforcement, you  
19 don't think that the prosecutor is entitled to reject that  
20 self-assessment without even saying so? Just to say no, I  
21 don't think you're anything like law enforcement.

22 MS. LOPEZ: The prosecutor could think that, but  
23 that's not the - - - the reason was that she believed - - -  
24 I certainly - - - she said, even though I didn't question  
25 her on it and I don't have grounds for cause for these



1 reasons, I do think that sympathy might come into play for  
2 her based on her line of work. Not based on her answers,  
3 just based on her line of work. But here, she said that  
4 her line of work was evidence-based, not sympathy-based,  
5 and she also was clearly - - -

6 CHIEF JUDGE WILSON: But is evidence-based sort  
7 of a term of art in psychology?

8 MS. LOPEZ: I don't know, but - - -

9 CHIEF JUDGE WILSON: Okay.

10 MS. LOPEZ: - - - she - - -

11 CHIEF JUDGE WILSON: But maybe the prosecutor  
12 knows?

13 MS. LOPEZ: Well, I think what's relevant is the  
14 prosecutor asked on Appendix Page 415, and so your sympathy  
15 won't play a role for you here? And then she said, same  
16 for you, Ms. C.C.? Not a problem. We follow evidence-  
17 based practice, clearly refuting that sympathy plays any  
18 role in her daily job duties.

19 CHIEF JUDGE WILSON: I'm not so sure about that.  
20 Right. Plus, the other thing, it seems like your argument  
21 is that for the purpose of peremptory strikes, if a  
22 potential juror says I can be unbiased, that has to be  
23 taken at face value.

24 MS. LOPEZ: Well, yes, if there's nothing else to  
25 refute that they're not going to be biased, and here, she -

1 - - but - - - I - - - yes.

2 CHIEF JUDGE WILSON: Well, peremptory is a strike  
3 you can use for sort of any reason as long as it's not  
4 racially discriminatory or gender-based, itself, right?

5 MS. LOPEZ: Yes.

6 CHIEF JUDGE WILSON: Pretextual classification?

7 MS. LOPEZ: Um-hum. And here, we know it's  
8 pretextual-based because all of the reasons that were  
9 provided for either C.C. or K.C. were either factually  
10 inaccurate or unevenly applied to other jurors. And so  
11 under the current Batson framework both of these were  
12 pretextual.

13 JUDGE PRITZKER: Can I ask you something about  
14 what the judge said? It's at A-360. And he said it a  
15 number of times, and it sort of bothered me. This is the  
16 quote. It said, as to prima facie case, he said, "What  
17 factor of inferences established a prima facie case that  
18 your adversary has excluded jurors" - - and he said this  
19 several times - - "solely on account of the membership in  
20 that group"?

21 So it looked to me like the judge was saying, you  
22 could have a racially discriminatory reason, but as long as  
23 it's not your sole reason, it's okay. Is that what the  
24 judge is saying here, or is that - - in other words, you  
25 can have mixed reasons, and if you have mixed reasons,

1 still no good, if one of them is racially discriminatory;  
2 is that right?

3 MS. LOPEZ: I would agree that if even one of  
4 those reasons is based on race, it should violate Batson.

5 MS. O'BOYLE: May it please the court. Good  
6 afternoon, Your Honors, for the respondent, Assistant  
7 District Attorney Danielle O'Boyle from the office of  
8 Melinda Katz.

9 As this court made clear in Hecker, and as  
10 several of Your Honors have noted today, this third step of  
11 the Batson inquiry is a pure issue of fact. So this  
12 court's review is limited as to whether - - - limited to  
13 whether there is record basis for the trial court's  
14 finding.

15 JUDGE TROUTMAN: So with respect to the record  
16 and the facts here, was there a difference in what was the  
17 criteria for allowing a nonwhite juror to sit versus a  
18 juror of color?

19 MS. O'BOYLE: No, Your Honor. Because the  
20 defense cannot point to any juror. We'll start with K. - -  
21 C.C., I'm sorry, any juror who was similarly situated to  
22 C.C.

23 JUDGE TROUTMAN: What about the ones who had  
24 relatives actually convicted of crimes?

25 MS. O'BOYLE: Well, Your Honor, preservation is

1 actually relevant to your point there. Here, by the time  
2 the Batson challenge happens with respect to C.C., thirty-  
3 two jurors have been questioned, two different panels of  
4 sixteen, and a lot of the information as to who had  
5 relatives that had been arrested or convicted or other  
6 interactions with law enforcement, those answers were given  
7 in response to questions by the judge, and it's not  
8 actually clear which jurors they correspond to.

9 We only really get that clarity when either the  
10 prosecution or the defense follows up with those jurors.  
11 So when the defense makes the challenges and says, well,  
12 there are other that meet those criteria that are non-  
13 African-American, he says, there are crime victims and  
14 people who have rented. First of all, C.C. did not  
15 identify as a crime victim. He identified as someone who  
16 had relatives who had a negative experience with police who  
17 had been arrested. So to say that there are similarly  
18 situated jurors, one, we don't have the record really to  
19 support that - - -

20 CHIEF JUDGE WILSON: We do have a record to  
21 certain of the jurors of their race, right, and as to  
22 whether they have relatives who were convicted of crimes,  
23 right? We have that.

24 MS. O'BOYLE: Absolutely, Your Honor.

25 CHIEF JUDGE WILSON: Okay.



1 MS. O'BOYLE: But in that regard, I think the two  
2 critical jurors to look at are C.C. and K.L. because both  
3 of those were in those second - - I'm sorry, the first  
4 round - - -

5 CHIEF JUDGE WILSON: Why does it have to be in  
6 the same round? I mean, isn't it almost universally across  
7 jurisdictions, the rule is that the Batson challenge is  
8 timely as long as it's made before the jury is seated?

9 MS. O'BOYLE: Absolutely, Your Honor. And I  
10 apologize if I was unclear. It's not that they were in the  
11 same round. It's just helpful to look at the analysis of  
12 those two jurors and the questioning.

13 CHIEF JUDGE WILSON: Maybe I misunderstood you,  
14 and maybe I misunderstood your papers as well. I thought  
15 you were making a point that unless you made an objection  
16 right at the time that a particular panel was there, it was  
17 not preserved. You started out saying something about  
18 preservation.

19 MS. O'BOYLE: No, Your Honor. That would not be  
20 our position, but just that the defense would have to  
21 certainly assert with sufficient specificity as to which  
22 jurors are being alleged to be similarly situated. That  
23 could be in either of the first two panels. C.C. is in the  
24 first panel, and the Batson challenge is made during the  
25 second round.

1 CHIEF JUDGE WILSON: It could be made as regard  
2 to the third panel, right?

3 MS. O'BOYLE: Absolutely.

4 CHIEF JUDGE WILSON: Okay.

5 MS. O'BOYLE: It's just a matter of alleging with  
6 sufficient specificity which jurors you're challenging so  
7 that the prosecutor could meaningfully respond to that.

8 CHIEF JUDGE WILSON: Well, they did identify  
9 which jurors they're challenging, which is with  
10 specificity. They did that.

11 MS. O'BOYLE: Yes, Your Honor. But in terms of  
12 saying, well, that juror is similarly situated to others  
13 with these vague assertions, that doesn't allow the  
14 prosecutor a meaningful opportunity to respond as to - -

15 CHIEF JUDGE WILSON: Well, well - -

16 MS. O'BOYLE: - - why she elected to not  
17 challenge those.

18 CHIEF JUDGE WILSON: Why not? I mean, they're  
19 both there. They both have the record.

20 MS. O'BOYLE: Absolutely, Your Honor. And  
21 certainly, the court had that full record before it, but -  
22 - -

23 CHIEF JUDGE WILSON: Right. And the - - -

24 MS. O'BOYLE: - - - at the time - - -

25 CHIEF JUDGE WILSON: - - - prosecutor could say,



1 no, actually, there's no jurors here or whoever else is  
2 convicted of a crime.

3 MS. O'BOYLE: Correct, Your Honor, but that would  
4 not have been accurate here. Certainly, there were jurors,  
5 right?

6 CHIEF JUDGE WILSON: Which is what - -

7 MS. O'BOYLE: - - - but the defense has - - -

8 CHIEF JUDGE WILSON: And everybody knows who  
9 those are.

10 MS. O'BOYLE: Yes, Your Honor. But the defense  
11 has the burden in two respects. The defense has the burden  
12 here to show at step three that the reasons were  
13 pretextual, and the defense has the burden to adequately  
14 preserve that record for appeal, and the defense failed in  
15 both of those respects.

16 So while it may have been known that some of  
17 these jurors had other relatives who were convicted of  
18 crimes, the defendant never alleged who those were with  
19 sufficient specificity that we could actually tie other  
20 qualities even to them because that record is not made, and  
21 - - -

22 JUDGE RIVERA: But if - - - but if - - - I'm  
23 sorry. Maybe I misunderstood you. But if they are all  
24 known, does it - - - is it necessary for the defense  
25 counsel to say, all of those others who are comparable, and



1 then you know it's all of them, and you can just go through  
2 them as opposed to saying it's this prospective juror on  
3 that panel and so forth?

4 MS. O'BOYLE: Well, Your Honor, if he were - - -  
5 if the defense were to say all - - - if we were to say all  
6 of them were known, we have to talk about which criteria.  
7 Are we saying one criteria, one or more? Because again,  
8 our position is that no other juror was similarly situated  
9 to C.C.

10 JUDGE GARCIA: It seems somewhat unfair  
11 complement to what we were saying to your adversary that we  
12 can go back and look in the record and say, you know, this  
13 colloquy with this potential juror was different, and then  
14 you made a general objection, but it brings with it this  
15 record, and then saying, no, you have to be more specific  
16 on where we look in the record for comparable jurors.

17 MS. O'BOYLE: No, Your Honor. And there's a  
18 critical distinction there because here, if you look at the  
19 prosecutor's reasons, admittedly she does not bring up at  
20 the time she gives her reasons with respect to C.C. that he  
21 had negative feelings, but the trial court is not looking  
22 at that in a vacuum. And it's not only the colloquy that  
23 the prosecutor had with C.C., but also that the court had.  
24 As Justice Garcia mentioned, at the time the judge was  
25 actually inquiring about people who were crime victims or



1 witnesses to crimes, and then C.C. offers this lengthy  
2 response. He's the first one to do that beyond just a  
3 brief statement about very clearly a negative experience  
4 that has had an impact on him - - -

5 JUDGE TROUTMAN: So C.C. is - - -

6 MS. O'BOYLE: - - - fifteen years later.

7 JUDGE TROUTMAN: - - - being forthright in  
8 answering a question that the court put to him. Sometimes  
9 jurors don't immediately answer with respect to that issue,  
10 but later, in response to something else, they will respond  
11 to the - - - to a question that's related to more than one  
12 specific category.

13 MS. O'BOYLE: Absolutely, Your Honor. And the  
14 issue is not that he was not being forthright. It's that  
15 that colloquy, together with the questions - - - his answer  
16 to the questions that the prosecutor posed, show that he  
17 absolutely had negative feelings toward police officers,  
18 and he explicitly affirmed that in response to those  
19 questions.

20 JUDGE TROUTMAN: Negative feelings or concerns  
21 about the impact of the experience on people. Not that - -  
22 - because wasn't there some discussion about what the  
23 cousin or the relative that caused the police to put the  
24 grandmother in that situation in the first instance?

25 MS. O'BOYLE: Yes, Your Honor. But there are two

1 different issues here, one, being whether the juror could  
2 have been struck for cause and one whether it was  
3 appropriate for the prosecutor to use a peremptory  
4 challenge, and that's really why it's important to look at  
5 the distinction and the colloquies with C.C. - - -

6 JUDGE TROUTMAN: That's clear, but it's also  
7 relevant when you look at the overall circumstances. When  
8 you look at Flowers v. Mississippi, when the - - - it was  
9 over a course of a number of trials, the sole strategy of  
10 the prosecutor was to get rid of black jurors. So what  
11 she's saying is, looking at what had happened before, it  
12 makes it more suspect, so to speak, when you're saying  
13 certain criteria apply to this one, yet she points to other  
14 people who they believe were seated in spite of, not simply  
15 arrests or having people who had contact, but actual  
16 arrests and convictions. Wasn't someone convicted of a  
17 weapon who sat on the jury?

18 MS. O'BOYLE: Yes, Your Honor. That was  
19 Alternate Number 1, but it's that juror and Juror Number  
20 10, S.M., who the defense points to, and neither of them  
21 can be seen as similar situated to C.C., even if we're just  
22 looking at the - - -

23 JUDGE TROUTMAN: So even though they had actual  
24 convictions themselves, that doesn't cause it to be suspect  
25 when she didn't have a conviction. There was a relative



1 who had contact fifteen years earlier, and some of the  
2 others, their experiences were more recent in time. So  
3 you're saying you can't look at any of that?

4 MS. O'BOYLE: Of course, Your Honor, you can look  
5 at it, but actually only one of them had the conviction,  
6 the seated Juror Number 10, S.M. She had the brother who  
7 had been arrested two years before for possession of stolen  
8 property. It was the alternate juror who had been  
9 prosecuted previously.

10 JUDGE TROUTMAN: So two years. Two years, that  
11 juror sat, someone has an experience, the relatives have an  
12 experience, and not even necessary within the close degree,  
13 and they can't sit from fifteen years ago, and you don't  
14 see a different application of the criteria used?

15 MS. O'BOYLE: It's not the same - - - it's not a  
16 different application, Your Honor, because at the time  
17 those jurors were questioned, Juror Number 10 and Alternate  
18 Number 1, they actually expressly affirmed that they did  
19 not have negative feeling towards police officers.  
20 Alternate Number 1 said she harbored no resentment.

21 That is very different from K.C., who had already  
22 given this lengthy colloquy about how the police raided his  
23 home. How he told that story was very telling, and that's  
24 actually all the more reason to give deference to the trial  
25 court.

1 JUDGE TROUTMAN: So K.C. - - - ask if K.C.  
2 currently harbored ill feelings against the police?

3 MS. O'BOYLE: Yes, Your Honor. C.C. was asked if  
4 - - - it was a present-day question - - if he had negative  
5 feelings, as he was seating there that day, towards the  
6 police officers, and as Justice Singas pointed out earlier  
7 - -

8 JUDGE TROUTMAN: And the answer was?

9 MS. O'BOYLE: Well, yeah. And he talks about how  
10 I didn't know why the police - - -

11 JUDGE TROUTMAN: The police overall or the police  
12 present at that time?

13 MS. O'BOYLE: I believe he says the police  
14 generally, Your Honor, and as Justice Singas pointed out  
15 earlier, he then went on to say they barged into the home.  
16 I didn't know why they had to take everyone. So those  
17 answers and the explicit affirmance that he currently  
18 harbored negative feelings absolutely - -

19 CHIEF JUDGE WILSON: So what do we - -

20 MS. O'BOYLE: - - distinguishes C.C. - - -

21 CHIEF JUDGE WILSON: What do we do with  
22 prosecutor's second reason, which is that C.C. has friends  
23 and relatives who've had multiple arrests, and there's zero  
24 support in the record for that?

25 MS. O'BOYLE: Your Honor, although that note

1           seems to have been in error, no doubt, the - - - it's not  
2           fair to say that there would be no support in the record  
3           for that because even the trial court acknowledges that  
4           there had been a number of people arrested in connection  
5           with his cousin's arrest. And again, this another  
6           opportunity - - -

7                    CHIEF JUDGE WILSON: But that was offered as an  
8           independent reason from the cousin - - -

9                    MS. O'BOYLE: Yes, Your Honor.

10                   CHIEF JUDGE WILSON: - - the incident with the  
11           cousin?

12                   MS. O'BOYLE: Yes, Your Honor. But the court is  
13           not looking at these just as one-by-one statements. The  
14           court is looking at the prosecutor's responses as a whole  
15           in connection with that colloquy.

16                   CHIEF JUDGE WILSON: Well, wait. I think we're  
17           trying to decide whether the prosecutor gave - - -  
18           essentially, we're trying to decide is the prosecutor  
19           striking people based on racial animus?

20                   MS. O'BOYLE: Yes, Your Honor.

21                   CHIEF JUDGE WILSON: Fair?

22                   MS. O'BOYLE: Correct.

23                   CHIEF JUDGE WILSON: So how do we deal with a  
24           situation where let's suppose you're right, just for  
25           purpose of argument, that as to the first she's got a

1 nonpretextual reason for striking the juror. Let's suppose  
2 for the second, she's got a racially biased reason for  
3 striking the juror. We would then say you can't use the  
4 peremptory; is that fair?

5 MS. O'BOYLE: Correct, Your Honor.

6 CHIEF JUDGE WILSON: So why aren't we looking at  
7 these explanations independently?

8 MS. O'BOYLE: Well, it's not - - - I actually  
9 don't think you should look at them independently. I just  
10 think that you should - - - I think you should look at it  
11 as the totality of the - -

12 CHIEF JUDGE WILSON: Well, but so - - -

13 MS. O'BOYLE: - - - evidence and record before  
14 the court.

15 CHIEF JUDGE WILSON: But that's sort of saying,  
16 sort of goes to Justice Pritzker's question, right? If a  
17 strike - - - if you give a couple of reasons and one of  
18 them is a perfectly good reason for using a peremptory and  
19 the other is a perfectly invalid reason, why isn't - - -  
20 why are you looking at the totality?

21 MS. O'BOYLE: But Your Honor, the second reason  
22 that we're talking about here about this note, it's - - I  
23 really don't think it's fair - - -

24 CHIEF JUDGE WILSON: No, no. Right. I  
25 understand. I'm giving you a hypothetical at the beginning

1 - - -

2 MS. O'BOYLE: Sure.

3 CHIEF JUDGE WILSON: - - - I don't think that the  
4 second is a concession that the prosecutor is operating in  
5 a racially biased way. I'm trying to get at the  
6 methodology first.

7 MS. O'BOYLE: I think if there was a mix of  
8 racially-motivated and nonracially-motivated reasons, of  
9 course that would be a basis for the court to have a  
10 finding - - - to make a finding of pretext. I don't  
11 disagree with that.

12 CHIEF JUDGE WILSON: We're not really looking at  
13 the totality, right? One racially biased explanation is  
14 sufficient to get you into Batson trouble.

15 MS. O'BOYLE: Yes, Your Honor. If the court  
16 finds that that makes that challenge pretextual, yes, but  
17 everything - - -

18 CHIEF JUDGE WILSON: Right.

19 MS. O'BOYLE: - - - would just have to be so  
20 factually specific because you do have to look at the full  
21 record before the trial court, and I go back to why that  
22 deference is so important.

23 JUDGE GARCIA: Wouldn't that depend, it seems to  
24 me, on what the reason is for the allegation that it's  
25 pretextual? So if you had three reasons - - - you had

1 reason A, and you say, okay, reason A is nonpretextual.  
2 And then you had B, C, D, and the reason the allegation is  
3 those are pretextual is other people have that, and you  
4 didn't strike them, then it seems to me you can say, okay,  
5 but those, in combination with a nonpretextual reason, is  
6 fine.

7 If there's B, C, or D that's standing on its own  
8 indicates it's a pretextual-racially, cover-to-cover racial  
9 animosity towards a juror, that would be bad. So it really  
10 depends on what the net - - - what the problem is with the  
11 other challenges is, doesn't it?

12 MS. O'BOYLE: Absolutely, Your Honor. That's why  
13 it would be so fact specific and you have to look at it as  
14 a whole. So with that issue regarding the note, it's  
15 important to say that wasn't the only reason given, right?  
16 And I think the court actually reconciled that, even though  
17 never pointed it at the time, the defense never said, oh,  
18 C.C. never said that. He never said he had other friends  
19 in law enforcement. I think the court was able to  
20 reconcile that because he says, yes, a number of people at  
21 the house were arrested.

22 So again, yet another reason to defer to the  
23 court there and to find that the court's finding that this  
24 is not pretextual is appropriate. It's not something that  
25 came out of the blue. This is all happening very quickly.



1 The prosecutor and the defense had twenty minutes in the  
2 first round - - -

3 JUDGE RIVERA: I just need to clarify because I  
4 took this note, and I'm not sure I captured your response  
5 to the Chief Judge. I wrote down that you said a mixed  
6 reason. That would be part of the response is the judge  
7 would say is pretext, right? The other part of the  
8 response, the judge would not find as pretext, that a mixed  
9 reason of basis for a finding of pretext. Did I get you  
10 right that you said that?

11 MS. O'BOYLE: I believe so, Your Honor, because  
12 you're not evaluating them one by one. You're looking at  
13 the challenge to that juror. So if you find that the  
14 prosecutor's reason or reasons are pretextual on the whole  
15 - - -

16 JUDGE RIVERA: Right.

17 MS. O'BOYLE: - - - and that could have been  
18 maybe when the prosecutor said the first reason the court  
19 was not yet - - - the court was not convinced that it was  
20 pretextual.

21 JUDGE RIVERA: All right. So if I'm  
22 understanding your position is that if mixed reasons are  
23 provided - - - what we're calling mixed reasons; let's just  
24 put it that way - - - that a judge could find pretext but  
25 need not find pretext. Have I understood you?

1 MS. O'BOYLE: I think so, Your Honor, but it's a  
2 little bit difficult because when we're talking about mixed  
3 reasons, ultimately at stage two, the prosecutor has to  
4 offer facially neutral reasons, and the prosecutor  
5 certainly did that here. Then at stage three, that's when  
6 the burden shifts to the defense to determine - - - or to  
7 prove and establish - - -

8 JUDGE RIVERA: Let's just go with, the judge  
9 hears what the prosecutor said and decides - - - let's say  
10 the prosecutor gave two reasons. I'm going to make it  
11 simple, two, one the judge says I think that that's  
12 pretext; the other is not - - -

13 MS. O'BOYLE: I think it - - -

14 JUDGE RIVERA: - - - is it your position then  
15 that the judge could decide that therefore that the judge  
16 will accept the peremptory challenge because - - -

17 MS. O'BOYLE: No - - -

18 JUDGE RIVERA: - - - there's a nonpretext reason?

19 MS. O'BOYLE: No, Your Honor.

20 JUDGE RIVERA: Okay.

21 MS. O'BOYLE: I think if the court were to find  
22 that in any way - - -

23 JUDGE RIVERA: Okay.

24 MS. O'BOYLE: - - - the prosecutor improperly  
25 discriminated against a cognizable group, then the court's

1 duty in evaluating that evidence at step three would be to  
2 find that that was an improper challenge.

3 JUDGE RIVERA: Thank you.

4 JUDGE PRITZKER: Counsel, then the prime facie  
5 analysis that the court is making at A-360 is incorrect  
6 because he's talking about excluding jurors solely on  
7 account of the membership in that group, and you're  
8 disagreeing with that, aren't you?

9 MS. O'BOYLE: Yes, Your Honor.

10 JUDGE PRITZKER: That was wrong, right?

11 MS. O'BOYLE: Yes. I think the court does  
12 somewhat mischaracterize that, but overall the inquiry does  
13 happen as it's supposed to in this case, and the court does  
14 follow the three-step process.

15 Your Honor, I see that my time has lapsed, but if  
16 I could just have lead to briefly address Juror K.C.?

17 CHIEF JUDGE WILSON: Yes.

18 MS. O'BOYLE: Thank you, Your Honor. In this  
19 case, my opponent focuses on the fact that in the defense's  
20 view, K.C. is a suitable juror, but again, I think this  
21 really blurs that distinction and the critical distinction  
22 between striking a juror for cause and exercising a  
23 peremptory challenge, and the line of work that my opponent  
24 says was - - - she characterized as evidence-based, before  
25 she got to any discussion of evidence-based, K.C. says that

1 she works as an intake probation officer dealing with  
2 juveniles, and then she goes - - - she's actually more  
3 specific and says she works in intake diversion.

4 The prosecutor absolutely had reason to doubt  
5 that she could set that aside, not just for sympathy  
6 reasons - - -

7 JUDGE TROUTMAN: So the prosecutor had the right  
8 to not just accept labels of general, you're in law  
9 enforcement, and look at the particulars and decide if a  
10 nonracial reason - - - I'm not comfortable with this juror.  
11 You can exercise a peremptory challenge validly, correct?

12 MS. O'BOYLE: Absolutely, Your Honor. And at the  
13 time, the defense only said that there were other jurors,  
14 and it was not clear whether the defense was talking about  
15 that particular group or any juror who has been questioned  
16 thus far - - - at this point, we're up to forty-three - - -  
17 had associations or identified with law enforcement, but  
18 law enforcement is such a broad group, and there is no  
19 other juror, prospective juror in this record that would  
20 have been similarly situated to K.C.

21 JUDGE TROUTMAN: But when the court is doing the  
22 general canvassing that is to elicit initial response, and  
23 then there's further inquiry - -

24 MS. O'BOYLE: Absolutely, Your Honor.

25 JUDGE TROUTMAN: - - to clarify?

1 MS. O'BOYLE: Yes. But the prospective juror  
2 that my opponent points to was D.L., who said he was a  
3 police officer, he was a delegate. That is certainly a  
4 significantly different day-to-day job than someone whose  
5 role day in and day out is to use these extra judicial  
6 factors to determine whether someone should be put through  
7 the court system at all.

8 JUDGE TROUTMAN: So again, the assessment of the  
9 prosecutor that the intake probation officer and the police  
10 officer are not the same, and in any event, this is not a  
11 juror for a valid reason that you wish to exercise a  
12 peremptory challenge, then it is valid to do so?

13 MS. O'BOYLE: Exactly, Your Honor. And so with  
14 respect to both C.C. and K.C., there was ample support in  
15 the trial record for the court's findings that these were  
16 not pretextual - - -

17 JUDGE RIVERA: So then what would a - - - given  
18 your position on K.C. and the comparison to D.L., what  
19 would be any perhaps any retort by the defense counsel to  
20 show that's pretext, other than showing, let's just say, a  
21 white person who also worked for probation was not  
22 peremptory?

23 MS. O'BOYLE: Well, Your Honor, it would matter  
24 that - - - to use your hypothetical, the white person that  
25 they also worked for probation, it would matter what their

1 role was within probation because this juror is really  
2 uniquely situated as having worked in intake diversion.  
3 That presents unique concerns, and I think the prosecutor  
4 and the court both appropriately recognized that as her  
5 line of work.

6 JUDGE RIVERA: So it boils down to the prosecutor  
7 perhaps thinking that this particular prospective juror,  
8 given the specific nature of their work, right, that's what  
9 you're focused on, might be defendant-friendly?

10 MS. O'BOYLE: Yes, Your Honor. Not just - - -

11 JUDGE RIVERA: Probation might find that  
12 interesting, but I take it that that's what you're saying?

13 MS. O'BOYLE: It's actually not just defendant-  
14 friendly, Your Honor, but it would also be that they would  
15 not be a great juror in any criminal case because the job  
16 of the jurors is to consider the evidence before them, the  
17 evidence presented to them in the courtroom, and someone  
18 whose job it is to consider all of these things beyond the  
19 courtroom, to determine whether juveniles should even be  
20 placed before a judge - - that was the juror - - - those  
21 were the juror's own words, there is significant concern  
22 that they would not take into account those other factors  
23 at the time they're doing what is supposed to be their job  
24 of evaluating the evidence before them.

25 JUDGE RIVERA: So it's an odd position I think to

1           argue. I accept your point, but it is an odd position to  
2           say that someone who works for this kind of department  
3           would not follow the instructions of the court, but you  
4           only decide this based on what is presented in this  
5           courtroom and your findings here. I understand the  
6           difference between what goes on there and what goes on in  
7           their job - - -

8                       MS. O'BOYLE: Absolutely, Your Honor.

9                       JUDGE RIVERA: - - - at their office at  
10           probation.

11                      MS. O'BOYLE: Yes. But the - - - I think your  
12           point goes to more that a cause challenge would not have  
13           been appropriate for this juror because we could not have  
14           established that here, but to the extent the prosecutor had  
15           any doubt as to her ability to do that, even if K.C.  
16           genuinely thought that she could do that - - - she  
17           certainly has respect for the law as a self-identified  
18           member of law enforcement, but the fact that the prosecutor  
19           has reason to doubt that, she had the right to use that  
20           peremptory challenge because this was not a discriminatory  
21           - - -

22                      JUDGE RIVERA: So then the only way to overcome  
23           that is someone who is not peremptory, who is in probation,  
24           a similar if not the exact same position, who is not of the  
25           same race of the person who is peremptory, right, is not

1 challenged - - -

2 MS. O'BOYLE: That would be - - -

3 JUDGE RIVERA: - - - that is then the only way  
4 you're going to be able to overcome this?

5 MS. O'BOYLE: I don't know that you could say  
6 that that's the only way, Your Honor, because there would  
7 have to be - - - and again, we don't have a full record  
8 here because of the lack of preservation from the defense.  
9 It would depend on what arguments were raised, but none of  
10 these were raised, and without those, there's no basis for  
11 this court to overturn the findings of the trial court.

12 If the court has no further questions, I'll rely  
13 on my brief. Thank you.

14 CHIEF JUDGE WILSON: Justice Pritzker might have  
15 had one? I wasn't sure.

16 JUDGE PRITZKER: Just one quick one. Thank you.  
17 It just doesn't add up to me. This is a juvie probation  
18 officer who does divergence. She wants to keep kids out of  
19 trouble, okay? She tries. How would she be sympathetic to  
20 a grown man that robbed somebody?

21 MS. O'BOYLE: Well, Your Honor - - -

22 JUDGE PRITZKER: How does that make sense? The  
23 idea is it's a pretext. So it may have a little bit of  
24 facial validity, but how ultimately does it really make  
25 sense?



1 MS. O'BOYLE: Well, Your Honor, it doesn't have  
2 to be related to this specific defendant, and Hecker  
3 specifically rejected that facts-of-the-case argument,  
4 saying it was overly restrictive. So it's not that Mr.  
5 Wright was a juvenile. That's not the issue, but the fact  
6 of working with juveniles as Justice Troutman pointed out  
7 earlier, similar to teachers who may often be struck by  
8 prosecutors - - -

9 JUDGE PRITZKER: To what?

10 MS. O'BOYLE: To teachers.

11 JUDGE PRITZKER: Oh.

12 MS. O'BOYLE: There may be more professions just  
13 more inclined to sympathy that would not be suitable jurors  
14 in any criminal case. So it's not about being a suitable  
15 juror for this defendant, but just that the prosecutor had  
16 reason and not just because of concerns of sympathy, but  
17 again, because of her role in what she did every day, her  
18 method of analysis in considering those other factors,  
19 that's why she had the right to strike that juror.

20 CHIEF JUDGE WILSON: Thank you.

21 MS. O'BOYLE: Thank you, Your Honors.

22 MS. LOPEZ: Your Honors, to protect the rights of  
23 all New Yorkers, criminal defendants, and just people who  
24 want to serve on a jury, their civil duty to serve, we need  
25 to be careful not to allow prosecutors on appeal now to

1 provide new step two reasons. We should carefully  
2 scrutinize the reasons that are provided, and if they are  
3 not supported by the record here, it's evidence of pretext,  
4 even if one of the reasons may not be under this court's  
5 determination, especially what we're - - -

6 JUDGE GARCIA: But wouldn't that depend on what  
7 the basis for the other reasons being pretextual is?  
8 Because if you're saying this reason, this juror had this  
9 reason, that juror had this reason, and another juror had,  
10 and reason A is a valid, nonpretextual reason, can't the  
11 people say, well, that in combination with these things is  
12 why we struck? If you're saying independently reason B is  
13 pretextual for some other reason, sure, then I think you  
14 can make that argument. So doesn't it really depend on  
15 what the basis for the challenge to that reason is?

16 Because if you're just saying other people had  
17 that reason, you know, other people had that and you didn't  
18 strike them, but you have a nonpretextual reason, that in  
19 combination with those things, makes that nonpretextual  
20 reason stronger?

21 MS. LOPEZ: Well, I'm not conceding that any of  
22 these reasons are not pretextual - - -

23 JUDGE GARCIA: I understand. I understand.

24 MS. LOPEZ: - - - but I think it's based on the  
25 view of this case, we just don't have that it was unevenly

1 applied, and the reason why we have this strong record  
2 against C.C. and all of his back and forth is because of  
3 this unequal questioning of a black juror when you compare  
4 it to how they questioned non-African-American panelists  
5 who fit that criteria. And I believe it's Flowers v.  
6 Mississippi, who says that this is concerning because it  
7 arms prosecutors with like what's happening now with the  
8 reasons to conceivably have these face-neutral reasons for  
9 black panelists while choosing to ignore, sort of distort  
10 the record on what non-African-American panelists could  
11 have responded in the same way. So that's the problem  
12 there, and that's very concerning in this case.

13 But I also want to clarify that C.C. never said  
14 he had present-day feelings towards the police. Although  
15 the respondent said that his - - - I would urge the court  
16 to look at the record. He did not say that.

17 And then if I could just briefly point - - -  
18 address the show-up point, if Your Honors have no questions  
19 as to Batson.

20 So this is a very short robbery case that  
21 involved a disguised perpetrator. He was wearing a red  
22 hood, covering all of his hair and hairline, and a mask  
23 covering most of all of his face, all the bottom. Really  
24 what's visible is the eyes, and against this backdrop, we  
25 have a suggestive show-up, and the verdict in this case

1 really hinged on this show-up that should have been  
2 suppressed.

3 I'll focus on two suggestive factors, one,  
4 wearing that nonspecific red hoodie. This was a generic  
5 description that really the only thing there was that the  
6 person was wearing a red hoodie. There was no, like,  
7 specific color of red, no logo. It could have been anyone  
8 wearing a red hoodie, who was also black or dark-skinned,  
9 and both witnesses at the hearing admitted that their  
10 identifications were based on the red hoodie, itself.

11 Ram Sahoy (ph.), who was unable to make an  
12 identification both at the hearing and at trial, stated  
13 that her identification was not based on the face, but,  
14 quote, clothes he was wearing. And when pressed about the  
15 clothes, she says that's all I remember, just wearing a red  
16 hoodie. Guzman (ph.) also admits that his identification  
17 was based on this nonspecific hoodie. First thing he  
18 noticed when he saw Mr. Wright was the hoodie, the same red  
19 hoodie as in the store, and then further tainting Guzman's  
20 was the suggestive police remarks in combination with his  
21 observations at the scene. So not only does he hear that  
22 they stopped a guy at a location, but critically, a police  
23 officer in that car says, I think it's the guy, and then  
24 they go to that location only to see more suggestive  
25 factors. They see a lot of police officers - - -

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CHIEF JUDGE WILSON: Thank you. Your time is up.

MS. LOPEZ: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Cathy L. Kleinbart, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of New York v. Freddie T. Wright, No. 55 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 7227 North 16th Street  
Suite 207  
Phoenix, AZ 85020

Date: April 24, 2024

