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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 55

FREDDIE T. WRIGHT,

Appellant.

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

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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: _____

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