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SUPREME COURT OF KENTUCKY
FILE NUMBER 2024-SC-0263-D

To review Court of Appeals No. 2023-CA-0431-MR

TERRELL HARRIS **APPELLANT**

v.

APPEAL FROM KENTON CIRCUITCOURT
HONORABLE KATHLEEN LAPE, JUDGE
ACTION NOS. 2022-CR-00381

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLANT, TERRELL LEJUAN HARRIS

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CERTIFICATE REQUIRED BY RAP 31(c)(1)(b):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to Hon. Kathleen Lape, Circuit Judge, Kenton County Justice Center, 230 Madison Ave., Room 600, Covington, Ky. 41011; Hon. Patrick Grote, Assistant Commonwealth Attorney, 1840 Simon Kenton Way, Suite 2300, Covington, KY 41011; by electronic mail to: Hon. Joseph Tutro, Assistant Public Advocate; and to be served by state messenger mail to Hon. Joseph A. Beckett, Assistant Attorney General, Criminal Appeals Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on February 13, 2025. The record on appeal has been returned to the Clerk of this Court.

/s/ Robert C. Yang
ROBERT C. YANG

INTRODUCTION

Appellant, Terrell Harris, was convicted of tampering with a prisoner monitoring device and being a first-degree persistent felony offender. He was sentenced to 10-years imprisonment after a jury trial. On direct appeal, Mr. Harris asked the Court of Appeals to review the trial court's ruling on a *Batson* challenge. The Court of Appeals affirmed the ruling and conviction. This Court granted Mr. Harris's motion for discretionary review on the *Batson* ruling.

STATEMENT REGARDING ORAL ARGUMENT

This Court designated this case for oral argument when granting discretionary review. Counsel is prepared to present oral argument for Mr. Harris.

STATEMENT CONCERNING CITATION TO THE RECORD

The one-volume certified written record will be cited as "TR" with the page number directly following (e.g., TR 1). The designated official recording, contained on one compact disc, will be cited in conformance with RAP 31(E)(4).

WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the document exempted by RAP 15(D) and 31(G)(5), this document contains **4,517** words.

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STATEMENT OF THE CASE

This case is on discretionary review to review the Court of Appeals's opinion regarding Terrell Harris's challenge of the prosecution's peremptory strike under *Batson v. Kentucky*, 476 U.S. 78 (1986).

Appellant, Terrell Harris, was indicted on one count of tampering with a prisoner monitoring device and being a first-degree persistent felony offender ("PFO"). TR 5, 28-29.

At the jury trial, Sgt. Werner Stilt, who ran the home incarceration unit from Kenton County Jail, testified that Mr. Harris was on home incarceration with an ankle monitor. (VR 11/29/22 at 1:06-1:08). On March 21, 2022, Officer Mike Petrie with the Covington Police Department made a house call to a reported "domestic between brothers." (VR 11/29/22 at 1:38-1:39). Ofc. Petrie saw a man, Mr. Harris, standing outside a car facing another man inside the car. (VR 11/29/22 at 1:40). Ofc. Petrie spoke with the two men, one of whom admitted to arguing a little bit. (VR 11/29/22 at 1:42). Ofc. Petrie called dispatch with Mr. Harris's information and dispatch informed Ofc. Petrie that Mr. Harris had an outstanding warrant for a failure to appear. (VR 11/29/22 at 1:43-1:44). Ofc. Petrie arrested Mr. Harris. (VR 11/29/22 at 1:44). After the arrest, Mr. Harris told the officer that his brother had slipped his

ankle monitor down and hid it from him two days ago. (VR 11/29/22 at 1:45).

During the jury trial, the jury found Mr. Harris guilty of tampering with a prisoner monitoring device and being a first-degree persistent felony offender ("PFO"). (VR 11/29/22 at 3:28, 5:25). The jury recommended a one-year sentence for the tampering conviction, enhanced to 10 by the PFO conviction. (VR 11/29/22 at 5:25). The trial court sentenced Mr. Harris according to the jury recommendation. Final Judgment, TR 59-62, attached as Appendix, Tab 2; (VR 3/20/23 at 9:57).

The sole issue raised on direct appeal was the trial court's denial of defense counsel's *Batson* challenge. A transcript of the *Batson* discussion in the trial court is attached in the Appendix, Tab 3. During the *Batson* discussion, the prosecutor offered a reason given to him from the Commonwealth's party representative, Sgt. Stilt, for striking the only African American juror. (VR 11/29/22 at 11:16). That reason was not what Sgt. Stilt told the prosecutor. As the trial court was about to give its decision, the prosecutor again provided the wrong reason. (VR 11/29/22 at 11:33). Sgt. Stilt clarified what he told the prosecutor, that the juror in question had the same name as an inmate he dealt with, but that he was bad with faces and was not sure this was the same person. (VR 11/29/22 at 11:34). Further, during *voir dire*, Sgt. Stilt claimed this

juror stared at him whenever Sgt. Stilt stared at the juror. (VR 11/29/22 at 11:34).

The trial court held the prosecutor's reason to be credible and that there was no pretext in their reason for striking the juror. (VR 11/29/22 at 11:35). Thus, the trial court denied the *Batson* challenge. (VR 11/29/22 at 11:35). The Court of Appeals affirmed the trial court's denial of the *Batson* challenge. See Slip Opinion, attached as Appendix, Tab 1.

Mr. Harris now appeals as a matter of right. Ky. Const. § 110, 115. Additional facts will be recited in the argument below as needed.

ARGUMENT

I.
The Court of Appeals erred in affirming the trial court's denial of the *Batson* challenge when the prosecutor's proffered race-neutral reasoning was based on information from a party-representative that the prosecutor had no knowledge of, had no good faith basis to believe, was based on the party-representative's personal knowledge, and was vague.

Preservation.

This issue is preserved by defense counsel's *Batson* challenge objecting to the Commonwealth using a peremptory strike on juror Kevin Walker and the trial court overruling the challenge. (VR 11/29/22 at 11:16, 11:36). The Court of Appeals affirmed the trial court. *See* Slip Opinion, attached as Appendix, Tab 1.

Facts.

During *voir dire*, the trial court asked the prospective jurors whether they were qualified to serve as jurors, including "not…presently under indictment, or convicted of a felony…." (VR 11/29/22 at 9:22). Juror Kevin Walker did not respond. Similarly, the prosecutor asked the jurors if anyone knew Sergeant Werner Stilt from the Kenton County Jail, and

juror Walker again did not respond. (VR 11/29/22 at 10:05). Further, none of the jurors, including juror Walker, indicated they knew any of the other jail employees, Sergeant Fred Stilt and Sergeant Jason Russell. (VR 11/29/22 at 10:08). Lastly, the prosecutor finished *voir dire* with a catch-all question, to which no one responded: "Is there anybody here who's thinking, man, I really wish you would have asked, whatever it is, because then I wouldn't have to be here today? Anybody with something that I should have asked that I didn't?" (VR 11/29/22 at 10:35).

After defense counsel raised the *Batson* challenge for striking juror Kevin Walker, the prosecutor explained that Sgt. Werner Stilt told him Mr. Walker "shares the same name as somebody who used to work at the jail. He's not sure if it was the same person. Um, he didn't look that way, but that's why I chose him. I didn't realize he was the only African American on the panel." (VR 11/29/22 at 11:16). Sgt. Stilt would later clarify he did not tell the prosecutor this.

Regardless, defense counsel pointed out that the jurors were asked if they knew the parties involved, including Sgt. Stilt, and Mr. Walker did not respond. (VR 11/29/22 at 11:17). The prosecutor responded, "Honestly, it was probably based on the name. I didn't realize that [Juror Walker] was the only African American on the panel. I have nothing else to inform the court." (VR 11/29/22 at 11:18). He also responded, "I'll defer

to the court as to the resolution, but that's all I have to say. (VR 11/29/22 at 11:19). Based on the prosecutor's proffered reason, defense counsel pointed out that "there's no evidence from Mr. Walker saying that he is the same person." (VR 11/29/22 at 11:19). To this, the prosecutor admitted, "And I'm not alleging that he was." (VR 11/29/22 at 11:19).

Next, the prosecutor explained that, "And I honestly got to the end of my list of strikes and asked [Sgt. Stilt], 'Is there anyone else that we would have any reason we would not want on the jury?'" (VR 11/29/22 at 11:19). The prosecutor claimed Sgt. Stilt responded, "[Kevin Walker] shares the same name. I don't know. He was staring at me the whole time. But I don't know if it's the same guy." (VR 11/29/22 at 11:19). Again, this explanation was not exactly what Sgt. Stilt told him.

After the break, the trial court started to announce its decision. (VR 11/29/22 at 11:32). The prosecutor again stated his wrong belief "that [Mr. Walker] shared a name with somebody who my witness recalled worked at the jail. [Sgt. Stilt] said, I'm not alleging that it was someone who worked at the jail or that this is the same person, but that was why he made the strike request." (VR 11/29/22 at 11:33).

At this point, Sgt. Stilt can be seen on the video record shaking his head and speaking to a second prosecutor, who suggested hearing from Sgt. Stilt for clarification. (VR 11/29/22 at 11:33). The trial court agreed

and started questioning him. (VR 11/29/22 at 11:33). Under oath, Sgt. Stilt explained that he knew of a Kevin Walker, who was an inmate at Kenton County Jail, and who he's dealt with in the past. (VR 11/29/22 at 11:34). Further, Sgt. Stilt stated, "And then, while we were doing the questioning and that, I felt like he was, like, staring at me any time I would glance over that way. So I'm not good on faces, so I wasn't sure if it might have been that same Kevin Walker that I dealt with in the past." (VR 11/29/22 at 11:34).

The trial court overruled the *Batson* challenge, relying on the credibility of the prosecutors and stating that "I've never seen any kind of racial discrimination or a strike on racial discrimination from them." (VR 11/29/22 at 11:35). The trial court accepted the prosecutors' proffered race-neutral reasoning as non-pretextual and allowed the strike to stand. (VR 11/29/22 at 11:36).

The Court of Appeals affirmed the trial court's decision. See Court of Appeals Slip Opinion. (attached as Appendix, Tab 1).

Law and Analysis.

Peremptory challenges have "been part of the common law for many centuries and part of our jury system for nearly 200 years." *Batson v. Kentucky*, 476 U.S. 78, 112 (1986) (Burger, J., dissenting). At the same

time, there have been systematic efforts to exclude black citizens from serving as jurors. *Batson*, 476 U.S. at 103 (Marshall, J., concurring) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)) ("A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors."). After *Strauder*, "[s]tate officials then turned to somewhat more subtle ways of keeping blacks off jury venires." *Batson*, 476 U.S. at 103 (Marshall, J., concurring) (internal citations omitted).

"Although the means used to exclude blacks have changed, the same pernicious consequence has continued." *Batson*, 476 U.S. at 103 (Marshall, J., concurring). For example, "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant." *Batson*, 476 U.S. at 103 (Marshall, J., concurring); *see also Flowers v. Mississippi*, 588 U.S. 284, 305 (2019) ("the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent." "The State tried to strike all 36 [black prospective jurors].").

"In *Batson*, the United States Supreme Court prohibited deliberate racial discrimination during jury selection." *Johnson v. Commonwealth*, 450 S.W.3d 696, 702 (Ky. 2014) (abrogated on other grounds by *Roe v.*

Commonwealth, 493 S.W.3d 814 (Ky. 2015)). *Batson* provided "a three-step process for trial courts to follow in adjudicating a claim that a peremptory challenge was based on race." *Id.* (quoting *Batson*, 476 U.S. at 97-98).

The first step requires the defendant to make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. *Id.* Second, if that *prima facie* showing has been made, the prosecutor must offer a race-neutral reason for striking the juror in question. *Id.* Finally, the last step requires the trial court to determine whether the defendant has shown purposeful discrimination. *Id.* This Court has explained that "the ultimate burden of showing unlawful discrimination rests with the challenger." *Johnson*, 450 S.W.3d at 702. (quoting *Rodgers v. Commonwealth*, 285 S.W.3d 740, 757-58 (Ky. 2009)).

Further, "[a] trial court's ruling on a *Batson* challenge will not be disturbed unless clearly erroneous." *Id.* (quoting *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000)). This Court has explained, "[T]he trial court's ultimate decision on a *Batson* challenge is akin to a finding of fact, which must be afforded great deference by an appellate court." *Chatman v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007). However, "'[d]eference,' of course, does not mean that the appellate court is powerless to provide independent review." *Johnson*,

450 S.W.3d at 702 (quoting *Rodgers*, 285 S.W.3d at 757-58) (internal citations omitted). For example, *Rodgers* cited *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), as U.S. Supreme Court cases "holding that the trial court's finding of non-discrimination was erroneous in light of clear and convincing evidence to the contrary." 285 S.W.3d at 757-758.

In this case, the trial court's ruling was clearly erroneous as to the proffered race-neutral reasoning for striking Mr. Walker.

First, Mr. Harris made a *prima facie* showing that a peremptory challenge was exercised on the basis of race because Mr. Walker is African American and the prosecutor struck him from the jury pool. "Nothing more is required to permit an inference of racial discrimination." *Johnson*, 450 S.W.3d at 702-703 (citing *Blane v. Commonwealth*, 364 S.W.3d 140, 149 (Ky. 2012) (abrogated on other grounds by *Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015))). Indeed, "the Constitution forbids striking even a single prospective juror for a discriminatory purpose[.]" *Snyder*, *supra*, 552 U.S. at 478 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). Regardless, "since the prosecutor offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate issue of intentional discrimination, the preliminary issue of whether the

defendant had made a *prima facie* showing also becomes moot." *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992) (citing *Hernandez v. New York*, 500 U.S. 352, 359 (1991)).

Moving to the second *Batson* step, the prosecutor's initial, yet incorrect, explanation for striking Mr. Walker was that Sgt. Stilt told him Mr. Walker "shares the same name as someone who used to work at the jail. He's not sure if it was the same person. Um, he didn't look that way, but that's why I chose him. I didn't realize he was the only African American on the panel." (VR 11/29/22 at 11:16). Accordingly, the initial round of proffered race-neutral reasoning had two components: Sgt. Stilt thought Kevin Walker might be a former employee at the jail and the prosecutor did not realize Kevin Walker was African American. Both reasons are pretextual.

First, whether juror Walker might be a former employee at the jail with Sgt. Stilt is a personal knowledge-based strike. *See Johnson*, 450 S.W.3d 696, 704 (Ky. 2014). This Court confirmed that "prosecutors may exercise peremptory challenges based upon their own personal knowledge concerning a juror, as well as from information supplied from outside sources." *Id.*, (citing *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992)). However, "as we said in *Snodgrass*, "Whether the information is true or false is not the test. The test is whether the

prosecutor has a good-faith belief in the information *and whether he can articulate the reason* to the trial court in a race-neutral manner which is not inviolate of the defendant's constitutional rights." *Id.* at 704 (emphasis in original). Here, the prosecutor had no good-faith belief in Sgt. Stilt's information and he did not adequately articulate that reason to the court.

In *Johnson*, one of the reasons offered by the prosecutor to strike a female African American juror was based on the prosecutor's "personal knowledge of her and her past associates from years ago…." *Id.* The *Johnson* Court faulted the prosecutor for not articulating the race-neutral rationale to the court and failing "to give a single, specific example of how his knowledge of the juror translated into a reason other than race to disfavor her participation as a juror.(FN7)" *Id.*

> FN7: The problem with accepting a naked assertion like, "my knowledge of her ... her friends and associates and things like that I know of" is that these type of statements would mask the same unconstitutional bias that *Batson* forbids if, and as a purely hypothetical example, all that the prosecutor knew about Juror Fourteen was that she was black and so were her friends. In other words, the simple expression, "based upon kind of my knowledge of her" does nothing to dispel the prima facie case that the strike is racially motivated.

Just as in *Johnson*, without more, the prosecutor's explanation that Sgt. Stilt might know a Kevin Walker and not necessarily juror Walker is not a single, specific example that dispels the *prima facie* case that the strike is racially motivated as required in *Johnson*. Further, "there must be some articulable, case-related reason attached to it." *Johnson*, 450 S.W.3d at 705. Here, the prosecutor did not offer an articulable reason because the prosecutor had no personal knowledge of what was in Sgt. Stilt's mind.

Similarly, the second reason offered by the Commonwealth, that he did not realize juror Walker was the only African American on the panel, violates *Batson*. (VR 11/29/22 at 11:16); *see Batson*, 476 U.S. at 98. ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' *Alexander v. Louisiana*, 405 U. S. [625,] 632 [1972]"). The prosecutor affirmed his lack of a discriminatory motive and affirmed his good faith that he did not realize juror Walker was the only African American on the panel. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 475 U.S. at 98 (*quoting Norris v. Alabama*, 294 U.S. 587, 598 (1935)). "The prosecutor therefore must articulate a neutral explanation

related to the particular case to be tried." *Id.* at 98, FN 20 ("the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges. *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. [248, 258 (1981)]."). Therefore, both reasons given initially were vague and not case specific. Individually, these reasons have been deemed pretextual by *Johnson* and *Batson*.

Even though the prosecutor claimed he had "nothing else to inform the court[, and] that's all I have to say[,]" the prosecutor offered subsequent reasons, that are also pretextual. (VR 11/29/22 at 11:18-11:19).

When defense counsel pointed out there was no evidence juror Walker was the same person Sgt. Stilt recognized as an inmate, the prosecutor admitted, "I'm not alleging that he was." (VR 11/29/22 at 11:19). The prosecutor clarified that juror Walker was not the same person Sgt. Stilt knew, just that he might be. This reason also fails the *Johnson* requirement that there be a "clear and reasonably specific" explanation. This is supported by the prosecutor's next words that he "didn't have a lot of information from the jury sheets that led me to have a lot of strikes." (VR 11/29/22 at 11:19). Further, this jury panel was not "exceptionally responsive." (VR 11/29/22 at 11:19). Thus, the prosecutor

admitted there was no reason offered by juror Walker in his jury sheet or during *voir dire* to warrant a peremptory strike.

The next set of reasons offered by the prosecutor was that he had one strike left and asked the rest of the prosecution team who to strike and relied on Sgt. Stilt's reasoning that juror Walker shared the same name as an employee and that juror Walker stared at Sgt. Stilt. (VR 11/29/22 at 11:19).

Merely sharing the same name as someone Sgt. Stilt knew has been discussed above as being pretextual. This new reason that juror Walker stared at Sgt. Stilt is also pretextual. While this Court has permitted striking a juror for demeanor reasons, such as failing to make eye contact, *e.g.*, inattentiveness, as proper race-neutral reasons, the Court of Appeals in this case recognized the Kentucky Supreme Court has "consistently found *Batson* violations when only the appearance or demeanor of a perspective juror is the given reason." Slip Opinion at 9-10, FN 3 (quoting *Sifuentes v. Commonwealth*, No. 2016-SC-000485-MR, 2018 WL 898228, at *4 (Ky. Feb. 15, 2018) (internal citations omitted in original) ("As it is unpublished, we cite *Sifuentes* solely as a concise summary of this aspect of Kentucky law, not as binding precedent.").

The facts of the nonbinding, unpublished case, *Sifuentes*, are instructive. The *Sifuentes* Court held that the juror struck by the

prosecutor for "belligerent" and "hostile" looks at the prosecutor's table was pretextual. 2018 WL 898228 at *3. This was because "the prosecutor 'did not offer any explanation as to why [the prospective juror's] perceived hostility would make him unfit to serve as a juror' and pointed out that 'when proffered reasons are so vague, the 'vagueness alone could fairly point toward a conclusion that they are merely pretextual.'" *Id.* at *4. (quoting *Johnson*, 450 S.W.3d at 704, *abrogated on other grounds by Roe*, 493 S.W.3d 814).

Here, the complained of demeanor was even more vague than what was condemned in *Sifuentes*. Sgt. Stilt's complaint was that juror Walker glanced at him whenever Sgt. Stilt looked at juror Walker. That's it. There was no allegation that juror Walker's staring was belligerent or hostile. Regardless, no one else mentioned juror Walker returning eye contact as that is a normal reaction when someone is looking at you. Further, there was nothing about why juror Walker returning a glance made him unfit to serve as a juror. Thus, Sgt. Stilt's vague, naked assertion "does nothing to dispel the prima facie case that the strike is racially motivated." *Johnson*, 450 S.W.3d at 704, FN 7. This is especially true as Sgt. Stilt admitted under oath that he was "not good on faces."

The Court of Appeals held that staring, by itself, might not have been enough, but was coupled with juror Walker "perhaps having been

an inmate at the Jail." Slip Opinion at 9. The Court of Appeals's holding was in error based on *Batson* and *Johnson*.

The purpose of *Batson* is two-fold, to prevent a defendant from being tried by all-white juries and to prevent African Americans jurors from being excluded based on race. The rationale is to provide public confidence in the judicial process. Here, if this Court were to agree with the Court of Appeals and the trial court, it sends a message that someone, who is not good on faces, can accuse a juror of sharing a name with an inmate and fault the juror for staring back when stared at. And that same someone does not have to be the prosecutor—all with no judicial review as *Batson* requires. Thus, a third-party can evade *Batson* review by the trial court or appellate courts. Surely *Batson* does not permit this. At a minimum, the trial court should have reviewed the demeanor of Sgt. Stilt and based any credibility determination on him as he was one offering the "legitimate reasons."

Here, the prosecutor admitted he could not articulate the reason, which was in Sgt. Stilt's mind. Indeed, the prosecutor admitted, "I have nothing else to inform the court." (VR 11/29/22 at 11:18). The prosecutor did not have a good faith basis in his information, having offered the incorrect reason twice. Even when corrected, the proffered reason was based on, not the prosecutor's knowledge, but on Sgt. Stilt's. Further,

Sgt. Stilt did not provide a single, specific example of how his knowledge of an inmate named Kevin Walker translates to juror Kevin Walker or was tied to this case. Thus, the trial court erred by relying on the credibility of the prosecutors and not on Sgt. Stilt.

The Court of Appeals faulted the use of "knowing" Sgt. Stilt during *voir dire* instead of "at all familiar with him." Slip Opinion at 7. However, "to know" means "to recognize as being the same as something previously known" or "to be acquainted or familiar with." https://www.merriam-webster.com/dictionary/know, last viewed Feb. 13, 2025. Further, as a noun, "familiar" is defined as "one who is often seen and well known," "especially: an intimate associate," and "one who is well acquainted with something." See https://www.merriam-webster.com/dictionary/familiar, last viewed Feb. 13, 2025. Similarly, as an adjective, familiar means "closely acquainted: intimate," and "of or relating to a family." *Id.* As expected, "familiar" is from the Latin "*familiaris*" for "familiar acquaintance/friend" or "member of householdy." *Id.*; https://latin-dictionary.net/definition/20281/familiaris-familiaris, last viewed Feb. 13, 2025. Accordingly, when juror Walker denied knowing Sgt. Stilt, that also meant he was not familiar with him. Regardless, Sgt. Stilt's personal knowledge of a Keven Walker, without more, is pretextual under *Johnson*. Even if the Court of Appeals is right, that juror Walker

was not personally familiar with, but merely recognized, Sgt. Stilt, how does that translate into juror Walker being an unfit juror? Again, this vagueness does not dispel the *prima facie* case.

Similarly, Sgt. Stilt's claim that juror Walker stared at him whenever Sgt. Stilt stared at juror Walker is also pretextual. First, there was no corroboration. It is the duty of the judge to "evaluate the demeanor of both the jurors and the prosecutor." This case is unique in that Sgt. Stilt offered the race-neutral reasons, so the trial court should have judged his demeanor, not the prosecutors. The trial court failed to do so in this case. Regardless, neither the judge, the prosecutors, nor defense counsel indicated that they observed any staring by juror Walker.

The error in this case is worse than what happened in *Johnson*. Here, the rational offered by the prosecutor was not even his own personal knowledge. It was the personal knowledge of Sgt. Stilt. Regardless, it suffered from the same problem as *Johnson* – whatever race-neutral rationale was never articulated to the trial court. There was not one "single, specific example of how [Sgt. Stilt's] knowledge of the juror translated into a reason other than race to disfavor [Mr. Walker's] participation as a juror." *Johnson*, 450 S.W.3d at 704, FN 7. Thus, it was improper for the trial court to base its decision on its knowledge of the

prosecutors, as they were not the ones offering this race-neutral reasoning. Further, the trial court had the opportunity to observe Sgt. Stilt's demeanor. It had a duty to do so as the prosecutors had no good faith basis to adopt Sgt. Stilt's vague reason. Its failure to exercise that duty was error.

Just as in *Johnson*, "[t]he trial court's acceptance of the explanations proffered by the Commonwealth was, therefore, unsupported by sound legal principles." 450 S.W.3d at 705. Further, "the trial court's overruling of Appellant's *Batson* challenge and its acceptance of the explanations proffered by the Commonwealth was an abuse of discretion." *Id.* at 705-706 (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) ("The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.")).

This was a case where the prosecutor relied on information from a third-party, did no investigation to determine if that information was true, failed to ask what about the juror possibly being an inmate made him unfit for jury service, and failed to ask what about a juror staring back made him unfit for jury service. This is also a case where the trial court based its credibility review on the prosecutors instead of the person who offered the reason to strike juror Walker. Accordingly, the trial

court's finding that there did not appear to be any pretext in the prosecution's reasons for striking Mr. Walker was a clear error, and it abused its discretion in overruling defense counsel's *Batson* challenge. Similarly, the Court of Appeals erred in affirming the trial court. Thus, this error violated Mr. Harris's right to due process, equal protection, and a reliable determination of his sentence. 5th, 8th, and 14th Amends., U.S. Constitution and §§ 2, 7, 11, and 17, Kentucky Constitution. Since *Batson* violations are "structural error[s] not subject to harmless error review[,]" reversal is required. *Johnson*, 450 S.W.3d at 706 (abrogated on other grounds by *Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015)).

CONCLUSION

Based on the *Batson* violation, this Court must remand this case for further proceedings consistent with its opinion.

Respectfully submitted,

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