Before the Supreme Court of Ohio

STATE OF OHIO, *Plaintiff-Appellee* v. LORICE MOORE, *Defendant-Appellant*	Case №

On Appeal from the Mahoning County Court of Appeals,
Seventh Appellate District
Case № 2022 MA 0013

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION OF APPELLANT LORICE MOORE

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TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS ONE OF GREAT GENERAL OR PUBLIC INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

It is easy to see why this case involves a substantial constitutional question. The *Batson* challenge that Appellant places before this Court and that was before the Court of Appeals involves nothing less than a panoply of constitutional freedoms, ranging from equal protection of the law, to trial by a fair and impartial jury, to due process, and rights guaranteed by the Ohio Constitution, such as the ability to defend liberty and to have justice administered without denial, in addition to the equal protection and impartial jury listed in connection with the federal Constitution.

As to the question of great general or public interest, the explanation is a bit longer. Why is this not simply a case of a lone individual who was the victim of an incorrect *Batson* ruling by the trial court, affirmed by the Court of Appeals? After all, to be fair, the Appellant's trial lawyers did not argue that he was factually innocent, just that he was not guilty of the *aggravated* murder for which he had been indicted. Put another way, it might at first blush be easy, with a shrug of the shoulders, to decide that a guilty man was the victim of error at trial, but he is guilty nonetheless.

The answer, from Appellant's view at least, comes in two parts. The first is that, regardless of factual guilt, we lawyers and judges, as stewards of the legal system, have an obligation to insure that trials are conducted fairly and constitutionally, factual guilt aside. There are any number of authorities to support this proposition, but, in the interest of brevity and space, only two will be mentioned. The

first is from this Court's late Chief Justice, Thomas Moyer, who, joined by retired Justice Paul Pfeifer, dissented in a heinous capital murder case, *State v. Williams,* 79 Ohio St.3d 1, 1997 Ohio 407, 679 N.E.2d 646. The Chief Justice pointed out that the *Williams* case was as heinous as any capital murder case to come before the Court, and indeed it was, involving the execution-style murder of four young men. Though different from the *Batson* claim here, there were jury issues in that case, and the Chief Justice noted that the *Williams* case represented a test for the justice system, because if the right to trial by an impartial jury was not guaranteed for the "worst" of us, it was guaranteed to none of us. *Id.*, 79 Ohio St.3d, at 21.

The second support for the proposition comes from retired Justice Anthony Kennedy, who in a C-Span interview years ago noted that a criminal trial is about far more than simply the guilt or innocence of the defendant. See, Justice Anthony Kennedy, *America and the Courts,* broadcast on C-SPAN on December 19, 1999. As will be shown in the argument portion of this memorandum, the well known three step analysis from *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its progeny was recognized in the case below. It was not, however, effectively followed. The record in the case below demonstrates that the prosecutor did not even question the removed black juror about the very subject matter which the prosecutor claimed was his cause for concern and the reason for striking the juror. The number of times that a prosecutor is going to admit a discriminatory strike

probably equals the number of times that an employer in an employment discrimination case will admit a discriminatory intent or motive behind its employment action. This means that courts in *Batson* cases, and juries in employment discrimination cases, must assess the credibility of the person offering an excuse which they claim is legitimate but which the challenger claims is a pretext for discrimination. Just as in the employment case it is up to the jury to make the decision, in a *Batson* challenge, it is up to the judge to decide credibility. But if appellate courts do not require trial judges to state reasons why the prosecutor is getting the credibility nod, particularly in the face of a record that suggests otherwise, there can be no effective appellate review of the trial judge's ruling and hence no effective appellate review of fundamental constitutional liberties. Deference to a trial court is one thing. But without requiring more, blind deference to the trial court permits a trial court, the facts notwithstanding, to utter, in mantra-like fashion, that the prosecution has shown a non-discriminatory reason for the strike.

Why else is this case one of great public or general interest? We live in trying, divided political times. Part of the fallout is that popular public trust in many government institutions has been seriously eroded. As the stewards of those systems, we can debate whether that decline in popular confidence is justified or not, but we cannot deny that popular confidence has been eroded. *See, e.g.*, Benjamin Barton, *American (Dis)Trust of the Judiciary*,

Advancement of the American Legal System, University of Denver (September 2019. It has been said by people far more intelligent and eloquent than the undersigned, and in more concise and persuasive fashion, but the judiciary does not have a police force or an army to enforce its decisions. Its orders are, in the main, obeyed because of popular respect for the courts and their authority. But that respect can only be maintained, or even grow, if the public has confidence that, regardless of the outcome of a case, regardless of the guilt or innocence of a defendant on trial, the person has been put to trial fairly. Failure to require a trial court to enter at least some factual findings to justify its conclusion that the prosecution's strike of a juror in a protected class was for demonstrably non discriminatory reasons undermines public confidence in the judicial process. To put a black man on trial before a citizen jury and to strike a black man for legitimate reasons, demonstrable on the record, is one thing. To allow judges simply to repeat the mantra prosecutor credibility in relation to a claim non-discriminatory reasons for a strike is the kind of *ipse dixit* that erodes public confidence. The United States Supreme Court, the federal appellate courts, this Court, and state appellate courts all write opinions explaining the reasoning for rulings for a number of reasons. The Appellant's submission here is that at least one of those reasons is to avoid a public perception of *ipse dixit* justice, and the corresponding erosion of confidence in public institutions.

Therefore, this Court should accept the case, and, after briefing, instruct the

trial and appellate judges of this State that when a judge makes a credibility determination in a *Batson* challenge, the trial judge must enter the reasons for that decision, so that there can be both public confidence in the decision itself, as well as the ability to review the decision effectively on appeal.

Statement of the Case

The Defendant-Appellant LORICE MOORE, was jointly indicted with Stephon Hopkins and Brian Donlow for aggravated murder, murder, and other offenses. Donlow was separately tried to the bench. Hopkins and LORICE MOORE were jointly tried before a jury. They were convicted of murder with a firearm specification, felonious assault with a firearm specification, and sentenced accordingly. MOORE timely appealed to the Court of Appeals for Mahoning County Seventh Appellate District, which on March 28, 2023, affirmed his convictions and sentences.

Statement of Facts

On November 17, 2018, the victim in this case, Christopher Jackson ("CJ") left his parents house in Warren, Ohio. Hours later, at about at 1:52 a.m., a 911 call was made to the Youngstown Police, reporting gunshots and 2 people running. Youngstown Police found Carlos Davis hiding behind the half wall that protected the front porch of a home in the area of the shooting. Davis did not tell the police who shot him. When police later discovered the separate shooting scene down the street, CJ's body was in the passenger seat. Police found 3 different sets of shell casings, and

three different calibers strewn about the car, and outside of the car. The Police found no weapons. CJ died of multiple gunshot wounds. Swabs from the car produced a DNA profiles that were consistent with LORICE MOORE.

During jury selection the State struck one of the two black jurors on the panel. MOORE is black. The prosecutor gave as the State's reasons for striking the black juror.

> Fairly obviously Mr. Penny * * * his daughter had a case in Mahoning County he did not put on his questionnaire. And *understandably so.* He would *probably forgot about it.* But Attorney Ingram [Stephon Hopkins' attorney] was his daughter's attorney. So essentially his little girl's freedom was in Attorney Ingram's hands *at one point in time.*
>
> Even going further, I didn't really seem to get a good reaction from Mr. Penny *as far as the Struthers police involvement.* He was a bit hesitant when I asked him if he was satisfied with the way they did their job. And he had mentioned something along the lines of *she was with another guy; it was his stuff. Which also cuts to this case, the complicity implication.* Obviously *the former attorney-client relationship with Attorney Ingram and his daughter is my main concern.* But there were other things that went into this.
>
> So if it weren't for those things I'd actually like him as a juror. But I just don't think we'd be doing our job if we kept him on. Thank you.

(Emphasis added.) There was no probing of the issue, just the following:

> PROS. JUROR PENNY: No. But I do want to bring up –
>
> ME. YACOVONE [the Prosecutor]: Yes, sir.
>
> PROS. JUROR PENNY: When I filled out the paperwork, I didn't realize. My daughter had a drug charge but didn't go to jury trial, probation, but Attorney Ingram was her attorney.
>
> ME. YACOVONE: Attorney Ingram was her attorney?
>
> PROS. JUROR PENNY: Yeah, but I didn't put anything.
>
> ME. YACOVONE: *No, that's fair.*

PROS. JUROR PENNY: But it didn't go to trial.

ME. YACOVONE: Thank you very much. I'm glad you brought it up. Did you deal yourself with Attorney Ingram during that?

PROS. JUROR PENNY: Yes.

(Emphasis added.) The other relevant inquiry of the juror was:

ME. YACOVONE: * * * . Do you know what police department?
PROS. JUROR PENNY: Struthers.

ME. YACOVONE: Struthers Police Department?

PROS. JUROR PENNY: Yes.

ME. YACOVONE: We're dealing with Youngstown here. Let's start with the Struthers Police Department. Was there anything about that experience that you and your daughter had to go through that makes you think that you cannot be fair toward the police or with the police?

PROS. JUROR PENNY: No.

ME. YACOVONE: Okay. Do you think that the Struthers Police Department did their jobs appropriately in that case?

PROS. JUROR PENNY: Yes.

ME. YACOVONE: You do? You seem a bit hesitant.

PROS. JUROR PENNY: Well, yes. I mean, she was with a guy and the guy had, had the stuff on him. But they charged them both with the same charge. So I disagree with that.

ME. YACOVONE: Okay.

PROS. JUROR PENNY: She got herself into it.

ME. YACOVONE: I got it. You said she got herself into it?

PROS. JUROR PENNY: Well, I mean, she was with him and she probably knew he had it on him.

ME. YACOVONE: Okay. How about Attorney Ingram, how do you feel about his, I don't want to do this but I have to ask you because it's my job, were you happy with Attorney Ingram's service?

PROS. JUROR PENNY: Definitely.

ME. YACOVONE: Definitely?

PROS. JUROR PENNY: Yes.

ME. YACOVONE: All right. Now he's a lawyer in this case. How is that going to go?

PROS. JUROR PENNY: I don't have any bias one way or another.
ME. YACOVONE: Okay.

PROS. JUROR PENNY: I'll go by the instructions that the judge presents to me.

ME. YACOVONE: Absolutely. So you can keep your pride – and it doesn't sound like this is a continuing relationship with Attorney –

PROS. JUROR PENNY: No.

ME. YACOVONE: Okay. Just a one-time deal; haven't talked to him since?

PROS. JUROR PENNY: (Nods head.)

Based on that inquiry the State struck the juror. in response to the State's argument for doing so, listed above, the trial judge said:

> THE COURT: So the court, after reviewing the case law, or the law in this matter, does find that the explanation given by the state was reasonable and was clear and was not based on race. Therefore, the court will allow the peremptory challenge *but will note that there's one other black member of the jury.* And in an effort to keep that matter, I guess on the mind of the court and of the parties, that's something the court will watch going forward.

(Emphasis added.) Moore and Hopkins were convicted at a joint trial. Moore's appeal to the Seventh District Court of Appeals was rejected. Other pertinent facts are integrated into the argument.

ARGUMENT

Proposition of Law № 1: U.S. Constitution, Amendments Six and Fourteen and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16 prohibit striking a juror based upon race without the trial court making the requisite credibility determination as to the proffered reason for the strike, and the trial court must set forth its factual findings in enough detail to permit meaningful appellate review.

The State used a peremptory challenge to excuse one of only two black jurors on the panel, one of only three blacks on the entire venire. There was a *prima facie* case made under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The State's proffered reason for the strike was illusory. During voir dire the State failed even to probe the very subjects that it would claim were so troubling to it about the juror's suitably, and that allegedly formed the basis for the "non-discriminatory" strike. The trial court must, in many of these situations, make a credibility determination. Were it otherwise, a prosecutor could offer *any* reason for the "non-discriminatory" strike, and the failure of the record to support the strike would become immaterial. This never-never land for a prosecutor who lacks a legitimate reason for a strike violates the Ohio and United States Constitutions. *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); *State v. Thompson*, 141 Ohio St.3d 254, 2014 Ohio 4751, 23 N.E.3d 1096.

The third step in a *Batson* challenge involves the trial court making a determination as to whether the challenger has shown purposeful discrimination. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 277, 125 S.Ct. 2317, 162 L.Ed.2d 196

(2005). Without question, then, the trial court has a pivotal role in evaluating *Batson* claims. The only way to evaluation of the prosecutor's credibility is to evaluate the demeanor of the attorney who exercises the challenge, and the trial court's own observations of the claimed race-neutral reasons for the peremptory challenge, such as a juror's demeanor. But without some findings on the record by the trial court, and none were made here, the simple declaration that the trial court found no discriminatory intent is legal hocus pocus, an incantation designed to negotiate a hurdle, but without meaning or substance. Such significant constitutional freedoms as the ability to have a trial by an impartial jury, to have justice administered without denial, to defend liberty are at stake. Trial courts are to be the guardians of liberty, not aiders and abettors, wittingly or not, to discriminatory strikes, by failing to test the prosecutor's credibility and by failing to make findings which an appellate court can effectively review.

The record in this case clearly proves that the State's proffered reasons were pretextual. The prosecutor said his reason for striking the black juror was "his daughter had a case in Mahoning County [that] he did not put on his questionnaire. Yet, the prosecutor told the juror that it was "fair" that he forgot, and told the trial court that the omission was understandable. Though the prosecutor cited the former attorney-client relationship with Hopkins' attorney and the juror's daughter as his "main concern." Yet, the attorney-client relationship had ended five years earlier. It

was in fact the *juror*, who probably did forget about the matter, and remembered it when he saw Hopkins' attorney, and brought up the case with his daughter. Like many people outside of government, the juror did not think that Ohio's complicity law is always fair, but the juror acknowledged that it was his daughter's mistake for being with the man, and the juror said that his daughter probably knew that her friend had drugs. He denied that being predisposed to disbelieve police. He was *not* asked if he would hesitate to follow complicity instructions. He was not even asked if he would be inclined to acquit Hopkins simply because his daughter had been Hopkins' attorney's client—5 years earlier. Though he did not think complicity law was fair, he brought up himself that he would follow the judge's instructions.

The State's reasons were artificial, and the trial court did not apply a credibility test. It simply found, without more, that none of the State's stated reasons were racial. Of course: is there a prosecutor alive who says that his or her strikes *are* race based?

> THE COURT: So the court, after reviewing the case law, or the law in this matter, does find that the explanation given by the state was reasonable and was clear and was not based on race. Therefore, the court will allow the peremptory challenge *but will note that there's one other black member of the jury.* And in an effort to keep that matter, I guess on the mind of the court and of the parties, that's something the court will watch going forward.

(Emphasis added.) The trial judge gave the State a "freebie," but warned that it would be the last. But that is *not* the law. A discriminatory strike against even one juror is structural error. A trial court's impairment of a criminal defendant's right to

exercise a peremptory challenged by misapplying the *Batson* test is a structural error that entitles him to a new trial. *See, United States v. McFerron,* 163 F.3d 952, 955-56 (6th Cir. 1998). LORICE MOORE was denied his rights to equal protection, due process, and an impartial jury, in contravention of the Sixth and Fourteenth Amendments to the United States Constitution and in contravention of Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16. Unfortunately, the Court of Appeals merely nodded when reviewing this claim. Part of the reason may be the failure of Ohio law to require a clear statement of facts upon which a trial court relies when upholding a strike, so that an appellate court may effectively review the claim for denial of fundamental liberties.

> These reasons provided by the prosecutor for excusing Juror No. 12 constituted a racially neutral explanation for the strike. The prosecutor was concerned that one of the defendants' attorneys had represented Juror No. 12's daughter in her criminal case. And Juror No. 12 did not initially disclose this information on his questionnaire. Additionally, the prosecutor did not feel that Juror No. 12 had a good reaction to how the Struthers Police had handled his daughter's case. Finally, the prosecutor expressed a concern regarding how Juror No. 12 felt about complicity charges, which were an issue in this case, given his daughter's case.
>
> Because the state put forward a racially neutral explanation for the strike, it was then up to the trial court to decide whether Appellant proved purposeful, racial discrimination by the state. The trial court found here "that the explanation given by the state was reasonable and was clear and was not based on race." (Tr. 250).

State v. Moore, 7th Dist. Mahoning № 22 MA 0013, 2023 Ohio 1000, ¶¶18-19. With all due deference, the Court of Appeals' lackluster glossing over of the problem highlights the need to require trial courts to state factual findings when making

these credibility calls so that there is both effective appellate review and renewed confidence in the court system to dispense even-handed justice. The Supreme Court in *Snyder* found that:

> it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution. And in light of the circumstances here—including *absence of anything in the record showing that the trial judge credited the claim that Mr. Brooks was nervous*, the prosecution's description of both of its proffered explanations as "main concern[s]," App. 444, and the adverse inference noted above—the record does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone.

Snyder v. Louisiana, 552 U.S., at 484-486. (Emphasis added.) This was not harmless error. *Cf. Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and, *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

This Court and appellate courts require factual findings for effective appellate review in other areas of constitutional law, such as suppression and speedy trial.

In other constitutional contexts, this Court and appellate courts appellate courts in this State have held that only with a recitation of a trial court's factual findings is a reviewing court able to properly determine whether the findings are supported by the record and whether the correct law was applied to those facts. For example in dealing with the right to speedy trial in *State v. Wentworth*, 54 Ohio St.2d 171, 175, 375 N.E.2d 424 (1978), this Court said that the "requirement of explication in the record" "is not novel" and that "to require less is to foreclose effective appellate review and, of necessity, to undercut a meaningful judicial implementation of' Ohio's

Speedy Trial Act of 1974. In a short but pointed opinion in *Bryan v. Knapp*, 21 Ohio St.3d 64, 65, 488 N.E.2d 142 (1986), this Court noted that without factual findings "neither the court of appeals nor this court can properly review the propriety of the trial court's ruling." Accord, *State v. Cook*, 11th Dist. Portage Nos. 2012 P 0098, 2012 P 0099, 2013 Ohio 2832, 2013 Ohio App. LEXIS 2877, 2013 WL 3367038, fn. 1, citing *Village of Kirtland Hills v. Medancic*, 11th Dist. Lake Nos. 2011 L 136, 2011 L 137, 2012 Ohio 4333, 2012 Ohio App. LEXIS 3806, 2012 WL 4344063, ¶8. There is no principled way to distinguish between speedy trial rights, guaranteed by the Ohio and United States Constitutions and implemented by the Speedy Trial Act of 1974, or between the Fourth and Fifth Amendment liberties at issue in suppression and the rights, at stake here, of equal protection and trial by an impartial jury guaranteed also by the Ohio and United States Constitutions.

CONCLUSION

The right to a fair trial stems from U.S. CONST., amend. VI and XIV and from OHIO CONST., art. I, §§1, 2, 5, 10, and 16. As to the Due Process component, *see, e.g., Ramos v. Louisiana*, __ U.S. ___, 140 S.Ct. 1390, 1397, 206 L.Ed.2d 583 (2020). A fair trial includes an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). It includes the appearance of fairness and even-handedness. *See, e.g., Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942

(1955).

Accordingly, this Court should accept jurisdiction in this case and instruct the appellate and trial courts of this State that such factual findings are required for effective appellate review. This may result in fewer prosecutorial *Batson-Snyder* strikes, more strikes, or about the same. Whichever way it falls, future defendants can have what this Defendant was denied: meaningful appellate review of his *Batson* claim. And the public will be able to have confidence in its courts that seemingly discriminatory strikes are not whitewashed. Because of the structural error, this case must be reversed and remanded.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was [__] sent by regular U.S. Mail, postage prepaid, [__] hand delivered [_x_] served electronically either by [__] facsimile or [__] electronic mail as authorized by OHIO CRIM.R. 49 and OHIO CIV.R. 5(B)(2)(f) on Friday, May 12, 2023Mr. Ralph M. Rivera, Esq., Mahoning County Prosecutor's Office, 21 West Boardman Street, Youngstown, Ohio 44503.

/s/ *John B. Juhasz*
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F:\$JBJS65TB\Appeals\State\OhSCt\Moore L\MIS7dr7.wpd*Friday 12 May 2023 11:23am (1123hrs)