No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____
_____

MARCELO JOEL SANTOS-CORDERO,

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.

_____
_____

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following a remand, must a trial court that is retrospectively analyzing whether a peremptory strike violated *Batson*'s[1] prohibition against discriminatory strikes examine the striking party's jury selection notes, as the Second and Fourth Circuits have done, or may such notes remain secret, as the Ninth Circuit allowed in this case?

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases **Page**

Federal Statutes

Federal Rules

INTRODUCTION

This case squarely presents an important question that has divided the courts of appeals concerning the process that should be followed at post-verdict hearings when the court is tasked with determining whether there were any errors in the jury selection process under *Batson v. Kentucky*, 476 U.S. 79 (1986). This Court has already explained that "determining whether invidious discriminatory purpose was a motivating factor [for the peremptory strike] demands a sensitive inquiry into such circumstantial…evidence of intent as may be available." *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (quotations and citation omitted). But the courts of appeals have struggled to determine the scope of that sensitive inquiry. Specifically, the courts of appeals are divided as to whether a trial court that is retrospectively analyzing whether a peremptory strike violated *Batson*'s holding should examine the striking party's jury selection notes, as the Second and Fourth Circuits have done, or whether such should notes remain secret, as the Ninth Circuit allowed in this case. *Compare Majid v. Portuondo*, 428 F.3d 112 (2d Cir. 2005) *and United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011), *to United States v. Santos-Cordero*, No. 17-50015, 2018 WL 4140450 (9th Cir. Aug. 30, 2018). This Court should grant review in this case to resolve this circuit split and establish whether the "sensitive inquiry" called for in *Foster* must include examination of the striking party's jury selection notes when there is a post-verdict hearing on the issue.

OPINION BELOW

The Ninth Circuit's unpublished memorandum disposition is appended to this Petition. See Pet. App. 1a-3a.

JURISDICTION

The court of appeals entered judgment on August 30, 2018. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit's final judgment.

STATEMENT OF THE CASE

Mr. Santos-Cordero was charged with illegal reentry, in violation of 8 U.S.C. § 1326, and making a false claim to U.S. citizenship, in violation of 18 U.S.C. § 911. He proceeded to trial.

During jury selection, after the district court questioned the prospective jurors, the parties made their peremptory challenges. Among the jurors the government wished to strike was Juror Number One, who is Hispanic. The defense objected to the government's request to strike Juror Number One, citing to this Court's decision in *Batson*, 476 U.S. at 79. Without allowing defense counsel to fully state the objection and without hearing the prosecutors' explanation for the strike, the district court overruled the objection based on its own speculation of the reasons for the strike. The jury subsequently convicted Mr. Santos-Cordero of both counts.

Mr. Santos-Cordero appealed, arguing that the district court misapplied *Batson*. The Ninth Circuit agreed, holding that "[t]he district court violated the procedure outlined in *Batson* when at step one, before offering defense counsel an opportunity to explain its objection, it offered its own speculation as to reasons the prosecutor might have challenged the juror." *United States v. Santos-Cordero*, 669 F. App'x 417, 418 (9th Cir. Sept. 28, 2016). The Ninth Circuit therefore remanded the case so that the district court could conduct a proper *Batson* analysis. *See id.* at 418.

Two prosecutors appeared at the remand hearing—the previous trial counsel appeared telephonically, and the other prosecutor (who had not participated in the trial and challenged *Batson* strike) was present in the courtroom. After some discussion of the purpose for the remand and what information the district court could consider, the district court allowed defense counsel to fully state the basis for the objection. The district court also asked the prosecutors to state their reasons for the strike, then invited defense counsel to respond.

Defense counsel informed the district court that the prosecutors had not turned over their jury selection notes. The prosecutor in court confirmed that he had the notes with him, but refused to give them to defense counsel or even allow the district court to review them *in camera*. The district court stated, "I'm not going to make a finding that I need to look at them or that the defense is entitled to them[, b]ut I'd encourage you to let me look at them to make the record, you know, complete one way or the other." The prosecutor declined that invitation, and the district court again overruled the *Batson* objection without ever reviewing the government's jury selection notes.

Mr. Santos-Cordero appealed again. This time, the Ninth Circuit affirmed his convictions. The panel acknowledged that "courts have reviewed jury selection notes when adjudicating *Batson* challenges," but stated that "no court has suggested that the prosecutor is compelled to disclose those notes, even for *in camera* inspection." Pet. App. 3a. The panel thus held that "even if in some instance a prosecutor might be compelled to disclose jury selection notes, Santos has not shown the need for such an unprecedented holding in this case." *Id.*

REASONS FOR GRANTING THE PETITION

This Court ought to grant this petition to resolve an important question that has divided the circuits. That question is, following *Foster*, 136 S. Ct. 1737, must a district court holding a post-verdict *Batson* hearing examine the striking party's jury selection notes when determining whether a substantial motivating factor for a peremptory strike was discriminatory? In *Foster*, this Court explained that "determining whether invidious discriminatory purpose was a motivating factor [for the peremptory strike] demands a sensitive inquiry into such circumstantial…evidence of intent as may be available." *Id.* at 1748 (quotations and citation omitted). Some trial courts holding post-verdict *Batson* hearings have consulted the striking party's jury selection notes as part of that sensitive inquiry, often by conducting *in camera* review to determine their relevance before sharing those notes with the opposing party. But the court below held that those jury notes need not be examined, even *in camera*, as part of that inquiry, despite their availability. This Court should grant review in this case to resolve this important issue.

I. The courts of appeal are split over whether a court conducting a post-verdict *Batson* hearing should examine the striking party's jury selection notes.

Since this Court's decision in *Batson*, 476 U.S. at 79, this Court has provided limited guidance on the process that a trial court should follow to implement *Batson*'s holding. Indeed, even in *Batson*, this Court specifically declined to prescribe a specific procedure that must be followed when a trial court is trying to contemporaneously determine whether a peremptory strike was substantially motivated by a discriminatory intent. *See id.* at 99 n.24 ("[W]e make no attempt to instruct these

courts how best to implement our holding today."); *see also Johnson v. California*, 545 U.S. 162, 169 (2005) (recognizing "that States do have flexibility in formulating appropriate procedures to comply with Batson"); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) ("[W]e leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decision."); *Powers v. Ohio*, 499 U.S. 400, 416 (1991) ("It remains for the trial courts to develop rules ... to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice."). Similarly, when cases have been remanded for post-verdict *Batson* hearings, the trial courts have generally been left to develop their own procedures for conducting the hearing. *See, e.g., Johnson,* 545 U.S. at 173 (remanding "for further proceedings not inconsistent with this opinion"); *Edmonson*, 500 U.S. at 631 (remanding "for further proceedings consistent with our opinion"); *Powers*, 499 U.S. at 416 (remanding "for further proceedings not inconsistent with our opinion").

With this limited guidance, the courts of appeals have come to diametrically opposed conclusions regarding the procedural obligations a court has when conducting a post-verdict *Batson* hearing. As is relevant here, before this case, no court of appeal had yet decided whether a trial court *must* examine the striking party's jury selection notes during a post-verdict *Batson* hearing. But several courts of appeal had affirmed a trial court's decision to do so.

The Second Circuit approved of a trial court's decision to examine prosecutors' jury selection notes at a *Batson* hearing held six-and-a-half years after the trial. *See Majid*, 428 F.3d at 114. The case had been remanded by the state appellate court for the trial court to hold a hearing on the *Batson* claim. *Id.* At that hearing, the

defendants argued, *inter alia*, "that they should be allowed to review the prosecution's *voir dire* notes from the original trial." *Id.* The trial court did not require the prosecutors to give their notes to defense counsel, but instead ordered that they be provided to the court for *in camera* review. *Id.* Later, "the prosecutors decided that they would voluntarily provide the defense with their original *voir dire* notes…." *Id.* at 119. Ultimately, the trial court held that *Batson* had not been violated, and this holding was affirmed by all the state appellate courts. *Id.* at 124. The defendants then filed petitions for writ of habeas corpus in the federal district court, in which they argued that the trial court's procedures at the post-verdict hearing did not satisfy *Batson*'s guarantee of a meaningful inquiry into the prosecutors' reasons for the peremptory strikes. *Id.* But the Second Circuit held "that the procedures adopted by the trial court resulted in a full and fair hearing satisfying *Batson*'s guarantee of a meaningful inquiry." *Id.* at 114. In reaching this decision, the Second Circuit approvingly noted that defense counsel had the opportunity "to examine the prosecutors' contemporaneous notes relating to jury selection" as part of that process. *Id.* at 129. Indeed, defense counsel had even been able to review those notes prior to hearing the prosecutor's testimony regarding his reasons for the strikes. *Id.* at 119.

The Fourth Circuit has also approved of trial courts' conducting *in camera* inspection of prosecutors' jury selection notes at post-verdict *Batson* hearings. In *Barnette*, 644 F.3d at 192, the Fourth Circuit approved of a procedure in which the trial court "conducted a thorough review of the prosecution's hand-written notes on the juror questionnaires *in camera*," noting that "the notes displayed no discriminatory intent on the part of the prosecutors." *Id.* at 209-10. The Fourth

Circuit cautioned, however, that "a trial court should ordinarily conduct adversarial, rather than *ex parte*, *Batson* proceedings." *Id.* But it reasoned that *in camera* review was sufficient in this case because the prosecutors had already contemporaneously offered their race-neutral explanations for the challenged strikes at the time of trial. *Id.*

Notably, this was not the first time the Fourth Circuit had approved of a procedure that included review of the prosecution's jury selection notes at a post-verdict *Batson* hearing—and not the first time that the Fourth Circuit suggested that *ex parte* review of such notes might not be sufficient in some cases. *See United States v. Garrison*, 849 F.2d 103 (4th Cir. 1988). In *Garrison*, the district court directed the prosecutor to submit his jury selection notes for *ex parte* inspection. *Id.* at 104. The Fourth Circuit approved of this procedure, even though the trial had occurred less than two years before the post-verdict *Batson* hearing. *Id.* at 105. But the Fourth Circuit cautioned that "the government must make a substantial showing of necessity to justify excluding the defendant from this important stage of the prosecution." *Id.* at 106. Thus, the Fourth Circuit views the examination of jury selection notes to be an essential party of the *Batson* inquiry.

The Sixth Circuit took a slightly different approach in *United States v. Torres-Ramos*, 536 F.3d 542 (6th Cir. 2008). In that case, the defendants raised a *Batson* objection at their trial in federal district court. *Id.* at 544. On appeal, the Sixth Circuit held that the trial court had misapplied the controlling legal standard. *Id.* at 558. But before remanding the case for a hearing, the Sixth Circuit "contacted the district court clerk's office *sua sponte* and located the juror questionnaires." *Id.* at 560. That step

was based on this Court's "command[] that district courts must conduct a *Batson* inquiry 'in light of all evidence with a bearing on it.'" *Id.* (quoting *Miller–El v. Dretke*, 545 U.S. 231, 251-52 (2005)). The Sixth Circuit further explained that "this command places an affirmative duty on the district court to examine relevant evidence that is easily available to a trial judge before ruling on a *Batson* challenge," and noted that the jury questionnaires contained only "adjudicative facts" that were "not subject to reasonable dispute." *Id.* (quoting Fed. R. Evid. 201). In light of the information revealed in those questionnaires, the Sixth Circuit remanded the case, tasking the trial court with "further development of the record by the parties." *Id.* at 561; *see also id.* at 561 n.12 (noting, again, the district court's "duty to consider a *Batson* challenge 'in light of all evidence with a bearing on it.'") (quoting *Miller–El*, 545 U.S. at 251–52).

But in contrast to these three circuits' efforts to examine all available evidence of the striking party's intent when retrospectively evaluating a *Batson* claim, the court below held that the trial court was not required to examine the prosecution's jury selection notes at the post-verdict *Batson* hearing in this case. Pet. App. 3a. The panel acknowledged that "courts have reviewed jury selection notes when adjudicating *Batson* challenges." *Id.* But the panel reasoned that "the evidentiary hearing on remand was only two years after voir dire, the original prosecutor participated in the hearing and had a clear memory of voir dire, and there are no inconsistencies or questionable representations by the prosecutor that might suggest a discriminatory purpose." *Id.* The panel pointed out that "no court has suggested that the prosecutor is compelled to disclose those notes, even for *in camera*

inspection." Pet. App. 3a. The panel thus held that "even if in some instance a prosecutor might be compelled to disclose jury selection notes, Santos has not shown the need for such an unprecedented holding in this case." *Id.*

The courts of appeals are thus deeply divided over what sources must be examined at a post-verdict *Batson* hearing, despite this Court's guidance that these claims should be adjudicated only after a "sensitive inquiry into such circumstantial…evidence of intent as may be available." *Foster*, 136 S. Ct. at 1748 (quotations and citation omitted). Only this Court can provide clarity on the scope of the sensitive inquiry that a trial court must conduct and, specifically, whether it must include examination of the striking party's jury selection notes.

II. Resolving the question presented now is critically important to the proper administration of both the state and federal criminal and civil justice systems.

It is critical that this Court grant review now to clarify what sources a court must consult when holding a post-verdict hearing to determine whether a peremptory strike was substantially motivated by a discriminatory intent. This question affects not only all federal criminal and civil jury trials, but also all state jury trials as well. *See Edmonson*, 500 U.S. at 616 (applying Batson's holding to a federal civil trial); *Foster,* 136 S. Ct. at 1747 (applying *Batson*'s holding to a state criminal trial).

It is unacceptable that the same basic standards for post-verdict *Batson* hearings do not govern the inquiry that must be conducted in all of these courts. The mere fact that the inquiry is "sensitive" should not prevent courts from examining all available circumstantial evidence, *Foster*, 136 S. Ct. at 1748, including the striking party's jury selection notes. Yet the absence of direct instruction from this Court to

consider that evidence has led to a weakness in the judiciary's efforts to protect "the overriding interest in eradicating discrimination from our civic institutions." *Johnson*, 545 U.S. at 172. This Court should grant review in this case to set forth clear direction for all federal and state courts to review *all* available circumstantial evidence at a post-verdict *Batson* hearing, including the striking party's jury selection notes.

III. This Court should grant review because the court of appeals below is on the wrong side of the circuit split.

Review is warranted in this case in particular because the court of appeals below is on the wrong side of the circuit split. Contrary to what the court held below, a trial court conducting a post-verdict *Batson* hearing must examine *all* circumstantial evidence of the striking party's intent for the peremptory challenge, including the striking party's jury selection notes. Anything less is not a sufficiently probing inquiry to satisfy *Batson*'s holding.

Indeed, this Court has already recognized as much in *Foster* when it explained its rationale for considering the prosecution's jury selection notes. 136 S. Ct. at 1748. This Court stated that, "[d]espite questions about the background of particular notes," it could not "accept the State's invitation to blind ourselves to their existence." *Id.* That is because this Court has "made it clear that in considering a *Batson* objection, or reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Id.* This Court explained that any "uncertainties concerning the documents" would be "pertinent only as potential limits on their probative value" given the uncontroverted fact that

"all of the documents in the file were authored by someone in the district attorney's office." *Id.*

Lower courts can likewise determine the appropriate weight to give relevant evidence. But ignoring the existence of that evidence undermines public confidence in the justice system. It "raises serious questions as to the fairness of the proceedings" and "mars the integrity of the judicial system" *Edmonson*, 500 U.S. at 628.

By instead ensuring that the striking party's jury selection notes are subject to at least *in camera* review, this Court will provide assurance that the inquiry at a post-verdict hearing will "produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," just as the framework outlined in *Batson* for contemporaneous objections is designed to do. *Johnson*, 545 U.S. at 172 (citation omitted). This post-verdict procedure will combat the "[t]he inherent uncertainty present in inquiries of discriminatory purpose" by avoiding "needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* (citation omitted). The simple question of whether the prosecutors' notes reveal any discriminatory intent can be obtained by the simple step of requiring *in camera* review of those notes. And whereas there is no harm in *in camera* review of a striking party's jury selection notes if they do not reveal a discriminatory purpose, there is great harm in failing to consider relevant evidence that may reveal that a constitutional violation has occurred. That is because "[t]he 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster*, 136 S. Ct. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (internal quotation marks omitted)). This Court should grant review in this

case to ensure that no discriminatory strikes escape scrutiny due to a court's failure to understand its duty to consult relevant evidence that would have revealed it.

IV. This case presents an ideal vehicle to resolve the circuit split.

This case presents an ideal vehicle for this Court to provide guidance to the lower courts, which have struggled to implement this Court's command to conduct a "sensitive inquiry" into available circumstantial evidence of intent at a post-verdict *Batson* hearing. Specifically, this case is the ideal vehicle for this Court to address whether the "sensitive inquiry" a court must conduct at a post-verdict *Batson* hearing to "determin[e] whether invidious discriminatory purpose was a motivating factor" for a peremptory strike must include review of the striking party's jury selection notes as part of the "circumstantial…evidence of intent" that is "available." *Foster*, 136 S. Ct. at 1748 (quotations and citation omitted).

At trial, Mr. Santos-Cordero raised a contemporaneous *Batson* objection that the court of appeal later determined was mishandled by the trial court. *See Santos-Cordero*, 669 F. App'x 417. Because of the way in which the trial court mishandled the objection, the prosecutors were not required to provide a race-neutral explanation for the strike at the time of trial. *Id.* at 418. Instead, the trial court "offered its own speculation as to reasons the prosecutor might have challenged the juror." *Id.* So it was only after the first appeal, and after review of the transcripts from trial that contained the trial court's race-neutral reasons that the juror may have been stricken, that the prosecutor was required to articulate reasons for the strike—which ended up being noticeably similar to those originally stated by the trial court.

Yet at the post-verdict remand hearing held for the purposes of properly addressing the *Batson* objection, the trial court made its decision to overrule the objection based on the reasons the prosecutor stated at that hearing—more than a year-and-a-half after the trial, and only after a successful appeal. In particular, the trial court did not examine the prosecutors' jury selection notes, even though those notes were actually in the courtroom and available for examination and even though Mr. Santos-Cordero asked the court to at least examine those notes *in camera*.

But because Mr. Santos-Cordero's case was in the Ninth Circuit, this limited inquiry was affirmed. The trial court's failure to consider all available circumstantial evidence was deemed sufficient. This procedure was notably inconsistent with procedures implemented at post-verdict *Batson* hearings in the Second and Fourth Circuits. It was also at tension with a more probing inquiry that the Sixth Circuit *sua sponte* conducted when reviewing a *Batson* claim on direct appeal. Notably, the prosecutors' jury selection notes were actually physically in the courtroom at the remand hearing in this case, so *in camera* review would have taken minimal additional resources. The trial court's decision not to examine these notes even *in camera* is at odds with this Court's guidance that all relevant evidence should be consulted.

Upon reversing the Ninth Circuit's erroneous conclusion that the trial court's limited inquiry in this case was sufficient, this Court should remand with instructions for the lower court to (at minimum) examine the prosecutor's jury selection notes *in camera*. Only after this review can the court determine whether, based on all

available circumstantial evidence, the peremptory strike of a Hispanic juror at Mr. Santos-Cordero's trial was motivated by discriminatory intent.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: November 28, 2018

s/ Kimberly S. Trimble

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