No. 18-6919

IN THE SUPREME COURT OF THE UNITED STATES

MARCELO JOEL SANTOS-CORDERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion when, in applying the framework established by Batson v. Kentucky, 476 U.S. 79 (1986), it declined to compel the production of the prosecution's jury-selection notes before rejecting petitioner's claim of racially based jury selection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 747 Fed. Appx. 530. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 669 Fed. Appx. 417.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2018. The petition for a writ of certiorari was filed on November 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of one count of attempted reentry of a removed alien, in violation of 8 U.S.C. 1326, and one count of false claim to United States citizenship, in violation of 18 U.S.C. 911. Judgment 1. He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-3.

1. On February 9, 2015, petitioner applied for admission into the United States from Mexico at the San Ysidro, California, Port of Entry. D. Ct. Doc. 20, at 4 (May 26, 2015). He told the Customs and Border Protection Officer that he was a United States citizen. Ibid. A records check, however, revealed that petitioner is a citizen of Mexico who had already been removed from the United States nine times. Id. at 5. Petitioner was arrested and, after advisement of his Miranda rights, admitted that he is a citizen of Mexico, that he falsely told the inspecting officer that he was a citizen of the United States, and that he did not have legal authorization to enter or remain in the United States. Ibid.

2. On March 11, 2015, a federal grand jury sitting in the Southern District of California indicted petitioner on one count of attempted reentry of a removed alien, in violation of 8 U.S.C. 1326(a) and (b), and one count of false claim to United States

citizenship, in violation of 18 U.S.C. 911. Indictment 1-2. Petitioner pleaded not guilty and proceeded to trial.

During voir dire, the district court provided each jury venire member a list of questions to answer, and then directly questioned each member of the venire. C.A. E.R. 130-235. The first member of the venire to answer the questionnaire was S.M. Perez, who, when asked whether she had previously been a part of the criminal justice system, provided her views on immigration generally. Id. at 132, 134-135. She stated, "I totally believe that this country is with immigrants." Id. at 135. She then explained how a case involving immigrants could be "somewhat hard because [she was] one of them." Ibid.

In response to the district court's questions, Perez stated that she was a legal immigrant who had been granted United States citizenship in 2007. C.A. E.R. 135-136. The court asked Perez whether she would be able to follow the law and "reach a verdict that [she] thought was indicated by the evidence." Id. at 137. The court added that Perez "seem[ed] a little hesitant" and asked whether she could "look at this objectively and make an objective decision on the facts and the law." Ibid. Perez responded that she was "willing to do that." Ibid.

In addition to Perez, one other member of the panel expressed views on immigration. Gov't C.A. Br. 5. W. Brody stated that she was a pharmacist, recently a defendant in a criminal matter, and

that she had "strong opinions about illegal immigration." C.A. E.R. 162-164. Brody did not identify her specific viewpoint.

Following the questioning of the venire members, neither party exercised any challenges for cause. C.A. E.R. 222. The parties then simultaneously exercised their peremptory challenges. Id. at 229-230. The government exercised one of its six such challenges against Perez, and both parties exercised a peremptory challenge against Brody. Id. at 230; Gov't C.A. Br. 6.

Petitioner then raised a challenge to the government's exercise of the peremptory strike against Perez, alleging that it was racially motivated, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). C.A. E.R. 230. The district court immediately stated that it found "no prima facie case" for the challenge. Ibid. The court explained that while Perez "appear[ed] to be Hispanic," "there was great hesitancy" in her answers. Ibid. The court found that "[s]he said she has very strong feelings about immigration, and notwithstanding that she was rehabilitated, there was hesitancy." Ibid. The court then explained that it did not "see anything * * * that would suggest that the challenge was exercised on an invidious basis," and it noted that there appeared to be other Hispanic jurors on the panel. Id. at 231.

When petitioner's counsel argued that "the only reason that could have possibly been given for striking Ms. Perez is her own immigration history, her Hispanic background," the district court questioned whether petitioner's counsel was "listening carefully

to what [Perez] said or watching her demeanor when she said it because [the court] right away noticed that there was great hesitancy on her part." C.A. E.R. 231-232. The court then stated that despite Perez's assurances of objectivity, "[it] honestly had [its] own subjective doubts about it." Id. at 232. The court concluded by stating that "if [it] thought otherwise, if [it] thought it was close, then [the court would] call on the Government to give an explanation, but [the court did not] see it." Ibid.

The district court impaneled the jury, and the trial commenced. During trial, petitioner's counsel raised the issue again, and the court again disagreed that the circumstances showed racial animus, explaining that Perez "remained quite uncomfortable, notwithstanding what she said." C.A. Supp. E.R. 4. It also observed that "[a]n appellate court is going to look at a cold record here and will not have the opportunity to see the distress in this woman's demeanor and in her voice. And that's meaningful to me, and it tells me that there was no racial animus in this challenge whatsoever, none, none." Id. at 6. The court added that there had been no other potential juror "who had a reaction like Ms. Perez did." Id. at 16.

The jury found petitioner guilty on both charged counts, and the district court sentenced petitioner to 24 months of imprisonment. Judgment 1-2.

3. Petitioner appealed, arguing that the district court had misapplied the procedure outlined in Batson for assessing a claim

of racially motivated jury selection when it had evaluated the government's peremptory strike on Perez. See 669 Fed. Appx. 417, 418. The court of appeals agreed that the district court had misapplied the first step of the Batson procedure -- which requires a defendant to make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose -- because "before offering defense counsel an opportunity to explain its objection, [the district court] offered its own speculation as to reasons the prosecutor might have challenged the juror." Ibid. The court of appeals reasoned that "the district court erred by relying on its own speculation about the prosecutor's potential reasons for striking the juror when it concluded that a prima faci[e] showing of discrimination had not been made at step one." Ibid. The court of appeals reversed and remanded for the district court to conduct another Batson analysis. Ibid.

4. On remand, the district court conducted another Batson analysis and found that petitioner had not in fact met his burden of establishing a prima facie case on the first step. C.A. E.R. 90-91. Nevertheless, the court proceeded to the second step of the Batson analysis and asked the prosecutor to provide the reasons that she had exercised a strike on the juror. Id. at 91-93.

The prosecutor who had exercised the strike explained that she had a "clear and independent memory" of the challenged potential juror and "remember[ed] exactly what occurred when she

was questioned." C.A. E.R. 95. The prosecutor stated that the potential juror had "demonstrated a lack of confidence in her ability to be impartial on an immigration case." Ibid. The prosecutor explained that "while the record shows that she could be -- that she said she could be impartial, her tone, the time it took her to answer, and her body language said exactly the opposite." Id. at 96. The prosecutor explained to the district court that "[i]t had absolutely nothing to do with [the juror's] race." Id. at 97.

Following the government's explanation, petitioner's counsel requested that the government produce its notes from the jury-selection process. C.A. E.R. 97-98. The district court encouraged the government to provide its notes ex parte for the court to review, id. at 98-100, but recognized that the government might decline the invitation to avoid "set[ting] a precedent," id. at 100. The government declined to produce the notes, and the court noted "that there's no right for [defense counsel] to inspect [the prosecution's] notes in this particular case. Another case may present different circumstances." Id. at 101. The court added that "if it was a close case and I was dubious about the explanation then I would say * * * you're going to have to offer a little bit more because I'm dubious about the explanation." Ibid. But the court emphasized, "I don't think that there was some ulterior motive that would require me to look for impeachment material" here, and denied the defense request. Ibid.

The district court then found that the government had exercised the peremptory strike for non-discriminatory reasons. C.A. E.R. 107. Specifically, it found that the prosecutor's explanation was "not only racially neutral but bona fide, honest and accurate." Ibid. The court explained that the prosecutor's description of the juror's tone and hesitance was consistent with the court's own memory. Ibid. The court also engaged in a comparative analysis of the other potential jurors in the venire, noting that there was "no systematic pattern" of the government striking Hispanic venire members. Ibid.

5. The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. 1-3. The court determined that "[t]he district court ultimately completed the three steps of the Batson process and the record fully supports the determination that [petitioner] has failed to show a discriminatory purpose for the challenge." Id. at 3. The court explained that on remand, the district court had "allowed [petitioner's] counsel to explain the Batson objection and had the prosecutor state her reasons for the challenge," id. at 2; that the district court had found the prosecutor's explanation for the strike -- that Perez had demonstrated a lack of confidence in her ability to be impartial -- "was racially neutral, conformed to the court's observation of Ms. Perez, and did not reflect a systemic pattern of discrimination," id. at 3; and that petitioner had "offered nothing

to suggest that Ms. Perez's answers did not reflect a lack of confidence," ibid.

The court of appeals also rejected petitioner's argument that the government should have been compelled to submit its juror selection notes to the district court for in camera review. Pet. App. 3. The court explained that "[a]lthough courts have reviewed jury selection notes when adjudicating Batson challenges, no court has suggested that the prosecutor is compelled to disclose those notes, even for in camera inspection." Ibid. The court emphasized 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." Ibid. The court therefore concluded that, "even if in some instance a prosecutor might be compelled to disclose jury selection notes, [petitioner] has not shown the need for such an unprecedented holding in this case." Ibid.

ARGUMENT

Petitioner contends (Pet. 4-12) that the court of appeals erred in determining that the district court was not required to review in camera the prosecution's jury-selection notes before finding that the government had not violated its obligations under Batson v. Kentucky, 476 U.S. 79 (1986). Petitioner further contends (Pet. 4-9) that the panel's unpublished, non-precedential

opinion conflicts with decisions of the Second and Fourth Circuits. Both contentions lack merit. The decision of the court of appeals is correct, does not conflict with the decision of any other court of appeals, and further review is unwarranted.

1. a. Batson establishes a three-step process for determining whether a prosecutor has discriminated on the basis of race in exercising peremptory challenges in selecting a jury. 476 U.S. at 96-98; see Snyder v. Louisiana, 552 U.S. 472, 476-477 (2008). First, the defendant must establish a prima facie case of discrimination by demonstrating that the "relevant circumstances raise an inference" of racial discrimination. Batson, 476 U.S. at 96; see Hernandez v. New York, 500 U.S. 352, 358 (1991) (plurality opinion). Second, if a defendant makes such a showing, the prosecution must come forward with a race-neutral explanation for each challenged strike. Batson, 476 U.S. at 97-98; see Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam). Third, if the prosecution provides such a race-neutral explanation, the trial court must decide "whether the opponent of the strike [i.e., the defendant] has proved purposeful racial discrimination." Purkett, 514 U.S. at 767; see Batson, 476 U.S. at 98. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768.

The "ultimate question of discriminatory intent" is a "pure issue of fact," Hernandez, 500 U.S. at 364 (plurality opinion),

that turns on "whether the trial court finds the prosecutor's race-neutral explanations to be credible," Miller-El v. Cockrell, 537 U.S. 322, 339 (2003). See Snyder, 552 U.S. at 477. The trial court's assessment of "[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El, 537 U.S. at 339. If the court makes a credibility determination, that determination receives "great deference on appeal" and is reviewed only for clear error. Hernandez, 500 U.S. at 364 (plurality opinion); see Snyder, 552 U.S. at 477.

This Court's decisions have recognized that trial courts have substantial discretion in the precise procedures that they use to evaluate Batson challenges. In Batson, this Court expressly declined to formulate procedures for district courts to follow in evaluating a claim of racially based jury selection within the general Batson framework. 476 U.S. at 99 n.24. In Georgia v. McCollum, 505 U.S. 42, 58 (1992), the Court explained that "[c]ounsel can ordinarily explain the reasons for peremptory challenges without revealing anything about trial strategy or any confidential client communications," but it recognized that, in "rare case[s]," district courts might evaluate, in camera, a party's explanation for its peremptory challenges to avoid disclosing confidential communications or trial strategy. Subsequently, in Miller-El v. Dretke, 545 U.S. 231 (2005), the

Court found Batson violations on the merits and, while it noted that the jury-selection notes in the record supported its holding, it did not address the procedures to be followed at a Batson remand hearing. See id. at 240-266.

The court of appeals' unpublished decision in this case is a correct application of Batson and its progeny. The court of appeals observed that the district court had allowed petitioner's "counsel to explain the Batson objection and had the prosecutor state her reasons for the challenge." Pet. App. 2. The court of appeals further observed that the district court "held that the explanation -- that Ms. Perez's answers had demonstrated a lack of confidence in her ability to be impartial -- was racially neutral, conformed to the court's observation of Ms. Perez, and did not reflect a pattern of systematic discrimination." Id. at 2-3. And the court of appeals additionally observed that petitioner had "offered nothing to suggest that Ms. Perez's answers did not reflect a lack of confidence." Id. at 3. The court of appeals therefore correctly determined that the district court "completed the three steps of the Batson process." Id. at 3; see Batson, 476 U.S. at 96-98 (explaining three-step process). The court of appeals also correctly upheld the district court's finding that the prosecutor had not discriminated on the basis of race in exercising the peremptory strike, as "the record fully supports the determination that [petitioner] has failed to show a discriminatory purpose for the challenge." Pet. App. 3.

b. Petitioner does not argue that the court of appeals erred in determining that the district court correctly followed the Batson analysis. Instead, petitioner asserts (Pet. 4-9) that the court of appeals erred by failing to require the district court to examine the prosecution's jury-selection notes as a prerequisite to finding that the exercise of the peremptory strike was not discriminatory. This contention lacks merit.

As petitioner acknowledges (Pet. 4-5), this Court has left to the discretion of trial courts the procedures to use in employing the Batson framework. See p. 11, supra. The Court has also specifically made clear that a case in which a district court would require a party to reveal trial strategy or any confidential client communications -- matters which could be included in attorney notes -- would be a "rare case." McCollum, 505 U.S. at 58.

Consistent with that guidance, the courts of appeals have recognized that trial courts addressing Batson challenges need not order production of notes or full evidentiary hearings, particularly when the prosecutor's memory of the relevant strike is clear. See, e.g., Majid v. Portuondo, 428 F.3d 112, 127 (2d Cir. 2005) ("[O]rdering [the prosecutor] to turn over contemporaneous notes regarding jury selection, at that stage of the proceedings (rather than, as here, many years thereafter) might prove to be, at best, both inconvenient and intrusive -- in addition to being unnecessary for an adequate evaluation of the prosecutor's explanations."), cert. denied, 549 U.S. 863 (2006);

United States v. Garrison, 849 F.2d 103, 107 (4th Cir.) ("Because an objection based on Batson must be raised immediately, rarely will the court need the prosecutor's notes to see if they cast any light on the prosecutor's recollection of the reasons for peremptory strikes."), cert. denied, 488 U.S. 996 (1988). In accord with those decisions, the court of appeals correctly determined that the district court here did not abuse its discretion in not ordering the production of the prosecutor's notes, where the memories of both the district court and the prosecutor were fresh and clear. Pet. App. 3.

Contrary to petitioner's suggestion (Pet. 4, 10-12), the decision below does not conflict with Foster v. Chatman, 136 S. Ct. 1737 (2016). In Foster, this Court held that the exercise of peremptory challenges against two prospective black jurors in a Georgia state murder prosecution was purposeful discrimination. Id. at 1755. The defendant had sought and obtained documents related to the prosecution's jury selection pursuant to a request under the Georgia Open Records Act, Ga. Code Ann. §§ 50-18-70 to 50-18-77 (2002). Foster, 136 S. Ct. at 1743-1744. Those documents included a "sheer number of references to race" that the Court found "arresting," and "plainly belie[d] the State's claim" that, in striking all four prospective jurors who were black, it had acted "in a 'color-blind' manner." Id. at 1755; see ibid. ("The focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury.").

Although the State had questioned the admissibility and probative value of these notes in the absence of testimony from the relevant prosecutors, the state habeas court admitted the notes into evidence. Id. at 1747-1748. In agreeing with the approach of the state habeas court, this Court explained that "all of the circumstances that bear upon the issue of racial animosity must be consulted," id. at 1748 (quoting Snyder, 552 U.S. at 478), which demands "a sensitive inquiry into such circumstantial . . . evidence of intent as may be available," ibid. (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

This Court in Foster thus approved of the consideration of jury selection notes that had already been obtained in that case through an open-records request, and which significantly undercut the State's claim that it had acted in a race-neutral manner in striking all four prospective black jurors. But at no point in Foster did this Court suggest that a district court must compel the production of notes as a categorical matter in response to every Batson challenge in the first instance, without regard to the individual facts and circumstances of the case. And here, the district court expressly stated that "if it was a close case and [the court] was dubious about the explanation" then it might have required the prosecution to produce additional information, but that it was not skeptical of the prosecution's explanation here and did not believe "that there was some ulterior motive that would

require [it] to look for impeachment material." C.A. E.R. 101. Accordingly, as the court of appeals explained, "even if in some instance a prosecutor might be compelled to disclose jury selection notes, [petitioner] has not shown the need for such an unprecedented holding in this case." Pet. App. 3. That determination is specific to the facts of this case, consistent with Foster, and correct.

2. Petitioner errs in contending (Pet. 4-9) that the unpublished decision below conflicts with the decisions of the Second and Fourth Circuit. The court of appeals' decision here is unpublished and thus does not establish circuit precedent. See Pet. App. 1 n.*. In any event, as petitioner himself acknowledges (Pet. 5), "no court of appeal had [previously] decided whether a trial court must examine the striking party's jury selection notes during a post-verdict Batson hearing."

The decisions petitioner cites as purportedly conflicting with the decision below merely note, or approve, the fact that the district courts in those cases had reviewed juror selection notes in conducting its Batson inquiry. For example, in Majid, supra, the Second Circuit affirmed the denial of habeas corpus petitions raising Batson challenges. See 428 F.3d at 112. The court noted that the state court had reviewed the prosecutors' voir dire notes in camera and that the prosecutors had ultimately decided to produce these notes to the defense. Id. at 115-119. While the production of the notes was not itself at issue before the Second

Circuit, the court's analysis of whether Batson's meaningful-inquiry standard had been satisfied included the observation that the habeas petitioners had been afforded the opportunity "to examine the prosecutors' contemporaneous notes relating to jury selection." Id. at 129. In determining that cross-examination of the prosecutors had not been required, however, the court cautioned that "[s]ubjecting the prosecutor to cross-examination, or indeed ordering [a prosecutor] to turn over contemporaneous notes regarding jury selection," at the time it occurs, as opposed to many years thereafter," could "prove to be, at best, both inconvenient and intrusive." Id. at 127. The Second Circuit thus did not establish any categorical rule regarding the production of a prosecutor's notes, and its precedents do not dictate such production where, as here, the participants recalled the jury selection clearly.

Like the Second Circuit, the Fourth and Seventh Circuits have also approved the examination of a prosecutor's voir dire notes, but have not required their production in all case. In Garrison, supra, the Seventh Circuit rejected a defendant's claim of prejudicial error in the district court's decision to conduct an ex parte (rather than open) examination of the prosecutor's voir dire notes in evaluating a Batson challenge, because the notes neither contradicted nor added to the government's explanations offered in open court. 849 F.2d at 107. Subsequently, in Barnette, supra, the Fourth Circuit applied Garrison and concluded

that a district court had not abused its discretion when it declined to provide the defendant with copies of the prosecution's voir dire notes. Barnette, 644 F.3d at 210-211. In reaching that conclusion, the Fourth Circuit explained that "the trial court conducted a thorough review of the prosecution's hand-written notes on the juror questionnaires in camera before concluding that a substantial number contained opinion work product in the form of jury selection strategy and mental impressions of jurors, some of which was unflattering." Id. at 210.[1]

The fact that courts of appeals, in certain circumstances, have approved of the examination of prosecution notes of jury selection does not suggest that any court of appeals would conclude that the district court in this case lacked discretion to find it unnecessary to compel disclosure of the prosecution's notes before rejecting petitioner's Batson claim. As petitioner correctly recognizes (Pet. 5), no court of appeals has required their production, much less required their production in all cases on a categorical basis. In the decision below, the court of appeals did not preclude the possibility that ordering the production of

[1] Petitioner also cites (Pet. 7-8) United States v. Torres-Ramos, 536 F.3d 542, 560 (6th Cir. 2008), cert. denied, 555 U.S. 1088 (2008), and 556 U.S. 1196 (2009). In that case, the court of appeals, noting an "unclear record," sua sponte requested from the district court clerk, and reviewed, prospective jurors' answers to questionnaires they were given as part of the jury-selection process. See id. at 560. The court did not purport to require such examination in every case, and juror questionnaires are not the equivalent of a prosecutor's privileged notes.

such notes could be appropriate in certain circumstances. It instead determined only that in the present case, where (among other things) both the prosecutor and the district court maintained a clear memory of voir dire, the district court did not abuse its discretion in declining to require production. Pet. App. 3. The decision below therefore is correct, limited to the facts of this case, and does not conflict with the decision of any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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