No. 18-6919

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

REPLY BRIEF FOR PETITIONER

KIMBERLY S. TRIMBLE
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Kimberly_Trimble@fd.org

Attorneys for Petitioner

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INTRODUCTION

The question presented in this petition is whether a trial court that is retroactively analyzing whether a peremptory strike violated *Batson*'s[1] prohibition against discriminatory strikes must examine the striking party's jury selection notes. The government's opposition does not dispute that this petition squarely presents the question presented, a question concerning the scope of a trial court's review of relevant evidence to determine whether a peremptory strike was substantially motivated by a discriminatory intent. The government also does not dispute that this case would be a good vehicle to resolve the question presented, with no procedural hurdles to overcome. And the government does not dispute that the prosecutors' jury selection notes from the trial would contain relevant evidence as to the prosecutors' true motivation for the challenged peremptory strike. Nevertheless, the government argues that this Court should deny review, thereby leaving lower courts to struggle with the scope of the inquiry that must be conducted under *Batson* when the issue is being decided retrospectively.

The government first argues that this Court should deny review because the court of appeals correctly applied *Batson* and its progeny. BIO 12. The government also claims that the question presented does not implicate a circuit split. BIO 10. The government, however, is incorrect with respect to both contentions. The government's argument that no error was committed relies on this Court's guidance regarding the procedures for contemporaneously addressing a *Batson* objection when it is raised during trial. But the reasoning behind those procedures does not apply when the

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

Batson issue is being analyzed retrospectively, years after the trial is over, as it was in this case. As to the circuit split, the Second and Fourth Circuits have affirmed decisions where the trial court reviewed the striking party's jury selection notes, whereas the Ninth Circuit in this case held that such review was not required. Thus, this Court should grant review to resolve a circuit split over an important federal question that will affect both the state and federal civil and criminal justice systems. At minimum, this Court should grant, vacate, and remand this petition when it issues its forthcoming decision in *Flowers v. Mississippi*, No. 17-9572, which will shed light on the appropriate outcome in this case.

ARGUMENT

I. The court of appeal below wrongly decided that a court conducting a post-verdict *Batson* hearing need not examine the striking party's jury selection notes.

The courts of appeal are divided over whether a court conducting a post-trial *Batson* hearing should review the striking party's jury selection notes as part of its probing inquiry as to whether a peremptory strike was substantially motivated by a discriminatory intent. That is so even after this Court held that "determining whether invidious discriminatory purpose was a 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). As the petition explained, several courts of appeal have affirmed a trial court's decision to review the striking party's jury selection notes when a post-trial hearing was held to decide a *Batson* issue, including the Second and Fourth Circuits. By contrast, the Ninth Circuit in this case affirmed the trial court's decision *not* to review the prosecutors' jury

selection notes. It did so even though the notes were available in court at the remand hearing that was held nearly two years after the trial when no contemporaneous reasons for the strike had been given. And it did so even though the issue was being presented after a successful appeal based on the trial court's mishandling of the *Batson* objection during trial.

In its opposition, the government argues that the court of appeals correctly applied *Batson* and its progeny in this case. In doing so, the government asserts that "trial courts have substantial discretion in the precise procedures that they use to evaluate Batson challenges." BIO 11. The government further argues that this case does not conflict with *Foster*, contending that this Court had only "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." BIO 15. The government argues that "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." BIO 15. Later, the government again argues that jury selection notes need not be provided "at the time it [the objection to the peremptory strike] occurs, as opposed to many years thereafter." BIO 17.

Petitioner agrees that *Foster* did not "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." BIO 15. Nor does this petition suggest that result. When this objection was raised "in the first instance"—during trial—there was no request for

the prosecutors' jury selection notes. That is because, as acknowledged in the petition, this Court has repeatedly allowed lower courts to establish the appropriate procedures for evaluating contemporaneous *Batson* objections during trial. *See* Pet. 5 (citing cases).

But it is the government's failure to distinguish between a contemporaneous *Batson* objection during trial and a post-trial *Batson* hearing that leads to its overly broad argument that "courts of appeals have recognized that trial courts addressing Batson challenges need not order production of notes or full evidentiary hearings." BIO 13 (citing *Majid v. Portuondo*, 428 F.3d 112, 127 (2d Cir. 2005) and *United States v. Garrison*, 849 F.2d 103, 107 (4th Cir. 1988)). The quotations the government relies on for this contention are both discussing contemporaneous *Batson* objections during trial.

The government quotes the Second Circuit's reasoning in *Majid* that "ordering [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." 428 F.3d at 127 (quoted on BIO 13). But the Second Circuit's use of the phrase "at that state of the proceedings" was specifically referring back to its acknowledgment in the prior sentence that "*Batson* hearings are typically conducted in association with, and at the same time as, jury selection." *Id.*

Likewise, the quotation selected by the government from the Fourth Circuit also specifies that a court would "rarely...need the prosecutor's notes to see if they

case any light on the prosecutor's recollection of the reasons for the peremptory strike" precisely "[b]ecause an objection based on Batson must be raised immediately." *Garrison*, 849 F.2d at 107 (quoted on BIO 14). In other words, these courts of appeals were only acknowledging that jury selection notes need not be reviewed during trial at the moment that a *Batson* objection is raised because the striking party would contemporaneously be required to provide the reason for the strike, and that procedure ensures that the party would not have had time to fabricate a reason for the strike.

By contrast, many years after a trial—and particularly after a successful appeal—there is reason to be concerned about fabrication or, at least, faded memories. That is why the government's reliance on the courts of appeal's interpretations of this Court's precedents addressing contemporaneous *Batson* objections is inapplicable to a post-trial *Batson* hearing.

Instead, the relevant guidance is this Court's explanation of how to retrospectively adjudicate *Batson* claims argued after trial has concluded. The limited guidance this Court has thus far provided for this scenario is found in *Foster*, when this Court explained that "determining whether invidious discriminatory purpose was a factor [for the peremptory strike] demands a sensitive inquiry into such circumstantial...evidence of intent as may be available." 136 S. Ct. at 1748. The government argues that this case is distinguishable because, in *Foster*, the prosecutors' jury selection notes had been obtained through a request under the Georgia Open Records Act rather than pursuant to a court order by the court adjudicating the *Batson* claim. BIO 14. Be that as it may, the government does not

dispute that the prosecutors' jury selection notes were actually in the courtroom, at the prosecutors' desk, at the time of the post-trial *Batson* hearing in this case. There is no dispute that these notes were relevant to the issue.[2] There is no assertion that the trial court's *in camera* review of these notes would somehow have caused unfair prejudice. And the presence of the notes in the courtroom means they were unquestionably "available." That means, under *Foster*, the trial court should have reviewed these notes as part of its sensitive inquiry into the intent for the challenged peremptory strike. The trial court's belief that such review was not necessary, and the court of appeals affirmance of that decision, is inconsistent both with *Foster* and with the understanding of the Second and Fourth Circuits as to the scope of the probing review that is required at a post-trial *Batson* hearing.

Rather than explaining why it believes this guidance from *Foster* nevertheless excludes consideration of the striking party's jury selection notes, the government misleadingly asserts that this Court "has 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.'" BIO 13 (citing *Georgia v. McCollum*, 505 U.S. 42, 58 (1992)). But in *McCollum*, this Court was pointing out that the "rare case" would be one in which "the explanation for a [peremptory] challenge would entail confidential

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[2] The government also finds it meaningful that the notes in *Foster* "significantly undercut the State's claim that it had acted in a race-neutral manner in striking all four prospective black jurors." BIO 15. Of course, Petitioner has no way of knowing whether the jury selection notes in his case would similarly undercut the prosecutors' race-neutral explanation for the strike in this case because he has never seen these notes.

communications or reveal trial strategy." *McCollum*, 505 U.S. at 58. And the Court explained that such a situation could be handled by "an *in camera* discussion." *Id.* So the Court was not saying that it would be "rare" for a trial court to review all relevant evidence when evaluating a challenged peremptory strike because such a probing review might reveal trial strategy or confidential communications. Rather, the Court was saying that, in the "rare" instance that such review really did reveal such confidential information, the review should be done *in camera*. That is exactly the procedure urged by Petitioner in this case.

II. This petition implicates a circuit split.

The government also argues that the question presented in this petition does not implicate a circuit split. The government points out that the decision in this case is unpublished and that no court of appeals has actually held that a striking party *must* provide its jury selection notes for at least *in camera* review. The government thus urges this Court to deny review because the decision below "did not preclude the possibility that ordering the production of such notes could be appropriate in certain circumstances." BIO 18-19.

It is true that no court of appeals has explicitly held that jury selection notes *must* be provided for *in camera* review at a post-trial *Batson* hearing. But that is because, in the Second and Fourth Circuits, there was no need for such a holding given that the notes had actually been reviewed by the trial courts. *See Majid*, 428 F.3d at 115, 119 (trial court's order stated, "[t]he prosecutor's voir dire notes will not be given to defense counsel, but will be examined by the Court in camera," and later "the prosecutors decided that they would voluntarily provide the defense with their

original voir dire notes"); *Garrison*, 849 F.2d at 105 ("The district court also requested the prosecutor to submit notes made during the voir dire for *ex parte* inspection to determine whether they shed additional light on the prosecutor's recollection of a voir dire that took place almost two years before the hearing."). Accordingly, the Second and Fourth Circuits were not directly asked to decide whether the trial court was *required* to review the notes. Rather, these courts of appeal were asked to review the process adopted by the trial courts, which included at least *in camera* review of the prosecutors' jury selection notes, and both the Second and Fourth Circuits approved of processes that included that review. Those results are clearly irreconcilable with the court of appeals decision in this case, where the trial court never reviewed the jury selection notes even though there was no dispute that the notes were relevant to the issue, and the court of appeals expressly held that such review was not required.

In short, this petition squarely raises the question of whether the probing inquiry that is required when conducting a *Batson* hearing years after a trial must include review of the striking party's jury selection notes. Indeed, this case is an ideal vehicle to resolve the question presented because it is a direct appeal of the preserved legal issue. This question has divided the courts of appeal, and this Court should therefore grant review.

III. At a minimum, this Court should grant, vacate, and remand this case after publication of this Court's forthcoming decision in *Flowers v. Mississippi*.

Even if this Court does not wish to grant review and have full briefing on the merits, this Court should grant, vacate, and remand this case in light of this Court's forthcoming decision in *Flowers v. Mississippi*, No. 17-9572. That case was argued before this Court on March 20, 2019. The outcome in *Flowers*, argued after the

petition and opposition were filed in this case, will undoubtedly shed light on the proper outcome of this case. The court of appeals should therefore have the chance to reconsider its decision in light of the guidance this Court will provide in its decision in *Flowers*.

The question presented in *Flowers* is "[w]hether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U. S. 79 (1986)." In that case—as in this case—the trial court was aware that the case had already been reversed on appeal based on *Batson* challenges to the prosecutor's peremptory strikes. And in that case—as in this case—at the hearing under review, the prosecutor had contemporaneously provided facially race-neutral reasons for the challenged strikes.

During oral argument in *Flowers*, Chief Justice Roberts noted that resolving the case at hand would also lead to a general rule that would guide future disputes. *See Flowers v. Mississippi*, No. 17-5972, Tr. of Oral Arg. 18; *see also id.* at 41 (Chief Justice Roberts suggesting the need for "a broader rule"); *id.* at 42-43 (Justice Gorsuch acknowledging "we're presumably taking cases to guide future disputes, not just to resolve this one."). The petitioner was accordingly asked what general rule this Court should adopt. *Id.* at 20. The petitioner asked this Court to adopt the general rule that every factor that weighs on the credibility of the reason provided for a strike is relevant to *Batson*'s probing inquiry. *Id.* at 21. If this Court adopts that rule, it would be outcome-determinative in this case because it would mean that the prosecutors' jury selection notes should have been reviewed by the trial court at the post-trial *Batson* hearing. And if this Court adopts a more limited rule, it would likely still be outcome determinative in this case because the court of appeals would use it

to determine whether the trial court's inquiry in this case was sufficiently probing even though it did not include review of the prosecutors' jury selection notes.

This Court should therefore GVR this case after it issues its decision in *Flowers*.

CONCLUSION

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

Respectfully submitted,

Dated: March 29, 2018

KIMBERLY S. TRIMBLE
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5097
Telephone: (619) 234-8467
Kimberly_Trimble@fd.org
Attorneys for Petitioner