No. 18-8826

IN THE SUPREME COURT OF THE UNITED STATES

OMAR CHRISTOPHER MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DEEPTHY KISHORE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in the form of its questions during voir dire directed at identifying sources of juror bias.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

United States v. Miller, No. 17-2140 (Oct. 24, 2018)

United States District Court (E.D.N.Y.):

United States v. Miller, No. 15-cr-580 (July 10, 2017)

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-8826

OMAR CHRISTOPHER MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 752 Fed. Appx. 51.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2018. A petition for rehearing was denied on January 11, 2019 (Pet. App. 7a). The petition for a writ of certiorari was filed on April 11, 2019. 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 Eastern District of New York, petitioner was convicted on one count of visa fraud, in violation of 18 U.S.C. 1546(a). Judgment 1. He was sentenced to 12 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed the conviction and remanded for resentencing. Pet. App. 1a-6a.

1. Petitioner, a citizen of Jamaica, applied for a temporary visa to enter the United States to perform in a series of musical concerts. Presentence Investigation Report (PSR) ¶¶ 3-4. On his visa application, petitioner denied having any prior arrests or any other names, even though he had twice been arrested in Jamaica under the name of "Andy Fowl." PSR ¶ 5. Petitioner obtained the visa and entered the United States. PSR ¶ 4. He overstayed his visa and was arrested approximately three years later. PSR ¶¶ 4, 6. Petitioner was indicted on one count of "knowingly and intentionally utter[ing], us[ing], attempt[ing] to use and possess a nonimmigrant visa, knowing said document was procured by means of one or more false statements and by fraud and was unlawfully obtained," in violation of 18 U.S.C. 1546(a). Indictment 1.

During jury selection, the district court asked the venire "a series of twenty-five questions concerning, among other things, the prospective jurors' involvement with the criminal justice

system, experience with the visa process, relationships with law enforcement and immigration authorities, and whether the nature of the case would affect their ability to impartially assess the evidence." Pet. App. 3a. After asking those questions, the court asked the venire: "is there anything else that I did not mention that makes you feel, personally, that you could not be an impartial and fair juror in this case?" Pet. C.A. Special App. SA26 (8/22/16 Tr. 24). The court then interviewed each prospective juror at a sidebar, see Pet. App. 3a, having made clear to counsel that "if an attorney has a concern about a potential juror's [response or] lack of response," the attorney could raise it with the court, which then would decide whether to "ask that juror to return" to the sidebar for further questioning, Pet. C.A. Special App. SA7-SA8 (8/22/16 Tr. 5-6). "In all, this process took approximately five hours." Pet. App. 3a.

After the district court had finished questioning all 110 potential jurors, excused venire members for cause and for hardships, and filled the jury box to allow the parties to exercise their peremptory strikes, defense counsel asked if she could "ask one question we haven't spoken about yet? We don't have anybody's employment information really." Pet. C.A. Special App. SA203 (8/22/16 Tr. 201). The court responded: "You have as much as you're going to get. As much as lawyers who try cases in this court get." Ibid. When defense counsel began to dispute the point, the court interjected: "Excuse me. We're not having this

discussion. What you're going to do now is we're going to line up the jurors. They're going to hold up their paddles. You are going to exercise your strikes." Ibid. The parties then exercised their strikes, resulting in a 12-member jury with four alternate jurors. See id. at SA207-SA213 (8/22/16 Tr. 205-211). Following a three-day trial, the jury found petitioner guilty on the sole count in the indictment. See Judgment 1.

2. In an unpublished summary order, the court of appeals affirmed petitioner's conviction and remanded for resentencing. Pet. App. 1a-6a.

As relevant here, the court rejected petitioner's claim that the district court "erred by failing to elicit, during voir dire, certain information from the prospective jurors, such as their occupations, views on immigration or visa fraud generally, and relationship to law enforcement personnel," such that petitioner would have been "unable to meaningfully exercise his peremptory challenges." Pet. App. 2a. The court of appeals explained that "[v]oir dire is necessarily a matter in which the trial court has extremely broad discretion," ibid. (citation omitted), and that the relevant question "is not whether the information [petitioner] seeks 'might be helpful,' but whether the District Court's failure to elicit this information rendered [petitioner's] trial 'fundamentally unfair,'" id. at 2a-3a (quoting Mu'Min v. Virginia, 500 U.S. 415, 425-426 (1991)).

Applying that principle, the court of appeals identified "three limited circumstances in which 'voir dire may be so insufficient as to call for a reversal'": (1) when voir dire is "'so demonstrably brief and lacking in substance as to afford counsel too little information even to draw any conclusions about a potential juror[]'"; (2) when the district court "'fails to inquire about, or warn against, a systematic or pervasive bias'"; and (3) when the record suggests "'a substantial possibility that a jury misunderstood its duty to weigh certain evidence fairly.'" Pet. App. 3a (brackets and citation omitted). The court of appeals explained that petitioner had not satisfied any of those "necessarily difficult standards" in his challenge to the five-hour questioning of the venire in this case. Ibid.

The court of appeals rejected petitioner's specific challenge to the district court's asking prospective jurors to identify "any relationship with any federal, state, or local law enforcement officers * * * that would prevent [them] from being fair and impartial," Pet. C.A. Special App. SA22-SA23 (8/22/16 Tr. 20-21). See Pet. App. 3a-4a. The court of appeals explained that the "qualifying language" at the end of the question did not have "any perceivable impact on [petitioner's] trial." Id. at 4a. The court observed that "the record shows that prospective jurors who heard the compound question brought numerous relations with law enforcement personnel to the [district court's] attention," and the district court "struck many of these jurors for apparent

cause." Ibid. The court of appeals further explained that the particular form of the challenged questioning, and the weight of the evidence here, distinguished this case from United States v. Littlejohn, 489 F.3d 1335 (2007), in which the D.C. Circuit concluded that a question about law-enforcement required reversal. Ibid. Although the court of appeals did not find any reversible error, it emphasized that when "the parties do not have complete information regarding the occupations of the prospective jurors * * * the better practice is to determine whether such relationships exist and then to probe whether those relationships might prevent a prospective juror from being fair and impartial -- not to rely on the jurors to make the latter assessment in the first instance." Ibid.

Although it affirmed the conviction, the court of appeals remanded for resentencing, agreeing with the parties that a particular sentencing consideration had not been supported by a proper factual finding. See Pet. App. 5a.

ARGUMENT

Petitioner renews his contention (Pet. 15-21) that his trial was fundamentally unfair as a result of the district court's questioning during voir dire. That factbound contention is incorrect and the decision below does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The "obligation to impanel an impartial jury lies in the first instance with the trial judge," who "must rely largely on his immediate perceptions," including of "demeanor evidence," in determining a given juror's impartiality. Rosales-Lopez v. United States, 451 U.S. 182, 188-189 (1981) (plurality opinion). For that reason, "[d]espite its importance, the adequacy of voir dire is not easily subject to appellate review." Id. at 188. Accordingly, "federal judges have been accorded ample discretion in determining how best to conduct the voir dire," id. at 189, and a district court "retains great latitude in deciding what questions should be asked," Mu'Min v. Virginia, 500 U.S. 415, 424 (1991).

For example, in Rosales-Lopez, this Court found no abuse of discretion in a district court's refusal to ask potential jurors about possible racial or ethnic prejudice when the defendant had not identified "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors." 451 U.S. at 190 (plurality opinion); see id. at 194 (Rehnquist, J., concurring in the result) (expressing agreement with that principle). Similarly, the Court found no abuse of discretion in a district court's failure to ask about potential "prejudice against people with beards" because such prejudice does not have "constitutional stature" beyond the "essential demands of fairness" that due process requires. Ham v. South Carolina, 409 U.S. 524, 526-528 (1973) (citation omitted); see Aldridge v. United States, 283 U.S. 308, 310 (1931).

Consistent with those precedents, the court of appeals correctly determined that the district court did not abuse its broad discretion here. As in Rosales-Lopez, petitioner identifies no substantial indication that any juror was affected by prejudice against him because of a relationship with law enforcement. And as in Ham, petitioner's allegations of juror bias arising from sympathy to law enforcement does not by itself have constitutional stature. Moreover, this was not a case in which the court "failed to ask any question which could be deemed to cover the subject." Mu'Min, 500 U.S. at 422-423 (citation omitted). To the contrary, the court engaged in an extensive colloquy with venire members to identify potential sources of law-enforcement-related bias. See Pet. App. 3a. Among the more than two dozen questions the court asked were:

- "Do any of you have a relationship with a prosec[u]torial office; that is to say, a District Attorney's Office, a U.S. Attorney's Office, a state prosecution office, United States Attorney's Office, or with anyone working there that would prevent you from being fair and impartial in this case?" Pet. C.A. Special App. SA22 (8/22/16 Tr. 20).

- "Do any of you have any relationship with any federal, state, or local law enforcement officers or federal agency employees, including police officers, federal agents, federal agency employees of any kind, that would prevent you from being fair and impartial in this case?" Pet. C.A. Special App. SA22-SA23 (8/22/16 Tr. 20-21).

- "Have you or any family member or close friend ever worked for a criminal defense lawyer or a private investigator?" Pet. C.A. Special App. SA23 (8/22/16 Tr. 21).

- "Have you or any of your close personal friends or family members had an experience with the Department of Homeland Security, the Department of State, Diplomatic Security Service, or any other governmental entity, foreign or domestic, which would prevent you from being fair and impartial in this case?" Pet. C.A. Special App. SA23 (8/22/16 Tr. 21).

- "Have any of you or your family members or a close friend ever applied for a visa; whether it turned out well, not well, neutral, just ever applied for a visa?" Pet. C.A. Special App. SA24 (8/22/16 Tr. 22).

- "Again, this case is about visa fraud. Is there anything about the nature of that that would prevent you or might cause you to favor one side or the other in such a case? * * * Anything about the nature of the case that would prevent you from being fair and impartial that would cause you right from the beginning to favor one side over the other?" Pet. C.A. Special App. SA24-SA25 (8/22/16 Tr. 22-23).

Those questions served to identify possible sources of juror bias related to law enforcement. Nor did the district court rely only on those questions; instead, it interviewed each prospective juror at a sidebar regardless of his or her answers, and made clear to the lawyers that they could request further questions if they had "concern[s] about [that] potential juror's [response or] lack of response." Pet. C.A. Special App. SA7 (8/22/16 Tr. 5); see Pet. App. 3a. The Constitution does not demand more. See Mu'Min, 500 U.S. at 424; Rosales-Lopez, 451 U.S. at 190; Ham, 409 U.S. at 528.

Petitioner errs in asserting (Pet. 16) that he was deprived of his constitutional right to an impartial jury because he could not effectively exercise his peremptory strikes. As this Court has explained, because "peremptory challenges are not required by

the Constitution," the mere fact that additional questions might have been "of some use in exercising peremptory challenges," standing alone, is insufficient to establish a constitutional violation. Mu'Min, 500 U.S. at 424-425; see Morgan v. Illinois, 504 U.S. 719, 729 (1992) ("The Constitution * * * does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury."). And to the extent that petitioner otherwise challenges the form of the district court's specific question asking jurors to reveal relationships with law enforcement that would prevent them from being fair or impartial, that challenge lacks merit. As the court of appeals observed, "prospective jurors who heard the compound question brought numerous relations with law enforcement personnel to the [district court's] attention," and the district court "struck many of these jurors for apparent cause." Pet. App. 4a. Petitioner has not identified a substantial likelihood that any juror harbored overt or implicit bias. Accordingly, though it might have been "better practice" to word the question differently, the compound question the district court asked was within the bounds of the court's discretion and did not have "any perceivable impact on [petitioner's] trial." Ibid.

2. Contrary to petitioner's assertion (Pet. 11-15), the factbound decision below does not conflict with United States v. Littlejohn, 489 F.3d 1335 (D.C. Cir. 2007), or United States v. Scott, 854 F.2d 697 (5th Cir. 1988).

In Littlejohn, the district court asked prospective jurors if they or a "close family member or close personal friend * * * is either presently or previously employed by any law enforcement agency" and -- only "if the answer to that is yes" -- to raise their hands if "[a]s a result of that experience * * * you personally would be unable to be fair and impartial to both sides." 489 F.3d at 1341 (citation omitted); see ibid. ("If your answer to the first question is yes, don't raise your hand right away, but listen very carefully to the second question.") (citation omitted); ibid. ("Now, here is the first question. And, again, you don't need to raise your hand.") (citation omitted). Although it expressed "deep reservations about compound questions," the D.C. Circuit acknowledged that whether such voir dire questions constitute reversible error depends heavily on the "'particular circumstances'" of the case. Id. at 1343-1344 (citation omitted).

Evaluating the particular circumstances of Littlejohn, the D.C. Circuit determined that the compound question there required reversal because, among other things, the evidence of guilt was "far from overwhelming" and "police officer credibility lies at the heart of the case." 489 F.3d at 1346. In making that determination, the D.C. Circuit distinguished its prior holding in United States v. West, 458 F.3d 1 (2006), which found "precisely the same compound question" not to be reversible error, Littlejohn, 489 F.3d at 1342, in part because in West "the record contained 'overwhelming' evidence of the defendant's guilt" and -- "'perhaps

most important' -- 'the credibility of the police witnesses was not at issue at trial.'" Id. at 1344 (citation omitted). The D.C. Circuit has since confirmed in United States v. Harris, 515 F.3d 1307 (2008), that determining whether such compound voir dire questions constitute reversible error requires a "case-specific analys[i]s." Id. at 1312; see id. at 1313 (affirming conviction when "the evidence of [the defendant's] guilt was strong and the verdict did not turn on police credibility," thereby presenting a case "far more like West than Littlejohn").

The factbound decision below does not conflict with the approach in the D.C. Circuit. Consistent with the D.C. Circuit, the court of appeals here acknowledged that "the better practice" is to avoid compound questions in voir dire. Pet. App. 4a. Also consistent with the D.C. Circuit's approach, the court here conducted a case-specific analysis and determined that the compound question had no "perceivable impact on [petitioner's] trial." Ibid. And petitioner cannot show that his case would have come out differently in the D.C. Circuit. As in West and Harris, evidence of petitioner's guilt was overwhelming: petitioner's visa application -- which he signed -- indisputably did not reveal his prior arrests or alias, and documentary evidence indisputably showed that he had twice been arrested in Jamaica and had used the alias "Andy Fowl." See Pet. C.A. App. A38-A43, A59-A61, A120-A122, A147-A155 (8/23/16 Tr. 22-27, 43-45, 104-106, 131-139).

Also, contrary to petitioner's contention (Pet. 7-8), the jury's finding of guilt did not turn on police credibility. Compare Littlejohn, 489 F.3d at 1344. As petitioner himself explains (Pet. 6), his defense at trial was not to dispute the objective facts of his prior arrests, his use of an alias, or the falsehoods on his visa application. Instead, his defense was that the commercial preparer he employed in Jamaica was responsible for those falsehoods and that petitioner therefore lacked the requisite knowledge or intent. See Pet. 6.

To rebut that defense, a government witness explained that the visa application requires the applicant himself to certify the truthfulness of everything contained in it even if someone else helps him to prepare and submit the form. See Pet. 7-8; Pet. C.A. App. A46 (8/23/16 Tr. 30). To prove that assertion, the witness simply read the form aloud, verbatim, to the jury:

> Q. Could you begin reading this paragraph?
>
> A. By clicking sign and submit application, you are electronically signing the application. You are required to electronically sign your application yourself * * * even if the application has been prepared by someone other than yourself. Your electronic signature certifies that you have read and understood the questions in this application and that your answers are true and correct to the best of your knowledge and belief.

Pet. C.A. App. A46-A47 (8/23/16 Tr. 30-31). The jury's evaluation of the witness's statement did not implicate any views on the credibility of law enforcement in general or the witness in particular; the form was displayed for the jurors, who could read

it and determine for themselves whether petitioner was therefore responsible for knowingly submitting the falsehoods on his application.

The Fifth Circuit's decision in Scott likewise does not conflict with the decision below. There, in response to a direct question whether any "close relatives" were "serving as law enforcement officials," a juror "failed to say that his brother was a deputy sheriff." 854 F.2d at 698. There was "no dispute" that the juror "would have been challenged and excused for cause had he revealed" that fact. Ibid. The Fifth Circuit explained that its task was therefore to determine "whether [the juror] was biased because of his relationship with his brother," id. at 698-699 -- not, as here, whether the district court abused its discretion in formulating its voir dire questions. Moreover, the Fifth Circuit engaged in a factbound, case-specific inquiry to determine whether the juror there actually was biased. In determining that he was, the court observed that the record evidence "strongly suggest[ed]" that the juror "consciously censored" his answer because he "wanted to serve on the jury," and further explained that the juror's "hostil[ity] to what he correctly perceived to be the interests of the defense and the court * * * in itself constitutes bias." Id. at 699. No similar circumstances exist here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DEEPTHY KISHORE
Attorney

SEPTEMBER 2019