

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL J. BAXTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court clearly erred in disallowing petitioner's attempted peremptory strike of an African-American juror under Batson v. Kentucky, 476 U.S. 79 (1986), where the court found that the strike was racially motivated.

2. Whether the district court erred in considering conduct at issue in a charge that the jury did not find beyond a reasonable doubt, but that the court found by a preponderance of the evidence, in sentencing petitioner to a term of imprisonment three months higher than the range recommended by the Sentencing Guidelines.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Fla.)

United States v. Baxter, No. 17-cr-00026 (Apr. 15, 2018)

United States Court of Appeals (11th Cir.)

United States v. Baxter, No. 18-11600 (June 13, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-6647

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A4-A18) is not published in the Federal Reporter but is reprinted at 778 Fed. Appx. 617.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2019. A petition for rehearing was denied on August 15, 2019 (Pet. App. A3). Pet. App. 3. The petition for a writ of certiorari was filed on November 13, 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 Northern District of Florida, petitioner was convicted of falsifying a record, in violation of 18 U.S.C. 1519. Pet. App. A19, A27-A31. The district court sentenced petitioner to 60 months of imprisonment, to be followed by one year of supervised release. Id. at A20-A21. The court of appeals affirmed. Id. at A4-A18.

1. Petitioner is a former corrections officer at the Apalachee Correctional Institution in Florida. Pet. App. A29. In July 2015, petitioner, who was then a major in the Florida Department of Corrections, punched and kicked an African-American inmate in the face multiple times during an altercation at the facility. Id. at A9, A12, A29-A31; 11/24/18 Tr. 32; 04/12/18 Tr. 45. The inmate, Darren Glover, suffered significant injuries. 11/24/18 Tr. 30; 04/12/18 Tr. 51. To document the altercation, petitioner wrote a use-of-force report in which he stated that Glover advanced toward him and "'forcefully' struck his head against [petitioner's]". Pet. App. A12. Petitioner claimed in the report that he had punched Glover in self-defense and "kicked him in the head and shoulders in response to continued resistance." Ibid.

A federal grand jury charged petitioner with one count of depriving a person of rights under the federal Constitution or laws on account of race, in violation of 18 U.S.C. 242, and one

count of falsifying a record, in violation of 18 U.S.C. 1519. Pet. App. A29-A31. At trial, the government planned to introduce evidence that petitioner's conduct had been motivated by Glover's upcoming marriage to a white woman and that petitioner had used a racial slur in describing Glover's interracial relationship. Id. at A9; 01/24/18 Tr. 92-93.

2. The jury pool included one African-American man and two African-American women. Pet. App. A33. Defense counsel used a peremptory challenge to strike the African-American male juror. Ibid. After one of the African-American female jurors made it onto the petit jury, defense counsel moved to strike the remaining African-American juror (Juror M). Id. at A9, A33. The government challenged defense counsel's attempt to strike Juror M under Batson v. Kentucky, 476 U.S. 79 (1986), as an improper racially motivated strike. Pet. App. A33.

The district court asked defense counsel to provide a race-neutral explanation for the strike. Pet. App. A33. Defense counsel stated that Juror M "ha[d] slight negative body language," and that "her arms were crossed and stretching away from [another juror] for a period of time during questioning." Ibid. Defense counsel added that Juror M's "body language seemed to be tight and negative compared to the other prospective jurors" and that he did not want her on the jury due to her "bad body language." Id. at A33-A34.

The district court rejected that explanation, upheld the government's Batson challenge, and disallowed the peremptory strike. Pet. App. A34-A35. The court found that defense counsel's explanation for striking Juror M was "not supported by the facts" and that it was "not true" that Juror M had exhibited negative body language. Ibid. Although the court did not initially make an "explicit finding" that the government had stated a prima facie case of racial discrimination under Batson, after rejecting defense counsel's asserted non-discriminatory reason for the strike, the court subsequently clarified that the government had established its prima facie case. Id. at A35. And after finding that defense counsel's attempted strike of Juror M was "race-based," the court placed Juror M on the petit jury. Ibid. As a result, the petit jury included two of the three African-American jurors from the jury panel. See id. at A33.

3. During trial, petitioner testified that he had "kicked Glover to overcome [Glover's] physical resistance and grabbing." Pet. App. A14. But other "[w]itnesses consistently testified * * * that [petitioner] punched Glover in the face twice and kicked Glover in the head or face twice while he was lying on the ground." Ibid. Those witnesses also testified that they did not see Glover "strike, punch, kick, or grab" petitioner during the altercation. Ibid. While some evidence indicated that Glover had "raised his voice, was 'flailing around,' and was talking with his

hands," witnesses gave varying accounts about whether Glover ever actually headbutted petitioner, as petitioner's use of force report had claimed. Ibid.

The jury found petitioner guilty of falsifying a record in violation of 18 U.S.C. 1519, but acquitted him of the charge of depriving a person of their rights in violation of 18 U.S.C. 242. Pet. App. A19, A27-A31.

4. Petitioner was subject to a statutory maximum term of imprisonment of 240 months. 18 U.S.C. 1519. At sentencing, the district court determined that petitioner's advisory sentencing range under the Sentencing Guidelines was 46 to 57 months of imprisonment. Pet. 2; 04/12/18 Tr. 35. The court, however, imposed an upward variance of three months, resulting in an above-Guidelines sentence of 60 months of imprisonment. Pet. App. A14-A15, A40; 04/12/18 Tr. 52-53.

The district court explained its sentence by pointing to a variety of grounds, including petitioner's efforts to conceal his conduct by "caus[ing] lower ranking people at the [d]epartment to participate in providing false reports"; the need for adequate deterrence; the recommended Sentencing Guidelines range; and mitigating factors such as petitioner's personal history, the absence of any past instances of excessive force, and the impact on his family. 04/12/18 Tr. 49-54; Pet. App. A36-A40. The court also stated that, notwithstanding the jury's verdict acquitting

petitioner of the Section 242 count, the preponderance of evidence supported a finding that he had "willfully inflicted unnecessary brutal force and badly injured * * * Glover." Pet. App. A37.

5. The court of appeals affirmed. Pet. App. A4-A18.

The court of appeals first found no clear error in the district court's upholding of the government's Batson challenge, rejecting petitioner's argument that the government had failed to make a *prima facie* showing that petitioner's decision to strike Juror M was motivated by race. Pet. App. A5, A8-A9. The court of appeals explained that the district court could have reasonably inferred that petitioner wanted to strike African-Americans from the jury pool "because [he] was a white corrections officer, the victim (Glover) was a black inmate, and the government's theory of the case included allegations that [petitioner's] use of force was motivated by Glover's impending interracial marriage and that [petitioner] had used a racial slur when referring to the relationship." Id. at A9. The court of appeals also determined that it was "within the district court's sound discretion" to reject negative body language as a legitimate explanation for striking Juror M. Ibid. And emphasizing that the district court had the opportunity to observe Juror M and to evaluate petitioner's attorney's "credibility," the court of appeals found that the district court "did not clearly err in finding that [petitioner's] motivation for striking Juror M was actually because of her race

and properly disallowed the strike." Ibid.

The court of appeals also separately rejected petitioner's argument that the district court had erred in considering at sentencing conduct at issue in another charge for which petitioner was acquitted. Pet. App. A5-A6, A14-A18. The court of appeals observed that in United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157; see Pet. App. A13. And the court of appeals determined that the district court had not clearly erred in finding by a preponderance of the evidence that petitioner did not have a legitimate reason for kicking Glover when Glover was lying on the ground, because that finding was "consistent[]" with witness testimony that petitioner punched and kicked Glover in the head or face multiple times, as well as other testimony that Glover never grabbed petitioner. Pet. App. A14.

ARGUMENT

Petitioner contends (Pet. 5-11) that the government failed to present a *prima facie* case of racial discrimination that would support the district court's application of Batson v. Kentucky, 476 U.S. 79 (1986), and therefore that the district court erred when it disallowed petitioner's strike of Juror M. The court of

appeals correctly determined that the district court did not clearly err in finding that the government made a *prima facie* showing of racial discrimination and in rejecting petitioner's reasons for striking Juror M. That fact-bound determination does not conflict with any decision of this Court or of any other court of appeals. Petitioner separately contends (Pet. 11-18) that the district court erred by considering conduct underlying the count on which he was acquitted in determining the appropriate sentence for the crime of which he was convicted. The court of appeals correctly recognized, however, that this Court's decision in United States v. Watts, 519 U.S. 148 (1997) (per curiam), permitted the district court to consider acquitted conduct when imposing petitioner's sentence, and this Court has repeatedly and recently denied petitions for a writ of certiorari raising similar claims. The same course is warranted here.

1. Petitioner's challenge to the district court's fact-bound application of Batson does not warrant this Court's review.

a. The use of preemptory challenges "is subject to the commands of the Equal Protection Clause," Batson, 476 U.S. at 89, which "prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges," Georgia v. McCollum, 505 U.S. 42, 59 (1992). When the government objects under Batson to the defendant's attempt to strike a juror, the government bears the burden to show a *prima*

facie case of racial discrimination based on the totality of the circumstances. 476 U.S. at 93-94; see Miller-El v. Dretke, 545 U.S. 231, 239 (2005). If the government meets that burden, then a defendant "must articulate a racially neutral explanation for [the] peremptory challenge[]." McCollum, 505 U.S. at 59. The district court must then determine whether the government has carried its burden of proving racial discrimination. Batson, 476 U.S. at 98.

This Court has emphasized that Batson determinations are inherently fact-based. In Batson itself, the Court explained that, because a district court's findings on the ultimate question of discriminatory intent "largely will turn on evaluation[s] of credibility, a reviewing court ordinarily should give those findings great deference." 476 U.S. at 98 n.21. Often, "the best evidence" of whether a race-neutral explanation for a peremptory challenge should be believed "will be the demeanor of the attorney who exercises the challenge." Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion). And because Batson determinations primarily depend on "evaluation[s] of * * * demeanor and credibility," they are "'peculiarly within a trial judge's province.'" Ibid. (citation omitted).

Here, the court of appeals correctly determined that the district court did not clearly err in finding that the government made a prima facie showing of racial discrimination under Batson.

As the court of appeals explained, the district court could have inferred from the totality of the circumstances that petitioner -- a white corrections officer on trial for assaulting an African-American victim in a case where there was evidence of expressed racial hostility toward the victim's impending interracial marriage -- would be motivated to attempt to exclude African-Americans from the jury. Pet. App. A9. The district court also had the advantage of observing defense counsel and Juror M, the subject of defense counsel's peremptory challenge, enabling it to recognize that "Juror M had not given any responses that would offer a facially race-neutral reason for using a peremptory strike." Ibid. Indeed, the court subsequently rejected as baseless defense counsel's race-neutral explanation that Juror M had exhibited negative body language, finding that Juror M "had not demonstrated negative body language," and that petitioner's argument that Juror M "had stretched away, crossed her arms, and appeared tight and negative" was pretextual. Ibid. The court of appeals was correct not to second-guess the district court's factual findings under Batson.

b. Petitioner argues (Pet. 9-10) that the court of appeals' decision in United States v. Folk, 754 F.3d 905 (11th Cir. 2014), cert. denied. 574 U.S. 1100 (2015), which stated that "[t]he striking of two out of three black veniremembers does not demonstrate a pattern of discrimination," id. at 914, required the

court to find clear error here in the district court's finding of a prima facie case of racial discrimination. As a threshold matter, any intra-circuit disagreement would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). In any event, the decision below does not conflict with Folk.

In Batson, this Court instructed that trial courts "should consider all relevant circumstances." 476 U.S. at 96-97. The Court stated that one relevant consideration is whether the party has engaged in "a 'pattern' of strikes against black jurors included in the particular venire," id. at 97, but this Court did not hold that a pattern of strikes of minority jurors is the only way a party can present a prima facie case of racial discrimination under Batson. This Court instead left it to trial courts to "decide if the circumstances concerning [a party's] use of peremptory challenges creates a prima facie case of discrimination against black jurors." Ibid. And as the court of appeals here reasoned (Pet. App. A8-A9), under the circumstances, the striking of one African-American juror did not preclude a finding of a prima facie case of discrimination.

Petitioner also suggests (Pet. 10 n.3) that the court of appeals' decision conflicts with decisions from other circuits holding that body language is a permissible race-neutral justification under Batson. But those decisions likewise present

no conflict with the decision below. The courts in the decisions cited by petitioner simply applied Batson's deferential standard of review to the unique facts at issue in those cases. In each case, the reviewing court considered claims of racial discrimination based on the totality of the circumstances and relied upon the credibility determinations and observations of the trial court.¹ The court of appeals in this case did not categorically hold that body language can never provide a legitimate race-neutral explanation for a strike. Rather, the court stated that "[i]t was within the district court's sound discretion to determine that [petitioner's] explanation for the strike -- that Juror M had exhibited negative body language -- was not genuine based on the [district] court's observation of Juror M." Pet. App. A9. That fact-bound determination does not conflict

¹ See, e.g., Braxton v. Gansheimer, 561 F.3d 453, 462 (6th Cir. 2009) ("[W]hen the totality of the circumstances are considered, the record reflects that the trial court, albeit in abbreviated fashion, adequately and reasonably conveyed its decision that the prosecution's race-neutral, demeanor-based justification for the peremptory strike of Juror No. 14 was credible."); United States v. Bentley-Smith, 2 F.3d 1368, 1376 (5th Cir. 1993) (per curiam) (affirming a trial court's rejection of a race-neutral explanation that an African-American juror "would be a follower," because the district court "evaluated all the information it had before it, including credibility judgments"); United States v. Changco, 1 F.3d 837, 840 (9th Cir.) (refusing to consider defendant's Batson arguments on appeal when defense counsel failed to challenge the prosecutor's race-neutral explanation in the district court), cert. denied, 510 U.S. 1019 (1993).

with similarly fact-bound decisions of other courts of appeals.

2. Petitioner additionally argues (Pet. 11-18) that the district court violated the Sixth Amendment by sentencing him based on conduct that the court found by a preponderance of the evidence, but that was at issue in a charge that the jury did not find beyond a reasonable doubt. This Court has recently and repeatedly denied petitions for a writ of certiorari raising that same question. See, e.g., Asaro v. United States, No. 19-107 (Feb. 24, 2020); Martinez v. United States, No. 19-5346 (Feb. 24, 2020); see also Br. in Opp. at 14, Asaro, supra (No. 19-107) (listing cases). For the reasons set forth in the government's briefs in opposition in those cases, the same result is warranted here. See Br. in Opp. at 7-15, Asaro, supra (No. 19-107); Br. in Opp. at 8-15, Martinez, supra (No. 19-5346).² As petitioner acknowledges, this Court held in Watts that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence." Pet. 14 (citation omitted).

Petitioner argues (Pet. 11-18) that Watts is inconsistent with Blakely v. Washington, 542 U.S. 296 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, this Court held that "[o]ther than the fact of a prior conviction, any fact that

² We have served petitioner with a copy of the government's briefs in opposition in Asaro and Martinez.

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). In Blakely, the Court subsequently extended that principle to a state-law system of mandatory sentencing guidelines. See 542 U.S. at 303-304. But the statutory maximum for petitioner's offense of conviction under 18 U.S.C. 1519 is 240 months of imprisonment, as the court of appeals noted, and the federal Sentencing Guidelines are advisory rather than mandatory. See Pet. App. A14-A15; United States v. Booker, 543 U.S. 220 (2005). Petitioner's 60-month sentence does not exceed the statutory maximum and does not violate Apprendi, Blakely, or any other decision of this Court. See Br. in Opp. at 9-10, Asaro, supra (No. 19-107).

Finally, petitioner argues (Pet. 13) that his 60-month sentence is "presumptively unreasonable" under Rita v. United States, 551 U.S. 338 (2007), because it exceeds the recommended range under the Sentencing Guidelines. But in Rita, this Court explained that the fact that "courts of appeals [may] adopt a presumption of reasonableness" for within-Guidelines sentences "does not mean that courts may adopt a presumption of unreasonableness" for sentences that are above or below the Guidelines range. Id. at 354-355; see also Gall v. United States, 552 U.S. 38, 51 (2007) ("[I]f the sentence is outside the Guidelines range, the court may not apply a presumption of

unreasonableness."). Petitioner's argument that his 60-month sentence is "presumptively unreasonable" because it includes a three-month variance above the recommended Guidelines range is foreclosed by this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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