NO:

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES EDWARD SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Batson v. Kentucky,* 476 U.S. 79, 97 (1986), the Court set forth a three-step protocol to prevent racial discrimination in jury selection. It applies whenever an objection is made to the use of a peremptory challenge in any jury trial in state or federal court, in both civil and criminal cases. In *Batson*'s first step, the objecting party must make a prima facie showing that the totality of relevant facts give rise to an inference of discriminatory purpose. This showing is not onerous and the inference may be satisfied circumstantially. In the second and third steps, the burden shifts to the striking party to explain actual race-neutral reasons for the strike, and the trial court evaluates if the stated reasons are pretextual. The trial court may only deny the *Batson* objection, without conducting the second and third steps, if it determines that the objector has failed to make a prima facie showing of discrimination. An adverse first-step determination is subject to review on direct appeal.

The Nation's courts are intractably divided about the standard of appellate review applicable to an adverse first-step determination. Four federal circuits and five states have applied de novo review, while three federal circuits and three states apply a highly deferential clearly-erroneous standard. Does de novo review apply, as the First, Third, Seventh and Tenth federal circuits hold, a standard shared by the states of Colorado, Kansas, Michigan, Tennessee, and Utah? Or, is the trial court's step-one determination subject only to the clearly erroneous standard of review, as the Eleventh Circuit ruled here, a standard shared by the Fifth and Ninth federal circuits, as well as the states of Illinois, Minnesota, and Wisconsin?

LIST OF PARTIES AND RELATED CASES

There are no parties to the proceeding other than those named in the caption of the case. Neither party is a corporation. There are no related cases.

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Charles Edward Smith respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-14169 in that court on September 20, 2019, *United States v. Charles Edward Smith a.k.a. Suncoast*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida. The Court of Appeals extended the time for filing a petition for rehearing, a timely petition was filed, and denied by the panel on November 21, 2019.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District

Court for the Southern District of Florida, appears at Appendix A of the petition and is unpublished.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals was entered on September 20, 2019 (App. A), a timely petition for rehearing was filed (*see* App. B) and denied on November 21, 2019. (App. C). This petition is timely filed pursuant to Sup. Ct. R. 13.1. The District Court had jurisdiction because petitioner was charged with violating federal criminal laws. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions:

> **U.S. Const. amend V (Equal Protection component of the Due Process clause).** No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .
>
> **U.S. Const. amend XIV, sec. 1. (Due Process and Equal Protection clauses).** No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Charles Smith and co-defendant Michael "Punkmeat" Clark were charged in a four-count federal indictment. Both men were charged in Count 1 with conspiring to commit the substantive offense of sex trafficking of a minor in violation of 18 U.S.C. §§ 1591(a)(1),(b)(2),(c) and 1594(c). Count 2 charged both men with the substantive offense of sex trafficking of a minor in violation of 18 U.S.C. §§ 1591 (a)(1),(b)(2),(c) and 1594(c). Co-defendant Clark, alone, was charged in Count 3, with sex trafficking of a minor involving the same alleged victim during a later time period. And, Mr. Smith, alone, was charged in Count 4, with possessing a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). (DE 23:1-3).

The co-defendant, Clark, pleaded guilty and agreed to cooperate (DE 60), but Mr. Smith elected to have his case tried by a jury. (App. A).

The subject of this petition concerns the jury selection at Mr. Smith's trial. Following voir dire, and challenges for cause, the parties exercised their peremptory strikes. (DE 173:85). Each qualified potential juror was presented in order, first to the government, and then to the defense. *Id.* Two of the government's first three peremptory challenges were of African American members of the jury venire. Mr. Smith's counsel objected under *Batson v. Kentucky*, 476 U.S. 79 (1986), noting that "this is the second African-American person who has been struck by the Government." (App. F at 86). These two strikes left an all-white panel of jurors

selected up to that point. (App. F). The government had not challenged for cause either of the African American jurors. (App. F).

The district court summarily denied Mr. Smith's *Batson* challenge. Instead of asking the prosecutor to tender race-neutral reasons for his peremptory challenges, the district judge speculated about possible race-neutral reasons for the government's strike of one of the two African American jurors and cautioned the prosecutor about selecting an "all-white jury." (App. F at 86).

> THE COURT: I'm not inclined, at this point. Thomas had a couple of issues which it was apparent, the foster care issue, he had another -- his mother's job; so I'm not, at this point.
>
> But I do not want an all-white jury, Mr. Morris.
>
> MR. MORRIS [the prosecutor]: We are going to make sure that doesn't happen.
>
> THE COURT: All right. I don't think, at this point, there is a basis for me to request a race neutral reason by the Government.

(App. F at 86-87). Despite its stated concern, the trial court did not proceed to the second step of *Batson* by requesting that the prosecutor provide race neutral reasons for his peremptory challenges to the African American members of the venire. (App. F at 86).

Trial spanned two and a half days. Jury deliberations (including 16 separate jury questions) consumed an additional two and a half days. In particular, the jury submitted 11 separate questions seeking clarification about their deliberations relating to the Count I conspiracy charge. On the fifth day of trial, the jury reported

that it was "hung," and after being instructed to continue its deliberations, reported to the court: "After deep consideration we are very hung on one of the count." (App. E Doc. 133, 120) (as in original). In the end, the jury acquitted Mr. Smith of Count 4 (the gun possession count) and announced it was unable to reach a verdict on Count 2 (the substantive count of sex trafficking). (App. E Doc. 124). It did, however, find Mr. Smith guilty of Count 1 (the conspiracy count). *Id.*

At the time of sentencing, Mr. Smith was time 63 years-old. (DE 160). The district court sentenced him to imprisonment for 235 months. (App. D). Should he be released, Mr. Smith will be subject to lifetime supervised release. *Id.*

Mr. Smith timely appealed. He raised four issues: (1) Erroneous denial of his challenge to jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) Insufficiency of evidence; (3) Erroneous application of sentencing enhancements; and (4) Unreasonableness of his sentence. The Court of Appeals affirmed, without oral argument. (App. A). It held that Mr. Smith's *Batson* claim did not meet *Batson*'s first-step requirement of a prima facie case of discrimination; the evidence was more than sufficient to support the jury's verdict; the sentence was properly enhanced under the Sentencing Guidelines; and the sentence of 235 months was reasonable. (App. A).

The analytical approach the Eleventh Circuit panel applied to the *Batson* claim relied on binding Eleventh Circuit precedent holding that the district court's ruling on step one of a *Batson* challenge "'is entitled to great deference, and must be

sustained unless it is clearly erroneous.' *United States v. Robertson*, 736 F.3d 1317, 1324 (11th Cir. 2013)." (App. A:3-4).

Applying that framework, the Court of Appeals held that the district court did not err in concluding that Mr. Smith failed to establish a prima facie case of discrimination because "he could show no other evidence other than two black jurors had been struck." (App. A:4-5). The panel held that the district court was within its discretion to consider the jurors' voir dire responses in determining if a prima facie case of discrimination had been established, and that discretion was owed deference by the Court of Appeals. In short, the decision concluded, "the fact that both stricken jurors[] were black is not enough to demonstrate a prima facie case of discrimination." (App. A:4-5).

Summary of the Relevant Trial Evidence

In a contentious jury trial, the government presented evidence that Mr. Smith owned the property at 330 Pine Street, that he had sex with A.A., an underage prostitute, that he paid her for sex, and was paid when she had sex with others. (DE 173:124, 138-188).

Mr. Smith denied the claims against him. Although he acknowledged that he owned the home at 330 Pine Street, he explained that A.A.'s mother had abandoned her at the house. He did not live at 330 Pine Street, but rather lived in a home across the street. Although he admitted to having had sex with A.A.'s mother, he denied ever having sex with A.A. And he denied having been paid when A.A. had sexual relations with others.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve the intractable conflict among the Nation's appellate courts about the standard of review applicable to an adverse first-step *Batson* determination.

1. The Court has ruled that the use of a peremptory challenge to remove even a single juror on account of race violates the Fourteenth Amendment's Equal Protection clause. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). To animate its holding, the Court has established a three-step challenge procedure that applies to every jury trial in the Nation, both in state and federal courts, whether a civil or criminal case. *Edmonson v. Leesville Concrete Company*, 500 U.S. 614 (1991) (extending *Batson* to civil cases); *see Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying equal protection component of Fifth Amendment's Due Process clause); *Flowers v. Mississippi,* 588 U.S. ___, 139 S. Ct. 2228, 2243 (2019) (noting *Batson* "now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases").

In *Batson*'s Step One, if a party objects claiming an opponent has exercised a peremptory challenge based on race, the objecting party must "make out a prima facie case by showing that the totality of relevant facts give rise to an inference of discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 168 (2005). This first step is not intended to "be so onerous that a defendant would have to persuade the judge–on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of

purposeful discrimination." *Johnson v. California*, 545 U.S. at 162. An objecting party can meet its burden by pointing to a "pattern of strikes against black jurors included in the particular venire." *Batson*, 476 U.S. at 97.

If the trial court determines that a prima facie showing has been made, the court proceeds to the second and third steps. Step Two shifts the burden to the party exercising the peremptory challenges to demonstrate "permissible race-neutral justifications for the strikes." *Johnson*, 545 U.S. at 168. This second step is critical to the court's eventual weighing of the claim because "[t]he *Batson* framework is designed to produce *actual answers* to suspicions and inferences that discrimination may have infected the jury selection process . . . . It does not matter that the prosecutor *might have* had good reasons; what matters is the *real reason* [jurors] were stricken." *Johnson*, 545 U.S. at 172 (internal quotation marks and alterations omitted) (emphasis added).

Step Three follows if the prosecutor alleges race-neutral reasons for the peremptory challenge. "[I]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proven purposeful discrimination." *Id.* at 168. The trial judge must determine whether the prosecutor's stated reasons are the actual reasons or instead are a pretext for discrimination. *Flowers v. Mississippi*, 139 S. Ct. at 2241, citing *Johnson* 545 U.S. at 97–98, 106.

2. *Batson* protects every citizen's right to participate in government by serving as a juror, free of racial discrimination. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the

democratic process." *Flowers v. Mississippi*, 139 S. Ct. at 2238 (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)). The very important rights protected by *Batson* are subject to review on direct appeal in every state and in every federal circuit.

Significantly, however, the three-part *Batson* protocol is short-circuited at Step One if the trial court determines that the objecting party has not demonstrated a prima facie case of discrimination. In that event, there is no further inquiry. Steps Two and Three never take place. The actual reason for the strike remains unknown and the claim of discrimination is left unanswered. Step One, and the trial court's determination about the existence of a prima facie case of discrimination is, therefore, the gateway to guaranteeing equal protection of the law for parties and jurors alike.

3. Important as the Step One determination is, the federal circuits and states disagree about its review on appeal. The appellate courts of nine state and federal jurisdictions apply de novo review, while their counterparts in six other jurisdictions apply the deferential clearly-erroneous standard of review.

a. Appellate courts in four federal circuits and five states apply de novo review to the Step One determination, offering no deference to the trial court's determination about the existence of a prima facie showing. This is the accepted standard of review in the First, Third, Seventh and Tenth federal circuits, as well as the states of Colorado, Kansas, Michigan, Tennessee, and Utah. *See Aspen v. Bissonnette*, 480 F.3d 571, 575-76 (1st Cir. 2007); *Sanchez v. Roden*, 753 F.3d 279 (1st Cir. 2014); *Bronshtein v. Horn*, 404 F.3d 700, 724 (3d Cir. 2004); *Minor v.*

Hastings, 704 F. App'x 103, 106 & n. 21 (3d Cir. 2017); *United States v. Stephens*, 421 F.3d 503, 511 (7th Cir. 2005); *United States v. Jordan*, 223 F.3d 676, 686 (7th Cir.2000); *Mahaffey v. Page*, 162 F.3d 481 (7th Cir. 1998); *Starr v. Quick Trip Corp.*, 726 F. App'x 692, 695 n.1 (10th Cir. 2018); *Valdez v. People*, 966 P.2d 587 (Col. 1998) (en banc); *State v. Pham*, 281 Kan. 1227, 1237, 135 P.3d 919, 928-29 (2006); *State v. Bolton*, 274 Kan. 1, 9, 49 P.3d 468 (2002); *State v. Angelo*, 287 Kan. 262, 272, 197 P.3d 337, 346 (2008); *People v. Knight*, 473 Mich. 324, 339-44, 701 N.W. 715, 724-26 (2005); *State v. Butler*, 795 S.W. 2d 680, 687 (Tenn. Ct. Crim. App. 1990); *State v. Pharris*, 846 P.2d 454, 460 (Utah Ct. App. 1993).

The First Circuit adopted the de novo standard of review in *Aspen v. Bissonnette*, 480 F.3d 571, 575-76 (1st Cir. 2007) ("We consider de novo whether Aspen is entitled to relief under the correct *Batson* standard"). In doing so, it adopted the Third Circuit's standard of review in *Bronshtein v. Horn*, 404 F.3d 700, 724 (3d Cir. 2004) (applying plenary review to district court's determination on the prima facie case prong). More recently, the First Circuit adhered to the de novo standard of review in *Sanchez v. Roden*, 753 F,3d 279 (1st Cir. 2014)("[W]e review the state court record de novo to determine whether Sanchez satisfied his burden of raising an inference of possible racial discrimination;" (citing *Aspen*, 480 F.3d at 576, and specifically rejecting a clear-and-convincing standard of review, 753 F.3d at 301 n.16.). In a footnote, *Sanchez* reiterated the "relatively barebones showing required at this [first] stage" of the *Batson* protocol and how the lawyer's explanation in Step Two facilitates appellate review of the *Batson* right. And, in a

subsequent case, *Sanchez v. Roden*, 808 F.3d 85, 89 & n.2 (1st Cir. 2015) (*Sanchez* II), the court of appeals confirmed that the original *Sanchez* panel decision correctly conducted a de novo review of the Step One prima facie case of discrimination. *Sanchez* I, 753 F.3d at 309.

Following its holding in *Bronshstein,* 404 F.3d at 724, the Third Circuit recently reiterated that its selection of a de novo standard is proper when a lower court decision ends at the First Step. *See Minor v. Hastings*, 704 F. App'x 103, 106 & n. 21 (3d Cir. 2017). The *Minor* court drew a distinction between the deferential approach appropriate when all three *Batson* steps are completed and there is a complete record for appellate review, as opposed to a case in which the *Batson* challenge is halted at the first step: "The Supreme Court's requirement for deference to a trial court's *Batson* finding is limited to the discriminatory intent prong of *Batson*, and not to the initial prima facie showing. *See* [*Miller-El v. Cockrell*, 537 U.S. 322 (2003)] at 339." 704 F. App'x at 106 n.21.

The Seventh Circuit Court of Appeals has repeatedly stated that the First Step determination is reviewed de novo. *United States v. Stephens*, 421 F.3d 503, 511 (7th Cir. 2005) ("the prima facie determination is subject to de novo review") (citing *United States v. Jordan*, 223 F.3d 676, 686 (7th Cir.2000) ("a de novo review must be conducted" of the prima facie determination).; *see also, Mahaffey v. Page*, 162 F.3d 481 (7th Cir. 1998) ("the preliminary question of whether a prima facie case has been shown presents a mixed question of law and fact . . . which the

appellate courts should review de novo."). The *Mahaffey* court explained why, analogizing this Court's decision *in Ornelas v. United States*, 517 U.S. 690 (1996):

> The question of whether an inference of discrimination may be drawn from a set of undisputed facts relating to the racial makeup of the jury venire and the prosecutor's exercise of peremptory challenges is, like the probable cause question before the Court in *Ornelas*, one over which the appellate courts should exercise a degree of control that a clear error standard would not afford. As in *Ornelas*, factual scenarios will recur in this context, and de novo review would allow for a measure of consistency in the treatment of similar factual settings, rather than permitting different trial judges to reach inconsistent conclusions about the prima facie case on the same or similar facts.

162 F.3d at 484 (citations omitted). As the *Mahaffey* court concluded, the de novo standard helps ensure judicial consistency on the very important issue of discrimination in jury selection.

The Tenth Circuit Court of Appeals applied the de novo standard in *Starr v. Quick Trip Corp.*, 726 F. App'x 692, 695 n.1 (10th Cir. 2018), albeit acknowledging the standard of review remains an open question in that circuit.

Colorado's Supreme Court, sitting en banc, made an early and comprehensive analysis of the standard of review, concluding "that the first step involves a question of legal sufficiency over which the appellate court must have plenary review. . . ." *Valdez v. People*, 966 P.2d 587 (Col. 1998) (en banc). Consistent with this, the en banc court held that "the question of whether the defendant has established a prima facie case under *Batson* is a matter of law, and we apply a de

novo standard of review to a trial court's prima facie determination of the *Batson* analysis." *Id.* at 591.

The Colorado Supreme Court's en banc decision is particularly compelling, in that it surveyed other jurisdictions and their respective and conflicting standards of review, before settling on de novo review as the correct formulation. The en banc court also considered how an analogous prima facie determination is reviewed under Title VII of the federal Civil Rights Act of 1964. Finding that the prima facie inference under Title VII is similar to the prima facie standard under *Batson*, it considered this Court's Title VII precedent, which supports the conclusion that appellate review should be de novo: "In *Furnco* [*Const. Corp. v. Waters*, 438 U.S. 567, 576, 579 (1978)] the United States Supreme Court indicated that whether a plaintiff has made a Title VII prima facie showing is a matter of law." *Valdez*, 966 P.2d at 591. It noted, further, that subsequently "some federal courts have applied a de novo standard of review to the trial court's prima facie determination under Title VII." 966 P.2d at 591 (citing *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1538 (11th Cir. 1988) and *Gay v. Waiters' & Dairy Lunchman's Union Local No. 30*, 694 F.2d 531, 543 n.10, 546 (9th Cir. 1992)). Significantly, in *Johnson v. California*, 545 U.S. 162, 171 n.7., the Court has since approved of the Title VII analogy and *Furnco*'s conclusion concerning a prima facie showing.

Impressed by the Colorado Supreme Court's analysis, the Kansas Supreme Court adopted the same standard of review, in *State v. Pham*, 281 Kan. 1227, 1237, 135 P.3d 919, 928-29 (2006): "The standard of review of the first step—the prima

facie showing on the basis of race—is a question of legal sufficiency subject to plenary review. *State v. Bolton*, 274 Kan. 1, 9, 49 P.3d 468 (2002)." *See, also, State v. Angelo*, 287 Kan. 262, 272, 197 P.3d 337, 346 (2008) (same); *State v. Sledd*, 250 Kan. 15, 21, 825 P.2d 114. 119 (1992) (same, recognizing analogy to Title VII discrimination claims).

Michigan, too, abides by the de novo standard of review as to the legal determination of a prima facie case. *See People v. Knight,* 473 Mich. 324, 339-44, 701 N.W. 715, 724-26 (2005). The *Knight* court did a detailed analysis and was particularly impressed with the Colorado Supreme Court's en banc decision in *Valdez*. Noting its belief that the first step involves a mixed question of law—deferential as to findings of fact, but de novo as to questions of law—the Michigan Supreme Court concluded that de novo review applies to the determination of "whether those facts constitute a prima facie case of discrimination under *Batson* and its progeny." 473 Mich. at 342, 701 N.W. 2d at 726. Indeed, the Michigan Supreme Court intends to follow its mixed-question formulation in which questions of law are reviewed de novo "until the United States Supreme Court holds otherwise." 473 Mich. at 343, 701 N.W. 2d at 726.

Tennessee has likewise adopted a plenary standard of review. *State v. Butler*, 795 S.W. 2d 680, 687 (Tenn. Ct. Crim. App. 1990). In *Butler,* the court also reviewed federal decisions from Title VII discrimination cases, which "have explained the operation of prima facie burden of proof rules." 795 S.W. 2d at 695. In that analogous context, the "federal courts treat the prima facie determination as a

question of law rather than of fact; the question is one of legal sufficiency, and an appellate court's review is plenary." *Id.* (citations omitted). Accepting that framework, the *Butler* court concluded that the prima facie determination is subject to plenary review. *Id.*

Utah takes the same position. In *State v. Pharris*, 846 P.2d 454, 460 (Utah Ct. App. 1993), that court held: "The trial court's conclusion as to whether or not a prima facie case was established is a legal determination which we review for correctness, according it no particular deference." *Id.*

b. The courts of appeals of three federal circuits and three states disagree. They apply a clearly-erroneous standard of appellate review, giving great deference to the trial court's determination about the existence of a prima facie showing. That is how the Eleventh Circuit ruled here, "giv[ing] deference to the district court's prima facie finding" and concluding that "[t]he district court did not clearly err in concluding that Smith failed to establish a prima facie case of discrimination . . . ." (App. A at 4-5). The Eleventh Circuit panel's decision was governed by its binding circuit precedent that the trial court's determination "'is entitled to great deference, and must be sustained unless it is clearly erroneous.' *United States v. Robertson*, 736 F.3d 1317, 1324 (11th Cir. 2013)." (App. A at 4).

The clearly erroneous standard of review is also employed by the Fifth and Ninth federal circuits, as well as the states of Wisconsin, Minnesota, and Illinois. *See United States v. Branch*, 989 F.2d 752 (5th Cir. 1993); *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc); *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004);

State v. James, 365 Wis.2d 195, 870 N.W. 2d 247, ¶¶ 15-19 (2015) (citing *State v. Lamon*, 2003 WI 78, ¶ 28, 262 Wis.2d 747, 664 N.W. 2d 607 (2003)); *Fleming v. Moswin*, 2012 IL App. (1st) 103475-B, 976 N.E. 2d 447 (2008); *People v. Sepulveda,* 2019 WL 4723975, *7, *12 (App. Ct. Ill., 1st Dist., 3rd Div. 2019) (unpublished); *State v. Hoard*, 2010 WL 695805 *5 (Minn. Ct. App. 2010) (unpublished) (citing *State v. Wren*, 738 N.W. 2d 378, 389 (Minn. 2007)).

The Ninth Circuit set forth its standard of review in *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc). Following a review of its own precedents, and decisions of other circuits, the en banc court held that "[a]lthough a *Batson* challenge involves the application of a legal standard, the prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue; thus, the concerns of judicial administration tip in favor of the trial court." 182 F.23d at 683. Tolbert was reaffirmed, as the general rule, in *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004), which noted that deferential review ordinarily applies to the first-step determination. 371 F.3d at 1090. According to the Ninth Circuit, this standard of review is only inappropriate in the rare case in which the lower court misinterprets the inferential burden of proof set forth in *Batson*; in that occasional case, de novo review is applied.

Without setting forth legal analysis of its own, the Fifth Circuit applied the clear error standard of review to an adverse first-step determination in *United States v. Branch*, 989 F.2d at 755. In *Branch*, the court interpreted the trial court's

action as a finding that there was not a prima facie case of discrimination, "and, as such it is reviewed for clear error." *Id.* Using that standard of review, the court of appeals held that "we do not find clear error in the denial of appellant's motion." *Id.* In establishing the standard of review, the Fifth Circuit explicitly cited an Eighth Circuit case, *United States v. Matha*, 915 F.2d 1220, 1222 (8th Cir. 1990), (*see Branch*, 989 F.2d at 755), but the *Matha* decision does not define the standard of review for the first-step alone; rather it sets forth the standard of review applicable when all three steps were completed in the trial court. *Matha,* 915 F.2d at 1222 ("The determination of whether the defendant has made a prima facie case under *Batson and the determination of whether the government's explanation for its strikes is pretextual* is a finding of fact, subject to great deference. Those findings will be set aside only for clear error.") (emphasis supplied).

Three states adhere to the clearly erroneous standard of review. Although the Wisconsin Court of Appeals acknowledged that its federal court of appeals, the Seventh Circuit, has applied de novo review to *Batson*'s first step, it rejected that standard of review, concluding instead that the first-step determination should be reviewed under a clearly-erroneous standard. *See State v. James*, 365 Wis.2d 195, 870 N.W. 2d 247, ¶¶ 15-19 (2015). Significantly, the state Court of Appeals followed the directive of Wisconsin's Supreme Court that "the clearly erroneous standard of review applies at *each step* of the *Batson* analysis." *Id.* at ¶16 (emphasis in original) (citing *State v. Lamon*, 2003 WI 78, ¶ 28, 262 Wis.2d 747, 664 N.W. 2d 607 (2003)).

Likewise, Illinois employs a clearly erroneous standard of review, as it did in the case of a civil jury trial, *Fleming v. Moswin*, 2012 IL App. (1st) 103475-B, 976 N.E. 2d 447 (2008). Citing both the state's supreme court and court of appeals, the Appellate Court of Illinois concluded in *Fleming* that "[w]e apply a clearly erroneous standard of review to a trial court's determination of whether a prima facie case is demonstrated at the first step of the *Batson* analysis." 976 N.E.2d at 461. It did the same in a criminal case, *People v. Sepulveda,* 2019 WL 4723975, *7, *12 (App. Ct. Ill., 1st Dist., 3rd Div. 2019) (unpublished). "[A]t issue here is whether the trial court erred in concluding that the defendant failed to establish a prima facie case of racial discrimination under step one of the *Batson* inquiry he initiated. Accordingly, we apply the clearly erroneous standard of review . . . ." Applying the deferential standard, the state court held that the trial court's ruling on step one "was not clearly erroneous." *Id.*

Minnesota's appellate courts also apply the clearly erroneous standard of review to the first step determination. *State v. Hoard*, 2010 WL 695805 *5 (Minn. Ct. App. 2010) (unpublished) (citing *State v. Wren*, 738 N.W. 2d 378, 389 (Minn. 2007)). In that state, "[t]he clear-error standard of review applies even when the district court overrules the objection after the first step of the *Batson* analysis, concluding that a prima facie showing of race-based discrimination has not been made." *Id.*

c. Not only are those 15 jurisdictions in intractable disagreement, but the conflict persists between states and the federal circuit in which they are located. As

noted above, the Seventh Circuit Court of Appeals applies de novo review to the first step, while two of its constituent states, Wisconsin and Illinois, apply the highly deferential clearly-erroneous standard of review. This disparity exists even though both the state and federal courts may eventually review the same criminal trial, first through state appellate review, then in federal habeas corpus proceedings. This is particularly problematic for state cases arising within the Seventh Circuit, since the state appellate courts review the first-step determination with deference to the trial court, while the federal court sitting in habeas or a habeas appeal will pay no such deference, analyzing the issue de novo. Such disparate standards of review invite a constitutional incongruity in which state and federal courts reach different conclusions about the peremptory strikes exercised in the same trial, relegating *Batson*'s equal protection guaranty to the happenstance of the court of review.

4. The practical effect of an appellate standard of review is significant. It is often determinative of the issue under review and the appeal itself. The standard of review "is a statement of the power not only of the appellate court but also of the tribunal below, measured by the hesitation of the appellate court to overturn the lower court's decision." Martha S. Davis, *Standards of Appellate Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 47-48 (2000). The difference between de novo review, as opposed to deferential review under the clearly erroneous standard, has been described in simple win-or-lose terms: In de novo review, "[i]f the court agrees with the trial court decision, it is sustained;

otherwise the lower court's decision is reversed." *Id.* at 48. But, under a clearly erroneous standard, "the appellate court displays a high level of deference" in which "an appellate court will sustain any reasonable or not reasonable decision that could be reached by reasoning from the evidence." *Id.* This stark reality in appellate outcomes directly impacts uniformity in enforcing *Batson*'s equal protection guaranty. *See Mahaffey v. Page*, 162 F.3d at 484 , citing *Ornelas v. United States,* 517 U.S. 690. De novo review best serves *Batson*'s constitutional protections: "In reviewing questions of law, and the more difficult 'mixed' questions (applications of law to the facts of the case), the appellate court typically applies straightforward de novo review." Davis, *Standards of Appellate Review* at 48.

5. This case presents a remarkably good vehicle for the Court to decide the proper standard of review in a case in which the trial court overrules a *Batson* objection at Step One. A *Batson* challenge was made in the district court and pursued on direct appeal. The challenge was decided on the merits by the court of appeals using the disputed standard of review at issue here. The panel erroneously "g[a]ve deference to the district court's prima facie finding," and with that undue deference held that "[t]he district court did not clearly err in concluding that Smith failed to establish a prima facie case of discrimination . . . ." (App. A at 4). The standard of review was determinative.

Moreover, this petition presents a very good case for review because it is on direct appeal, as opposed to a habeas corpus proceeding, so it is not complicated by statutory deference implicated by rules of collateral review.

a. Significantly, the role of individual jurors in this case was vital to the verdicts. The jury deliberated extensively, for two and one-half days, following a brief two and one-half day trial. Jury deliberations accounted for half of the trial. During their lengthy deliberations, jurors asked 16 separate questions, including 11 that related specifically to their deliberations on the sole count of conviction. (App. E). At one point, the jury advised the trial court that "We are hung." (App. E at Doc. 113). After being advised to continue deliberations, the jury reported "After deep consideration, we are very hung on one of the count." (App. E. Doc. 120) (as in original). Unable to decide the substantive trafficking count, the jury acquitted Mr. Smith of the gun-possession count, and convicted him only of a single count of conspiracy to traffick. (App. E at Doc. 124). The split-verdict—taken together with the relative length of the jury deliberations, the number of juror questions, and their notes that they were "hung" and "very hung"—is indicative of a jury compromise in which each individual juror's vote was critical.

b. The Court of Appeals' decision would likely have been different if it had employed the correct standard of review.

First, the panel erroneously "g[a]ve deference to the district court's prima facie finding" concluding that "[t]he district court did not clearly err in concluding that Smith failed to establish a prima facie case of discrimination . . . ." (App. A at 4). Here, of course, the district judge never made an explicit finding about a prima facie showing of discrimination. Rather, the district judge simply attempted to refute such a showing, by making his own observations and speculating about the

prosecutor's motive, without eliciting from the prosecutor the actual motive for the challenges. The district judge jumped the prima facie determination and, without following the second and third steps required by *Batson*, provided judicial speculation for possible race-neutral reasons. But this turns *Batson* aside in favor of a process that has been legally rejected as a mistake of law, for which de novo review is appropriate. This mistake of law resembles the error the Court redressed in *Williams v. Louisiana*, ___ U.S ___, 136 S. Ct. 2156 (2016), where the Court granted certiorari, vacated, and remanded a case in which the trial court used a state procedural rule allowing judges to find race neutral reasons *sua sponte*. Four justices separately concurred to emphasize that the Court's prior precedent clearly forbids such a practice, admonishing that "the [government] is obligated to offer a race-neutral reason. The judge is an arbiter not a participant in the judicial process. Allowing the court to provide race-neutral reasons for the [government] violates [the Constitution]." *Id.* (Ginsburg, J. concurring) (quoting *State v. Williams*, 157 So.3d 1128 (La. 2015) (Belsome, J. dissenting). The Court reiterated this point last Term in *Johnson v. California*, 545 U.S. at 172, "[T]he *Batson* framework is designed to produce *actual answers* to suspicions and inferences that discrimination might have infected the jury selection process . . . . It does not matter that the prosecutor might have had good reasons; what matters is the *real reason* [jurors] were stricken." (citing cases) (internal marks and alterations omitted).

Second, in giving deference, the Eleventh Circuit panel failed to fully account for all of the evidence of discrimination in the record. To this end, the panel held

that Mr. Smith "could show no other evidence of discrimination other than the fact that two black jurors had been struck." (App. A at 4). But this holding overlooks much of the inferential showing of discrimination. Not only did Mr. Smith establish that two black jurors had been peremptorily struck by the prosecutor, but he also demonstrated that the resulting jury had no remaining black jurors, and that the prosecutor's strikes were so questionable that the district court cautioned the prosecutor that, "I do not want an all-white jury, Mr. Morris," and the prosecutor acknowledged that concern by responding, "[w]e are going to make sure that doesn't happen." (App. F at 86).

Thus, the prima facie evidence of discrimination went much further than the trial court acknowledged and the appellate panel addressed: It was not simply that (a) two black jurors had been struck (in isolation), but it was also that (b) the resulting jury was all-white, (c) a fact the district court was concerned about such that (d) it cautioned the government about its use of peremptory challenges, and (e) the government did not dispute the allegation, but rather (f) assured the court it would in the future consider race in selecting the balance of the jury. Together, these facts more than meet the prima facie threshold for discrimination. Under the Court's generous inference standard, *Batson*'s Step-Two inquiry was required. As the Court has made clear, "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." *Foster v. Chatman*, ___ U.S. ___, 136 S. Ct. 1737, 1755 (2016).

Notably, the Court of Appeals' deferential review overlooked a record in which jury selection was specifically structured to be race-based. However well-intentioned, when the trial court sought assurance from the prosecutor that an all-white jury would not be selected, and the prosecutor made that assurance, they were both agreeing that the government *would* use race in exercising the remainder of its strikes—a clear and unequivocal violation of the Constitution.

"Active discrimination by a prosecutor during [jury selection] condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers v. Ohio*, 499 U.S. at 412. The error strikes at the heart of the legitimacy of our system of justice. Indeed, "the very integrity of the courts is jeopardized" when race-consciousness plays a part in a prosecutor's jury selection decisions, "invit[ing] cynicism . . . and undermin[ing] public confidence in adjudication." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). *Batson*'s three-step protocol serves as a constitutional prophylaxis to discrimination, but when it is short-circuited at Step One, an appellate court can only properly ensure the constitutional guaranty of equal protection by de novo review of the adverse determination.

The standard of review of a prima facie case of discrimination in the courtroom is just as important as it is in society at large. The underlying constitutional protections are the same. The Court should unify appellate review of

the prima facie determination so that the protections of Title VII and *Batson* are enforced on equal terms.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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