No. 19-7061

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES EDWARD SMITH, 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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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review to the district court's determination that petitioner had not established a prima facie claim of racial discrimination in jury selection under Batson v. Kentucky, 476 U.S. 79 (1986).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Smith, No. 18-cr-80062 (Sept. 21, 2018)

United States Court of Appeals (11th Cir.):

United States v. Smith, No. 18-14169 (Sept. 20, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the Federal Reporter but is reprinted at 788 Fed. Appx. 654.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2019. A petition for rehearing was denied on November 21, 2019 (Pet. App. C). The petition for a writ of certiorari was filed on December 23, 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 Southern District of Florida, petitioner was convicted of conspiring to commit sex trafficking of a minor, in violation of 18 U.S.C. 1591(a)(1), (b)(2), and (c), and 1594(c). Judgment 1. The district court sentenced petitioner to 235 months of imprisonment, to be followed by a lifetime of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A10.

1. In March 2018, police executed a search warrant at a house that petitioner rented in West Palm Beach, Florida. Presentence Investigation Report (PSR) ¶¶ 3, 7; Gov't C.A. Br. 3-4, 9-10. During the search, police found a 14-year-old girl, A.A., sleeping in a bedroom with an adult man. PSR ¶ 3; Gov't C.A. Br. 9-10. Officers subsequently learned that A.A. had run away from her foster home. PSR ¶ 4; Gov't C.A. Br. 4. She told the officers that, for the past three months, she had been engaging in prostitution out of petitioner's house. PSR ¶ 4; Gov't C.A. Br. 11. Petitioner, along with co-defendant Michael Joseph Clark and A.A.'s mother, arranged prostitution appointments for A.A. and received payment either directly from A.A. or from her customers. PSR ¶¶ 5-6, 13-15; Gov't C.A. Br. 4-9, 11. Petitioner himself had sex with A.A. in exchange for drugs and as part of A.A.'s rent. PSR ¶¶ 6, 15; Gov't C.A. Br. 5-6.

A grand jury in the Southern District of Florida charged petitioner in a superseding indictment with conspiring to commit

sex trafficking of a minor, in violation of 18 U.S.C. 1591(a)(1), (b)(2), and (c), and 1594(c); sex trafficking of a minor, in violation of 18 U.S.C. 1591(a)(1), (b)(2), and (c); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Second Superseding Indictment 1-3. Petitioner proceeded to a jury trial. Pet. App. A2.

2. During jury selection, the district court asked prospective jurors a list of standard questions before allowing the parties to ask questions. 1 C.A. App. 160-183. In response to the questions from the court, one prospective juror (Juror 7) disclosed that two of his family members had been charged with crimes in federal court in Atlanta. Id. at 166-167. He asserted, however, that this fact would not affect his ability to be a fair juror. Id. at 167. Another prospective juror (Juror 10) indicated that he had been accused of shoplifting 37 years before. Id. at 168-169.

Following examination by the district court, the prosecutor asked the prospective jurors about their views regarding "child sex exploitation laws," the "legaliz[ation of] prostitution for adults," and whether they believed a minor girl should be able to choose to work as a prostitute. 1 C.A. App. 183-184. The prosecutor then asked whether anyone in their families had been involved in foster care or prostitution. Id. at 184. Juror 7 indicated that he had been in foster care in the past, and that his biological mother had been a prostitute. Ibid. He said,

however, that his experience in the foster care system had been good and that he did not believe it would change his view of the case or affect his ability to be fair. Id. at 184-185.

The defense then asked the prospective jurors about their reaction to the fact that petitioner "doesn't have to prove anything" and whether it would "bother" them if they "did not hear from the Defense." 1 C.A. App. 186-188. Juror 7 said, "I feel both sides should present." Id. at 187. Juror 10 indicated that he "fe[lt] the same way." Ibid. Juror 10 explained, "if I were in [petitioner's] position, sitting in his seat, I would want my side to be heard so that the jurors could be able to make a better decision." Ibid. Defense counsel asked, "so if you sat as a juror in a case, and the defendant did not put on any evidence, then would you * * * feel that that was a problem because they didn't show you what happened?" Ibid. "Yes," Juror 10 answered. Ibid.

The district court struck five jurors for cause. 1 C.A. App. 193-194. The court then read through the list of remaining jurors, asking first whether the government wanted to use a peremptory strike and then whether the defense did. Id. at 195-198. Through the first ten jurors, the defense and the government each used three of their allotted peremptory strikes. Id. at 195-196. The government used its second strike on Juror 7 and its third strike on Juror 10, both of whom were African-American. Id. at 195.

After the government struck Juror 10, the following exchange occurred:

> [DEFENSE COUNSEL]: Your Honor, this is the second African-American person who has been struck by the Government.
>
> THE COURT: I'm not inclined, at this point. [Juror 7] 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, [Prosecutor].
>
> [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.

Id. at 195-196. The government used two more peremptory strikes (for a total of five), but the defense did not renew its Batson challenge. Id. at 195-198. The defense used five more strikes (for a total of eight). Ibid. The record does not reflect the racial composition of the venire or of the jury that was ultimately selected. See Gov't C.A. Br. 24 n.10.

After trial, the jury found petitioner guilty of conspiring to commit sex trafficking of a minor, acquitted him of possessing a firearm as a felon, and was unable to reach a verdict on the substantive sex-trafficking charge. Jury Verdict 1. The district court sentenced petitioner to 235 months of imprisonment, to be followed by a lifetime of supervised release. Judgment 1-3.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A10.

The court of appeals noted that "[o]rdinarily, a prosecutor is entitled to exercise permitted peremptory challenges for any reason at all." Pet. App. A3. But the court recognized that the Equal Protection Clause "forbids a prosecutor from challenging potential jurors solely on account of their race." Ibid. And it explained that this Court's decision in Batson v. Kentucky, 476 U.S. 79, 96 (1986), established a three-step process for district courts to use to adjudicate a claim that a peremptory strike was based on race. The defense first "must make a prima facie showing that the peremptory challenge [wa]s exercised on the basis of race." Pet. App. A3. If it does so, "the burden then shifts to the [prosecutor] to articulate a race-neutral explanation for striking the juror in question." Ibid. And, finally, "trial court must determine whether the objecting party has carried its burden of proving purposeful discrimination." Ibid. The court of appeals stated that, when reviewing a district court's resolution of such a claim, the district court's determination "is entitled to great deference, and must be sustained unless it is clearly erroneous." Ibid. (citation omitted). In particular, the court of appeals explained that it gave "deference to the district court's prima facie finding." Id. at A4.

The court of appeals determined here that "[t]he district court did not clearly err in concluding that [petitioner] failed to establish a prima facie case of discrimination because he could show no * * * evidence of discrimination other than the fact

that two black jurors had been struck." Pet. App. A4. The court of appeals reasoned that "[t]he pure numbers of those struck of a certain race 'takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck.'" Ibid. (quoting United States v. Ochoa-Vasquez, 428 F.3d 1015, 1044 (11th Cir. 2005), cert. denied, 549 U.S. 952 (2006)). It accordingly found that the district court was "within its discretion to consider the stricken juror's voir dire responses" and how they compared to other jurors' responses. Ibid. And it determined that "the [district] court did not clearly err in finding that the stricken juror had a unique background compared to the other potential jurors" because his background "connected to the facts of [petitioner's] case." Id. at A5.

ARGUMENT

Petitioner contends (Pet. 7-24) that this Court's review is warranted to determine the standard of review that courts of appeals should apply when reviewing a district court's finding that a defendant failed to make out a prima facie showing of racial discrimination in jury selection under Batson v. Kentucky, 476 U.S. 79, 97 (1986). The court of appeals' decision is correct, and does not conflict with any decision of this Court or implicate any division of authority that warrants this Court's review. Moreover, this case would be a poor vehicle for considering the

question presented because petitioner did not contest below that a clear-error standard applied to review of his Batson claim, and he would not, in any event, be entitled to relief even under the de novo standard that he requests for the first time in this Court.

1. In Batson v. Kentucky, supra, this Court held that the Constitution prohibits the use of peremptory challenges to strike prospective jurors based on their race. 476 U.S. at 89. Inquiry into a possible Batson violation consists of three steps. First, the defendant must make out a prima facie case of discrimination, which may include evidence about a prosecutor's "pattern" of peremptory strikes against members of a particular racial group or disparate questioning of black and white prospective jurors. Id. at 96-97; see Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019) (listing sources of potential evidence). Second, if the defendant makes such a showing, the burden then shifts to the prosecution to offer race-neutral explanations for the challenged strikes. Johnson v. California, 545 U.S. 162, 168 (2005); Batson, 476 U.S. at 94. Finally, the district court must evaluate the proffered evidence and the government's race-neutral explanation and decide whether the defendant has proved purposeful racial discrimination. Johnson, 545 U.S. at 168.

This Court has made clear that the ultimate question of discriminatory intent in this inquiry is a "'finding of fact'" to which "a reviewing court ordinarily should give * * * great deference." Batson, 476 U.S. at 98 n.21; see Flowers, 139 S. Ct.

at 2244 (noting that "[t]he Court has described the appellate standard of review of the trial court's factual determinations in a Batson hearing as 'highly deferential'") (citation omitted); Hernandez v. New York, 500 U.S. 352, 364 (1991) (plurality opinion) (describing "Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard"). Accordingly, "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." Flowers, 139 S. Ct. at 2244 (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)). Petitioner suggests (Pet. 9-15), however, that a court of appeals should apply de novo review to a district court's finding under Batson's first step as to whether the defendant has made a prima facie showing of intent. That contention lacks merit.

In Batson, this Court treated the existence of a prima facie showing as a primarily factual inquiry. It explained that, in determining whether the defendant has made the required showing, "the trial court should consider all relevant circumstances," including, for example, any "'pattern' of strikes against black jurors" and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." Batson, 476 U.S. at 96-97. The Court stated: "We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination

against black jurors." Id. at 97. Subsequently, this Court described the defendant's burden as "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Johnson, 545 U.S. at 170 (emphasis added). And it has emphasized that, in general, "the job of enforcing Batson rests first and foremost with trial judges" who "operate at the front lines of American justice." Flowers, 139 S. Ct. at 2243. Because determining the existence of a prima facie case of discrimination is predominately a factual inquiry "primar[ily]" entrusted to the district court, ibid., an appellate court appropriately reviews the district court's determination for clear error, not de novo. See U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC, 138 S. Ct. 960, 966 (2018).

In accord with this Court's precedents, most courts of appeals review a district court's determination regarding the existence of a prima facie case for clear error. See United States v. Charlton, 600 F.3d 43, 50 (1st Cir. 2010); United States v. Lane, 866 F.2d 103, 105 (4th Cir. 1989); United States v. Branch, 989 F.2d 752, 755 (5th Cir.), cert. denied, 509 U.S. 931 (1993); United States v. Matha, 915 F.2d 1220, 1222 (8th Cir. 1990) (per curiam); United States v. Guerrero, 595 F.3d 1059, 1062-1063 (9th Cir. 2010); United States v. Ochoa-Vasquez, 428 F.3d 1015, 1039 (11th Cir. 2005), cert. denied, 549 U.S. 952 (2006); see also United States v. Jackson, 985 F.2d 1069, 1993 WL 8152, at *1 (6th Cir. 1993) (Tbl.) (per curiam) (unpublished), cert. denied, 508 U.S. 913

(1993). As the en banc Ninth Circuit has explained, "[w]hether or not 'all the relevant circumstances' 'raise an inference' of discrimination will depend on factors such as the attitude and behavior of the challenging attorney and the prospective jurors manifested during voir dire." Tolbert v. Page, 182 F.3d 677, 683 (1999). The trial judge is able to observe "the jurors' demeanor and tone of voice as they answer questions," as well as "counsel's demeanor and tone of voice in posing the questions." Ibid. As a result, "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." Id. at 684.

Petitioner suggests (Pet. 13-15) that de novo review is appropriate because the Batson analysis is similar to the burden-shifting framework under Title VII of the Civil Rights Act of 1964. See Batson, 476 U.S. at 94 n.18 ("Our decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules."); see generally McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). But as the Ninth Circuit has explained, significant differences exist "between the Title VII and Batson prima facie inquiries." Tolbert, 182 F.3d at 683 n.10. The elements of a Title VII prima facie case "are all historical facts that show up in the record and can readily be evaluated on appeal," whereas "the Batson prima facie inquiry involves a trial court's evaluation

of facts that play out in court, in front of the trial judge." Ibid. This Court's decisions in the Batson and Title VII contexts have not suggested that the two inquiries must be reviewed on appeal under the same standard.[1]

2. Petitioner contends (Pet. 7-19) that the Court should grant a writ of certiorari to resolve a conflict among lower courts on the appropriate standard of review in this context. But petitioner significantly overstates the conflict among the courts of appeals, and any conflict that does exist does not warrant this Court's review.

a. As noted, among the federal courts of appeals, most courts review for clear error the district court's determination whether a defendant has established a prima facie case under Batson. See pp. 10-11, supra. And the Second Circuit reviews the district court's prima facie determination under a similarly deferential abuse-of-discretion standard. See United States v. Martinez, 621 F.3d 101, 109-110 (2010), cert. denied, 562 U.S. 1280 (2011).

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[1] Petitioner also asserts (Pet. 24) that, by assuring the district court there would not be an "all-white jury," 1 C.A. App. 195, the prosecutor indicated "that the government would use race in exercising the remainder of its strikes -- a clear and unequivocal violation of the Constitution." The prosecutor's statement is best read simply as a representation that he was mindful of the government's obligations under Batson. In any event, petitioner does not point to any case holding that a prosecutor violates the Constitution by refraining from using a peremptory strike, and such a factbound claim of error would not warrant this Court's review.

Only the Seventh Circuit has stated that de novo review is appropriate. See United States v. Brisk, 171 F.3d 514, 523 (7th Cir.), cert. denied, 528 U.S. 860 (1999). It first did so in a state habeas case that predated the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, in which the court conceded that "the standard of review question [wa]s largely beside the point" because it would have found clear error in any event. Mahaffey v. Page, 162 F.3d 481, 484 (7th Cir. 1998), cert. denied, 526 U.S. 1127 (1999). And although the Seventh Circuit has subsequently applied de novo review on federal direct review in two cases, the standard of review was likewise not dispositive of the Batson claim in those cases because, in each case, the court of appeals affirmed the district court's prima facie determination even under the de novo standard. See Brisk, 171 F.3d at 523; United States v. Stephens, 421 F.3d 503, 510-511 (7th Cir. 2005).[2] In the appropriate case, the Seventh Circuit may well reconsider the issue and adopt a more deferential standard of review in line with the other circuits.

Contrary to petitioner's contention (Pet. 9), the First, Third, and Tenth Circuits do not apply de novo review in the situation presented here. Two of the cases petitioner cites involved collateral review of state-court convictions where the

[2] The Seventh Circuit has cited the de novo standard in a few other cases on direct review in which it did not actually review the prima facie determination. See, e.g., United States v. Willis, 523 F.3d 762, 767 (2008); United States v. Jordan, 223 F.3d 676, 686 (2000).

state court applied an incorrect legal standard to the Batson claim. See Aspen v. Bissonnette, 480 F.3d 571, 575-576 (1st Cir.) ("We consider de novo whether [the defendant] is entitled to relief under the correct Batson standard."), cert. denied, 552 U.S. 934 (2007); Bronshtein v. Horn, 404 F.3d 700, 724 (3d Cir. 2005) (applying "plenary review" to the prima facie inquiry after concluding that "the state supreme court misinterpreted Batson"), cert. denied, 546 U.S. 1208, and 546 U.S. 1209 (2006). That is consistent with the practice in other circuits that expressly agree with the court below about the deferential standard of review in the circumstances presented here. See, e.g., Fernandez v. Roe, 286 F.3d 1073, 1077 (9th Cir.) (explaining that "where the [state] trial court has applied the wrong legal standard, AEDPA's rule of deference does not apply" and the court "review[s] de novo the question whether a defendant made a prima facie showing of a Batson violation"), cert. denied, 537 U.S. 1000 (2002).

The unpublished state habeas case that petitioner cites from the Third Circuit did suggest in a footnote that an appellate court should review the prima facie inquiry under a de novo standard, but the court of appeals ultimately denied relief on the habeas claim before it by applying the deferential standard required by AEDPA. See Minor v. Hastings, 704 Fed. Appx. 103, 106-107 & n.21 (2017) ("Although we may well have reached a different result if we were reviewing this record de novo, given the limitations of our appellate review under AEDPA, we must affirm the District

Court's decision."), cert. denied, 138 S. Ct. 1594 (2018). And the unpublished case petitioner cites from the Tenth Circuit actually declined to decide which standard applies because the litigant's Batson claim "fail[ed] even de novo review." Starr v. Quicktrip Corp., 726 Fed. Appx. 692, 695 n.1 (10th Cir. 2018). Those cases, which are not precedential, do not indicate a conflict with the decision below.

b. Petitioner also contends (Pet. 9-19) that review is warranted to resolve a conflict in the state courts regarding the appropriate standard of review for the Batson first step. This Court has never held that state courts, in reviewing claims under Batson, are bound to follow the same appellate standards of review established by the federal courts in the exercise of their supervisory powers. And Batson specifically noted that, "[i]n light of the variety of jury selection practices followed in our state and federal trial courts," the Court "ma[d]e no attempt to instruct these courts how best to implement [Batson's] holding." 476 U.S. at 99 n.24.

Because this case arises from a federal court of appeals, it is an unsuitable vehicle for determining whether state and federal courts are bound to follow the same appellate standards in the Batson context. Compare, e.g., Carter v. Illinois, 329 U.S. 173, 175 (1946) (recognizing that States are generally "free to devise their own systems of [appellate and collateral] review in criminal cases"), with, e.g., Bose Corp. v. Consumers Union of U.S., Inc.,

466 U.S. 485, 510-511 (1984) (holding that "[t]he requirement of independent appellate review" of a finding of "'actual malice'" in cases governed by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), "is a rule of federal constitutional law"). Any differences in approach among the state courts provide no basis for further review in this case.

3. In any event, this case would be a poor vehicle for considering the question presented for multiple reasons.

As an initial matter, petitioner did not ask the court of appeals to apply de novo review to the district court's prima facie determination. On the contrary, petitioner acknowledged that the court of appeals "reviews a district court's ruling on a Batson challenge for clear error." Pet. C.A. Br. 14. Petitioner thus forfeited, if not waived, the argument he presses for the first time in this Court. See, e.g., United States v. Ortiz, 422 U.S. 891, 898 (1975). Moreover, this Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and no sound reason exists for the Court to consider the standard of review question that petitioner raises for the first time in his petition for a writ of certiorari.

In any event, petitioner would not be entitled to relief even if the district court's determination should have been reviewed under a de novo standard. Although "a 'pattern' of strikes against black jurors might give rise to an inference of discrimination" in some cases, Batson, 476 U.S. at 97, the only "pattern" here

consisted of two strikes, and the district court noted that Juror 7 "had a couple of issues which [were] apparent." 1 C.A. App. 195; see United States v. Folk, 754 F.3d 905, 914 (11th Cir. 2014) (finding no "facially discriminatory pattern" where prosecutor struck only two of three black veniremembers and there was a clear reason to strike at least one), cert. denied, 574 U.S. 1100 (2015). Contrary to petitioner's claim (Pet. 23), the racial makeup of the final jury is not clear from the record. See p. 5, supra. Petitioner also failed to create a record regarding the number of African Americans in the venire, which would also be relevant to establishing any inference of discrimination. See, e.g., Jones v. West, 555 F.3d 90, 98-99 (2d Cir. 2009) (observing that "it is impossible for a reviewing court to conclude that the state court should have drawn an inference of discrimination" where the record does not reflect the percentage of the venire that belongs to the relevant racial group).[3]

And even if petitioner could establish a prima facie case, he would still have to show purposeful discrimination under Batson's third step. But, here, the government had race-neutral reasons for striking Jurors 7 and 10. Juror 7 had (like the victim A.A.) previously spent time in foster care and his mother had been a

[3] Because petitioner failed to establish even a prima facie case of discrimination, this case does not resemble Williams v. Louisiana, 136 S. Ct. 2156 (2016), in which the trial court applied a state rule of procedure that "permit[ted] the trial court, rather than the prosecutor, to supply a race-neutral reason at Batson's second step." Id. at 2156 (Ginsburg, J., concurring in the decision to grant, vacate, and remand).

prostitute -- experiences which the government might reasonably be concerned would affect his judgment in this case concerning similar circumstances. 1 C.A. App. 184. Juror 10 had been accused of shoplifting in the past and expressed the belief that it would be "a problem" if the defense failed to put on any evidence. Id. at 188. Petitioner thus cannot show that he would have prevailed on his Batson claim even if the court of appeals had reviewed the prima facie determination de novo. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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