No. 19-7061

IN THE

Supreme Court of the United States

CHARLES EDWARD SMITH

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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"Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019). Such discrimination infringes the constitutional rights of citizens on trial and those doing their civic duty, and it "undermine public confidence in the fairness of our system of justice." *Johnson v. California*, 545 U.S. 162, 171–72 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)). In *Batson*, this Court prescribed a three-step framework for enforcing those rights and protecting our justice system. The first step requires a defendant opposing a peremptory strike to establish a prima facie inference of discrimination. That requirement is not "onerous." *Id.* at 170. But if it is not met, the prosecutor is relieved from proffering a race-neutral reason for the strike, and the court is relieved from ascertaining if discrimination was the reason.

The question presented here concerns the proper standard for reviewing an adverse step-one ruling on appeal: is it *de novo* or for clear error? The government concedes that the federal courts of appeals are divided on that question, and it does not dispute state appellate courts are too. Nor does it dispute that the question presented is important. Instead, it argues that this case is a poor vehicle for deciding it. But, as explained below, the appropriate standard of review is squarely presented for decision here, and Petitioner has a good chance of prevailing on remand were he to prevail in this Court. The government also argues that clear error is the correct standard of review. But, given the conflict of authority, that argument on the merits is no basis for denying review. In any event, *de novo* is the correct standard of review.

I. THE CIRCUITS ARE OPENLY DIVIDED ON THE STANDARD OF REVIEW

a. The government concedes (BIO 10–13) that the federal courts of appeals are divided on the standard of review governing step one of the *Batson* inquiry. It correctly observes that: most circuits review the prima facie determination for clear error; the Second Circuit reviews it for abuse of discretion; and the Seventh Circuit reviews it *de novo*. There should be one uniform standard of review, not three.

The government (BIO 13) seeks to downplay the conflict by equating clear error with abuse of discretion (two different standards), and by speculating that the Seventh Circuit might reconsider its *de novo* standard in the future. But there is no indication that it will do so. To the contrary, it deliberately adopted the *de novo* standard in *Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998), rejecting the clear-error standard employed in other circuits. It has re-affirmed that standard in no less than four published opinions. *United States v. Willis*, 523 F.3d 762, 767 (2008); *United States v. Stephens*, 421 F.3d 503, 510–11 (2005); *United States v. Jordan*, 223 F.3d 676, 686 (2000); *United States v. Brisk*, 117 F.3d 514, 523 (1999). And no member of that court has ever criticized it. That standard of review has been settled law in the Seventh Circuit for over two decades, and there is no sign of that changing.

b. Like the Seventh Circuit, several state courts also review the first-step determination *de novo*. *See* Pet. 12–15 (discussing cases, including *People v. Knight*, 701 N.W.2d 715, 724–26 (Mich. 2005); *Valdez v. People*, 966 P.2d 587, 590–91 (Col. 1998) (en banc), and *State v. Sledd*, 825 P.2d 114, 119 (Kan. 1992)). Rather than dispute that characterization, the government suggests (BIO 15–16) that state and

federal courts need not adopt the same standard of review. But *Batson* is a rule of federal constitutional law that applies equally in state and federal courts. *See Johnson*, 545 U.S. at 164 (granting certiorari because a state and federal court disagreed about the standard of proof for *Batson* step one). The government fails to explain why the same prima facie inquiry would be subject to different standards of review on appeal. In any event, the government does not dispute that the standard of review in *federal* courts must be uniform. Currently it is not. And resolving that conflict here would, at the very least, guide (if not bind) state courts too.

c. In light of the foregoing, it is no surprise that numerous courts have recognized the conflict of authority. *See, e.g.*, *Watson v. State*, 335 P.3d 157, 166 n.2 (Nev. 2014) ("There is a split of authority as to whether the finding of a prima facie case of discrimination (step one of the *Batson* analysis) should be reviewed deferentially."); *United States v. Martinez*, 621 F.3d 101, 109 & n.5 (2d Cir. 2010) (recognizing that the "circuits have split on the question, dividing on whether the [first-step] determination is subject to clear error or *de novo* review"); *People v. Knight*, 701 N.W.2d 715, 724 (Mich. 2005) ("courts appear to be split with regard to the proper standard of review when examining *Batson*'s first step"); *State v. White*, 684 N.W.2d 500, 505 (Minn. 2004) ("Federal circuit courts are not in agreement as to the standard of review of a district court's determination, under step one of *Batson*").

That conflict has persisted for the last two decades. Indeed, it took only a year after the Seventh Circuit's decision in *Mahaffey* for a divided en banc Ninth Circuit to expressly disagree and adopt the clear-error standard. *See Tolbert v. Page*, 182

F.3d 677, 685 n.11 (9th Cir. 1999) (en banc) ("We disagree with the Seventh Circuit's conclusion [in *Mahaffey*] that the *Batson* prima facie determination" is subject to *de novo* review); *id*. at 691 (McKeown, J., dissenting) ("We should join the Seventh Circuit in adopting *de novo* review of the *Batson* prima facie inquiry."). Over the last two decades, that conflict has only deepened and shown no sign of resolving itself. And both sides of the conflict have now been fully aired in the lower courts. This Court should resolve this mature and long-standing conflict of authority.

II. THE QUESTION PRESENTED IS IMPORTANT

Batson's framework "enforce[s] the constitutional principle" that "[e]qual justice under law requires a criminal trial free from racial discrimination in the jury selection process." *Flowers*, 139 S. Ct. at 2242. As a practical matter, "*Batson* immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States." *Id*. at 2243. And its scope is expansive: "*Batson* now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases" in state and federal courts. *Id*. (citations omitted). Given its importance in preventing invidious discrimination, and its ubiquitous application, this Court has "vigorously enforced and reinforced the decision, and guarded against any backsliding." *Id*.

The first step of the *Batson* framework plays a critical gatekeeping role. If the opponent of the peremptory strike cannot make out a prima facie inference of discrimination, the striker is not required to proffer a race-neutral reason, and the court is not required to ascertain whether discrimination was the reason for the

strike. Failing to satisfy step one thus pretermits the inquiry. Since the first step controls whether the other two steps occur at all, this Court has characterized its standard of proof as "narrow but important." *Johnson*, 545 U.S. at 168. The same is true for the standard of review. Indeed, "[g]iven the importance of th[e] constitutional right[s]" at stake, as well as the role of step one in safeguarding them, "the standard of review governing an equal protection challenge to the exercise of peremptory strikes is a significant issue." *Tolbert*, 182 F.3d at 686 (McKeown, J., dissenting).

Despite the issue's significance, geography alone now determines the vertical allocation of judicial authority vis-à-vis *Baton*'s first step. Clear-error review will, "as a practical matter, insulate[ ] the trial court's decision to reject a *Batson* challenge" even before there has been any attempt to defend it. *Id*. at 691. Thus, trial judges in, say, Miami have substantial discretion to cut off the inquiry, even when it should go forward, because they know appellate review will be highly deferential. By contrast, trial judges in, say, Chicago will be reluctant to prematurely cut off the inquiry, because they know appellate review of step one will be meaningful.

In that way, the standard of review affects the degree to which *Batson* enforces equal justice. The constitutional rights of defendants and jurors should not be different in Chicago than they are in Miami. Recognizing the substantive effect that standards of review have in general, this Court has granted certiorari in a variety of contexts to prescribe a uniform standard of review. *See, e.g.*, *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018) (review of bankruptcy court determination of non-statutory insider status); *McClane*

Co., Inc. v. EEOC, 137 S. Ct. 1159 (2017) (review of district court decision to enforce EEOC subpoena); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015) (review of district court patent claim construction); *Fry v. Pliler*, 551 U.S. 112 (2007) (federal habeas harmless-error review of state-court trial). The same course is warranted here given the important constitutional and systemic interests at stake.

III. THIS CASE IS AN EXCELLENT VEHICLE

The government argues that this case is a poor vehicle. It is mistaken.

a. The question presented is squarely before this Court. At trial, Petitioner raised a *Batson* challenge, and the district court denied it at step one. On appeal, the Eleventh Circuit affirmed that ruling, reviewing it for clear error and emphasizing the "great deference" afforded to it. Pet. App. A3–5. That court referenced both the clear-error standard and the notion of "deference" three times in two short pages. And its analysis was tied to that standard, deferring to the trial court's conclusory ruling. At no point did it suggest that the result would be the same on *de novo* review.

Nonetheless, the government argues (BIO 16) that Petitioner did not ask the Eleventh Circuit to apply *de novo* review. But such a request to the panel would have been futile given binding circuit precedent. Indeed, the Eleventh Circuit had published countless opinions—going back several decades—applying the clear-error standard to the step-one determination. *See United States v. Hill*, 643 F.3d 807, 838 (11th Cir. 2011) (string-citing six cases dating back to 1986). And, under that court's stringent prior panel precedent rule, the panel below was bound by that standard. Thus, in his brief on appeal, Petitioner could do no more than accurately describe that

court's practice. Pet. C.A. Br. 14 ("This Court reviews a district court's ruling on a *Batson* challenge for clear error."). Challenging that circuit precedent at the panel level would have been pointless and done nothing to facilitate review in this Court.

Critically, however, Petitioner *did* subsequently petition for rehearing in an effort to have the full court reconsider that precedent. Relying on out-of-circuit decisions, he argued that "a district court's step-one *Batson* determination is not entitled to deferential appellate review. Rather, the district court's step-one determination of a prima facie case of discrimination must be reviewed *de novo*." Pet. C.A. Rehearing Pet. 2–3. Thus, Petitioner directly challenged the Eleventh Circuit's clear-error standard at the first meaningful opportunity. Although the government notes that rehearing petition in its jurisdictional statement (BIO 1), it inaccurately asserts (BIO 8) that Petitioner seeks *de novo* review "for the first time in this Court."

In any event, even if Petitioner had not pressed his argument at the first available opportunity below, this case would still be a suitable vehicle because the court of appeals based its ruling on the clear-error standard of review. That fact alone defeats the government's vehicle argument. For this Court has made clear that, even where not pressed at all, certiorari is appropriate where the question was passed on below, particularly where (as here) circuit precedent foreclosed Petitioner's position in the court of appeals. *See United States v. Williams*, 504 U.S. 36, 41–45 (1992).

b. The government also argues (BIO 16–17) that Petitioner would not prevail even on *de novo* review of the district court's step-one determination. But, as the government itself recognizes (BIO 16), this Court is one of "review, not first

review," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and the court of appeals did not address whether the result would be the same on *de novo* review. Thus, the court of appeals would address that issue in the first instance on remand were Petitioner to prevail in this Court. There is no impediment to this Court's review.

Moreover, Petitioner would likely prevail on remand. There is no dispute that Petitioner is black, the government struck two black jurors in a row, and the jurors seated up to that point were all white. And there is another key fact suggesting discrimination as the motivation: the government had a compelling reason to seat—not strike—both black jurors. As it acknowledges (BIO 4, 18), both were outspoken in their view that the defense must present a case, or else they would draw an adverse inference against it. Dist. Ct. Dkt. Entry 173 at 70, 72. That viewpoint made these black jurors extremely favorable to the prosecution; yet it struck them.

In that regard, it is also telling that the government struck another (white) juror who was in law enforcement, "disgusted" by the charges, and sympathetic to abused children like the victim. The only discernible reason for striking him was that he understood the presumption of innocence. *See id.* at 26–27, 75–76, 85. Striking such an otherwise highly-favorable juror on that basis reflects that the government was concerned about meeting its burden to prove the charges beyond a reasonable doubt. Yet it still struck two (black) jurors who said it would be a problem if the defense did not put on a case. That further points to race as the motivation for those strikes. *See Hollingsworth v. Burton*, 30 F.3d 109, 112 (11th Cir. 1994) ("a comparison of stricken whites with stricken blacks is relevant to a *Batson* claim").

The above circumstances make out a prima facie inference of discrimination. After all, this Court has held that the prima facie showing is not "so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination." *Johnson*, 545 U.S. at 169. The government cites *United States v. Folk*, 754 F.3d 905 (11th Cir. 2014), but the court of appeals concluded there that "it was unclear whether Folk made a prima facie showing" where the government struck two of three black jurors, the defendant "concede[d] that there were 'clear reasons' for striking" one of the two, and the strike being challenged was directed at a juror with a "family member [who] had been charged with a similar offense for which Folk was on trial." *Id*. at 912–14. If step one was "unclear" in that case, then surely Petitioner crossed the low threshold here.[1]

c. Lastly, the government argues (BIO 17–18) that Petitioner would fail at step three. But the district court resolved the *Batson* challenge at step one, so steps two and three never happened. To be sure, the district court supplied its own race-neutral reason for one of the two challenged strikes. But, as four members of this Court recently explained, this procedure—where "the trial judge, rather than the prosecutor" "suppl[ies] a race-neutral reason"—"does not comply with this Court's *Batson* jurisprudence." *Williams v. Louisiana*, 136 S. Ct. 2156, 2156 (2019) (Ginsburg, J., concurring in the decision to grant, vacate, and remand). Thus, if

[1] Contrary to the government's suggestion (BIO 16–17), *Batson* "declined to require proof of a pattern" of discriminatory strikes. *Johnson*, 545 U.S. at 169 n.5; *see United States v. Horsley*, 864 F.3d 1543, 1546 (11th Cir. 1989) (vacating step-one determination where only one black juror was struck, and district court required a pattern without considering disparate treatment of similar jurors of different races).

Petitioner satisfied step one on remand, the Eleventh Circuit would have to remand to allow the government to articulate a race-neutral reason. *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1045 n.40 (11th Cir. 2015). Only then could step three occur.

And if the race-neutral reasons proffered by the government at this late stage were proffered in the district court, Petitioner would likely prevail. Indeed, those reasons are implausible. It observes that both stricken black jurors (7 & 10) had a problem if the defense did not present a case; but, as explained, that hostility to the presumption of innocence was a compelling reason for the government to seat (not strike) them. The government also observes that Juror 10 had been accused of shoplifting; but it omits that this accusation occurred "over 37 years ago," and the prosecution accepted two non-black jurors who had been accused of a crime and had family members accused of crimes. Dist. Ct. Dkt. Entry 173 at 30, 33, 39, 86, 88; *see Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.") (citation and brackets omitted). Finally, the government observes that Juror 7 was in foster care and had a mother who was a prostitute. But that experience would have only led him to sympathize with the victim, not Petitioner. Once again, although highly favorable to the prosecution, it struck this black juror.

In sum, the question presented is squarely before the Court, as the court of appeals relied heavily on the deferential clear-error standard of review. There is no impediment to this Court's review, as the court of appeals did not hold, let alone

suggest, that the result would be the same on *de novo* review. And, on remand, the record reflects that Petitioner could prevail not only at step one but also at step three given the government's inability to supply a plausible race-neutral reason even with the benefit of hindsight. Thus, the standard of review is likely dispositive here. And this trial was already a cliffhanger even with the tainted jury. *See* Pet. 21.

IV. THE ELEVENTH CIRCUIT ERRED BY APPLYING CLEAR-ERROR REVIEW

The Eleventh Circuit erred by employing deferential clear-error review.

a. As several courts have recognized, *Baton*'s "first step involves a question of legal sufficiency over which the appellate court must have plenary review." *Valdez*, 966 P.2d at 591; *accord State v. Angelo*, 197 P.3d 337, 346 (Kan. 2008) (citation omitted). Supporting that view, this Court has explained that "a defendant satisfies the requirements of *Batson*'s first step by producing *evidence sufficient* to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170 (emphasis added). That is a legal determination. To be sure, the trial court may make factual findings about what happened during jury selection, and those findings would be subject to clear-error review on appeal. But the ultimate question is whether the underlying facts give rise to an inference of discrimination. And that is a question of legal sufficiency that should be subject to *de novo* review on appeal.

The government observes (BIO 8–9) that the ultimate determination at step three is a finding of fact subject to clear error. But steps one and three are distinct inquiries. The Court should not "blur[ ] the distinction between shifting the burden of production [at step one] and satisfying the burden of persuasion" at step three;

merely "raising an inference of discrimination sufficient to require the other side to articulate a neutral explanation cannot be equated with the ultimate factual finding of purposeful discrimination." *Tolbert*, 182 F.3d at 688 (McKeown, J., dissenting). This Court in *Johnson* recognized that distinction. Relying on the Court's Title VII jurisprudence, it observed that "steps one and two . . . can involve no credibility assessment because 'the burden-of-production determination necessarily precedes the credibility-assessment stage" at step three. 545 U.S. at 171 n.7 (citation omitted).

b. This Court's Title VII jurisprudence further confirms that step one should be reviewed *de novo*. In that context, the Court has recognized that the "prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978). Thus, "federal courts have applied a *de novo* standard of review to the trial court's prima facie determination under Title VII." *Valdez*, 966 P.2d at 591 (citing cases). And the government does not dispute that this is the correct standard of review in the Title VII context. *See* BIO 11–12.

That standard of review should apply equally here because *Batson* modeled its three-step framework on the Title VII framework adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. Indeed, *Batson* relied heavily on Title VII precedents. 476 U.S. at 94–98 nn. 18–21. Most notably, in footnote 18, *Batson* incorporated the "operation of prima facie burden of proof rules" from this Court's Title VII cases. *Id.* at 94 n.18. And, in *Johnson*, this Court again reiterated its approval of the "the burden-shifting framework in cases arising under Title VII."

545 U.S. at 171 n.7. Thus, the *de novo* standard for reviewing step one in the Title VII context should apply equally in the *Batson* context.

The government argues (BIO 12) that "[t]his 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." But that is incorrect. *Batson* itself specifically endorsed Title VII's deferential standard for reviewing the step-three determination. 476 U.S. at 98 n.21. There is no reason why the standard for reviewing step three should be the same in both contexts, but the standard for reviewing step one should be different. Incongruity in the law should be avoided.

Yet the government promotes such incongruity, arguing (BIO 11–12) that the Title VII context involves historical facts, whereas the *Batson* context involves facts that play out in front of the judge. But that distinction would only support deferential review of the trial judge's *factual* findings; it would not support deferential review of a determination about whether the facts satisfy the legal standard for a prima facie case. The government's purported distinction is also belied by cases in other contexts holding that a question of legal sufficiency is reviewed *de novo*, not for clear error.

Take, for example, this Court's Fourth Amendment decision in *Ornelas v. United States*, 517 U.S. 690 (1996). In that context, the facts play out in front of the court through live witness testimony. Nonetheless, this Court held that, while underlying factual findings and credibility determinations are reviewed for clear error, the "ultimate questions of reasonable suspicion and probable cause . . . should be reviewed *de novo*." *Id*. at 691, 699. The Court has reached the same conclusion

with respect to the voluntariness of a confession, *Miller v. Fenton*, 474 U.S. 104, 112 (1985) and whether a suspect is "in custody," *Thompson v. Keohane*, 516 U.S. 99, 112–13 (1995) (citing more examples). The government ignores those precedents, but their logic applies equally here. *See Tolbert*, 182 F.3d at 690 (McKeown, J., dissenting).

c. Instead, the government argues (BIO 9–10) that the prima facie determination is "primarily" factual and entrusted to trial judges. As explained, that understanding collapses the threshold determination at step one with the ultimate determination at step three, circumventing the step-two requirement that the prosecutor state a race-neutral reason. *Id.* at 689–90. The government's argument also undermines *Baton*'s purpose of removing the "crippling burden of proof" on defendants that had rendered "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92–93. Treating the prima facie determination as a factual finding would revive that "policy of sweeping deference" immunizing virtually all rulings from review. *Ornelas*, 517 U.S. at 697.

In addition to undermining *Batson*'s structure and purpose, that result would be contrary to the "sound administration of justice," "strip[ping] . . . federal appellate court[s] of [their] primary function as . . . expositor[s] of law." *Miller*, 474 U.S. at 114. Where a legal standard is "provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984). Because the prima facie standard can "acquire content only through application," *de novo* review is "necessary if appellate courts are to maintain control

of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697. Such "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." *Mahaffey*, 162 F.3d at 484.

Such disparity would be untenable given *Batson*'s importance and step one's gatekeeping role. Clear-error review would remove appellate courts from this constitutional-enforcement process, except in rare cases involving overt or egregious racial discrimination. Trial judges would otherwise have free rein to allow racially-suspect peremptory challenges, without ever requesting a race-neutral reason or ascertaining the real reason for itself. *De novo* review is the only way for appellate courts, this Court included, to "preserve[ ] meaningful review with respect to one of the most important constitutional rights—the right to be judged by a jury chosen free of purposeful discrimination." *Tolbert*, 182 F.3d at 691 (McKeown, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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