No. 20-6260

IN THE SUPREME COURT OF THE UNITED STATES

SHERMAN JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim under Batson v. Kentucky, 476 U.S. 79 (1986) based on its determination that the district court had not clearly erred in accepting the prosecutor's race-neutral reasons for striking a juror.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 954 F.3d 1106.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2020. A petition for rehearing was denied on June 5, 2020 (Pet. App. 127). The petition for a writ of certiorari was filed on November 2, 2020. 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 District of Nebraska, petitioner was convicted on one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846. Judgment 1. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-14.

1. On June 21, 2016, a police officer stopped a van outside Omaha, Nebraska, for following too closely behind another vehicle. Pet. App. 2. Petitioner was sitting in the van's front passenger seat, and the van's rental agreement was in petitioner's name. Id. at 3. Petitioner gave consent to a search of the van, in which police officers found a blowup mattress, bank receipts, and six kilograms of cocaine hidden in the van's spare tire. Ibid.

A federal grand jury charged petitioner with one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846. Indictment 1-2. Petitioner proceeded to a jury trial. Pet. App. 3.

2. Prior to jury selection, each juror was asked to complete a juror questionnaire. See Pet. App. 8. One question on the questionnaire asked, "[h]ave you or a close family member ever

been a victim of a crime?" Id. at 11 (emphasis omitted). And during in-court jury selection, the district court, the prosecutor, and defense counsel questioned jurors on a variety of topics. Id. at 17-113. As relevant here, the court asked jurors whether any of them had "been involved in any court in a criminal matter that concerned you, any member of your family or close friend, either as a defendant, a witness, or a victim?" Id. at 36. Only one person, Juror 24, indicated that she had. Ibid. The prosecutor's questions focused on jurors' views about and interactions with law enforcement. Id. at 48-63.

After the district court struck one juror for cause (Pet. App. 54-55), counsel made their peremptory challenges (Id. at 114). The prosecutor struck six people. Id. at 115. Defense counsel objected to three of those strikes -- those used for Jurors 1, 7, and 24 -- under Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits racially discriminatory peremptory strikes, arguing that the strikes removed "the only minorities in the jury pool." Ibid.

The district court asked for the prosecutor's race-neutral reasons for striking each juror. Pet. App. 115-121. The prosecutor first explained that he had struck Juror 24, an African-American woman, because she "initially indicated" "concerns about being * * * impartial," "doesn't agree with the sentencing laws involving drugs," and has "issues with law enforcement." Id. at 115-116. The prosecutor then explained that he had struck Juror 1, whom he had not definitely known was a member of a minority

group, because Juror 1 "couldn't tell us what beyond a reasonable doubt meant * * * even after we explained [it] to him a couple of times"; could not say how long he had lived in his house; and generally "appear[ed] very young." Id. at 116. The district court accepted those race-neutral reasons, observing that "everybody had to pull out of [Juror 24] that she was going to be fair," and that Juror 1 had not been "able to be responsive" to the voir dire questions. Id. at 116-117.

Regarding Juror 7, an African-American woman, the prosecutor first explained that, based on her juror questionnaire, he "had flagged her before [the prosecutor] even knew who she was." Pet. App. 118. Speaking without the juror questionnaire in front of him, the prosecutor suggested Juror 7 had only obtained "a GED," was a renter, and was single. Ibid. At that point, the district court interrupted the prosecutor to retrieve its copy of Juror 7's questionnaire, and the prosecutor did the same. Ibid. With the questionnaire in hand, the prosecutor clarified that his "biggest concerns" with Juror 7 were that she had "only been living in her place for a month," "just had a child," and was "a single mother," which could constitute "a big burden." Id. at 119.

"More important[]," the prosecutor explained, was his concern about Juror 7's potential views on law enforcement and the criminal justice system. Pet. App. 119. Referencing the question on the juror questionnaire asking whether the juror or a close family member had ever been a victim of a crime, the prosecutor noted

that Juror 7 answered, "[Y]es. My dad was killed when [I] was 2." Id. at 11-12 (emphasis omitted); see id. at 119. But the prosecutor observed that during voir dire, when the prosecutor "kept talking about * * * contact with law enforcement" and "if people were the victim of a crime," Juror 7 "just sat back there, didn't answer one question, didn't raise her hand once." Id. at 119. The prosecutor explained that he found that "a pretty concerning thing," as he could not know "if she thinks justice was served," "if there was no justice," "if the perpetrator was caught," or "how she feels." Ibid. The prosecutor further stated that the juror's "offer[ing] nothing" was a "pretty significant thing when she only answered three questions." Ibid.

In response, defense counsel pointed out that Juror 7 had a college education, not merely a GED as the prosecutor had first stated, and that she had in fact "answered all the questions on the jury questionnaire." Pet. App. 120. Defense counsel also argued that "the overall majority" of jurors "didn't have answers or have any questions or responses to any of the answers of all the counsel," and that Juror 7 didn't have "an obligation" to answer any questions. Ibid.

The prosecutor responded by observing that Juror 7's answers in her questionnaire were "kind of [a] bare bones thing." Pet. App. 120. He also explained that he had used one of his other peremptory challenges to strike a juror who was similar to Juror 7. Id. at 120-121. That juror stated in his juror questionnaire

that "[he] was the victim of a sexual assault." Id. at 120. But because "he didn't proffer any information or talk about his experience with law enforcement or what was going on" in response to questions posed by the district court and counsel, the prosecutor struck the juror, just as he had done with Juror 7. Id. at 120-121. Striking both individuals, the prosecutor explained, was intended to mitigate the "big risk of getting somebody on this jury that has a grudge" against law enforcement. Id. at 121.

The district court overruled petitioner's Batson challenge with respect to Juror 7. Pet. App. 116-118, 121. The court considered the challenge a "closer question" than the challenges to Jurors 1 and 24, but the court found that "the government has met its * * * burden in this case in stating why there was a legitimate nondiscriminatory reason for making that strike." Id. at 121.

After a four-day trial (D. Ct. Docs. 127-130 (May 8, 2018-May 11, 2018)), the jury found petitioner guilty on both counts (Pet. App. 2). The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1-14. It first reiterated this Court's holdings that "even a single instance of race discrimination against a prospective juror is impermissible," and that a trial court's Batson findings should be reviewed for

clear error. Id. at 5 (quoting Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019)). The court recognized that the prosecutor's use of three of his six peremptory strikes to remove the only minority jurors was "evidence that might suggest the prosecutor was motivated by discriminatory intent," and that the district court had accordingly requested race-neutral reasons for the strikes. Id. at 6. But the court of appeals found no clear error in the district court's acceptance of the prosecutor's race-neutral reasons for striking the minority jurors. It observed that Juror 24 had, among other things, "acknowledged her disagreement with the country's drug laws." Id. at 7. And the court of appeals determined that the district court had reasonably accepted the prosecutor's concerns about Juror 1's inability to respond to basic questioning on the reasonable doubt standard. Id. at 7.

The court of appeals also affirmed the district court's finding with respect to Juror 7. Pet. App. 10. It recounted that the prosecutor had offered three race-neutral reasons for the strike. Id. at 7-8. First, the juror had only been renting her home for a month, suggesting she may not have substantial ties to the community; second, she was a single mother to a toddler; and third, she had not provided information at voir dire about her father's killing, suggesting a "lack of candor" about her "family's history with law enforcement." Id. at 8 (citation omitted).

The court of appeals acknowledged that the prosecutor had "initially misstated [J]uror 7's level of education" and "mistakenly indicated that she had not fully completed her jury questionnaire." Pet. App. 8. But the court found it "clear * * * that the prosecutor was initially speaking off the cuff without the benefit of his notes." Ibid. And, even after defense counsel "corrected these errors," the district court still found that the prosecutor was "sincere" in explaining that his main reason for striking Juror 7 was the "mystery surrounding her father's death" rather than "discriminatory intent." Ibid. (citation omitted).

Judge Kelly concurred. In her view, "the government's use of a peremptory challenge to strike Juror 7 present[ed] a close call," Pet. App. 10, but she agreed that the district court had not clearly erred in finding that the prosecutor struck Juror 7 for race-neutral reasons. Id. at 14. She emphasized that "the district court is in the best position to make what can be a difficult call." Id. at 13.

ARGUMENT

Petitioner contends (Pet. 11-19) that the court of appeals should have found clear error in the district court's rejection of his challenge to the peremptory strike of Juror 7. Review of that fact-bound contention is unwarranted because the court of appeals'

decision is correct and does not conflict with the decisions of this Court or any other court of appeals.

1. a. In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that the Constitution prohibits the use of peremptory challenges to strike jurors based on their race. Id. at 89. Inquiry into a possible Batson violation consists of three steps. First, the defendant must establish a prima facie case of discrimination by demonstrating that the "relevant circumstances raise an inference" of racial discrimination. Id. at 96. Second, if the defendant makes such a showing, the prosecution must come forward with a race-neutral explanation for each challenged strike. Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016). Finally, the district court considers the parties' submissions and determines whether the objecting party has proved purposeful racial discrimination. Ibid. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

This Court has made clear that the ultimate question of discriminatory intent is a "finding of fact" to which "a reviewing court ordinarily should give * * * great deference." Batson, 476 U.S. at 98 n.21 (citation omitted); see also Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019). 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)).

In this case, the district court appropriately applied Batson's three-step inquiry. After defense counsel challenged the prosecutor's use of some of his peremptory strikes to remove the potential minority jurors, the district court required the prosecutor to offer a race-neutral explanation for striking each of the three jurors in question. Pet. App. 114-121. And, after hearing each explanation, the court evaluated whether it was sufficient. Ibid. The court accepted, for example, the prosecutor's concerns regarding Juror 24's impartiality because "everybody had to pull out of her that she was going to be fair." Id. at 116. The court also accepted the prosecutor's stated concerns about Juror 1 because of that juror's "struggle[]" to answer the prosecutor's question about reasonable doubt. Id. at 117. And, while the court found Juror 7 a "closer question," it found that the government had "met its burden" by "stating why there was a legitimate nondiscriminatory reason for making that strike." Id. at 121.

The court of appeals, in turn, properly recognized that it should review the district court's findings only for "clear error" and that it should not second-guess the trial court's credibility and demeanor determinations except in "exceptional circumstances." Pet. App. 5-6 (quoting Snyder, 552 U.S. at 486). The court of appeals also stated that striking all potential minority jurors

"is evidence that might suggest" discriminatory intent. Id. at 6. But its review of the record found no "clear error" in the district court's findings that the prosecutor had offered permissible race-neutral explanations for each of the challenged strikes. Id. at 6-9.

b. Petitioner asserts (Pet. 13) that the court of appeals erred in failing to recognize that the prosecutor's factual misstatements regarding Juror 7 triggered the need for the reviewing court to conduct a more detailed analysis of the "facts and circumstances which show racial discrimination." But the court of appeals did analyze the significance of the prosecutor's incorrect statements with respect to Juror 7's level of education and her answers to the juror questionnaire. Pet. App. 8. The court found it "clear" from the record that the prosecutor was simply "speaking off the cuff without the benefit of his notes." Ibid. It further observed that defense counsel had corrected the errors, and that -- even after hearing the factual errors and defense counsel's corrections -- the district court had determined that the prosecutor's race-neutral reasoning was "sincere and not motivated in substantial part by discriminatory intent." Ibid. (citation and internal quotation marks omitted). The court of appeals was not required to engage in an even more extensive analysis in order to uphold that credibility determination on clear-error review. See Snyder, 552 U.S. at 486 (determinations regarding credibility and demeanor are "peculiarly within a trial

judge's province" and should be overturned only in "exceptional circumstances" (citation omitted)).

2. Petitioner does not allege that the Eighth Circuit's decision conflicts with a decision of any other circuit. Instead, he erroneously contends (Pet. 19) that it stands "in direct contradiction" to this Court's decisions in Flowers v. Mississipi, supra, Foster v. Chatman, supra, and Miller-El v. Dretke, 545 U.S. 231 (2005). He asserts (Pet. 12) that those cases establish that, where the prosecutor's initial race-neutral reasons for striking a juror are challenged as factually inaccurate, the reviewing court's analysis "must" consider "whether the prosecution struck all of the prospective black jurors or the majority of them"; whether the prosecutor failed to strike white jurors "who had the same issues as the reasons stated for striking the black jurors"; and whether the prosecutor "failed to engage in any meaningful voir dire to address the issues [it] raised to strike the black jurors." That is incorrect.

Petitioner offers no support for the proposition that this Court has mandated a specific, detailed inquiry of that sort that a reviewing court, or even a district court, must apply every time a prosecutor's articulation of race-neutral reasons contains a factual error or misstatement. In Batson itself, this Court "decline[d]" the invitation "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." 476 U.S. at 99. Since then, this Court has

consistently advocated a flexible, fact-sensitive approach to Batson claims. For example, while petitioner alleges (Pet. 12) that factual misstatements by the prosecutor should always prompt an appellate court to analyze whether the government attempted to address its concerns through meaningful voir dire, this Court has not always considered that factor, even in the cases on which petitioner relies. In Foster, for instance, this Court did not undertake any analysis as to whether the prosecution questioned black jurors about any of the issues it later cited as reasons for striking them. 136 S. Ct. at 1747-1755.

Similarly, while petitioner contends (Pet. 12) that factual misstatements by a prosecutor mean that the appellate court "must" ask "whether the prosecution" struck minority jurors but "kept [similar] white jurors," this Court has not been so absolute. In Miller-El, the Court recognized that it can be helpful for a court to engage in "comparative juror analysis" by analyzing whether the prosecutor struck black jurors while retaining comparable white jury members. 545 U.S. at 241. And in Flowers, the Court reiterated that comparative juror analysis "can be an important step in determining whether a Batson violation occurred." 139 S. Ct. at 2248. But, far from mandating such comparative juror analysis in every case, the Court has recognized its limitations, particularly at the appellate level where "a retrospective comparison of jurors based on a cold appellate record may be very misleading." Snyder, 552 U.S. at 483. "In that situation, an

appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." Ibid.

3. Petitioner suggests (Pet. 17-18) that -- at least in his case -- a comparative juror analysis was necessary based on the one performed by Judge Kelly in her concurrence. Judge Kelly referred to a juror -- potentially one not discussed in the district court or petitioner's initial appellate briefing -- who had not been struck even though, in Judge Kelly's view, the juror was in an "analogous situation" to Juror 7. Pet. App. 12. But even Judge Kelly did not contend that her analysis counselled a decision in petitioner's favor; like the panel majority, she found no clear error in the district court's resolution of petitioner's highly fact-specific Batson claims. Id. at 14.

Other aspects of the record reinforce the correctness of that fact-bound determination and also highlight why this case would be unsuitable for further review. When explaining his race-neutral reasons for striking Juror 7, the prosecutor observed that Juror 7 had not been forthcoming with respect to the circumstances of her father's killing and any impact the crime may have had on her view of the criminal justice system. Pet. App. 119. In her concurrence, Judge Kelly stated that the juror whom she viewed as "analogous" was similar to Juror 7 in this respect because he had acknowledged a past sexual assault without discussing it at voir dire. Id. at 12. But, during the Batson proceedings before the

district court, the prosecutor explained that he had struck a white male juror whose questionnaire reflected that he "was the victim of a sexual assault" precisely because -- like Juror 7 -- the juror had not "proffer[ed] any information * * * about his experience with law enforcement or what was going on." Id. at 120-121. Neither defense counsel nor the district court challenged the prosecutor's assertion that he had struck that similarly-situated juror. Ibid.

If Judge Kelly and the prosecutor were referring to two different jurors with a history of sexual assault, the prosecutor's decision to strike at least one of the similarly-situated white jurors still supports the district court's finding that the prosecutor was not motivated by discriminatory intent when he struck Juror 7. See, e.g., Rice v. Collins, 546 U.S. 333, 341 (2006) (concluding that a prosecutor's motivation in striking a juror was "race neutral" where "she used a peremptory strike on a white male juror * * * with the same characteristics"). If instead Judge Kelly and the prosecutor were describing the same juror, then one of them appears to have been mistaken as to whether the juror with a history of sexual assault ultimately remained on the jury. The record does not clarify the issue because petitioner did not adopt this argument until his petition for an en banc rehearing. Accordingly, even if this Court did wish to consider the fact-bound question presented, review would be complicated by

factual uncertainties attributable to petitioner's failure to raise or flesh out this argument at an appropriate stage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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