No. 20–6990

IN THE
SUPREME COURT OF THE UNITED STATES

ALLYN AKEEM SMITH,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Courts around the country have unanimously concluded that the good faith exception applies when police obtained cell site location information pursuant to a statute, but without a warrant, before this Court issued *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Should this Court nonetheless review the state court's application of the good faith exception under the same circumstances in this case?

2. Should this Court review a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge based on objections not raised at trial?

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INTRODUCTION

There is no compelling reason to grant certiorari here. First, despite raising issues stemming from two widely litigated cases,[1] Smith has not pointed to a decision from any jurisdiction applying a rule that conflicts with the opinion below. *See* U.S. Sup. Ct. R. 10(a–b) (stating a conflict between United States courts of appeals or a conflict between state courts of last resort may be a compelling reason to grant a writ of certiorari). The various courts that have considered cell site location information ("CSLI") searches post-*Carpenter* have consistently applied the good faith exception: "every one of our sister courts to have considered this question since *Carpenter* has agreed that the good-faith exception—specifically the *Krull* [*v. Illinois*, 480 U.S. 340 (1987)] exception—applies to CSLI obtained under [18 U.S.C.] § 2703(d) prior to *Carpenter*." *United States v. Beverly*, 943 F.3d 225, 235 (5th Cir. 2019) (listing cases). Similarly, Smith has not pointed to another jurisdiction where the *Batson* issue would come out differently, and he is largely asking this court to revisit factual findings he disagrees with.

[1] According to Westlaw, as of February, 22, 2021, *Batson* has been cited in 17,714 cases, while *Carpenter* has been cited in 784 cases in less than three years since its publication.

Additionally, Smith asks this Court to rule on the *Batson* issue based on a comparative analysis of prospective jurors—an argument he did not raise at trial. He also failed to question at trial whether the prosecutor's race-neutral reasons were pretextual, depriving the trial court of the opportunity to address that issue. Accordingly, the Arizona Supreme Court found these issues waived and the record is inadequately developed to address his argument. This is especially problematic here because a reviewing court defers to the factual findings of the trial court, which is better positioned "to make credibility determinations" regarding the prosecutor's proffered reasons. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

Lastly, the decision below was correctly decided. The Arizona Supreme Court correctly held that the CSLI, which was obtained in accordance with state statute prior to *Carpenter*, was admissible under the good faith exception to the exclusionary rule. Pet. App. 7a. In doing so, it specifically noted *Krull* and found that the detective who applied to obtain Smith's CSLI "reasonably relied on [A.R.S.] § 13-3016(C), which permitted the state to obtain CSLI without a warrant." Pet. App. 8a.

The trial court also correctly denied Smith's *Batson* challenges. In conducting the third step of the *Batson* inquiry, it explained: "I remember [J]uror 14 very clearly being hesitant about being able to serve on this. We talked to him for some period of time." Pet. App. 17a. The trial court also agreed that Juror 211 had "hardships with regard to her health." Pet. App. 17a.

Put simply, neither question warrants certiorari, especially in light of the uniformity with which lower courts have ruled on the *Carpenter* issue and Smith's failure to raise his comparative juror argument until appeal.

STATEMENT OF THE CASE

I. Smith murders K.L. and shoots K.S., their two-month-old daughter

During a breakup with his on-again-off-again girlfriend, K. Ward, Smith dated K.L. Pet. App. 3a. In October 2014, K.L. gave birth to K.S. *Id.* To apply for welfare benefits from the Arizona Department of Economic Security ("DES"), K.L. had to name the father of the child. Pet. App. 4a. She informed DES that Smith was the father and provided his contact information to set up a DNA test. *Id.* By that time, Smith was back together with Ward, and he "tried to convince Ward that he was not the father." Pet. App. 3a.

Smith, however, skipped his appointments to provide a DNA sample to DES. Pet. App. 4a. After missing appointments on December 4 and 9, K.L. told Smith (through a Facebook account that Smith used under the pseudonym "OG Triple") that DES would "refer the matter to the courts" if Smith did not submit a test by December 11. *Id.* Smith told K.L. that he would go on December 11 and meet her and the baby beforehand, but "only if they were alone." *Id.* K.L. gave Smith her address, and Smith told her that he would be there around noon on December 11. *Id.*

On the morning of December 11, Smith deleted K.L. as a friend on Facebook and deleted his OG Triple account. *Id.* Smith then went to a gun shop and bought a .22-caliber handgun. *Id.* He filled out paperwork and the store security cameras recorded him at the shop at 11:46 a.m. *Id.* He arrived at K.L.'s apartment shortly thereafter, where K.L.'s roommate, Tashae Jones, saw him. Pet. App. 5a. Smith immediately asked K.L. to have Jones leave the apartment. *Id.*

Smith drove K.L. and K.S. to a "remote" hiking trail at the base of South Mountain in Phoenix, where he shot K.L. in the back of the head and K.S. in the thigh, fracturing her femur. Pet. App. 2a–4a, 56a. He immediately went to a DES office and took a paternity test. Pet. App. 5a.

While at the office, he asked an employee what would happen to the paternity case if K.L. never showed up again. *Id.* The employee told him the case would be closed. *Id.* The test later revealed Smith is K.S.'s father. *Id.*

A hiker found K.L. and K.S. around 3 p.m. and called 911. *Id.* K.L. could not be revived. *Id.* K.S. survived after undergoing emergency surgery. *Id.* The Phoenix Police Department ("PPD") found a .22-caliber shell casing at the crime scene. *Id.*

II. Detective Balmir obtained Smith's CSLI.

PPD detective Helen Balmir prepared an application for a court order to obtain Smith's CSLI consistent with A.R.S. § 13-3016, which required "reasonable grounds" for the order to be granted. Pet. App. 6a–7a. She submitted the application and affidavit in support, which detailed the ongoing murder investigation, on September 13, 2016, and it was granted the same day. Pet. App. 5a–6a. The affidavit explained the facts of the crime scene, the identity of the victims, why Smith was suspected, and how the telephone numbers were connected to Smith. Pet. App. 50a–60a.

Smith's cell phone provider turned over subscriber information, historical detail records, and device information from March 1, 2014

through December 14, 2014. Pet. App. 6a. His provider "did not disclose any information regarding the content of Smith's communications, such as texts, voicemails, or emails." *Id.* Section 13-3016(D)(1) allows notice to defendants to be delayed for 90 days and Detective Balmir requested the court delay disclosure. Pet. App. 9a. Smith's counsel admitted that the State disclosed Smith's CSLI 35 days after the order. *Id.*

Smith moved to suppress the CSLI. Pet. App. 6a. He argued that *Carpenter*, published almost two years after PPD obtained the order, required suppression. *Id.* After a hearing, the trial court denied the motion, concluding there was probable cause to support the CSLI order and lack of notification under A.R.S. § 13-3016 was not grounds for suppression. *Id.*

On appeal, the Arizona Supreme Court held that the good faith exception to the exclusionary rule applied because PPD obtained the CSLI in good faith reliance on A.R.S. § 13-3016. Pet. App. 8a. The court noted that its holding was consistent with other courts, specifically mentioning that the Ninth, Fifth, and Third Circuits, along with Nebraska and Virginia, had applied the good faith exception to CSLI obtained in reliance on a statute. *Id.* It explicitly rejected the argument that *Riley v. California*, 573 U.S. 373 (2014), undermined law enforcement's reliance on A.R.S. § 13-

3016 because *Riley* concerned a warrantless search of a cell phone's contents while CSLI "simply contains records about [Smith's] general location." *Id.*

III. The trial court denied Smith's *Batson* challenges based on race-neutral reasons.

After jury selection, the trial was expected to last 16 weeks. Pet. App. 267a. During voir dire, the trial prosecutor used peremptory strikes on Jurors 14 and 211. Pet. App. 16a. Smith objected under *Batson*, stating that jurors 14 and 211 were "middle-of-the-road jurors" and both African American. *Id.*; Pet. App. 149a. The trial court turned to the second step of *Batson* and asked the prosecutor if she had race-neutral reasons for the strikes. Pet. App. 17a. The prosecutor first pointed out that juror 14 was the State's first strike and Juror 211 was the eighth. Pet. App. 149a. She then explained that Juror 14 was very hesitant during questioning:

> And when he actually spoke during voir dire, he was in that first panel, he actually asked to speak in privately [sic] and he raised several issues. He said he had to do a lot of soul searching. He couldn't make a decision. He did not want that weight. He would hesitate and say that he could. He said, I lean towards life. I could. I think so. Soul searching. Can't make a decision. The evidence would be difficult.

Pet. App. 149a–50a. For Juror 211, the prosecutor explained she was concerned about the juror's background in counseling and her health complications:

> With regards to [J]uror number 211, [J]uror number 211 actually checked "other" on her racial form on the biographical information. She has a master[']s in theology. She is a human services counselor. Human services counselors typically believe in redemption. She does counseling for domestic violence and she does counseling for addiction. All of those things are about forgiveness and all of those things are about the redemption of a human. And in addition, Your Honor, she also had some medical issues that she was concerned about. She raised them in both, I believe, her questionnaire, the initial screening.

Pet. App. 149–150a. The prosecutor also noted Juror 211 had two surgery follow-up appointments that conflicted with the trial schedule, suffered from migraines, and took daily medication. Pet. App. 17a. Juror 211's answer to the questionnaire additionally indicated that serving on the jury would create an "undue hardship" because she could not reschedule her doctor's appointments. Pet. App. 18a–19a. After the state offered its race-neutral reasons, the trial court asked Smith's counsel if he had anything else he wanted to put on the record. Pet. App. 317a. Smith's counsel did not

challenge the State's reasons as pretextual or make a comparative analysis to other jurors; instead counsel replied he had "nothing else to add." *Id.*

The trial court found the prosecutor's race-neutral reasons credible. The court remembered "[J]uror 14 very clearly being very hesitant about being able to serve on this." Pet. App. 17a. For Juror 211, the trial court found that she had "hardships with regard to her health," and denied both *Batson* challenges. *Id.*

On appeal, the Arizona Supreme Court affirmed the trial court. It concluded that "the record supports the trial court's conclusion that the strikes were not pretextual," and it declined to "conduct a comparative analysis of jurors 14 and 211 vis-à-vis other jurors . . . [b]ecause Smith did not raise this issue in the trial court." Pet. App. 18a–19a. Accordingly, it deemed the comparative analysis issue waived. Pet. App. 19a. It noted that Juror 14 said multiple things to show he was reluctant to serve on a death penalty case, included that he would "have to do some soul searching," did not know if he wanted "a death sentence on his conscience," and that it would be very difficult to impose a death sentence and would consider it a "last option." Pet. App. 18a. For Juror 211, she "advised the court that she suffered from migraines, and that serving on the jury would

create an 'undue hardship' because she had two surgery follow-up appointments that conflicted with the trial schedule and could not be rescheduled." *Id.* It also rejected Smith's argument that the trial court did not conduct the third step of *Batson*: "Unlike [*United States v.*] *You*[, 382 F.3d 958 (9th Cir. 2004)], the trial court here did more than simply deem the State's explanations 'plausible.' Rather, the court made specific findings as to each juror[.]" Pet. App. 19a.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons." *Id.* Smith has not provided a compelling reason for review because the Arizona Supreme Court's opinion does not conflict with another state court of last resort or of a United States court of appeals, nor does it conflict with the relevant decisions of this Court. *See* U.S. Sup. Ct. R. 10(b), (c). His argument further relies on a comparative analysis of juror answers, something he did not argue in the trial court and that the appellate court thus deemed waived.

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. . .

I. Smith does not allege a conflict between the Arizona Supreme Court's opinion and another Court.

There is no compelling reason to grant Smith's petition because he has not shown that the Arizona Supreme Court's opinion conflicts with any other state courts of last resort or of a United States court of appeals. A conflict between such courts is a "principal purpose" for granting certiorari. *Braxton v. United States*, 500 U.S. 344 (1991); *cf. F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 146 (2013) (noting the Court granted certiorari because "different courts ha[d] reached different conclusions" about the appealed issue); *Kinder v. United States*, 504 U.S. 946, 951 (1992) (White, J., dissenting from denial of certiorari) (arguing a case that raised "a recurring issue of constitutional importance" with "varying conclusions" from the courts of appeals merited granting certiorari). Despite Smith's claim that Arizona does not follow two heavily-litigated cases from this Court, his petition does not point to an opinion from a different jurisdiction that conflicts with the Arizona Supreme Court's decision below. Without a conflict, a primary purpose of certiorari review is missing.

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A. *Smith has not identified a conflict regarding the good faith issue.*

As the Arizona Supreme Court noted, courts have been remarkably consistent in applying the good faith exception in the wake of *Carpenter*. *See United States v. Beverly*, 943 F.3d 225, 235 (5th Cir. 2019) ("We find additional support for our holding in the fact that every one of our sister courts to have considered this question since *Carpenter* has agreed that the good-faith exception—specifically, the *Krull* exception—applies to CSLI obtained under § 2703(d) prior to *Carpenter*."). In *Beverly*, for example, the Fifth Circuit noted that the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh circuits all held similarly. *Id.*

Respondents have also been unable to find a state court of last resort that has not applied the good faith exception to CSLI obtained consistent with statutes prior to *Carpenter*. The Arizona Supreme Court noted that the Nebraska Supreme Court applied the good faith exception, also specifically mentioning the *Krull* exception, to CSLI obtained without a warrant but consistent with the Stored Communications Act ("SCA"). Pet. App. ¶24 (citing *State v. Brown*, 921 N.W. 2d. 804, 811 (Neb. 2019)). The court below also cited a Virginia Court of Appeals opinion where that court applied the *Krull* exception to CSLI obtained in accordance with the SCA

and a Virginia state statute. *Id.* (citing *Reed v. Commonwealth*, 834 S.E. 2d. 505, 510–11 (Va. App. 2019)).

Unless and until a federal court of appeals or a state court of last resort decides the good faith exception post-*Carpenter* differently, there is no compelling reason for this Court to grant certiorari.

B. *Smith has also failed to allege a conflict regarding the* Batson *issue.*

Even accepting Smith's framing of the opinion below as endorsing the use of an "implicit finding" to conduct the third step[2] of the *Batson* inquiry, Smith has also failed to allege a conflict between the opinion below and another state court of last resort or federal circuit court. Many courts, like Arizona, will affirm the denial of a *Batson* claim even when trial courts "make implicit findings while performing the *Batson* analysis." *United States v. Ongaga*, 820 F.3d 152, 166 (5th Cir. 2016) (internal quotations

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[2] Respondent's view is that the trial court made specific findings regarding the challenged jurors: "Rather, the court made specific findings as to each juror, stating that 'Juror 14 [was] very clearly being very hesitant about being able to serve,' and Juror 211 had 'hardships with regard to her health.'" Pet. App. ¶ 73. For emphasis, the Arizona Supreme Court also noted: "Moreover, our precedent allows us to defer to an 'implicit finding' that a 'reason . . . was non-discriminatory' even when 'the trial court did not expressly rule on [the third *Batson* factor].'" *Id.* (citing *State v. Prasertphong*, 75 P.3d 675, 692 (Ariz. 2003)).

omitted); *see also Smulls v. Roper*, 535 F.3d 853, 861 (8th Cir. 2008) ("Here, by denying the *Batson* challenge, the trial court implicitly found that the prosecution's proffered nondiscriminatory reasons were credible. No further fact-finding was required. The absence of additional findings is certainly not a misapplication of clearly established Supreme Court precedent as required for relief under § 2254(d)(1)."). The same is true in the Tenth Circuit: "While explicit rulings are preferable, we can conclude in this case that the trial court implicitly ruled that the explanations offered by the prosecution were credible, believable, and race-and/or gender-neutral." *Saiz v. Ortiz*, 392 F.3d 116, 1180 (10th Cir. 2004). Thus, Smith having failed to point to any significant split among the state or federal courts, this Court should deny certiorari.[3]

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[3] While Smith does not allege a split or conflict, Respondent discovered several decisions that might at first glance appear inconsistent with the decision below. They are, however, readily distinguishable. For example, in *Higgins v. Cain*, 720 F.3d 255, 268 n.58 (5th Cir. 2013), the court cited to *Coombs v. Diguglielmo*, 616 F.3d 255, 261 (3rd Cir. 2010), and *Smulls v. Roper*, 535 F.3d 853, 860 (8th Cir. 2008), as evidence of a circuit split. In *Coombs*, however, unlike in this case, the trial court did not give the defense the opportunity to challenge the State's proffered reasons and failed to itself address those reasons. 616 F.3d at 263–64 (noting the trial court "unreasonably limited the defendant's opportunity to prove that the prosecutor's proffered reasons . . . were pretextual"). In two other cases, the Sixth Circuit faulted the trial court where it was "unclear to what extent the district court engaged in the third step, if it did at all," *United*

II. Petitioner's *Batson* issue presents a fact-bound dispute unworthy of review because he failed to raise it at trial, the Arizona Supreme Court deemed it waived, and the record is undeveloped.

Much of Smith's petition argues that the trial prosecutor's strikes were pretextual and rests that argument on a comparative analysis of other jurors the prosecutor did not strike. Pet. at 12–17. He did not raise these issues at trial, and the Arizona Supreme Court found them waived. Nevertheless, he asks this Court to conduct an independent comparison of the various jurors' responses during voir dire. But because Smith waived this issue and the record is undeveloped, this Court should not grant certiorari to consider it.

A. *Granting relief to Smith would require this court to reject facts found by the courts below.*

As explained above, Smith's petition essentially asks this Court to review the trial court's factual findings below. This is not a sufficient

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States v. McAllister, 693 F.3d 572, 580 (6th Cir. 2012), and the Seventh Circuit faulted the trial court where it "merely repeated that the [prosecutor's] demeanor-based justification was a 'nonracial-related reason.'" *United States v. Rutledge*, 648 F.3d 555, 560–61 (7th Cir. 2011). Here, in contrast, the trial court gave Smith the opportunity to challenge the prosecutor's reasons as pretextual (which Smith did not take) and expressly noted that it, too, had observed the reasons the prosecutor supplied for the strikes. Smith's case thus would have come out the same even in these jurisdictions.

reason for certiorari review. *See* U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error."). Both the trial court and the Arizona Supreme Court agreed that the strikes were race neutral: "The record supports the trial court's conclusion that the strikes were not pretextual. In denying Smith's *Batson* challenge as to Juror 14, the court stated that 'we talked to him for some period of time,' and observed that he was 'very hesitant' about serving on the jury." Pet. App. 18a. The courts below found similarly with regard to Juror 211:

> The court concluded that the State struck Juror 211 based on "hardships with respect to her health." Specifically, during voir dire and in her written questionnaire, Juror 211 advised the court that she suffered from migraines, and that serving on the jury would create an "undue hardship" because she had two surgery follow-up appointments that conflicted with the trial schedule and could not be rescheduled.

Id.

Nevertheless, without evidence, Smith asserts the strikes were pretextual. Pet. at 14. This is not supported by the record. Juror 14 explained he would "have to do some soul searching" about imposing the death penalty and did not know if he wanted a death sentence on his conscience. He even asked to speak privately with the court and reiterated that he would consider the death penalty as a "last option." The trial court did not error in finding that he was "very clearly being very hesitant about being able to serve." For Juror 211, the prosecutor pointed to her counseling background and her medical hardships, as she stated in her questionnaire that she had two doctor's appointments during the trial that she could not reschedule. Consequently, the trial court did not error in finding Juror 211 had medical hardships. The Court should deny Smith's request to revisit these factual findings.

B. *The issue is waived.*

The court below correctly held that Smith failed to raise a comparative analysis of the jurors at the time of trial. Pet. App. 19a. At trial, after the prosecutor explained her race-neutral reasons for striking Jurors 14 and 211, Smith's counsel did not challenge those reasons as pretextual and did not compare the prosecutor's reasons for those juror

strikes with other jurors who remained on the panel. Now, Smith asks this Court to deem the prosecutor's reasons pretextual when his trial counsel did not give the trial court the opportunity to address that question. The failure to raise this objection is especially problematic here, because an assessment of the prosecutor's demeanor and credibility lies "peculiarly within a trial judge's province." *Hernandez v. New York*, 500 U.S. 352, 369 (1991); *accord Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Miller-El*, 537 U.S. at 339 ("Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations."). This Court thus defers to the trial court unless there are "exceptional circumstances." *Snyder*, 552 U.S. at 477.

Contrary to Smith's suggestion, Pet. at 15, *Foster v. Chatman*, 136 S. Ct. 2228 (2016), does not require a reviewing court to conduct a comparative juror analysis for the first time on appeal, and neither does *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), *Snyder*, 552 U.S. 472, or *Miller-El*, 537 U.S. 322. As the court below acknowledged, *Foster* conducted an independent examination of the record, but did not require a comparative analysis where it was not raised at trial. Pet. App. 19a. This is

because "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. at 483; *accord People v. Beauvais*, 393 P.3d 509, 522 (Colo. 2017) ("We hold that appellate courts may conduct comparative juror analyses despite an objecting party's failure to argue a comparison to the trial court, but only where the record facilitates a comparison of whether the jurors are similarly situated."); *State v. Curry*, 447 P.3d 7, 11 (Or. App. 2019) (explaining that assessment under *Flowers* should include a comparative analysis "when the record is adequate to do so").

Further, as this Court has repeatedly stressed, "it is generally unwise to consider arguments in the first instance." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018) (refusing to consider a defendant's alternative argument that he did not previously raise). This is a "court of review, not of first view." *United States v. Haymond*, 139 S. Ct. 2369, 2385 (2019) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *accord Chaidez v. U.S.*, 568 U.S. 342, 358 n. 16 (2013) (refusing to consider "two back-up arguments" of a defendant because she did not "adequately raise them in the lower courts"). Accordingly, the Court should not grant certiorari to

entertain an issue that Smith failed to raise at trial and the Arizona Supreme Court deemed waived.

C. Smith's failure to object at trial makes this case a poor vehicle to consider the question presented.

In *Snyder*, this Court said that appellate courts "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," and conducted one only because "concern about serving on the jury to due to conflicting obligations[] was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." *Snyder*, 552 U.S. at 483. The Tenth Circuit has also explained that a trial court must rely on the opposing party to counter a "nonracially-motivated proffer." *United States v. Vann*, 776 F.3d 746, 754–55 (10th Cir. 2015). Thus, when a party fails to challenge at trial a proffered race-neutral reason for a strike, a reviewing court "can hardly criticize the district court's decision denying the *Batson* challenge" because the defendant "'gave the district court no reasonable basis for questioning the government's credibility in offering its race-neutral reasons.'" *Id.* at 755 (quoting *United States v. Smith*, 534 F.3d 1211, 1226 (10th Cir. 2008)); *cf United States v. Sineneng-Smith*, 140 S.

Ct. 1575, 1575 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation.").

A review of Smith's attempt at comparative analysis on a cold record proves these cases prescient. For example, Smith asserts that Juror 131 was similarly situated to the stricken jurors because he was "conflicted" about the death penalty. Pet. at 15; Pet. App. 181a. But that juror also stated "society shouldn't have to support someone that commits such serious crimes," had young children—whereas jurors 14 and 211 only had adult children—and stated that getting older and having a family changed how he felt about the death penalty. Pet. App. 172a, 182a. Any one of these race-neutral reasons could justify a prosecutor preferring to keep him over an otherwise similarly-situated juror.

A similar review of the other jurors mentioned by Smith reveal race-neutral differences between them and the jurors whose strikes Smith challenges. For example, Juror 2 wanted to be a detention officer before switching careers and viewed the death penalty as "necessary." Pet. App. 193a, 201a. Juror 57 also said the death penalty "may be necessary dependent on the crime." Pet. App. 334a. Juror 83 had two young daughters and said that a person may "deserve" the death penalty. Pet.

App. 228a, 238a. Juror 190 had a young son and also agreed that the death penalty "should be used . . . but only when necessary." Pet. App. 247a, 257a. And Juror 143 had medical issues, but was "comfortable" trying to make jury service work. Pet. App. 64a. Juror 211, in contrast, had "two doctors app[ointment]ts that cannot be rescheduled" and had four more appointments that she did not know if she could schedule around the trial. Pet. App. 267a.

Given Smith's failure at trial to compare Jurors 14 and 211 to any of these jurors or to argue the prosecutor's reasons were pretextual, the trial court was not unreasonable in denying the *Batson* challenge. A comparative analysis of the jurors now would be an exercise in speculation, as neither the trial prosecutor nor the trial judge were given the opportunity to answer or evaluate Smith's contentions, and it would undermine our adversarial system. This Court should not review this issue where Smith failed to adequately develop the record.

III. The Arizona Supreme Court's opinion is correct.

The court below decided both of these issues correctly. The *Krull* exception to the exclusionary rule was created just for situations like this: where officers acted in objectively reasonable reliance on a statute later

found to be unconstitutional. 480 U.S. at 349–50. Additionally, the record fully supports the trial and Arizona Supreme Court's findings that the prosecutor struck Jurors 14 and 211 for race-neutral reasons.

A. *The court below properly applied the good faith exception.*

As discussed in the opinion below, Arizona joined every other court to consider the issue in holding the good faith exception applies to CSLI orders obtained prior to *Carpenter*. Under *Krull*, 480 U.S. at 349–50, the good faith exception applies when an officer objectively relies on a statute that is later declared unconstitutional. That is exactly what happened here, as Detective Balimir relied on A.R.S. § 13-3016 to obtain Smith's CSLI. The exclusionary rule is meant to "deter future unlawful police conduct," but it would "not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Krull*, 480 U.S. at 347, 350. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Id.* at 349–50.

The court below, along with every other appellate court that has considered the issue, was also correct in rejecting Smith's argument that *Riley*, 573 U.S. 373, and *United States v. Jones*, 565 U.S. 400 (2012),

should have alerted the police that a warrant was necessary. Both cases are factually distinguishable and, as *Carpenter* itself noted, CSLI "does not fit neatly under existing precedents." 138 S. Ct. 2206, 2214. *Jones* concerned a GPS tracking device that tracked a vehicle's movement for 28 days. 565 U.S. at 403. *Riley* concerned a physical cell phone and its contents. 573 U.S. at 379. Neither of those are analogous facts as CSLI is not nearly as accurate as GPS and can only give approximate position within a "mile and a half radius," Pet. App. 21a, and, unlike a search of a cell phone, CSLI does not reveal the phone's contents such as text messages, voicemails, or emails.

Neither case should have alerted the State that it needed to obtain a warrant for Smith's CSLI, and the Arizona Supreme Court was correct in applying the good faith exception.

B. *The court below properly conducted the third step of* Batson.

In conducting the third step of the *Batson* inquiry, the trial court made specific findings regarding each stricken juror. It found that Juror 14 was "very clearly being very hesitant about being able to serve" and Juror 211 had "hardships with regard to her health." Both of these findings are

supported by the record and are consistent with the reasons offered by the prosecution.

Smith bears the burden of proving purposeful discrimination. *Johnson v. California*, 545 U.S. 162, 170–71 (2005). He did not do so. When it came time to challenge the prosecutor's reasons for striking the jurors as pretextual or inconsistent with other jurors, Smith was silent, because the reasons were credible and supported by the record. This Court thus need not review the state appellate court's decision denying this claim.

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CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

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