NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

JACK V. SMALLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a comparative-juror analysis on a Batson claim depend on the reasons a party actually gave for exercising a peremptory challenge, or does it extend as well to reasons that could have been given or that a party might have offered on questioning by a trial court?

STATEMENT OF RELATED CASES

United States v. Smalley, No. 19-cr-00409-DDD (D. Colo.)
Judgment entered April 23, 2021

United States v. Smalley, No. 21-1167 (10th Cir.)
Judgment entered November 7, 2022

TABLE OF CONTENTS

PAGE

APPENDIX

SUPPLEMENTAL APPENDIX (submitted under seal)

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER

PRAYER

Petitioner, Jack V. Smalley, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on November 7, 2022.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Smalley, No. 21-1167, 2022 WL 16729562 (10th Cir. Nov. 7, 2022), is found in the Appendix at App. 1. The decision of the United States District Court for the District of Colorado is part of *voir dire* proceedings that are under seal in that court and in the Tenth Circuit. Mr. Smalley has filed a motion for leave to file a sealed, supplemental appendix containing that decision, which is found in the Supplemental Appendix at Supp. App. 1.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Ninety days from November 7, 2022, is Sunday, February 5, 2023, so the ninety- day period for seeking certiorari expires on the next business day of February 6, 2023. See Sup. Ct. R. 30.1. This petition is therefore timely.

CONSTITUTIONAL PROVISION INVOLVED

This petition implicates the equal-protection component of the due-process clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. V.

STATEMENT OF THE CASE

At the end of June 2015, James Smalley bought a house in Colorado Springs, Colorado. Mr. Smalley, who had served almost a quarter of a century in the Air Force, obtained a mortgage for a little less than a million dollars from Navy Federal Credit Union. At the time, he had accounts there with more than $450,000 in them. He contributed more than $110,000 to the purchase price of the house.

Mr. Smalley was later charged with bank fraud, on the theory that he submitted a loan application that falsely stated his income. Vol. 1 at 4-5. On January 6, 2020, a jury was empaneled in the District of Colorado to hear the charge.

The prosecution was given six peremptory challenges that could be used against the prospective jurors who might serve on the jury itself. The prosecution used three of those challenges to excuse the only three Hispanic members of the venire.

The jury selection and the Batson challenge

During *voir dire*, defense counsel asked whether anyone thought the federal government has too much power. Vol. 5 at 71.[1] Only one member of the venire, prospective juror #30, Supp. Vol. 2 at 4, 9, raised a hand, Vol. 5 at 71. The entirety of that colloquy was as follows:

> *MR. MOYA [defense counsel]*: Here's a question. I'd like a show of hands if you agree with this statement.
>
> The Government in the United States of America has too much power? Anybody agree with that? One?
>
> Why do you say that? Mr. [prospective juror #30's last name].
>
> *THE PROSPECTIVE JUROR [#30]:* Just on a federal level the bureaucratic system with the alphabet agencies I believe has grown too much.
>
> *MR. MOYA*: How about the Government size generally? Do you feel the Government is too big, or do you feel one way or the other about it?
>
> *THE PROSPECTIVE JUROR [#30]*: I'm inclined to think the Government is getting to large, but I understand the need for it.

[1] Citations to the record on appeal in the Tenth Circuit are provided for the Court's convenience, in the event this Court deems it necessary to review the record to resolve this petition. See Sup. Ct. R. 12.7.

Vol. 5 at 71.[2]

When counsel asked whether any other member of the panel felt like prospective juror #30, one said he did. That prospective juror, who was in seat fifteen, did not differentiate his views in any way from those of prospective juror #30. He said only that he agreed with that prospective juror:

> *MR. MOYA:* Anybody else feel like [prospective juror #30]? Does anyone strongly disagree with [prospective juror #30]?
>
> *THE PROSPECTIVE JUROR [#15]:* I agree.

Id.

Defense counsel then turned to prospective juror #6, asking him, "what do you think about that?" Id. Prospective juror #6 echoed prospective juror #30's point, which prospective juror #15 had endorsed, about the government being too large, but that he could see the need for it:

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[2] The Tenth Circuit directed that the briefing refer to prospective jurors only by their juror numbers. This petition does so as well. The prospective jurors from whom the jury itself were in seats 1 through 28. The alternate juror was selected from those members of the venire in seats 29 through 31.

> Simply put, it is a necessary evil. There needs to be checks and balances. Do I agree with everything? No. Do I disagree with other things? Yes.

Id.

Terming the checks-and-balance concept interesting, id., counsel observed that the jury system is not a feature of other governments, id. at 72. He then asked whether prospective juror #6 would agree that "one function of a jury, at least one part of a job of a jury, is to be a check and balance on Government using its power to prosecute." Id. Prospective juror #6 responded, "I agree." Id.

After just one more question, defense counsel wrapped up his questioning of the panel. Id. Within three transcript pages of the above discussions, the parties used a form provided by the court to exercise their peremptory challenges. Id. at 74-75. Before they could return the form to the court, defense counsel asked to approach to raise what he said was the first challenge he had ever made to the discriminatory use of peremptory challenges. Supp. App. 1; see generally Batson v. Kentucky, 476 U.S. 79 (1986).

Mr. Moya explained, without contradiction, that there were "three Hispanic potential jurors on the panel," identifying by name those in seats one, seven and fifteen. Supp. App. 2. Noting that "[e]ach of those Hispanic jurors has been stricken by the Government with peremptory challenges," id., counsel urged that the prosecution's action was "racially based," id.

The court asked the prosecutor to respond to the Batson challenge and "to provide the rationale for those strikes." Id. As to prospective juror #15, whose challenge is at issue here, the prosecutor invoked only what he had said about government being too big, id., which was just to agree with what prospective juror #30, (who was in the alternate pool and who the prosecutor did not strike, Supp. Vol. 2 at 4, 9) had said. The prosecutor justified the challenge against prospective juror #15 as follows:

> [*THE PROSECUTOR*]: . . . No. 15, [prospective juror's name], the reason the Government struck him was based on his answer [to] what counsel asked him in his questioning regarding the size of Government and Government being too big.
>
> So his answer to counsel's questioning about the Government being too big, I just took as I felt bureaucracy. I work for the bureaucracy. I felt that could be held against us for being over[-]vindictive on a prosecution matter that he

might not have an interest in. That's, basically, why I struck him.

Supp. App. 2-3.

The court proceeded to declare that the prosecutor had provided "legitimate bona fide reasons for [its] strikes." Supp. App. 4. It therefore denied the Batson challenge. Id.

The empaneled jury included prospective juror #6, see Supp. Vol. 2 at 3, who had also endorsed the view held by prospective juror #30 that the government was too large, but he could see the need for it. Prospective juror #30 served as the alternate juror. Id. at 4.

Mr. Smalley's appeal and the Tenth Circuit's decision

Mr. Smalley was convicted at trial. On appeal, he argued that the prosecution had excused prospective juror #15 on the basis of ethnicity, in violation of Batson. He relied on a comparison of prospective juror #15 with prospective juror #6.

The prosecution "based" its strike of the prospective juror #15 -- who is Hispanic -- on his views "regarding the size of Government and Government being too big," Supp. App. 2, which the prosecution thought

could be held against it. Prospective juror # 15 only stated that he agreed with prospective juror #30's views. And prospective juror #30 ultimately did not say he thought the federal government was too large. He said only that he was "inclined to think" it was. Vol. 5 at 71.

Mr. Smalley noted that the prosecution had, if anything, even more to fear in this regard from prospective juror # 6, who is not Hispanic and whom the prosecutor chose not to strike. When prospective juror # 6 was asked to comment on what had been said about the federal government, he termed it a "necessary evil." Id. That is, he considered the extensive bureaucracy, and the power and size of the federal government, to be regrettable, but also something that circumstances require. This matched the initial remark of prospective juror # 15 (through his endorsement of the position of prospective juror # 30) that government is too large, but that he "understand[s] the need" for it. Id.

Significantly, though, prospective juror # 6's endpoint was different than that of prospective juror # 15. By saying the size of the federal government "*is* a necessary evil," id. at 71 (emphasis added), prospective juror # 6 was saying the evil had already occurred. He was stating that he

in fact believed the government to be too large, and not just that he was inclined to that belief. This should have made him more problematic on the prosecutor's stated rationale than prospective juror # 15.

Mr. Smalley identified another reason why this was so. Prospective juror # 6 not only volunteered that there must be checks and balances as to government power, but also agreed the jury played such a role. He endorsed the view that "one function of the jury . . . is to be a check and balance on Government using its power to prosecute." Id. at 72. This went to the very core of the prosecutor's stated fear: that a juror might hold against him that he "work[s] for the bureaucracy" and was being "over[-] vindictive" in this matter." Supp. App. 3. Prospective juror #15 could not be considered to have adopted anything in this vein.

The Tenth Circuit rejected Mr. Smalley's argument and affirmed the judgment of the district court. App. 1-4. It agreed that, in keeping with this Court's decision in Miller-El v. Dretke, 545 U.S. 231 (2005), it could consider Mr. Smalley's comparative-juror analysis, even though it was raised for the first time on appeal. App. 3 & n.2 (citing Miller-El, 545 U.S. at 241 n.2). This was so, it explained, because "all of the facts relied upon

are in the voir dire transcript." App. 3 n.2. But notwithstanding this, it thought that the failure to raise the argument in the district court "severely undermined its probative value." App. 3. The court of appeals quoted in this regard a passage from this Court's decision in Snyder v. Lousiana, 552 U.S. 472 (2008):

> "[A] restrospective comparison of jurors based on a cold appellate record can be very misleading when alleged similarities were not raised at trial. 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."

App. 3 (quoting Snyder, 552 U.S. at 483) (brackets by the Tenth Circuit).

The Tenth Circuit continued that the record did not clearly show that prospective juror #6 had an even stronger anti-government bias than prospective juror # 15. App. 4. "For example," the court wrote, "one could just as easily argue that by describing government as a 'necessary evil,' Juror # 6 affirmatively recognized the validity of government power in a way that Juror # 15 did not, a factor the prosecutor could plausibly have interpreted as favorable to the government's position." Id. It then added that the record did not show "whether" the demeanor of prospective juror # 15 "may have informed the prosecutor's decision" or why the prosecutor

might have thought prospective juror # 15 not to have an interest in a bank-fraud case. Id.

The Tenth Circuit then added that the failure to make a comparative-juror analysis in the district court also meant that there may have been other reasons for the prosecutor's action beyond those he gave for his actions. As the court of appeals put it:

> Had Mr. Smalley raised the comparisons below, the court would have had an opportunity to tease out whether the government decided to strike the Hispanic jurors because of these or other distinctions rather than invidious discrimination.

Id.

REASONS FOR GRANTING THE WRIT

This Court should grant review to ensure that a vital means for an accused to show that a prosecutor acted with discriminatory purpose in excusing a prospective juror is not improperly diluted.

"The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" Foster v. Chatman, 578 U.S. 488, 499 (2016) (quotation omitted). Equal protection of the law -- guaranteed in state cases by the Fourteenth Amendment, and in federal cases by the equal-protection component of the Due Process Clause of the Fifth Amendment -- prohibits a prosecutor from using a peremptory challenge to excuse a prospective juror on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986). It likewise bars such invidious discrimination on account of ethnicity. Hernandez v. New York, 500 U.S. 352, 355 (1991) (applying Batson to discrimination against Hispanic, prospective jurors).

A comparative-juror analysis is a powerful means for a defendant, like Mr. Smalley, to make the ultimate showing that a prosecutor acted with such prohibited intent in exercising a peremptory challenge. Indeed, five judges of the Fifth Circuit have noted that such an analysis played a prominent role in the only two cases, as of 2018, in which that court had

ever found there to be intentional discrimination in violation of Batson. Chamberlin v. Fisher, 885 F.3d 832, 846 (5th Cir. 2018) (en banc) (Costa, J., joined by Stewart, C.J., and Davis, Dennis and Prado, JJ.). And the Tenth Circuit itself has elsewhere recognized that comparative proof can be "'compelling'" evidence that a proffered reason is pretextual and that a prosecutor acted with discriminatory purpose. Grant v. Royal, 886 F.3d 874, 951 (10th Cir. 2018) (quotation omitted).

The Tenth Circuit greatly weakened what is often a defendant's best hope of showing purposeful discrimination. The court of appeals correctly recognized that, under this Court's decision in Miller-El v. Dretke, 545 U.S. 231, 241 n.2 (2005), such a comparative-juror analysis can be made for the first time on appeal. App. 3 & n.2. But it then authorized consideration of matters not stated by the prosecutor in exercising peremptory challenges, and ones that might have been offered on inquiry by the district court. Id. at 3-4.

In taking this approach, the Tenth Circuit misread this Court's decision in Snyder v. Louisiana, 552 U.S. 472 (2008). This Court should grant review to prevent the dilution of a valuable means of making the

difficult showing that a prosecutor acted with discriminatory purpose in excluding jurors on the basis of race or ethnicity, and what is "usually" the only tool a reviewing court has "to fairly evaluate Batson claims." United States v. Atkins, 843 F.3d 625, 627 (6th Cir. 2016).

As a threshold matter, the Tenth Circuit did in fact look to matters not provided by the prosecutor. The prosecutor said nothing about any difference in demeanor between prospective juror # 15, the Hispanic venireperson he struck, and prospective juror # 6, the non-Hispanic venireperson he did not strike. See Supp. App. 3-4. And there is no reason to think this played any role in why the prosecutor excused the former and not the latter. To the contrary, the prosecutor cited to juror demeanor when he considered it to have factored into his challenged strike. It was his explanation for why he struck a different Hispanic venireperson. Supp. App. 3. Yet the Tenth Circuit based its decision in part on its being "unable to discern from the record whether Juror # 15's demeanor may have informed the prosecutor's decision." App. 4.

The Tenth Circuit also speculated that the prosecutor might have offered something more if the comparative-juror analysis had been made

in the district court. App. 4. The court of appeals first stated, without explanation, that the comparators "appear to differ in some respects unrelated to their ethnicities." Id. It then declared that had Mr. Smalley made a comparative-juror analysis at jury selection, "the district court would have had an opportunity to tease out whether the government decided to strike the Hispanic jurors because of these or other distinctions rather than invidious discrimination." Id. This would have allowed the prosecutor to supplement its reasons beyond those it gave when it had the unlimited opportunity to explain why it exercised its challenges.

This Court's decision in Miller-El does not allow for such back-filling. As this Court explained there, the validity of a challenged strike must "stand or fall" on the reasons the prosecutor gave in defending the strike. Miller-El, 545 U.S. at 252.

The Tenth Circuit was wrong to think this Court's decision in Snyder permitted such a result, and the rejection of a Batson claim in part for what else a prosecutor might have offered. The court of appeals drew support for its approach from the following language:

> [A] restrospective comparison of jurors based on a cold appellate record can be very misleading when alleged

> similarities were not raised at trial. 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.

Snyder, 552 U.S. at 483 (quoted in App. 3).

This language does not have the import the Tenth Circuit ascribed to it. For it to do so would change the stand-or-fall principle of Miller-El, something this Court did not purport to do in Snyder. It would also be at odds with a bedrock principle of Batson jurisprudence: that what matters is whether the prosecutor in fact engaged in purposeful discrimination. This depends on *why* the prosecutor acted, and not whether it was possible for the prosecutor to have achieved the same result without engaging in purposeful discrimination.

What the language in Snyder means is only that when making the comparison, a reviewing court must assure itself that the record shows enough to treat the struck juror as similar on the point of comparison. It is a caution that record gaps may prevent a valid comparison. That squares with the use of a comparison to determine the prosecutor's discriminatory purpose at the time. If the prosecutor cannot be charged with considering the two panelists to be comparable on the point of comparison, the strike of

the venireperson and the retention of the comparator may not say much about whether the prosecutor acted with a discriminatory purpose. See Chamberlin, 885 F.3d at 858 (Costa, J., dissenting) ("how persuasive a comparative juror analysis is depends on how clear the record is about whether prospective jurors were similar *as to the prosecutor's stated justification*") (emphasis in original).

The record here does not contain the type of record gap this Court in Snyder indicated might be problematic. The "basis for comparison [was] sufficiently explored" in the district court. Atkins, 843 F.3d at 637. Indeed, aside from remarking on what might be said of demeanor and the like, the Tenth Circuit did not claim it to be otherwise. Its invocation of matters like demeanor -- mentioned by the prosecution with respect to another strike, but not the one at issue here -- and what more the prosecutor might have said if questioned after providing his chosen explanation, do not at all change this.

Nor does the fact that the Tenth Circuit gave an explanation for why it thought prospective juror # 6 could have been thought to be more favorable to the prosecution on the prosecutor's stated rationale, App. 4,

and not less favorable as Mr. Smalley argued, see *supra* at 8-10, mean that the Tenth Circuit's distortion of comparative-juror analysis did not matter to the result here. The Tenth Circuit specifically buttressed this with the observation that it could not tell from the record "whether Juror # 15's demeanor may have informed the prosecutor's decision." App. 4. And it also relied on the proposition that raising a comparative-juror analysis in the district court would have given the district court the chance to elicit from the prosecutor whether "other distinctions" informed his decision. Id. Each of these additional factors is improper. Their invocation makes it inappropriate to consider the Tenth Circuit to have made only a fact-bound decision that does not warrant this Court's attention, rather than a legal decision that does.

There is something else that indicates the Tenth Circuit's flawed legal approach may well have truncated its consideration of Mr. Smalley's claim and affected the outcome. The Tenth Circuit gave an "example" of what could be argued from the responses of prospective juror # 6 and prospective juror # 15. Id. But it did not engage at all with a prominent fact that went squarely and strongly in the opposite direction than the

example it gave. Prospective juror # 6 -- unlike prospective juror # 15 -- actually made a statement that went to the very essence of the prosecutor's concern that views on the size of government would be held against him as being overly vindictive. It was prospective juror # 6 alone who stated he held the view that a function of the jury was to act as a check and balance against the prosecution. See *supra* at 9-10.

Were it not for the Tenth Circuit's watered-down and incorrect approach to comparative-juror analysis, the Tenth Circuit may well have considered Mr. Smalley's pointed argument in this regard. The legal issue raised here cannot be dismissed as unimportant to the outcome.

Comparative-juror analysis is a significant part of appellate review of Batson claims. The decision here, if allowed to take hold, would threaten one of the few tools available to show purposeful discrimination. This court should decide the important question presented here to ensure that appellate review is robust and up to the task of ensuring that invidious discrimination in jury selection is not tolerated in practice, just as it is not tolerated in theory.

CONCLUSION

This Court should grant Mr. Smalley a writ of certiorari.

Respectfully submitted,

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