No. 24-5659

IN THE SUPREME COURT OF THE UNITED STATES

LUIS ANGEL CRUZ-CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

BRENDAN B. GANTS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court permissibly denied petitioner's challenge under Batson v. Kentucky, 476 U.S. 79 (1986), to the peremptory strike of a prospective juror.

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OPINIONS BELOW

The order and amended opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is available at 2024 WL 3177787. The amended opinion of the court of appeals is not published in the Federal Reporter but is available at 2023 WL 8519121.

JURISDICTION

The amended judgment of the court of appeals was entered on June 26, 2024. A petition for rehearing was denied on that same date. Pet. App. 1a-9a. The petition for a writ of certiorari was

filed on September 23, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one misdemeanor count of attempting to enter the United States as a noncitizen by a willfully false or misleading misrepresentation, in violation of 8 U.S.C. 1325(a)(3). Judgment 1. He was sentenced to time served (75 days). Judgment 2; Gov't C.A. Br. 1. The court of appeals affirmed. Pet. App. 1a-7a.

1. On February 28, 2022, petitioner arrived at a port of entry from Mexico and sought to enter the United States using a Washington state driver's license that bore the warning "Federal Limits Apply." Pet. App. 6a; C.A. E.R. 164, 173. Petitioner told a Customs and Border Patrol officer that he had a U.S. passport, even though petitioner had neither applied for nor received one. Pet. App. 6a. Petitioner later admitted that he is not a U.S. citizen. Ibid.

A grand jury in the Southern District of California charged petitioner with one count of making a false statement to a federal officer, in violation of 18 U.S.C. 1001, and with one misdemeanor count of attempting to enter the United States as a noncitizen by a willfully false or misleading misrepresentation, in violation of 8 U.S.C. 1325(a)(3). Indictment 1-2.

2. The case proceeded to trial. During jury selection, petitioner challenged one of the government's peremptory strikes under Batson v. Kentucky, 476 U.S. 79 (1986). Pet. App. 10a. Petitioner argued that the government's strike of Juror 22, whom petitioner described as "a Hispanic male," was substantially motivated by race. Ibid.

When asked to provide a race-neutral reason for the strike, the government identified an "accumulation of" five factors indicating that Juror 22's lack of life experience "would make it difficult to make the decision to convict or not convict in jury service." Pet. App. 12a. In particular, the government explained that Juror 22 "appeared to be young," "[h]e's single," "[h]e has no children," "[h]e's unemployed," and "he's never been on a jury before." Ibid. The government made clear that "it's really the accumulation of those factors with his age that led us to be concerned he may have * * * lacked the likely experience of making tough choices and gave us concern about whether he would be able to, sort of, come to a decision in deliberations." Ibid.

The district court then asked petitioner whether other prospective jurors who had not been struck by the government presented a similar "aggregate of someone who is starting out and hasn't had these life experiences." Pet. App. 13a. Petitioner identified some individuals who shared one or two of the traits the government had identified, but none that shared all five. Id.

at 13a-14a. The closest analogue was Juror 10, who shared four of the five identified traits. Id. at 13a-15a; see C.A. E.R. 55.

Before it announced its decision, the district court asked whether the government would prefer to withdraw the contested strike and to use the strike on a different prospective juror. Pet. App. 14a. The government declined, reiterating that its strike was due to the five race-neutral factors indicating Juror 22's lack of life experience. Id. at 14a-15a. In response to petitioner's proffered comparison to Juror 10, the government noted,

> I believe she had a husband who was self-employed. But she also was an Asian female. We -- I believe she maybe had an accent. She has experience crossing the border that we may use in this case. Had likely used a passport to travel internationally and dealt with the immigration system that we believe would be relevant to bear on this case.

Id. at 15a. The government again emphasized that petitioner's comparisons among Juror 22 and other venirepersons were inapt "because it [wa]s a combination" of all five traits that motivated the strike. Id. at 16a; see id. at 14a-15a.

The district court denied the Batson challenge. Pet. App. 16a-17a. While the court took the view that petitioner had made a prima facie showing that the peremptory strike was "possibly based on a racial ground," it determined that the government had satisfied its burden of production to "offer[] the race neutral reason for that particular challenge." Id. at 16a. The court found the government's race-neutral justification "legitimate" and

"credible." Ibid. And the court "f[ou]nd" that the government's strike did not constitute "purposeful racial discrimination." Ibid. The court also noted that the final jury was racially diverse and included several Latino jurors. Id. at 16a-17a.

Petitioner was acquitted of making a false statement to a federal officer, see 18 U.S.C. 1001, but convicted of attempting to enter the United States as a noncitizen by a willfully false or misleading misrepresentation, see 8 U.S.C. 1325(a)(3). C.A. E.R. 278. The district court sentenced petitioner to time served (75 days). Judgment 2; Gov't C.A. Br. 1.

3. The court of appeals affirmed in an unpublished nonprecedential decision. Pet. App. 1a-7a.

The court of appeals agreed with the district court that the government had satisfied its burden of production under Batson to come forward with a race-neutral reason for the challenged strike. Pet. App. 3a-4a. Even under a de novo standard of review, the court of appeals agreed that the government had adequately "asserted a number of race-neutral traits for striking Juror 22 (he was young, unmarried, and unemployed, with no children and no prior jury experience)." Id. at 4a.[1]

The court of appeals also found no clear error in the district court's determination that petitioner had failed to establish

[1] In its initial memorandum disposition, the court of appeals reviewed that aspect of the Batson analysis for clear error. Pet. App. 8a-9a. The panel later amended its opinion and made clear that the government had met its burden of production even under a de novo standard. Ibid.

purposeful discrimination. Pet. App. 4a-5a. The court of appeals observed that petitioner "fail[ed] to show * * * that there was a similar juror to Juror 22," observing that while petitioner had "point[ed] to other jurors who shared individual traits with Juror 22," he had not identified any who shared the same combination of traits. Id. at 4a (emphasis added). The court of appeals agreed with the district court that Juror 10 was not similarly situated to Juror 22 because Juror 10 "was married, and her husband was self-employed," which "suggest[ed] that Juror 10 had a different life experience from Juror 22." Id. at 4a-5a. And the court of appeals also found no clear error in the district court's decision to credit the government's explanation that it had struck Juror 22 based on a combination of five race-neutral traits. Id. at 5a.

ARGUMENT

Petitioner contends (Pet. 9-26) that the court of appeals erred in affirming the district court's denial of his claim of a discriminatory strike of a prospective juror under Batson v. Kentucky, 476 U.S. 79 (1986). The court of appeals' decision is correct, and no conflict exists between that unpublished, nonprecedential decision and any decision of this Court, another court of appeals, or any state court of last resort. This Court has repeatedly and recently denied petitions for writs of certiorari raising similar issues. See, e.g., Harper v. Lumpkin, 144 S. Ct. 429 (2023) (No. 23-5089); Sheppard v. Lumpkin, 141 S. Ct. 2677 (2021) (No. 20-6786); Cook v. United States, 140

S. Ct. 894 (2020) (No. 19-6190). It should follow the same course here.

1. In Batson, this Court held that the Constitution prohibits the use of peremptory challenges to strike jurors based on their race. 476 U.S. at 89. Inquiry into a possible Batson violation comprises 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 offer a race-neutral explanation for the challenged strike. Foster v. Chatman, 578 U.S. 488, 499 (2016). Finally, the district court must evaluate the proffered evidence and the government's race-neutral explanation and decide whether the defendant has proved purposeful racial discrimination. Johnson v. California, 545 U.S. 162, 168 (2005). "[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 Flowers v. Mississippi, 588 U.S. 284, 303 (2019) (noting that "[t]he Court has described the appellate standard of review of the trial court's factual determinations in a Batson hearing as 'highly

deferential'") (quoting Snyder v. Louisiana, 552 U.S. 472, 479 (2008)). The Court has emphasized the importance of "[t]he trial judge's assessment[s] of the prosecutor's credibility" and "'demeanor,'" which are "'determinations'" that "'lie peculiarly within a trial judge's province.'" Flowers, 588 U.S. at 302-303 (quoting Snyder, 552 U.S. at 477). Accordingly, "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." Id. at 303 (quoting Snyder, 552 U.S. at 477).

2. The court of appeals' factbound application of those principles to this case does not warrant this Court's review. See 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."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

The court of appeals correctly affirmed the district court's application of Batson's three-step inquiry. The district court, accepting that petitioner had made a prima facie showing under Batson's first step, properly required the government to come forward with a race-neutral explanation at step two. And as both courts below recognized (Pet. App. 3a-4a, 12a-17a), the government satisfied its burden of production by identifying a combination of race-neutral traits suggesting that Juror 22 lacked sufficient

life experience to reach an important decision such as whether to convict. See, e.g., Purkett, 514 U.S. at 768-769 (explaining that the prosecution satisfies its burden of production by citing a reason that is "related to the particular case to be tried" and "is not a characteristic that is peculiar to any race") (citations omitted).

The record amply supported the district court's factual finding, at Batson's third step, that the challenged strike did not constitute purposeful discrimination. As the trial court recognized, no other panel member shared Juror 22's combination of race-neutral traits that the government had identified, Pet. App. 11a-16a, underscoring the legitimacy and credibility of the government's race-neutral explanation, id. at 16a-17a. The court of appeals, in turn, correctly recognized that petitioner "fail[ed] to show" clear error because, among other things, he could not point to "a similar juror to Juror 22." Id. at 4a.

Petitioner errs in asserting (Pet. 22-26) that the lower courts' Batson analysis was nonetheless flawed, on the theory that an "express citation of [the] race or gender" of a seated juror during a Batson hearing "per se invalidates a peremptory strike" under "Batson's second step." Most fundamentally, petitioner "err[s] by combining Batson's second and third steps into one." Purkett, 514 U.S. at 768. Batson's second step requires only the articulation of "a race-neutral basis for striking the juror in question." Foster, 578 U.S. at 499 (emphasis added) (quoting

Snyder, 552 U.S. at 477); see Rice v. Collins, 546 U.S. 333, 338 (2006); Miller-El v. Cockrell, 537 U.S. 322, 328-329 (2003).

At that stage of the inquiry, the government bears only a "burden of production," Purkett, 514 U.S. at 768-769, to "come forward with" a facially neutral explanation for the challenged strike, Batson, 476 U.S. at 97. Not until "Batson's third step" does a court consider "side-by-side comparisons" of "panelists who were struck and * * * [those] allowed to serve," as part of determining whether the evidence supports the claim of purposeful racial discrimination. Miller-El v. Dretke, 545 U.S. 231, 241 (2005). The courts below adhered to this Court's precedent by analyzing whether, at step two, the government had articulated a race-neutral explanation for striking Juror 22, and they permissibly found that petitioner had not carried his "ultimate burden of persuasion regarding racial motivation." Purkett, 514 U.S. at 768.

Petitioner does not address the authority discussed above, and he misdescribes (Pet. 21-22) the government's reliance on it in the proceedings below. The government did not (and does not) take the position that "there is no Batson issue" in preferring a seated juror over one who was struck "because of" the seated juror's race. Pet. 21. Rather, the government made clear that the characteristics of seated jurors and the prosecutor's reasons for preferring those jurors may be properly considered at the final step of the Batson inquiry. See, e.g., Gov't C.A. Br. 24; Gov't

C.A. Resp. to Reh'g Pet. 5. If the credible facts show that the prosecutor, in preferring some seated jurors to others, was "motivated in substantial part by discriminatory intent," then under Batson the strike would be constitutionally impermissible. Flowers, 588 U.S. at 303 (citation omitted); see ibid. (explaining that, at step three, "[t]he trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual"). Here, however, the district court found that the credible facts did not show a racial motivation, and the court of appeals correctly determined that the trial court's case-specific finding was not clearly erroneous. See pp. 4-6, 8-10, supra.

Petitioner's repeated assertion (Pet. i, 3, 5, 20) that the government "preferred" Juror 10 over Juror 22 "because" of Juror 10's race is unfounded. The court of appeals explicitly rejected that premise. See Pet. App. 3a-4a. Petitioner incorrectly asserts that the court did not "dispute" his contention that "the prosecutor 'expressly justified keeping a[] person on the jury because of her race.'" Pet. 15 (brackets in original) (quoting Pet. App. 3a). In the passage that petitioner quotes, the court was describing petitioner's view before finding that it lacked merit. Pet. App. 3a-4a (explaining that petitioner's "argument is a step too far"). Petitioner does not attempt to show error in that factbound determination. And as the government explained to the district court, Juror 10 was differently situated from Juror

22: unlike Juror 22, Juror 10 was married, her husband was employed, and during the jury-selection process the government inferred that she "likely used a passport to travel internationally and dealt with the immigration system." Id. at 15a; see Gov't C.A. Br. 25-26.

Had the district court believed that the government's mention of Juror 10's race reflected racially motivated jury selection, it could, should, and would have sustained petitioner's Batson challenge. It did not do so, and the government explained to the court of appeals that it mentioned Juror 10's race during the Batson hearing only to "make her race clear for the record while explaining why [the government] did not strike her" under Batson's third step. Gov't C.A. Resp. to Reh'g Pet. 4. That is not prohibited by this Court's precedents, which have emphasized, for example, that "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve" -- which inherently require taking account of the race of each prospective juror -- can be "powerful" at the third step of a Batson claim. Miller-El, 545 U.S. at 241; see Flowers, 588 U.S. at 311; Foster, 578 U.S. at 512-513.

Those precedents highlight the flaw in petitioner's claim (Pet. 22-23) that "expressly cit[ing] race in any capacity" will per se invalidate a peremptory strike under Batson's third step. It would be difficult for a party to raise a Batson challenge, or for the opposing party to respond, without mentioning race "in any

capacity." Pet. 23. And petitioner offers no sound reason why this Court should replace the well-established and fact-intensive Batson inquiry with his novel categorical rule.

3. Contrary to petitioner's contention (Pet. 9-18), the court of appeals' nonprecedential decision in this case does not conflict with the decision of any other court of appeals or state court of last resort. Consistent with this Court's precedent, courts evaluate at Batson's second step whether the stated explanation for striking a prospective juror is facially race-neutral. And at Batson's third step, courts assess -- based on all the facts and circumstances -- whether the challenging party has met its burden to show that the strike was motivated in substantial part by discriminatory intent.

Petitioner's principal claim (Pet. 13-18) of a division in authority relies on cases that predate this Court's decision in Flowers v. Mississippi, supra, and that have no bearing on the decision below. Before Flowers, some courts applied a so-called "dual motivation" or "mixed motive" analysis akin to a but-for causation test at Batson's third step,[2] while the courts below and

[2] See Pet. 13-15 (citing United States v. Douglas, 525 F.3d 225, 239 (2d Cir.), cert. denied, 555 U.S. 1033 (2008); Gattis v. Snyder, 278 F.3d 222, 234 (3d Cir.), cert. denied, 537 U.S. 1049 (2002); Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995); United States v. Darden, 70 F.3d 1507, 1531 (8th Cir. 1995), cert. denied, 517 U.S. 1149, and 518 U.S. 1026 (1996); United States v. Allen-Brown, 243 F.3d 1293, 1298 n.2 (11th Cir.), cert. denied, 534 U.S. 1010 (2001)); People v. Hudson, 745 N.E.2d 1246, 1258 (Ill.), cert. denied, 534 U.S. 858 (2001); Guzman v. State, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002) (en banc)).

certain state courts asked whether the State was "motivated in substantial part by discriminatory intent," Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010) (citation and emphasis omitted); see Pet. 15-18. This Court endorsed the latter standard in Flowers, see 588 U.S. at 303, and petitioner identifies no court of appeals or state court of last resort that has applied dual-motivation or mixed-motive analysis since then. On the contrary, the courts petitioner identified have applied the principles articulated in Flowers.[3] At all events, petitioner's criticism of "dual motivation" and "mixed motive" analyses is beside the point because the courts below did not perceive any potential combination of permissible and impermissible motives that might require application of such a rubric.

Petitioner's reliance (Pet. 10-11) on the First Circuit's decision in Porter v. Coyne-Fague, 35 F.4th 68 (2022), is similarly misplaced. Porter is inapposite because it "[wa]s the rare case in which the prosecutor's explanation for his peremptory strike was not race-neutral on its face and, thus, violated Batson" for

[3] See Rowell v. Ferreira, 830 Fed. Appx. 698, 699 (2d Cir. 2020), cert. denied, 142 S. Ct. 115 (2021); United States v. Savage, 970 F.3d 217, 267 (3d Cir. 2020), cert. denied, 142 S. Ct. 481 (2021); United States v. Dennis, 19 F.4th 656, 662-663 (4th Cir. 2021); United States v. Iron Crow, 970 F.3d 1003, 1007 (8th Cir. 2020), cert. denied, 141 S. Ct. 1422 (2021); United States v. Williamson, No. 19-14523, 2022 WL 68623, at *2-*3 (11th Cir. Jan. 7, 2022), cert. denied, 143 S. Ct. 625 (2023); Compton v. State, 666 S.W.3d 685, 698 (Tex. Crim. App. 2023), cert. denied, 144 S. Ct. 916 (2024); see also People v. Martin, No. 1-12-3561, 2022 WL 1651367, at *4-*6 (Ill. App. Ct. May 24, 2022), appeal denied, 199 N.E.3d 1189 (Ill. 2022) (Tbl.).

that reason. Id. at 71. The facts in Porter, unlike the facts here, were materially indistinguishable from Batson itself: "The only reason[s]" the prosecutor gave for striking the sole black venireperson were "'common sense'" and a "suspicion that [the venireperson] was disinclined to vote guilty" because "'he's a member of the African-American community, the defendant at the bar is a member of the African-American community, he's the only one on the panel who is, and if he were to vote guilty there could be consequences to it.'" Id. at 72-73, 81. The court of appeals recognized that those grounds were not race-neutral because they "echoe[d] the discredited justification for striking 'jurors of the defendant's race on the assumption * * * that they would be partial to the defendant because of their shared race.'" Id. at 81 (quoting Batson, 476 U.S. at 97). In petitioner's case, by contrast, the government satisfied its burden of production by providing five race-neutral reasons for the challenged strike. See pp. 3-5, 8-11, supra.

Petitioner also cites (Pet. 11-13) decisions of the U.S. Court of Appeals for the Armed Forces and various state intermediate and high courts stating that a Batson violation is established when a prosecutor provides a racially discriminatory reason for striking a particular juror, even if another reason or another part of the explanation was race-neutral. But those decisions do not show a division of authority either. Many of petitioner's cited cases

found no Batson violation at all.[4] And in all of the cases, the court assessed whether the prosecutor gave a facially race-neutral reason for striking a prospective juror at Batson's second step.[5]

They did not involve, as petitioner's case does, a challenge focused on the third step, and none of them supports petitioner's argument that the government fails to meet its burden of production -- or otherwise violates Batson -- when the prosecutor references a seated juror, or that juror's race, at step three. As explained earlier, this Court has repeatedly observed that "side-by-side comparisons" between "venire panelists who were struck and * * * panelists allowed to serve" are relevant to assessing allegations of "purposeful discrimination" at "Batson's third step." Miller-El, 545 U.S. at 241; see Flowers, 588 U.S. at 311.

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[4] See Lingo v. State, 437 S.E.2d 463, 465-468 (Ga. 1993) (affirming denial of Batson challenge because prosecutor offered race-neutral grounds for each individual strike); Ex parte Sockwell, 675 So. 2d 38, 41 (Ala. 1995) (similar); State v. Porter, 491 P.3d 1100, 1108-1109 (Ariz. 2021) (similar), cert. denied, 142 S. Ct. 789 (2022).

[5] See United States v. Greene, 36 M.J. 274, 279 (C.M.A. 1993) (finding Batson violation where prosecutor expressly cited venireperson's race in explaining strike); Payton v. Kearse, 495 S.E.2d 205, 208-209 (S.C. 1998) (concluding that prosecutor's explanation was "facially discriminatory"); Robinson v. Bon Secours St. Francis Health Sys., Inc., 675 S.E.2d 744, 746 (S.C. 2009) (per curiam) (similar in civil-trial context); Hart v. State, 310 A.3d 1157, 1161 (Md. App. Ct. 2024) ("[T]he State expressly stated that it struck two jurors in part because of an impermissible consideration -- their gender."); State v. Saunders, 162 N.E.3d 959, 962-963 (Ohio Ct. App. 2020) (finding Batson violation where prosecutor cited concern that the "potential juror [was] of the same race" as the defendant); Coleman v. Hogan, 486 S.E.2d 548, 548 (Va. 1997) (addressing remedy for Batson violation where the prosecutor's cited grounds for each stricken panel member "were based on the[ir] gender").

Finally, petitioner cites (Pet. 18) cases in which courts of appeals applied the deferential standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and declined to disturb a Batson determination at step three where the defendant seeking to show pretext had failed to rebut each legitimate justification articulated by the state prosecutor. See 28 U.S.C. 2254(d); Harper v. Lumpkin, 64 F.4th 684, 697 (5th Cir.) (per curiam) (relying on circuit authority applying AEDPA), cert. denied, 144 S. Ct. 429 (2023); Sheppard v. Davis, 967 F.3d 458, 472 (5th Cir. 2020) (similar), cert. denied, 141 S. Ct. 2677 (2021); see also Washington v. Roberts, 846 F.3d 1283, 1286-1287 (10th Cir.), cert. denied, 583 U.S. 909 (2017); Akins v. Easterling, 648 F.3d 380, 391-393 (6th Cir. 2011). The AEDPA standard is not at issue here; petitioner does not even show a conflict in the application of that standard; and the results of those cases do not conflict with the outcome below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

BRENDAN B. GANTS
Attorney

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