No. 17-9130

IN THE SUPREME COURT OF THE UNITED STATES

GRACIELA POTENCIANO, 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

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QUESTION PRESENTED

Whether the court of appeals erred in declining to remand petitioner's claim of racially-biased jury selection under Batson v. Kentucky, 476 U.S. 79 (1986), to the district court for further proceedings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23a-28a) is not published in the Federal Reporter but is reprinted at 728 Fed. Appx. 620.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2018. A petition for rehearing was denied on May 16, 2018 (Pet. App. 29a). The petition for a writ of certiorari was filed on May 23, 2018. 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 three counts of importation of controlled substances (heroin, methamphetamine, and fentanyl), all in violation of 21 U.S.C. 952 and 960. Pet. App. 23a. She was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. C.A. E.R. 291-292. The court of appeals affirmed. Pet. App. 23a-28a.

1. In May 2016, petitioner entered the United States by car coming from Mexico to a port of entry in California. C.A. E.R. 112-113; Gov't C.A. Br. 3. A Customs and Border Protection (CBP) officer conducted a preliminary inspection of the car. C.A. E.R. 118; Gov't C.A. Br. 3. The officer noticed that the spare tire had been "tampered with" and that a "ring of sand" was weighing down on the rim. C.A. E.R. 118. Petitioner denied that any work had been done on the car. C.A. E.R. 120; Gov't C.A. Br. 3. During a secondary inspection, CBP officers recovered almost three kilograms of heroin, 4.5 kilograms of methamphetamine, and over 12 kilograms of fentanyl hidden in the spare tire. C.A. E.R. 121, 139-140, 166; Gov't C.A. Br. 4.

2. In July 2016, a federal grand jury in the Southern District of California returned a superseding indictment charging petitioner separately with importation of heroin, methamphetamine,

and fentanyl, all in violation of 21 U.S.C. 952 and 960. C.A. E.R. 10-11.

During jury selection, the district court asked the jury venire members whether they had experienced "any problems with a relative" having "been arrested or convicted of using or possessing controlled substances or drugs." Pet. App. 11a-12a. Several venire members raised their hands, including prospective Juror No. 22. This exchange followed:

> Prospective Juror [No. 22]: My brother was convicted.
>
> The Court: Your brother was convicted of what?
>
> Prospective Juror: Sale of narcotics.
>
> The Court: I'm sorry?
>
> Prospective Juror: To sell narcotics.
>
> The Court: Selling narcotics?
>
> Prospective Juror: Uh-huh.
>
> The Court: How long ago was that?
>
> Prospective Juror: About ten years ago.
>
> The Court: How do you feel about that?
>
> Prospective Juror: He is out now so I'm okay.
>
> The Court: So you think that he was treated fairly by the justice system?
>
> Prospective Juror: I don't know. I wasn't there when it happened. I was in college.
>
> * * *
>
> The Court: I'm sorry * * * was it your nephew?
>
> Prospective Juror: It was my brother.

> The Court: Your brother was treated fairly?
>
> Prospective Juror: I don't actually know. I was in college when it happened, so I don't know exactly what happened.
>
> The Court: Can you assure both the government and Ms. Potenciano that nothing that happened in connection with your brother would affect your ability to be fair and impartial in this case if you were selected as a juror?
>
> Prospective Juror: Yes, I can assure that.
>
> The Court: Okay, great. Thank you.

Id. at 13a-14a.

Following voir dire, the parties exercised their peremptory strikes. C.A. E.R. 94-100. When the government struck prospective Juror No. 22 (among other prospective jurors), the defense challenged the strike as racially motivated in violation of Batson v. Kentucky, 476 U.S. 79 (1986), stating that Juror No. 22 was "the only African-American on the panel." Pet. App. 19a. The prosecutor responded:

> Your honor, the United States has challenged No. 22. We definitely have concerns about the fact that her brother was convicted of selling drugs. I know she indicated it was ten years ago. However, when your honor, you know, asked about her being fair and impartial, she -- she said, well, he is out now, so I'm okay. So we have concerns about if there was any, you know, issues that are connected with her brother's drug conviction, and seeing the officers that come into court, the fact that a large amount of drugs were found in this case. We have true concerns about whether or not she can truly be fair and impartial.

Id. at 19a-20a. The district court denied the Batson challenge:

> All right. Well, it certainly appears that she is a member of a protected group. However, it also appears to me that Ms. Stingley has stated a non-discriminatory reason for excluding [Juror No. 22]. So your Batson challenge will be denied, okay.

Ibid.

Before bringing the jurors in, the district court expressed a concern that it had not given defense counsel a sufficient opportunity to argue the Batson challenge. Pet. App. 21a. Defense counsel responded that the juror "seemed very removed from the incident" with her brother and "seemed as though she could [not] have cared less." Ibid. Defense counsel also "correct[ed]" the record, noting that the juror's statement "He is out now, so I'm okay" was in response to the court's inquiry about how long ago the conviction was, not in response to the court's question whether "she could be fair and impartial." Id. at 20a-21a ("That's the only correction I would add to the record."). The court responded: "All right. Well, again, I think it's a nondiscriminatory reason for excusing her. So anyway, my ruling will stand." Id. at 21a-22a.

After a two-day trial, the jury found petitioner guilty on all counts. C.A. E.R. 288. The district court sentenced her to concurrent terms of 120 months of imprisonment on each count, to be followed by five years of supervised release. C.A. E.R. 290-291.

3. The court of appeals affirmed in an unpublished opinion. With respect to petitioner's Batson challenge, the court viewed the district court to have erred by "engag[ing] in no further analysis" before concluding that the prosecutor's reason for striking Prospective Juror No. 22 was non-discriminatory. Pet.

App. 27a. The court then stated noted that "'[f]aced with an improper application of the Batson framework, the court may decide de novo whether the government's strikes were motivated by purposeful discrimination," or "the court may remand to the district court for either a factual hearing or new trial." Ibid. (quoting United States v. Alvarez-Ulloa, 784 F.3d 558, 565-566 (9th Cir. 2015)) (brackets omitted). Stating that it would review petitioner's challenge de novo, the court of appeals explained that the government's reason for striking Juror No. 22 "appeared race neutral and specific to [that] juror" and "[n]othing else about the circumstances surrounding the Batson challenge suggest[ed] that the government's stated reason for striking juror No. 22 was pretext for purposeful discrimination." Id. at 27a-28a. Thus, petitioner had "failed to carry her burden to show that the prosecutor's reason was * * * purposeful race discrimination," as required under Batson. Id. at 28.

ARGUMENT

Petitioner contends (Pet. 16-19) that the court of appeals erred in not remanding the case to the district court for further consideration of whether the government violated its obligations under Batson v. Kentucky, 476 U.S. 79 (1986). She further contends (Pet. 8-16) that the panel's unpublished, non-precedential opinion conflicts with the decisions of other courts of appeals. Petitioner's contention misapprehends the panel's decision and the circuit precedent the panel applied. Both are correct and do not conflict with the decisions of any other court of appeals. Further review is unwarranted.

1. Batson establishes a three-step process for determining whether a prosecutor has discriminated on the basis of race in exercising peremptory challenges in selecting a jury. 476 U.S. at 96-98; see Snyder v. Louisiana, 552 U.S. 472, 476-477 (2008). First, the defendant must establish a prima facie case of discrimination by demonstrating that the "relevant circumstances raise an inference" of racial discrimination. Batson, 476 U.S. at 96; Hernandez v. New York, 500 U.S. 352, 358 (1991) (plurality opinion). Second, if a defendant makes such a showing, the prosecution must come forward with a race-neutral explanation for each challenged strike. Batson, 476 U.S. at 97-98; Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam). Third, if the prosecution provides such a race-neutral explanation, "the trial court must * * * decide * * * whether the opponent of the strike has proved purposeful racial discrimination." Purkett, 514 U.S. at 767; see Batson, 476 U.S. at 98. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768.

The "ultimate question of discriminatory intent" is a "pure issue of fact," Hernandez, 500 U.S. at 364 (plurality opinion), that turns on "whether the trial court finds the prosecutor's race-neutral explanations to be credible," Miller-El v. Cockrell, 537

U.S. 322, 339 (2003). The trial court's assessment of "'[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Ibid. If the court makes a credibility determination, that determination receives "great deference on appeal" and is reviewed only for clear error. Hernandez, 500 U.S. at 364 (plurality opinion).

2. The court of appeals' decision correctly reflects those principles.

a. As petitioner acknowledges (Pet. 17-18), courts of appeals may decline to remand for further fact-finding when the circumstances would support only one possible determination on remand. See, e.g., Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 n.3 (2008) (acknowledging such an exception for review of rulings implicating Federal Rule of Evidence 403); Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982) (same, for findings of intentional discrimination under Title VII). Consistent with that well-established practice, this Court in Snyder v. Louisiana, supra, declined to remand a Batson challenge for further fact-finding after concluding that the record as it stood could not support an alternative ground for a valid peremptory challenge. 552 U.S. at 486 (finding no "realistic possibility that this subtle question of causation could be profitably explored further on remand * * * more than a decade after petitioner's trial"). And the courts of appeals have repeatedly rejected Batson claims, and declined to remand, when the record is conclusive. See, e.g., United States v. Stephens, 514 F.3d 703, 713 (7th Cir.) (declining to remand where "[v]iewing the record now in its entirety presents only one plausible conclusion -- that there is no Batson violation in this case"), cert. denied, 555 U.S. 969 (2008); King v. Moore, 196 F.3d 1327, 1334 (11th Cir. 1999) ("A remand is unnecessary here * * * because the district court could not find an inference of discrimination [under Batson] on this record without clearly erring."), cert. denied, 531 U.S. 1039 (2000); United States v. Allison, 908 F.2d 1531, 1537 (11th Cir. 1990) (declining to remand a Batson-related factual issue because the record permitted only one finding), cert. denied, 500 U.S. 904 (1991); United States v. Dennis, 804 F.2d 1208, 1210 n.22 (11th Cir. 1986) (same), cert. denied, 481 U.S. 1037 (1987).

The court of appeals permissibly followed that same course in this case. Although it concluded that the district court did not sufficiently analyze the non-discriminatory reason provided by the prosecutor at Batson's third step, the court of appeals proceeded to determine that petitioner's Batson claim was unavailing because "[t]he government's reason for striking juror No. 22 appeared race neutral and specific to juror No. 22" and "[n]othing else" in the record "suggest[ed]" that the government's stated reason was a "pretext for purposeful discrimination." Pet. App. 27a-28a. In the circumstances here, where the district court strongly suggested that it found the government's explanation credible and indeed described the strike as "nondiscriminatory," id. at 21a-22a, and the record itself offers "[n]othing" to controvert that conclusion, id. at 27a, the court of appeals could permissibly affirm, rather than remand in order for the district court to reach the only available outcome on its own.

Petitioner contends (Pet. 21-22) that the facts of this case warranted a remand because "the evidence was mixed" and the prosecutor "misrepresent[ed] what the juror had said." But that factbound contention does not warrant this Court's review. See Sup. Ct. R. 10. In any event, the court of appeals was correct that "[n]othing * * * suggest[ed] that the government's stated reason * * * was pretext for purposeful discrimination." Pet. App. 27a. Even when given an explicit chance to respond to the prosecutor's proffered reason for the strike, defense counsel did not argue that the strike was pretextual. She simply offered her own observations about the juror in question and corrected the prosecutor's recollection of the colloquy between the court and the juror. C.A. E.R. 102. At no point did defense counsel suggest to the district court that the prosecutor's mistaken recollection was itself proof of purposeful discrimination, as petitioner later contended on appeal and now argues in this Court. And that theory is in any event unsound. The prosecutor's proffered reason for the strike was not her concern with the juror's belief that she could be fair and impartial (the subject of the prosecutor's mistaken recollection); it was her concern with the fact of "her brother's drug conviction" itself. Id. at 100-101 ("We definitely have concerns about the fact that her brother was convicted of selling drugs."). That concern was a race-neutral reason to strike the juror regardless of what the juror believed or represented about her ability to be fair and impartial.

b. Petitioner more broadly asserts (Pet. 13-14) that the Ninth Circuit has improperly "claimed the authority" to conduct de novo fact-finding in all Batson claims. But the decision below is not premised on any such view of the court's authority.

The unpublished decision in this case relied on precedent that is fully consistent with the principles discussed above. It drew its "de novo" standard of review from United States v. Alvarez-Ulloa, 784 F.3d 558 (9th Cir. 2015). See Pet. App. 5. That case in turn relied on United States v. Alanis, 335 F.3d 965 (9th Cir. 2003); a habeas case finding the state trial court's Batson ruling to be premised on "an unreasonable determination of the facts," Green v. LaMarque, 532 F.3d 1028, 1031 (9th Cir. 2008); and a Seventh Circuit decision declining to remand where "the record now in its entirety presents only one plausible conclusion," such that "[a] second proceeding in the district court would be a redundant exercise," Stephens, 514 F.3d at 713. See Alvarez-Ulloa, 784 F.3d at 565-566. None of those cases holds that the court of appeals may act as the primary factfinder.

Although the court of appeals loosely described its approach here as "de novo," its application of that approach does not appear to entail any usurpation of the district court's role. For example, in Alanis -- the primary case on which the decision below relied -- the Ninth Circuit explained the general rule that, "[o]rdinarily, it is for the trial court, rather than for the appeals court, to perform the third step of the Batson process in the first instance." 335 F.3d at 969 n.5. But the court went on to determine, on the facts of that case, that it "must conclude, even based on a 'cold record,' that the prosecutor's stated reasons for striking prospective male jurors" in that case "was a pretext for purposeful discrimination." Ibid. "Had the [district] court properly proceeded to step three," the court of appeals found, "it would have concluded that the prosecution's gender-neutral explanations were pretexts for further discrimination." Id. at 969.*

To the extent that the decision below, or other Ninth Circuit decisions, may have recited the "de novo" language without fully explicating its meaning in this context, it is far from clear that doing so has affected the analysis, let alone outcome, of any cases. The Ninth Circuit has explicitly recognized that the

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* Similarly, in SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (2014), the Ninth Circuit found that "[t]he record reflects that had the district judge applied the law correctly, she would necessarily have concluded that Abbott's strike of Juror B was impermissibly made on the basis of his sexual orientation." Id. at 478-479. For that reason, the court deemed it appropriate to "perform the third step of the Batson analysis." Id. at 479.

default course is to remand, see, e.g., Alanis, 335 F.3d at 969 n.5, and it presumably does so when it views further proceedings in the district court as potentially dispositive. Cf. Sprint/United Mgmt. Co., 552 U.S. at 388 (reviewing court should not lightly presume error by lower court).

As petitioner's own reply brief below recognized, the Ninth Circuit's precedent permits an appellate panel to decide a Batson claim in the first instance "only where the 'record * * * is well developed and there are not outstanding issues that would benefit from an additional hearing.'" Pet. C.A. Reply Br. 23 (quoting Alvarez-Ulloa, 784 F.3d at 566) (brackets omitted).

3. Petitioner contends (Pet. 8-13) that the unpublished decision below (and the circuit precedent it applied) conflicts with the decisions of several other lower appellate courts. That contention in unavailing for the reasons already discussed. None of the decisions cited by petitioner sets forth any rule that would categorically foreclose a remand.

The decisions cited by petitioner merely recognize or apply the general rule that "[w]hen a court has failed to make needed credibility findings as to each challenged strike 'the appropriate course usually will be to remand for findings by the court as to the challenged strikes and an ultimate determination on the issue of discriminatory intent based on all the facts and circumstances.'" United States v. Thomas, 303 F.3d 138, 146 (2d Cir. 2002) (citation omitted) (emphasis added); accord United

States v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991) (applying general rule); Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995) ("[W]hen the district court fails to articulate its findings, remand for further proceedings may be necessary.") (emphasis added); United States v. Joe, 928 F.2d 99, 104 (4th Cir. 1991) (same, noting that "[w]e are not well positioned to conduct this important analysis with only a cold record and without the benefit of findings and supporting reasons of the trier of fact"), cert. denied, 502 U.S. 816 (1991); United States v. Romero-Reyna, 867 F.2d 834, 837 (5th Cir. 1989) (remanding where prosecutor's explanation was facially weak: "I never accept anyone whose occupation begins with a P"); United States v. McAllister, 693 F.3d 572, 583 (6th Cir. 2012) (applying general rule); United States v. Torres-Ramos, 536 F.3d 542, 561 (6th Cir. 2008) (same); United States v. Kimbrel, 532 F.3d 461, 469 (6th Cir. 2008) (remanding "[a]bsent any argument for a different approach"); United States v. Harris, 192 F.3d 580, 588 (6th Cir. 1999) (same); United States v. Rutledge, 648 F.3d 555, 560 (7th Cir. 2011) (same); United States v. McMath, 559 F.3d 657, 666 (7th Cir.) (same), cert. denied, 558 U.S. 881 (2009); United States v. Taylor, 509 F.3d 839, 845 (7th Cir. 2007) (defendants had made a "strong case" of purposeful discrimination); United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989) (per curiam) (remanding because the district court applied the wrong legal standard in finding no prima facie showing).

The Ninth Circuit, too, has remanded Batson claims when the record was inconclusive or insufficiently developed. See, e.g., United States v. Collins, 551 F.3d 914, 923 (9th Cir. 2009). None of the decisions cited by petitioner, however, stated that such remands are required even when a reviewing court is able to conclude that a remand could produce only one viable result. Indeed, at least two of the circuits cited by petitioner as conflicting with the Ninth Circuit's position (the Seventh and the Eleventh) have rejected Batson claims without remanding to the district court in those circumstances. See Stephens, 514 F.3d at 713; King, 196 F.3d at 1334.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2018