

No. 17-9130

In the
Supreme Court of the United States

GRACIELA POTENCIANO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Reply Brief for Petitioner

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INTRODUCTION

The Ninth Circuit, and only the Ninth Circuit, has claimed the discretionary authority to conduct appellate fact-finding in the *Batson* context and “decide *de novo*” the pure issue of fact of “whether the government’s strikes were motivated by purposeful discrimination.” *United States v. Alvarez-Ulloa*, 784 F.3d 558, 565–66 (9th Cir. 2015). The court has repeatedly invoked this authority, including in the case below. *See* Pet. 13–16. The Ninth Circuit’s rule, however, is contrary to this Court’s “frequent[]” reminder to the courts of appeals that they cannot “decide factual questions *de novo*.” *Maine v. Taylor*, 477 U.S. 131, 145 (1986). Indeed, every other court of appeals to consider this issue—the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits—has refused to conduct *de novo* fact finding. *See* Pet. 10–13. The Petition explained that this Court should grant review to resolve this split by again reminding a lower federal court that it is not to decide factual questions *de novo*.

In its opposition, the government contends that this Court should deny review. In doing so, the government does not dispute that the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits do not conduct *de novo* fact finding in the *Batson* context. And the government does not dispute that it would be serious and obvious error for an appellate court to conduct *de novo* fact finding. Instead, the government claims that this case is not worthy of review because the Ninth Circuit does not really conduct *de novo* fact finding. According to the government, the Ninth Circuit has only “loosely described its approach” as “*de novo*[:.]” BIO 12. What it is *really* doing, the government contends, is that it is declining to remand in cases where the record

permits only one resolution of the factual issue. BIO 8. In such a situation, the appellate court is not conducting *de novo* fact finding. The government further argues that the court of appeals applied this rule in Petitioner's case. BIO 9.

But the Ninth Circuit has not just "loosely described" its approach as "*de novo*." It has repeatedly and unambiguously stated it can resolve *de novo* the fact question of the prosecutor's intent when the trial court misapplies *Batson*. Indeed, the Ninth Circuit has *never* claimed that it can make factual findings *de novo* only because the record permits only one resolution of whether purposeful discrimination motivated the prosecutor's strikes. Not only does the court say without qualification that it is applying *de novo* review, the analysis it employs confirms that it is actually applying *de novo* review. The court "careful[ly] reviews" the evidence and then makes a factual finding. *United States v. Mikhel*, 889 F.3d 1003, 1031 (9th Cir. 2018).

This is exactly what the court below did in Petitioner's case. Following the Ninth Circuit's published line of cases in which it has applied *de novo* review, the panel held—without qualification—that it would "decide[] *de novo* whether the government's strikes were motivated by purposeful discrimination." Pet. App. 27a (internal quotation marks omitted). Nowhere did the court claim that it was applying *de novo* review because the record permitted only one resolution of the factual issue. Indeed, the record in this case does not permit only one resolution of the prosecutor's intent. The evidence in the record was mixed—and much of it indicated that the prosecutor had struck a minority juror because of the juror's race.

In short, this Court should grant review to resolve the circuit split and confirm once again that a court of appeals should not conduct fact finding *de novo*, including in the *Batson* context. Alternatively, in light of the government's failure to defend the Ninth Circuit's rule, summary reversal would be appropriate.

ARGUMENT

I. The Ninth Circuit has claimed the discretionary authority to decide *de novo* the pure issue of fact of whether the government's strikes of prospective jurors were motivated by purposeful discrimination.

In its opposition, the government does not defend a rule that would permit an appellate court to conduct *de novo* fact finding in the *Batson* context. Nevertheless, the government does not find fault with the Ninth Circuit's approach. According to the government, while the Ninth Circuit has "loosely described its approach" as "*de novo*" review, what it is *really* doing is following the well-established rule that an appellate court "may decline to remand for further fact-finding when the circumstances would support only one possible determination on remand." BIO 8, 12. The government is incorrect.

When a trial court misapplies *Batson*'s third step, the Ninth Circuit has not just "loosely described" its approach as resolving *de novo* whether the prosecutor struck a juror based on purposeful discrimination. Rather, the court has over and over again expressly and unambiguously said without qualification that it was conducting *de novo* review:

- *United States v. Mikhel*, 889 F.3d 1003, 1028 (9th Cir. 2018) (applying “*de novo* review . . . where the [trial] court improperly applied the three-step [*Batson*] framework”).
- *United States v. Rodarte*, 2018 WL 2191118, at *1 (9th Cir. May 14, 2018) (holding that the trial court misapplied *Batson* and thus deciding “*de novo* whether the government’s strikes were motivated by purposeful discrimination”).
- *United States v. Calderon-Jimenez*, 637 F. App’x 295, 297 (9th Cir. 2016) (assuming the trial court erred and applying “*de novo* review” to determine whether the prosecutor’s strikes were motivated by purposeful discrimination).
- *United States v. Alvarez-Ulloa*, 784 F.3d 558, 566–66 (9th Cir. 2015) (holding that, “[fa]ced with an improper application of the *Batson* framework, we may decide *de novo* whether the government’s strikes were motivated by purposeful discrimination”).
- *United States v. Hitsman*, 624 F. App’x 462, 466 (9th Cir. 2015) (“applying a *de novo* standard of review” after trial court misapplied *Batson*).
- *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 476 (9th Cir. 2014) (applying “*de novo*” review after trial court misapplied *Batson*).

Thus, taking the Ninth Circuit at its word, it is applying *de novo* review. Indeed, as this Court has noted, a “good rule of thumb for reading our decisions is that what they say and what they mean are one and the same[.]” *Mathis v. United States*, 136

S. Ct. 2243, 2254 (2016). That same rule should apply to Ninth Circuit’s decisions. The Ninth Circuit says it is applying *de novo* review, and that means it is applying *de novo* review.

Moreover, if by “*de novo*” review the Ninth Circuit really meant that it would review to determine if there was only one possible resolution of the prosecutor’s intent, the Ninth Circuit would presumably just say that. Indeed, in the Seventh and Eleventh Circuit cases in which those courts have applied this rule to *Batson* claims, they did just that—they did not claim to be applying *de novo* review. See BIO 9 (quoting cases). But, in the *Batson* context, the Ninth Circuit has never said it was reviewing to determine if the record permitted only one resolution.¹ And that is particularly notable because, in other contexts, the Ninth Circuit has expressly said it would not remand if the record permitted only one resolution of the factual issue—and in doing so, it does not appear the Ninth Circuit has ever claimed that this meant it was resolving the factual issue “*de novo*.” See, e.g., *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 214 (9th Cir. 1989) (holding that, where “findings are

¹ The closest the government comes to locating support for its reading of Ninth Circuit law is *SmithKline Beecham*, see BIO 12 n.*—but that case does not support the government’s position. In that case, the Ninth Circuit stated without qualification that it could resolve the *Batson* issue “*de novo*,” since the “district judge applied the wrong legal standard.” 740 F.3d at 476. After reviewing the evidence, the court did conclude that, “[t]he record reflects that had the district judge applied the law correctly, she would necessarily have concluded that [the] strike of Juror B was impermissibly made on the basis of [the juror’s] sexual orientation.” *Id.* at 478–79. Thus, while the court did conclude that the record permitted only one resolution of the fact issue, the court never claimed that it could apply *de novo* review only because the record permitted one resolution.

infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue” without calling this *de novo* review); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1411 (9th Cir. 1988) (same); *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1217 (9th Cir. 1983) (same); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1318 (9th Cir. 1982) (same).

Not only has the Ninth Circuit said it would apply *de novo* review without qualification, its analysis makes clear that it is applying *de novo* review. Take *Mikhel*, a death penalty case the Ninth Circuit decided earlier this year. There, defendants argued that the trial court had misapplied *Batson* in determining whether the prosecutor had struck a minority juror based on purposeful discrimination. 889 F.3d at 1028. The Ninth Circuit noted, without qualification, that it had “applied *de novo* review . . . where the [trial] court improperly applied the three-step framework” from *Batson*. *Id.* It then assumed the trial court had erred and proceeded to evaluate the merits of the defendants’ challenge *de novo*. *Id.* Over four pages, the court parsed the evidence. *See id.* at 1028–31. The court found one of the prosecutor’s explanations for the strike persuasive, but thought there was “less merit” to the government’s secondary reason. *Id.* at 1030. Ultimately, “[a]fter careful review,” the court could not say that the “defendants have met their burden of demonstrating [that] race was a ‘substantial motivating factor’ in the government’s peremptory strike[.]” *Id.* at 1031 (emphasis added). Nowhere did the court claim that it would apply *de novo* review because the factual record permitted only one resolution.

The Ninth Circuit conducted a similarly careful review in *Alvarez-Ulloa*. There, the Ninth Circuit held that the trial court had erred by not evaluating the persuasiveness of the prosecutor's facially neutral reason for striking three minority jurors. 784 F.3d at 565. "Faced with an improper application of the *Batson* framework," the court held without qualification that it "may decide *de novo* whether the government's strikes were motivated by purposeful discrimination." *Id.* The court then proceeded to parse the evidence with respect to the three prospective jurors. *Id.* at 566–67. For example, with respect to one Hispanic juror, the prosecutor claimed to have struck him because he had attended a pro-immigration rally. *Id.* at 567. The panel noted there was no direct evidence that the "government was concerned about this panelist's race." *Id.* But the court also recognized that the "government's decision to strike a Hispanic venire member for a purported interest in immigration policy perhaps raises a question about motive[.]" *Id.* Nevertheless, the court ultimately found this was not sufficient because "the burden of showing purposeful discrimination rests with [the defendant]," and the statistical evidence was "not overwhelming and the comparative analysis [was] unhelpful." *Id.* Nowhere did the court claim that it would apply *de novo* review because the factual record permitted only one resolution.

The government's opposition also implies that Petitioner in the court below embraced the view that the Ninth Circuit applies *de novo* review only where the record permits one resolution of the factual issue. See BIO 13 (citing Pet. C.A. Reply Br. 23)). Petitioner, however, merely pointed to the Ninth Circuit's statement in

Alvarez-Ulloa where the court said it would decide the factual question of whether the prosecutor had relied on purposeful discrimination *de novo* because the record was “well-developed” and that there were not “outstanding issues” that would benefit from a remand. 784 F.3d at 566. Petitioner argued that this caveat was not met in her case. This caveat from *Alvarez-Ulloa*, however, is not the same as the limitation the government now attempts to read into Ninth Circuit case law. A record can be fully developed without the record permitting only one resolution of the factual issue. Indeed, a summary-judgment record might be complete, but that does not mean that summary judgment is necessarily appropriate. Reasonable minds could disagree on the inferences to draw from the complete record. And, in any event, the court has never again applied the caveat for a fully developed record since *Alvarez-Ulloa*, including in Petitioner’s case.

On the other hand, while the government now tries to back away from the Ninth Circuit’s “*de novo*” approach, the government’s answering brief in the court of appeals represented that the court could review “*de novo*” whether Petitioner had met “her burden at *Batson* step three.” Gov’t C.A. Ans. Br. 6, 39. In doing so, the government never disclosed any purported limitation on that review. It is only now after the Ninth Circuit has affirmed Petitioner’s conviction and ten-year sentence that the government has claimed that the court’s review is not really *de novo*.

In short, the Ninth Circuit’s outlier rule is inconsistent with the basic rule that appellate courts should not conduct *de novo* fact finding. *See Taylor*, 477 U.S. at 145.

Indeed, the government makes no attempt to defend the rule on the merits. Thus, this Court should thus grant review—if not summarily reverse.

II. This Petition squarely raises the question presented.

The government also disputes whether the panel below actually found *de novo* that the prosecutor did not rely on purposeful discrimination in striking the lone African American juror; the government instead contends that the record permitted only one resolution of the issue of the prosecutor's intent. BIO 9–11. Thus, the government in essence contends that this case is not a good vehicle to correct the Ninth Circuit's mistaken rule.

The court below, however, stated it was applying *de novo* review without qualification, just as the government's answering brief contended that it could. After holding that the trial court had misapplied *Batson*, the Ninth Circuit quoted its published decision in *Alvarez-Ulloa* in which it said 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.” Pet. App. 27a (quoting 784 F.3d at 565; brackets in original). The court then said it would “review Potenciano's *Batson* challenge *de novo*.” Pet. App. 27a.

Moreover, the record in this case does not permit only one resolution of whether the prosecutor's relied on purposeful discrimination in striking the lone African American juror from the Petitioner's jury pool in her drug trial. The prosecutor's race-neutral reason for the strike relied on a misrepresentation of what the juror had

said. Specifically, the prosecutor claimed in part that the juror, when “asked about being fair and impartial, she . . . said well, he is out now, so I’m okay.” Pet. App. 19a–20a. The juror, however, never said that. And while the government now claims that this was just a “mistaken recollection,” that cannot be decided on a cold record. BIO 10. Whether that was just a “mistaken recollection” or whether the prosecutor got caught trying to make up a reason to cover up her decision to rely on race-based stereotyping is something that a fact finder who observed the prosecutor’s demeanor should decide.

The government also claims that defense counsel herself never argued that the prosecutor’s misrepresentation “was itself proof of purposeful discrimination[.]” BIO 10. But this claim is not consistent with the record. When asked to respond to the prosecutor’s justification for her strike, defense counsel right then and there pointed out that the prosecutor’s representation was inaccurate: “When Your Honor asked her if she could be fair and impartial, she did not say, now he is out, so now I’m okay. It wasn’t in response to that question. It was in response to saying how long ago the case was.” Pet. App. 21a. The government seems to be arguing that defense counsel did not then say that this misrepresentation was evidence of pretext. But she pointed out the misrepresentation in context of the *Batson* process in which the court was supposed to be deciding whether the prosecutor’s justification was pretext. Why else would counsel have pointed it out, except as part of her legal argument in support of her *Batson* claim?

The government also claims that the prosecutor was really more concerned about the fact that the juror had a brother with a drug conviction from a decade prior. BIO 10–11. But the prosecutor did not just focus on the fact of the drug conviction itself. Indeed, if she had, it would have raised other questions, since the government chose not to strike a non-African-American juror who had a nephew with a drug conviction. *See* Pet. 21 (citing Pet. App. 6a, 10a, 20a). Moreover, defense counsel pointed out that the juror seemed “very removed from the incident,” which had occurred a decade prior—she “seemed as though she could have [not] cared less,” something the trial prosecutor never responded to in front of the fact finder. Pet. App. 21a.

In any event, these sorts of arguments about the evidence are *exactly* the reason why the record did not permit only one resolution of the issue of the prosecutor’s intent. There was evidence to suggest that the prosecutor relied on race in striking the lone African American prospective juror, and there was evidence to suggest the prosecutor did not rely on race. Only a fact-finder who witnessed the prosecutor articulate the race-neutral reason, and witnessed the prospective juror’s demeanor in discussing her brother’s ten-year-old drug conviction, could make the third-step finding.

In short, this case squarely raises the question presented. The court applied *de novo* review and resolved an issue of fact over which reasonable minds could disagree.

CONCLUSION

This Court should grant this petition for a writ of certiorari or summarily reverse.

September 11, 2018

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'D' followed by a horizontal line that tapers to the right.

Doug Keller