No. 05-1524

In the Supreme Court of the United States

FABIO OCHOA-VASQUEZ, AKA JULIO, AKA PEPE,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government exercised its peremptory challenges on the basis of ethnicity.

2. Whether petitioner's sentence violated the doctrine of specialty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A82) is reported at 428 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2005. A petition for rehearing was denied on January 12, 2006 (Pet. App. B1-B2). On April 3, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 27, 2006. The petition was filed on May 26, 2006. 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 Florida, petitioner

was convicted of conspiracy to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and conspiracy to import five kilograms or more of cocaine into the United States, in violation of 21 U.S.C. 963. He was sentenced to 365 months of imprisonment. The court of appeals affirmed. Pet. App. A1-A82.

1. In the 1980s, petitioner was a high-ranking member of the Medellín drug cartel in Medellín, Colombia. Pet. App. A3. In the early 1990s, petitioner surrendered to Colombian authorities, spent several years in jail, and was released in 1997. *Ibid.* Petitioner subsequently resumed his illegal drug activities. In particular, petitioner agreed to assume a drug debt that Alejandro Bernal owed to Nicolás Bergonzoli in exchange for Bernal's agreement to repay him with cash from future drug-trafficking operations. *Id.* at A4. Petitioner also advised Bernal on his trafficking activities. *Ibid.* In October 1999, Colombian authorities arrested petitioner pursuant to a United States arrest warrant. *Id.* at A3. In 2001, Colombia extradited him to the United States. *Ibid.*

Before trial, the government moved to empanel an anonymous jury. Pet. App. A23. In support of the motion, the government proffered evidence that Colombian drug organizations had used threats and violence to obstruct justice. *Ibid.* The district court granted the motion and withheld prospective jurors' names, addresses, and places of employment from the parties. *Id.* at A23-A24.

During jury selection, petitioner objected to the government's use of its fourth peremptory challenge on the ground that the government was excluding Hispanic males in violation of *Batson* v. *Kentucky*, 476 U.S. 79

(1986). Pet. App. A28. The district court asked the government to explain the fourth strike. *Ibid.* "The government responded that the potential juror was a photographer," and that it wanted jurors who had a more professional background. *Ibid.* "The district court accepted that explanation for the government's fourth challenge." *Ibid.*; see *id.* at A41-A43.

Petitioner objected to the government's sixth peremptory challenge on *Batson* grounds. Pet. App. A28. The government stated that it did not believe that the potential juror was Hispanic. *Ibid.* The government went on to explain that it struck that juror because he was a state court juror clerk, and it did not want a person who had participated in jury selection to serve on the jury. *Ibid.* The district court accepted the government's explanation. *Ibid.*

In conducting peremptory challenges, neither the government nor the defense possessed information on the ethnicity of the prospective jurors. Petitioner's counsel claimed that the ethnicity of the jurors could be determined based on their physical characteristics and accent. Pet. App. A46-A47. The district court repeatedly expressed its view that such a determination could not be made, and the court denied petitioner's *Batson* motion. *Id.* at A49 & n.36.

At petitioner's request, the district court supplemented the record with the portion of the jury questionnaires in which the jurors had reported their racial and ethnic backgrounds. Pet. App. A28-A29. Those responses revealed that four of the jurors and two of the alternate jurors were Hispanic. *Id.* at A50-A51. The responses further revealed that the government had used five of its six peremptory challenges to strike Hispanic jurors, that the government accepted at least six

Hispanic jurors, that petitioner had used seven of his 13 peremptory challenges to strike Hispanic jurors, and that the district court had struck 21 Hispanic jurors for cause. *Id.* at A57-A60.

2. The court of appeals affirmed. Pet. App. A1-A82. As relevant here, the court rejected petitioner's *Batson* claim. *Id.* at A38-A60. The court noted that petitioner's *Batson* claim rested solely on an allegation that the government had engaged in a discriminatory pattern of strikes. *Id.* at A40. The court then held that petitioner's evidence did not support an inference of discrimination.

In reaching that conclusion, the court of appeals relied on the district court's finding that the government could not ascertain the ethnic identity of the jurors. Pet. App. A49-A50. The court of appeals explained that, "[i]f the government could not determine the ethnicity of the potential jurors in the venire, then it could not improperly strike them on that basis." *Ibid.* The court deferred to the district court's finding that the government could not ascertain the ethnic identity of the prospective jurors because that court could observe first-hand whether such a determination could be made. *Id.* at A50. The court of appeals also concluded that the evidence in the record supported the district court's conclusion. *Id.* at A50-A51. In particular, based on his observations, petitioner's counsel had claimed that only one member of the jury was Hispanic when the record revealed that six Hispanics were empaneled as jurors. *Ibid.*

The court of appeals went on to hold that, even assuming that the government could identify the ethnic identity of the jurors, the evidence did not support petitioner's claim that the government's pattern of strikes gave rise to an inference of discrimination. Pet. App.

A52. The court relied on several considerations in reaching that conclusion. First, the court concluded that the government's strike-rate reflected an "anti-pattern" because the government accepted six Hispanics while striking five Hispanics, and six Hispanic jurors were empaneled to serve on the jury. *Id.* at A59. Second, the court deemed it significant that the government's strike rate against Hispanics (56%) was proportional to the composition of the venire (54%). *Ibid.* And third, while the percentage of Hispanics on the jury (35%) was lower than the percentage on the venire, the court did not view that disparity as significant because it was the result of the district court's 21 for-cause strikes against Hispanics and petitioner's use of seven of his 13 strikes against Hispanics. *Id.* at A59-A60.

Petitioner argued on appeal that his sentence violated the conditions of his extradition. The court of appeals rejected that claim without explanation. Pet. App. A60.

Judge Barkett concurred in part and dissented in part. Pet. App. A61-A82. As relevant here, Judge Barkett disagreed with the majority's rejection of petitioner's *Batson* claim. *Id.* at A68-A82. Judge Barkett concluded that petitioner's showing that the government had used five of its peremptory challenges to strike Hispanics supported a prima face case of discrimination. *Id.* at A75-A76 & n.15. Judge Barkett also concluded that the district court had improperly blocked petitioner from obtaining the information necessary to prove his *Batson* claim. *Id.* at A76-A82.

ARGUMENT

1. Petitioner contends (Pet. 7-18) that the court of appeals erred in rejecting his claim under *Batson* v.

Kentucky, 476 U.S. 79 (1986). That contention is without merit and does not warrant review.

a. A prosecutor's use of peremptory challenges to strike venire members based on their race or ethnicity violates the Constitution. *Batson*, 476 U.S. at 89. To establish a *Batson* violation, the defendant must first make out a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson* v. *California*, 125 S. Ct. 2410, 2416 (2005) (quoting *Batson*, 476 U.S. at 94). To meet that initial burden, the defendant need not prove that it is more likely than not that the strikes were racially or ethnically motivated. *Id.* at 2419. Instead, the defendant must only produce evidence that creates a reasonable inference of discrimination. *Ibid.* The defendant may meet that burden in several different ways, including with evidence that the prosecutor engaged in a "pattern" of strikes against members of a particular racial or ethnic group. *Batson*, 476 U.S. at 96-97.

If the defendant is successful in establishing a prima facie case, the burden shifts to the government to offer a neutral explanation for the challenged strike. *Johnson*, 125 S. Ct. at 2416; *Batson*, 476 U.S. at 94. If such an explanation is offered, the trial court must then decide whether the opponent of the strike has proved purposeful racial or ethnic discrimination. *Johnson*, 125 S. Ct. at 2416.

b. In this case, petitioner sought to establish a *Batson* claim based on the government's pattern of strikes. Applying established principles, the court of appeals correctly rejected that claim. Most important, the court of appeals relied on the district court's finding that the government could not ascertain the ethnic iden-

tity of the prospective jurors. That finding is sufficient by itself to defeat petitioner's *Batson* claim. As the court of appeals explained, "[i]f the government could not determine the ethnicity of the prospective jurors in the venire, then it could not improperly strike them on that basis." Pet. App. A49-A50. See *Hernandez* v. *New York*, 500 U.S. 352, 369-370 (1991) (plurality opinion) (relying on the prosecutor's assertion that he did not know the ethnicity of the venire members that he struck as a basis for affirming the district court's finding of no discrimination).

The court of appeals further concluded that, even assuming that the government could ascertain the ethnic identity of the jurors, the government's pattern of strikes did not create an inference of discrimination. That alternative holding is also correct. As the court of appeals explained, no inference of discrimination was warranted because (1) the government accepted six Hispanics, while striking five, and six Hispanics were empaneled either as jurors or alternates; (2) the rate at which the government struck Hispanics (56%) was proportional to the percentage of Hispanics in the jury pool (54%), and (3) the disparity between the percentage of Hispanics empaneled and the percentage of Hispanics in the jury pool was the result of the district court's for-cause strikes, and the defense's peremptory strikes, not the government's strikes. Pet. App. A59-A60. In any event, the court of appeals' fact-bound determination about the significance of the government's pattern of strikes does not warrant review.

c. For the most part, petitioner ignores the district court's finding on the government's inability to identify the ethnicity of the prospective jurors. Instead, he concentrates his attack on the court of appeals' alternative

holding that the government's pattern of strikes would not, in any event, give rise to an inference of discrimination. Even if those attacks had merit, they would not warrant review. The court of appeals' affirmance of the district court's finding on the government's inability to identify the ethnicity of the jurors provides an independent ground for the Eleventh Circuit's decision. There is consequently no need in this case to decide whether the pattern of strikes would have given rise to an inference of discrimination if the government could have identified the ethnic identity of the jurors.

In any event, petitioner's attacks on the court of appeals' alternative holding are without merit. Petitioner first argues (Pet. 11-12) that the court of appeals' reliance on the ultimate composition of the jury conflicts with *Alvarado* v. *United States*, 497 U.S. 543 (1990). That argument is without merit. In *Alvarado*, the Court granted the petition for a writ of certiorari and remanded the case to the court of appeals for further consideration in light of the government's concession that a finding that the ultimate composition of the jury represents a fair cross-section of the community does not automatically negate a *Batson* claim. The court of appeals in this case did not hold that the ethnic composition of the jury automatically negated petitioner's *Batson* claim. Instead, it merely held that the composition of the jury was one of several factors that was relevant in assessing whether the government's pattern of strikes created an inference of discrimination. Pet. App. A54-A55, A59. Nothing in *Alvarado* calls that holding into question. And that holding is fully consistent with the Court's holding in *Batson* that a court must consider "the totality of the relevant facts" in assessing whether

there is a prima facie case of discrimination. 476 U.S. at 93-94.

For similar reasons, petitioner errs in contending that the decision below conflicts with court of appeals decisions holding that the government's failure to strike some jurors of a particular race or ethnicity does not automatically defeat an inference of discrimination. See Pet. 11-12 (citing cases). As discussed above, the court of appeals considered the presence of Hispanics on the jury as one relevant factor supporting its determination that the pattern of strikes did not create an inference of discrimination; it did not hold that the government's acceptance of Hispanic jurors automatically defeated such an inference. Indeed, as petitioner concedes, the Eleventh Circuit has repeatedly held that the existence of members of the minority on the jury does not automatically defeat an inference of discrimination. See Pet. 13-14 (citing cases). Nothing in the decision below casts any doubt on the continuing vitality of that principle in the Eleventh Circuit.

Petitioner next contends (Pet. 14) that the court of appeals' reliance on evidence that the defendant used some of his peremptory challenges to strike Hispanics conflicts with the Court's decision in *Miller-El* v. *Dretke*, 125 S. Ct. 2317 (2005). There is, however, no conflict. In *Miller-El*, the Court held that the evidence supported an inference that the prosecution's shuffles of the jury pools reflected intentional discrimination, and the fact that the defendant also shuffled the jury pool could not rebut that inference. *Id.* at 2333 & n.14. Nothing in *Miller-El* suggests that a defendant's conduct can never be relevant in assessing the significance of the defendant's evidence.

Here, the court of appeals considered petitioner's strikes of Hispanics for the limited purpose of determining whether the disparity between the percentage of Hispanics on the jury and the percentage of Hispanics in the jury pool created an inference of discrimination in the first place. Pet. App. A59-A60. That mode of analysis was entirely appropriate. The disparity between the percentage of Hispanics on the jury and the percentage of Hispanics in the pool would tend to support an inference that the government engaged in intentional discrimination only if the disparity resulted from the government's actions. If the disparity resulted from the district court's actions, the defendant's actions, or a combination of the two, then the disparity could not support an inference that the government engaged in intentional discrimination. In order to determine the significance of the disparity between the percentage of Hispanics on the jury and the percentage of Hispanics in the pool in this case, the court of appeals was therefore required to examine the extent to which the defendant's strikes contributed to that disparity. As the court of appeals explained, "[o]therwise, the alleged Batson violator would essentially be held responsible for the strikes made by the objecting party." *Id.* at A60 n.47. Nothing in *Miller-El* suggests that a court must ignore the defendant's use of strikes when it has such obvious relevance to the appropriate inferences to be drawn from statistical comparisons.

For largely the same reasons, petitioner errs in asserting that the decision below conflicts with court of appeals decisions holding that the defendant's use of strikes against members of a minority group does not allow the government to engage in discriminatory strikes. Pet. 14 (citing cases). The court of appeals in

this case expressly reaffirmed its earlier holding that the defendant's unclean hands cannot justify a prosecutor's use of discriminatory strikes. Pet. App. A60 n.47. It explained, however, that the duty to consider all relevant circumstances required it to examine the extent to which the defendant's strikes explained the disparity between the percentage of Hispanics on the jury and the percentage of Hispanics in the jury pool. *Ibid.* None of the court of appeals decisions cited by petitioner addresses the propriety of considering the defendant's strikes for that limited purpose.

Petitioner next contends (Pet. 15) that the Court should grant review to resolve a conflict in the circuits on the question whether a district court determination that the evidence fails to establish a prima facie case should be reviewed de novo or deferentially. This case, however, is not an appropriate vehicle for addressing that asserted conflict.

While the court of appeals in this case announced that a deferential standard applies to a district court's ultimate determination on whether a prima facie case has been established, Pet. App. A39, it actually deferred only to the district court's underlying finding that the government could not determine the ethnicity of the prospective jurors. *Id.* A49-A50. In holding that the pattern of strikes would not, in any event, support an inference of discrimination, the court of appeals exercised de novo review. *Id.* at A52. None of the decisions cited by petitioner as conflicting with the decision below, see Pet. 15, suggests that a court of appeals should exercise de novo review over the district court's findings on the underlying facts. Indeed, one of the decisions relied on by petitioner expressly holds that an appellate court must review deferentially the district court's findings on

"those underlying facts on which the claimant relies to raise a presumption that the prosecutor used peremptory challenges in a discriminatory manner." *United States* v. *Alvarado*, 891 F.2d 439, 443 (2d Cir. 1989), vacated on other grounds, 497 U.S. 543 (1990).

Deferential review is particularly appropriate when the underlying finding is that the government cannot ascertain the ethnic identity of the jurors. As the court of appeals in this case explained (Pet. App. A50), the district court is in a far better position than an appellate court to assess whether the government can determine the ethnic identity of the jurors from their physical characteristics or speech patterns.

This case is also not an appropriate one to decide whether review of underlying factual findings should be deferential or de novo because the court of appeals made clear that it would have reached the same conclusion on the question whether the government could ascertain ethnic identity, regardless of whether it applied deferential or de novo review. The court specifically noted that the most significant record evidence on that issue was that petitioner's counsel had misidentified five persons as Hispanic. Pet. App. A50-A51.

Petitioner next contends (Pet. 16) that the anonymity of the jury did not prevent the government from engaging in discrimination against Hispanics. The court of appeals did not hold, however, that a prosecutor can never engage in discrimination when jurors are anonymous. Rather, it relied on the district court's finding that, in this case, the government could not ascertain the jurors' ethnic identity. Petitioner ignores the force of that finding. Nor does petitioner come to grips with the evidence in the record that petitioner's counsel could not accurately identify the ethnicity of the jurors.

In any event, that issue is fact-bound and is unlikely to arise in the future. The court of appeals in this case made clear its view that the better practice in anonymous-jury cases is to disclose the self-reported ethnic identity of the jurors to the parties. Pet. App. A51. There is no reason to believe that, in the future, district courts in the Eleventh Circuit will fail to follow that practice.

Finally, petitioner argues (Pet. 16-17) that evidence other than the pattern of strikes supports an inference of discrimination. The court of appeals, however, understood petitioner's *Batson* claim to rest entirely on the pattern of strikes. Pet. App. A40. In any event, the question whether additional evidence raised an inference of discrimination is fact-bound and does not warrant review.

2. Petitioner argues (Pet. 22-25) that his sentence violated the doctrine of specialty, and that this case is therefore an appropriate vehicle to resolve a conflict in the circuits on whether a defendant has standing to enforce that doctrine, absent a request from the extraditing country. Petitioner's sentence, however, did not violate the doctrine of specialty. And, in any event, this case does not implicate the circuit conflict on a defendant's standing to raise that doctrine.

a. At its core, the doctrine of specialty bars the government from trying an extradited defendant for offenses other than the ones for which extradition was granted. *United States* v. *Rauscher*, 119 U.S. 407, 424 (1886); *Benitez* v. *Garcia*, 449 F.3d 971, 975-976 (9th Cir. 2006); *United States* v. *Campbell*, 300 F.3d 202, 209-210 (2d Cir. 2002), cert. denied, 538 U.S. 1049 (2003); *United States* v. *Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989). No such core violation occurred here. Petitioner was prose-

cuted only for the offenses for which extradition was granted.

Petitioner does not contend otherwise. Instead, he claims (Pet. 24-25) that, in granting extradition, Colombia limited his sentence to 12 years of imprisonment and that his sentence exceeds that limit. While the doctrine of specialty extends to additional sentencing conditions to which the countries involved agree, *Benitez*, 449 F.3d at 976; *Campbell*, 300 F.3d at 211-212, there was no agreement that petitioner would be sentenced to no more than 12 years of imprisonment.

In connection with his extradition, the Colombian Ministry of Justice requested various assurances related to petitioner's sentence. The United States responded by assuring Colombia that (1) petitioner would only be tried for the crimes for which he was extradited, (2) petitioner would not face the death penalty, and (3) if petitioner were to receive a life sentence, the prosecution would ask the sentencing court for a definitive term of years. The Ministry of Justice made no other requests to limit petitioner's sentence. Gov't C.A. Br. 58.

Nor did the incorporation of Item One of Article 512 Criminal Procedure Code of Colombia into the extradition resolution limit petitioner's sentence to 12 years of imprisonment. Item One specifies that a person extradited shall "not be tried for a prior act other than the one giving rise to the extradition, nor subjected to penalties other than those that would have been imposed on him in the sentence." Gov't C.A. Br. 61. That provision simply incorporates the background international law rule that an extradited person may not be tried or punished for offenses other than those on which extradition has been granted.

Petitioner contends (Pet. 20) that Article 512 limits the punishment to that available under Colombian law for the comparable offense. The text of Article 512, however, provides no support for that contention. Moreover, adoption of that interpretation would be inconsistent with the course of the negotiations that led to the specific assurances that the United States made in connection with petitioner's extradition, assurances that did not include any limitation on the length of his sentence. In any event, the question of the nature of the conditions for petitioner's extradition is fact-bound and does not present any issue of recurring importance.

Petitioner argues (Pet. 24) that the Second Circuit's decision in *Campbell* supports his claim. But in that case, the parties expressly agreed that the extradited defendant would serve no more than 50 years. 300 F.3d at 211. There was no such express agreement here.

b. Regardless of the merits of petitioner's doctrine of specialty claim, this case does not implicate the circuit conflict on standing that petitioner seeks to raise. In arguing that this case presents an appropriate vehicle to resolve that standing conflict, petitioner apparently assumes that the court of appeals in this case rejected his doctrine of specialty claim on standing grounds. The court of appeals, however, did not give any explanation for its rejection of petitioner's doctrine of specialty claim. Indeed, the court did not even specifically refer to that claim at all. Instead, that claim is simply one of several claims that the court rejected in the following terms: "[Petitioner's] remaining claims are also without merit." Pet. App. A60. Nothing in the court's opinion supports petitioner's assumption that the court rejected his claim on standing grounds.

Nor is there any other reason to assume that the court of appeals rejected petitioner's claim on standing grounds. To the contrary, as petitioner recognizes, the law in the Eleventh Circuit is that a defendant has standing to enforce the doctrine of specialty, even absent a request from the extraditing country. *United States* v. *Puentes*, 50 F.3d 1567, 1575 (11th Cir.), cert. denied, 516 U.S. 933 (1995). It is implausible to suggest that a panel of the Eleventh Circuit intended to overrule that binding precedent through a summary statement that petitioner's remaining claims were without merit.

The most likely explanation for the court of appeals' rejection of petitioner's doctrine of specialty claim is that the court concluded that there was no violation of that doctrine. For the reasons discussed above, that conclusion is correct and does not, in any event, warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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