No. 08-750

In the Supreme Court of the United States

JAIME DURAN FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly declined to address a claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), where petitioner failed to assert that claim in the district court and the government therefore had no occasion to provide a race-neutral explanation for its peremptory challenges.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statute and rules: Page

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-19) is not published in the *Federal Reporter* but is reprinted in 286 Fed. Appx. 206.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2008. A petition for rehearing was denied on September 9, 2008 (Pet. App. 21-22). The petition for a writ of certiorari was filed on December 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of being a felon in possession of a firearm, in vio-

lation of 18 U.S.C. 922(g)(1). He was sentenced to 86 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed in a non-precedential, per curiam opinion. Pet. App. 1-19.

1. The evidence at trial showed that two individuals stole a firearm and then traded it to Manuel Antonio Mata in exchange for a quantity of heroin. During the exchange, Mata placed a call from his cell phone to the number of petitioner's common-law wife and spoke to an individual in Spanish. Pet. App. 2-3. A police investigator later interviewed Mata about the theft and asked him to help retrieve the gun. In response to that request, Mata made another cell phone call to the number of petitioner's common-law wife, again speaking in Spanish. Immediately after the call, Mata went with two other officers to an apartment complex located one and a half blocks from petitioner's home. In a dumpster behind the complex, police recovered the stolen gun in a Toys 'R' Us bag. *Id.* at 3-4.

When petitioner was arrested, he provided as his phone number the number of his common-law wife. The Toys 'R' Us bag in which the gun was found contained a receipt marked with a time and date corresponding to the time and date of surveillance footage showing petitioner making a purchase at a Toys 'R' Us store. Pet. App. 4-5.

2. A grand jury sitting in the Western District of Texas returned an indictment charging petitioner with one count of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2. Petitioner proceeded to trial, and the jury found him guilty. *Id.* at 6.

3. On appeal, petitioner contended, among other things, that the government had violated the Equal Pro-

tection Clause as interpreted in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by using its peremptory challenges to strike three prospective jurors with Hispanic surnames. The court of appeals held that petitioner had waived that argument as a result of his failure to raise it during jury selection. Pet. App. 7-8. The court explained that "a timely objection is an essential prerequisite to a *Batson* claim," and therefore "a defendant is not entitled to raise a *Batson* claim on appeal if he did not object to the prosecutor's use of peremptory challenges in the district court." *Id.* at 7 (quoting *United States* v. *Pofahl*, 990 F.2d 1456, 1465 (5th Cir.), cert. denied, 510 U.S. 898 and 510 U.S. 996 (1993)). The court therefore declined "to address this claim raised for the first time on appeal." *Id.* at 8.

ARGUMENT

Petitioner contends (Pet. 9-16) that the court of appeals erred in holding that he waived his *Batson* claim by failing to raise it in the district court. He argues that, instead of treating the claim as waived, the court should have deemed the challenge forfeited, reviewed it under the plain-error standard of Federal Rule of Criminal Procedure 52(b), and concluded that the exclusion of certain panel members constituted plain error requiring reversal of his conviction. That contention lacks merit and does not warrant this Court's review.

1. Under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the use of peremptory challenges to exclude persons from a petit jury based on their race or gender violates the Equal Protection Clause. *Id.* at 84. "A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry." *Rice* v. *Collins*, 546 U.S. 333, 338 (2006). First, when the defendant asserts a *Batson*

claim during jury selection, he has the burden of establishing a *prima facie* case of intentional discrimination by showing that he is a member of a cognizable group, that the group's members have been excluded from the defendant's jury, and that the circumstances raise an inference that the exclusion was based on race. See *Batson*, 476 U.S. at 96. Second, if the defendant makes that showing, the government must offer a facially race-neutral explanation for its peremptory challenge. See *Purkett* v. *Elem*, 514 U.S. 765, 767 (1995) (per curiam). Third, the district court must determine whether the explanation is indeed facially race-neutral and credible. See *id*. at 768-769. Where the defendant succeeds in establishing a *prima facie Batson* claim, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez* v. *New York*, 500 U.S. 352, 365 (1991) (plurality opinion). The credibility of the explanation is a "pure issue of fact." *Id*. at 364. The trial court's findings on that issue will not be disturbed absent "exceptional circumstances," because "the best evidence" on credibility "often will be the demeanor of the attorney who exercises the challenge," and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Id.* at 365-366 (quoting *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1984)). For those reasons, "the trial court has a pivotal role in evaluating *Batson* claims." *Synder* v. *Louisiana*, 128 S. Ct. 1203, 1208 (2008).

2. a. The court of appeals correctly declined to address petitioner's *Batson* argument on the merits. Because petitioner did not raise an objection at the appropriate time in the district court, the government had no cause to provide a race-neutral explanation for its chal-

lenges and did not do so. The district court, in turn, could not perform its "pivotal role," *Snyder*, 128 S. Ct. at 1208, by evaluating the credibility of the prosecutor's reasons and making factual findings about whether the challenges were racially motivated. As a result, when petitioner raised the claim for the first time on appeal, the court of appeals lacked any record on the matter to review. The court was in no position to speculate how the prosecutor might have responded were he called upon to proffer a race-neutral justification for the strikes, nor could the court plumb the state of mind of the prosecutor based on such factors as his "demeanor and credibility." *Hernandez*, 500 U.S. at 365 (plurality opinion).

Petitioner's failure to raise the issue therefore deprived the court of appeals of the record necessary to determine whether a *Batson* violation occurred. In these circumstances, the court of appeals properly deemed petitioner's *Batson* challenge waived. See *James* v. *Bowersox*, 187 F.3d 866, 869 n.4 (8th Cir. 1999), cert. denied, 528 U.S. 1143 (2000); *Morning* v. *Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997); *United States* v. *Pofahl*, 990 F.2d 1456, 1465 (5th Cir.), cert. denied, 510 U.S. 898, and 510 U.S. 996 (1993); *United States* v. *Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992); cf. *Ford* v. *Georgia*, 498 U.S. 411, 422 (1991) (recognizing as "sensible" a rule deeming *Batson* challenges untimely and thus procedurally defaulted unless raised "not only before trial, but in the period between the selection of the jurors and the administration of their oaths").

b. Petitioner is incorrect in contending that the court of appeals should have reviewed his *Batson* claim under the plain-error standard of Federal Rule of

Criminal Procedure 52(b). To support that contention, petitioner seeks to analogize a *Batson* violation to other errors subject to plain-error review. See Pet. 16-17 (citing decisions applying plain-error review to a district court's failure to advise a defendant at a guilty plea proceeding of his right to be represented by counsel at trial, *United States* v. *Vonn*, 535 U.S. 55, 74-76 (2002); the presence of alternate jurors during deliberations, *United States* v. *Olano*, 507 U.S. 725, 740 (1993); or improper prosecutorial comment during closing argument, *United States* v. *Young*, 470 U.S. 1, 20 (1985)). In each of those situations, however, an appellate court has a record from which it can determine whether the alleged error occurred and whether that error satisfies the other elements of the plain-error standard—*i.e.*, whether it is "clear" or "obvious," implicates substantial rights, and "seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings." See *Olano*, 507 U.S. at 732-735 (brackets in original) (quoting *Young*, 470 U.S. at 15). That is not true in the *Batson* context. Without a record containing the government's race-neutral explanation for its challenges or the district court's assessment of those explanations, a defendant cannot make even the threshold showing of error, let alone establish that any error was plain. The failure to object on *Batson* grounds during jury selection thus more closely resembles the failure to file a pretrial motion to suppress, which similarly deprives an appellate court of a record sufficient to conduct meaningful review and is treated as a waiver partly for that reason. See Fed. R. Crim. P. 12(e); *United States* v. *Brooks*, 438 F.3d 1231, 1239-1240 (10th Cir. 2006); *United States* v. *Chavez-Valencia*, 116 F.3d 127, 132 (5th Cir.) (noting that plain-error review is inappropri-

ate in these circumstances because, *inter alia*, "on appeal the government will be forced to rely on an underdeveloped record in defending itself"), cert. denied, 522 U.S. 926 (1997).

In any event, even if petitioner were correct that plain-error review applied, he would not be entitled to relief under that standard. Petitioner contends that jury selection in this case "demonstrate[d] a pattern of discrimination evidencing a strong inference of the use of peremptory challenges based on race." Pet. 11. He then argues that the government "could not possibly proffer race-neutral bases" for the challenges and that any effort to do so "would be rejected as a matter of law." *Ibid*. But the credibility of the government's explanations is a "pure issue of fact," not one of law, and such explanations may rest on any number of factors that a paper record would not illuminate. *Hernandez*, 500 U.S. at 364. Thus, in deciding whether to exercise a peremptory challenge on a particular prospective juror, a prosecutor may properly rely not only on the substance of the juror's answers during voir dire but also on the prosecutor's impression of the juror's veracity, concentration, seriousness, temperament, and personality as reflected by such factors as the juror's body language, facial expressions, and manner of speaking. As this Court recognized in *Snyder*, 128 S. Ct. at 1208, "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention)." See *Rice*, 546 U.S. at 339-342 (on habeas review, upholding peremptory challenge based in part on juror's "eye rolling"). There is no basis to conclude that the government's explanations in this case would have been inherently invalid or unbelievable. Petitioner should not be permitted, moreover, to deprive the gov-

ernment of an opportunity to explain its peremptory challenges and then to seize on the absence of any evidence in the record justifying those challenges as grounds for reversal of his conviction. That result, far more than a decision that petitioner waived his *Batson* challenge by failing to raise it in a timely manner, would "undermine public confidence in the fairness of our system of justice." *Johnson* v. *California*, 545 U.S. 162, 172 (2005).

c. Because petitioner cannot demonstrate plain error in any event, this case does not squarely present the need to resolve any split of authority on the standard of review applicable to unpreserved *Batson* challenges. Contrary to petitioner's contention (Pet. at 7-8), while several circuits have reviewed *Batson* claims not raised below for plain error, no decision from another circuit would dictate a different result in the circumstances here. Where, as here, the failure to assert a *Batson* claim during jury selection results in a record that is silent on discriminatory intent, the courts that review for plain error have uniformly and summarily rejected *Batson* arguments on appeal. See, *e.g.*, *Hidalgo* v. *Fagen*, *Inc.*, 206 F.3d 1013, 1019-1020 (10th Cir. 2000); *United States* v. *Bedonie*, 913 F.2d 782, 794-795 (10th Cir. 1990), cert denied, 501 U.S. 1253 (1991); *United States* v. *Dobynes*, 905 F.2d 1192, 1196-1197 (8th Cir.), cert. denied, 498 U.S. 877 (1990); *Government of Virgin Islands* v. *Forte*, 806 F.2d 73, 76-77 (3d Cir. 1986). Most of the cases petitioner cites, moreover, involve the readily distinguishable situation in which the prosecution offered a race-neutral explanation for its peremptory challenges in the district court despite the defendant's failure to press the issue, and the record therefore contains at least some basis for appellate review. Even in

those circumstances, however, courts of appeals have uniformly rejected *Batson* challenges on plain-error review. See *United States* v. *Brown*, 352 F.3d 654, 662-663 (2d Cir. 2003);[1] *United States* v. *Parsee*, 178 F.3d 374, 378 (5th Cir.), cert. denied, 528 U.S. 988 (1999); *United States* v. *Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir.), cert. denied, 519 U.S. 903 (1996); *United States* v. *Chandler*, 12 F.3d 1427, 1432 (7th Cir. 1994); *United States* v. *Pulgarin*, 955 F.2d 1, 2 (1st Cir. 1992); *cf. United States* v. *Willis*, 523 F.3d 762, 767-768 (7th Cir. 2008) (treating claim as "preserve[d]" in light of the government's race-neutral justification, proffered during colloquy mentioning *Batson*).[2] In this context, therefore, the difference between treating an unpreserved *Batson* challenge as waived and treating it as forfeited will rarely, if ever, prove consequential, and this Court's review of that issue is unnecessary.

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[1] Because the government agreed that plain-error review was "proper," the court in *Brown* did not determine whether plain error review applies in *Batson* cases, although it suggested in dicta that a forfeited *Batson* claim is not waived. 352 F.3d at 663.

[2] Petitioner also relies on a number of state decisions (Pet. 8-9 n.4), but in all but one of those cases, the defendant raised a *Batson* claim in the trial court. See *State* v. *Were*, 890 N.E.2d 263, 278-279 (Ohio), cert. denied, 129 S. Ct. 606 (2008); *McGee* v. *State*, 953 So. 2d 211, 214 (Miss. 2007); *State* v. *Nordlund*, No. 26859-1-II, 2000 WL 31081997, at *3 (Wash. Ct. App. Sept. 13, 2002); *Hurts* v. *Woodis*, 676 So. 2d 1166, 1172-1173 (La. Ct. App. 1996). In the remaining state case, *Rodriguez* v. *Weber*, 617 N.W.2d 132 (S.D. 2000), the court reviewed for plain error a *Batson* claim raised for the first time on appeal, concluding that the defendant's evidence for believing that the prosecutor had "a discriminatory state of mind" was unpersuasive. *Id.* at 141. Petitioner cites no case, federal or state, in which an appellate court has upheld an unpreserved *Batson* claim in the absence of a record containing the prosecutor's race-neutral explanation for his challenges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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