No. 08-35

# In the Supreme Court of the United States

WAYNE STEPHENS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals' decision rejecting petitioner's claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), conflicts with this Court's decision in *Snyder* v. *Louisiana*, 128 S. Ct. 1203 (2008).

2. Whether the court of appeals applied an incorrect standard of review to the district court's decision.

3. Whether the court of appeals erred in declining to remand petitioner's *Batson* claim to the district court for further proceedings.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 514 F.3d 703. An earlier opinion of the court of appeals is reported at 421 F.3d 503. The opinion of the district court (Pet. App. 60a-86a) is not published in the Federal Supplement but is available at 2006 WL 1663447.

## JURISDICTION

The judgment of the court of appeals was entered on January 31, 2008. A petition for rehearing was denied on April 9, 2008 (Pet. App. 87a-88a). The petition for a writ of certiorari was filed on July 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. V 2005). He was sentenced to 21 months of imprisonment. A divided panel of the court of appeals concluded that petitioner had established a *prima facie* case of racial discrimination in jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and remanded for further proceedings. 421 F.3d 503 (7th Cir. 2005). On remand, the district court found a *Batson* violation and granted a new trial. Pet. App. 60a-86a. A divided panel of the court of appeals reversed and reinstated petitioner's convictions. *Id.* at 1a-59a.

1. Petitioner, an African-American male, was a manager who oversaw computer and technology support for Accenture. Accenture's computerized time and expense report system permitted employees to manually add money to their paychecks in order to take into account legitimate business expenses that were not reflected elsewhere on the standardized expense report. Between April and August of 2000, petitioner used that feature to add approximately $68,000 to his paychecks. Pet. App. 3a. Petitioner's first "add to" request was for $7800 in a month in which he had a legitimate business expense of $78.00. *Id.* at 4a. After Accenture failed to challenge that request, petitioner made a series of "add to" requests that were all just under $10,000. 421 F.3d at 506. He also failed to submit the relevant reports to his supervisor and Accenture's accounting department, as required by company policy. Pet. App. 4a. A jury found petitioner guilty on three counts of wire fraud, and petitioner filed a timely motion for a judgment of acquittal based on insufficiency of the evidence. *Id.* at 5a-6a.

2. More than two months after the jury returned its verdict, the district court issued a *sua sponte* minute order that raised the issue of whether the government had violated *Batson* in selecting petitioner's jury. The court acknowledged that petitioner had never raised a *Batson* objection but believed, contrary to its earlier view, that petitioner had no strategic reason for withholding an objection. Therefore, the court decided that it would address the issue on its own and it directed the government to provide non-discriminatory explanations for its exercise of peremptory challenges in petitioner's case. Pet. App. 6a.

The government responded by arguing that the time for filing a motion for a new trial had expired and that the district court lacked authority to raise a *Batson* issue *sua sponte* at that stage in the proceedings. Pet. App. 6a; see Fed. R. Crim. P. 33(b)(2) (stating that a motion for a new trial "grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict"). The government also provided a variety of non-discriminatory explanations for its use of peremptory challenges that it stated were "apparent in the record." 421 F.3d at 515.

The district court issued a second minute order vacating the first minute order. Pet. App. 6a. The court agreed that it lacked authority to raise the *Batson* issue at that stage but suggested that petitioner should raise the issue by way of a motion for postconviction relief under 28 U.S.C. 2255 (Supp. V 2005). Pet. App. 6a-7a.

3. Petitioner raised a *Batson* claim on direct appeal. 421 F.3d at 510. In its brief, the government affirmatively waived the argument that any *Batson* claim was forfeited and responded to petitioner's argument on the merits. *Id.* at 510.

a. A divided panel of the court of appeals concluded that petitioner had "set forth a *prima facie* case of discrimination," 421 F.3d at 510; see *id.* at 511-518, and it "[r]emanded for further proceedings consistent with this opinion," *id.* at 518 (emphasis omitted). The majority emphasized that its decision did not "imply that the government in fact lacked legitimate non-discriminatory reasons for the choices it made," and it described "the only question before" it as "whether the government should be required to articulate its actual reasons for the peremptory challenges." *Id.* at 517-518.

b. Judge Kanne dissented from the majority's *Batson* holding. 421 F.3d at 518-528. In his view, "[i]t [was] unwise to consider [petitioner's] *Batson* claim in the first instance when he failed to preserve the issue by objection during jury selection, and the district court did not raise the issue until long after it could have fashioned any relief." *Id.* at 518. On the merits, Judge Kanne "d[id] not believe that [petitioner] had established a *prima facie Batson* claim warranting a remand." *Ibid.*

4. On remand, the government provided various nondiscriminatory explanations for its peremptory challenges. Pet. App. 8a; see Gov't C.A. App. 24-40. The government also provided its original contemporaneous notes from voir dire. Pet. App. 8a, 24a.

The district court concluded that there had been a *Batson* violation and ordered a new trial. Pet. App. 60a-86a. The court determined that the reasons offered by the government for its peremptory challenges were "clear and reasonably specific" and were "on their face * * * race-neutral and national origin-neutral." *Id.* at 66a (internal quotation marks and citation omitted).

The district court next concluded that petitioner had met his "burden of proving intentional discrimination." Pet. App. 63a; see *id.* at 66a-82a. The court stated that it "d[id] not find credible * * * that the two factors" cited by the government—which it described as "jurors who both (a) lacked white collar work experience and (b) lacked a college degree or allegedly showed confusion [during] the written and oral *voir dire*"—"are what *actually* motivated its peremptory challenges." *Id.* at 68a-69a. The court emphasized that the government had not used all of its peremptory challenges and that the government had not chosen to strike "as many jurors as possible that met its stated criteria for exclusion." *Id.* at 70a. The court acknowledged that "[t]he government ha[d] offered distinctions among the non-white collar, non-college degreed jurors that it contends ma[d]e those who were not struck more desirable jurors from its perspective than those who were struck." *Id.* at 75a-76a. But the district court described that argument as "miss[ing] the primary point" because, in its view, "the government ha[d] not explained" why "given its stated key criteria for jury selection, * * * it failed to strike any of the remaining white jurors who met those criteria, even though it had enough strikes to eliminate at least some of them." *Id.* at 76a.

5. A divided panel of the court of appeals reversed. Pet. App. 1a-59a.

a. The court of appeals stated that "a finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court." Pet. App. 14a (quoting *Batson*, 476 U.S. at 98 n.21) (internal quotation marks omitted; citation omitted). But the court further stated that "deference is due only when a district court properly performs its task in the first in-

stance." *Id.* at 15a. The court of appeals concluded that it was "unable to defer to the district court's decision finding intentional discrimination" because that decision had "incorrectly recount[ed] much of the record and fail[ed] to note material portions" and had thus "misapplied the *Batson* three-part test." *Id.* at 16a. The court of appeals further stated, however, that "even under a clearly erroneous standard of review, the district court's result would not pass muster." *Id.* at 17a.

The court of appeals next concluded it was unnecessary to remand the case to the district court for further consideration of petitioner's *Batson* claim. Pet. App. 17a-18a. The court stated that it "ha[d] the entire record before [it], and ha[d] reviewed it thoroughly." *Id.* at 17a. Having done so, the court of appeals determined that a remand "would be futile as there is only one plausible conclusion based on the entire record—that there was no *Batson* violation." *Ibid.*

The court of appeals concluded that "[t]he district court's central error was its failure to take into account the government's non-discriminatory explanations for its peremptory challenges." Pet. App. 18a. The court explained that "[a]lthough white-collar experience and a college education were important for the government, the record demonstrates that the government never relied on th[o]se two factors alone." *Ibid.* The court of appeals stated that the district court had erred by: (i) "overemphasi[zing]" those two factors by "transforming" them "into a simple 'litmus test' * * * despite the fact that those two factors were not used in that fashion by the government"; (ii) concluding that the resulting litmus text was pretextual because the white-collar-experience and college-degree factors could not alone explain all of the government's decisions to strike or not

strike individual jurors; and then (iii) "explain[ing] that this new-found pretext was evidence of intentional discrimination." *Ibid.*; see *id.* at 18a-19a. In doing so, the court of appeals concluded that "the district court did not credit the government's strategy in selecting jurors," *id.* at 19a-20a, and had "ignored all of the individual explanations provided by the government" for its decisions whether to exercise a peremptory challenge with respect to a given juror, *id.* at 21a.

The court of appeals then reviewed the "detailed individualized explanations regarding [the government's] strikes of minority jurors." Pet. App. 21a-35a. The court determined that "[t]he government's notes substantiate its explanations," *id.* at 27a, and that "[w]hen the record is considered in its entirety, it shows that the government exercised its peremptory challenges in a non-discriminatory manner," *id.* at 36a.

b. Judge Rovner dissented. Pet. App. 37a-46a. In her view, the majority had erred in not deferring to the district court and in failing to remand the case for further proceedings with respect to petitioner's *Batson* claim. *Id.* at 37a-38a, 46a. Judge Rovner acknowledged that the district court had "focused predominantly on two factors"—which she described as "work experience and ability to understand the case"—but she argued that "[t]hat focus was appropriate because the government quite clearly identified those factors as the primary reason for its challenges." *Id.* at 38a; see *id.* at 38a-40a.

6. Petitioner filed a petition for rehearing. Before the court of appeals acted on that petition, petitioner filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) in which he brought to the court's attention this Court's intervening decision in *Synder* v. *Louisiana*, 128 S. Ct. 1203 (2008). Letter from Barry Leven-

stam & Irina Dmitrieva, Jenner & Block LLP to the Hon. Gino J. Agnello, Clerk, United States Court of Appeals for the Seventh Circuit (Mar. 19, 2008). The court of appeals denied the petition for rehearing after no judge in active service requested a vote on the petition for rehearing en banc and a majority of judges on the panel voted to deny rehearing. Pet. App. 87a-88a.

**ARGUMENT**

Petitioner contends (Pet. 12-15) that the court of appeals' decision rejecting his *Batson* claim conflicts with this Court's decision in *Snyder* v. *Louisiana*, 128 S. Ct. 1203 (2008). He also asserts that the court of appeals applied the wrong standard of review (see Pet. 15-22) and erred in failing to remand the case to the district court for further proceedings with respect to his *Batson* claim (see Pet. 22-26). The court of appeals' decision does not conflict with the decisions of this Court or any of the other decisions cited by petitioner. In addition, the central disagreement between the court of appeals' majority, on one hand, and the dissenting judge and the district court, on the other, involves the proper interpretation of the government's overall strategy for selecting jurors in this particular case. That factbound dispute does not warrant this Court's review.

1. Petitioner contends that the court of appeals' decision conflicts with *Snyder* in two related respects. First, petitioner asserts that the court of appeals "requir[ed] a finding that all race-neutral reasons proffered by the government were pretextual before a *Batson* violation can be found." Pet. ii; see Pet. 12-14. Second, petitioner argues that the court of appeals "fail[ed] to determine that alternative race-neutral reasons proffered by the government in addition to the reasons which the district

court found pretextual[] motivated its peremptory strikes 'in substantial part.'" Pet. ii; see Pet. 14-15. Petitioner misreads the court of appeals' decision and there is no conflict with *Snyder*.

a. In *Snyder*, a prosecutor had offered two independent explanations for striking a particular juror—the juror had appeared nervous during voir dire and the prosecutor was concerned about the juror's student-teaching commitments. See 128 S. Ct. at 1208. Because "the record d[id] not show that the trial judge actually made a determination concerning [the juror's] demeanor," the Court stated that it could not "presume that the trial judge credited" that explanation for the strike. *Id.* at 1209. The Court then concluded that the explanation regarding the student-teaching commitments was pretextual for a variety of reasons, including "the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious." *Id.* at 1211. The Court further determined that "[t]he prosecutor's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." *Id.* at 1212.

The Court noted that it had held in other contexts "that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative." *Sndyer*, 128 S. Ct. at 1212. But the Court concluded that it "need not decide" in *Snyder* whether a similar analysis applies in the *Batson* context. *Ibid.* Rather, because "the record [in *Snyder* did] not show that the prosecution would have preemptively challenged [the juror in question] based on his nervousness alone," the Court determined that it was "enough to rec-

ognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." *Ibid.*

b. Petitioner's contentions that the court of appeals' decision in this case conflicts with *Snyder* are premised on the view that the court of appeals *accepted* the district court's conclusion that the white-collar-experience and college-education factors were pretextual, but nonetheless found no *Batson* violation based on other nondiscriminatory "fallback explanations" (Pet. 13) that the district court had failed to consider adequately. But, in fact, the court of appeals *rejected* the district court's conclusion that any of the government's explanations was pretextual. The court of appeals concluded that the district court's "central error" had been in "transforming a lack of white-collar experience and college education into a 'litmus test'" that the government had never actually employed and then using the inadequacy of that "litmus test" alone to explain all of the government's use of peremptory strikes as the basis for finding pretext. Pet. App. 18a; see *id.* at 18a-20a. After conducting a "thorough[]" review of "the entire record," *id.* at 17a, the court of appeals concluded that "[w]hen the record is considered in its entirety, it shows that the government exercised its peremptory challenges in a non-discriminatory manner," *id.* at 36a. In short, because the court of appeals did not rely on alternative reasons after finding one government reason to be pretextual, there is no conflict with *Snyder*.

2. Petitioner next contends (Pet. 15-22) that the court of appeals applied the wrong standard of review to the district court's decision. The court of appeals acknowledged that "[a] finding of intentional discrimina-

tion is a finding of fact," Pet. App. 14a (quoting *Batson*, 476 U.S. 98 n.21), and that a reviewing court's conclusion that it "would have decided the case differently" is not sufficient for a reversal, *id.* at 15a (quoting *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001)). The court of appeals held, however, that deference was not warranted in this particular case because "the district court did not factor in material portions of the record [and thus] misapplied the *Batson* three-part test." *Id.* at 16a None of the decisions cited by petitioner states that the role of a reviewing court in reviewing findings of ultimate fact is precisely the same regardless of whether a district court misapplied the governing legal test. Cf. *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").[1]

At any rate, this case would not present an appropriate vehicle in which to determine the precise degree of deference owed to a trial court's ultimate conclusion that there was a *Batson* violation in circumstances where the court "incorrectly recount[ed] much of the record and fail[ed] to note material portions." Pet. App. 16a. The court of appeals expressly stated that "even under a clearly erroneous standard of review, the district court's result would not pass muster." *Id.* at 17a. Cf. *United States* v. *Blotcher*, 142 F.3d 728, 731 (4th Cir. 1998) (see Pet. 17 n.2) (concluding that a district court had committed clear error in finding a *Batson* violation because the court had failed to "acknowledge the rule that intentional discrimination is not shown by a failure to chal-

[1] Petitioner also asserts that "[t]here is simply no support for the Seventh Circuit's conclusion that the district court did not consider the supporting record." Pet. 18; see Pet. 18-20. That case-specific contention does not warrant this Court's review.

lenge all jurors with a given characteristic" or the rule that a party may exercise peremptory challenges for any reason not related to a prohibited characteristic). As a result, this Court's identification of the appropriate standard of review would not change the outcome in this case.[2]

3. Petitioner's final contention (Pet. 22-26) is that the court of appeals erred in not remanding the case to the district court a second time for further consideration of whether the government violated its obligations under *Batson* in striking three minority jurors about whom the district court had not ruled definitively during the first remand. The court of appeals did not deny that remands are generally appropriate in such circumstances. Indeed, in another recent *Batson* case the Seventh Circuit remanded for a determination concerning the credibility of the government's proffered reasons for striking a sixth juror after having upheld the government's challenges of five other jurors. See *United States* v. *Taylor*,

[2] Petitioner also contends that the district court's finding of intentional discrimination in this case "was not clearly erroneous." Pet. 20; see Pet. 20-21. That issue is not fairly encompassed within any of the questions presented as formulated by petitioner, Pet. i-ii, and petitioner's factbound claim about the proper application of the clearly erroneous standard of review would not warrant this Court's review in any event. At any rate, the court of appeals extensively discussed the government's nondiscriminatory reasons for striking jurors 27 and 36, see Pet. App. 26a-28a, 32a-35a, and the appendix that the court of appeals attached to its opinion reveals that the government had identified non-discriminatory reasons for not striking jurors 20 and 26, see *id.* at 53a (stating that juror 20 was "attending college at the time of trial, at the age of 50, after [a] lifetime of blue-collar work" and that he "would likely be unsympathetic to [petitioner's] lies about his Yale degree"); *id.* at 54a (noting that juror 26 had a sister who was a police officer and had expressed frustration "when asked if anyone was arrested for stealing his trucks").

509 F.3d 839, 845-846, 850-851 (2007). Rather, the court of appeals held that a remand was unnecessary in the particular circumstances of this case because its "thorough[]" review of "the entire record" allowed it to "confidently conclude" that a "remand would be futile." Pet. App. 17a; see *ibid.* (stating that there was "only one plausible conclusion—that there [was] no *Batson* violation"). It is not uncommon for courts of appeals to decline to remand for further proceedings when they conclude that doing so would be futile. See, *e.g.*, *Clark* v. *Perez*, 510 F.3d 382, 393 (2d Cir. 2008); *United States* v. *Timely*, 507 F.3d 1125, 1131 (8th Cir. 2007); *Whitman* v. *Bartow*, 434 F.3d 968, 971 n. 1 (7th Cir.), cert. denied, 547 U.S. 1199 (2006); *United States* v. *Lewis*, 35 F.3d 148, 152 (4th Cir. 1994). Indeed, this Court declined to remand in *Snyder* after concluding that the record as it stood could not support an alternative ground for a valid peremptory challenge. 128 S. Ct. at 1212.

Petitioner has failed to identify any conflict between the court of appeals' failure to remand in this case and the decisions of this Court or any other lower court. This Court's decision in *USPS* v. *Aikens*, 460 U.S. 711 (1983) (see Pet. 25), did not involve a claim of racial discrimination in jury selection. In addition, although this Court chose to remand for further proceedings in that case because it could not "be certain that [the district court's] findings of fact * * * were not influenced by its mistaken view of the law," *id.* at 717, the Court did not state that such remands are required even when a reviewing court's examination of the entire record leads it to conclude that there is only one permissible view of the evidence. Cf. *Sprint/United Mgmt. Co* v. *Mendelsohn*, 128 S. Ct. 1140, 1146 n.3 (2008) (acknowledging such an exception for review of rulings implicat-

ing Fed. R. Evid. 403); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982) (same, for findings of intentional discrimination under Title VII).

Petitioner is correct (Pet. 24-25) that the Second Circuit has remanded several *Batson* cases in order to permit district courts to conduct further proceedings. But the Seventh Circuit has done the same thing in other cases, see *Taylor*, 509 F.3d at 850-851, and none of the Second Circuit decisions cited by petitioner states that such remands are required even when a reviewing court is able to conclude as a matter of law that a remand would be futile.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2008