

No. _____

19-5449

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD SHELLEY

(Your Name)

vs.

UNITED STATES OF AMERICA

— PETITIONER

FILED

MAY 20 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RICHARD SHELLEY

(Your Name)

Federal Correctional Complex

Yazoo City Low

P.O. Box 5000

Yazoo City, MS, 39194

(Phone Number)

RECEIVED

MAY 28 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

WHETHER THE DISTRICT COURT ERRED IN FINDING THAT SHELLEY FAILED TO OBJECT TO THE GOVERNMENT'S USE OF A PEREMPTORY STRIKE, THEREBY CAUSING AN 5th AMENDMENT DUE PROCESS CLAUSE VIOLATION AND VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL? And Batson v Kentucky, violation?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	7
CONCLUSION.....	9

INDEX TO APPENDICES

APPENDIX A - OPINION OF THE UNITED STATES COURRT OF APPEALS

APPENDIX B - OPINION OF THE DISTRICT COURT

APPENDIX C - A COPY OF THE ORDER DENYING REHEARING

APPENDIX D

APPENDIX E

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 8, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 02/25/2019, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712,(1986).....	7,8,
Bui v. Haley, 321 F.3d 1304 (11th Cir. 2003).....8
Central Alabama Fair Housing Ctr. v. Lowder Realty Co., 236 F.3d 629 (11th Cir. 2000).....	
United States v. Allen-Brown, 243 F.3d 1293(11th Cir.2201)...	6
United States v, Campa, 529 F.3d 980(11thCir.2008).....	7
United States v. Robertson, 736 F.3d 1317(11thCir.2013).....	7
Hernandez v. Texas, 347 US, at 482, 98 L. Ed. 866, 74 S Ct 667....	8
Patton v. Mississippi, 332 US, at 469 L.Ed. 866, 74 S Ct 667.....	8
Whitus v. Georgia, 385 US, at 549-550, 17 L.Ed 2d 599, 87 S Ct 643....	8

STATUTES AND RULES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 5th AMENDMENT DUE PROCESS CLAUSE, AND THE EQUAL PROTECTION CLAUSE

6th Amendment Fair Trial Violation

REASONS FOR GRANTING THE PETITION

Mr. Shelley states the reasons for granting the petition are: (1) The District Court made an incorrect finding that Mr. Shelley failed to object; (2) The Court of Appeals found that it therefore was not error for the District Court not to make a finding that the government used its peremptory strike on a prospective African-American juror for a non-discriminatory reasons. (3) Mr. Shelley was denied his 5th Amendment right to due process by the Courts action and (4) Mr. Shelley was denied a fair trial in violation of the Sixth Amendment. This petition should be granted for the above stated reasons as Mr. Shelley will not be granted the relief he seeks in a 28 U.S.C. § 2255, because of the Court of Appeals affirmation the lower court will not reverse the Appeals Court.

STATEMENT OF THE CASE

Mr. Shelley submits this is an error. Not only did Mr. Shelley object to the government's use of a peremptory strike on the prospective juror, but the district court also shifted the burden onto the government, making an implicit finding that a prima facie case of racial discrimination had been made based on Mr. Shelley's objection.

After the government struck two African-Americans jurors in its first four peremptory challenges, defense counsel observed a pattern and objected: "I'm sorry Your Honor, but that's the second black member of the panel that the Government has stricken peremptory." DE:162:150 (emphasis added). This was the first opportunity Mr. Shelley had to object to the striking of both African-American jurors, because this was the moment defense counsel observed a pattern of striking African-American jurors. Mr. Shelley could not have objected when only Walter Lubin (the first of the two African-American jurors) was struck because at the time there was no pattern; only one African-American juror had been stricken. And the objection clearly encompassed the striking of both Walter Lubin and Shirley Sims (the second of the two African-American jurors) as Shelley's attorney objected on the grounds that two blacks jurors had just been stricken.

And in fact, *United States v. Allen-Brown*, 243 F.3d 1293, 1297 (11th Cir. 2001), the case cited to by the panel, see slip op. at 3, supports Mr. Shelley's position. In that case, the defense attempted to remove six white prospective jurors using peremptory challenges. *Allen-Brown*, 243 F.3d at 1295. The government objected, raising a Batson challenge, and defense counsel was required to give a race neutral reason for the striking of all six jurors. *Id.* at 1296. The court did not find that defense counsel was only required to give a race neutral reason for the striking of

the sixth juror; race neutral reasons for striking of the previous five jurors was required as well. Seeid.

The same is true here. Defense counsel's objection to the government's attempt to remove two African-American jurors was an objection to the striking of both of those jurors. The district court was therefore required to make a finding that the government used a peremptory strike on both jurors for a non-discriminatory, race neutral reason. The government's reasons for striking the second of the two African-American jurors, Ms. Sims, and the district court's finding that this reason was race neutral, without questioning the government, was not enough. A race neutral reason for the striking of Mr. Lubin was required as well. The district court's failure to make any findings as to Mr. Lubin, after making an implicit finding that Mr. Shelley had made a prima facie case of racial discrimination by turning the burden over to the government, was error.

As laid out in the Initial and Reply Briefs, because the court shifted the burden onto the government after defense counsel objected, stating: "What do you want to say [Assistant United States Attorney]?", DE:162:50, the district court made an implicit finding that Mr. Shelley had made a prima facie. See *United States v. Robertson*, 736 F.3d 1317, 1317(11th Cir. 2013)(finding "although the court did not elaborate on how the government met its burden at step one, the district court's prima facie finding was implicit."); see also *United States v. Campa*, 529 F.3d 980, 998(11th Cir. 2008)(finding the court's shifting of the burden onto the government to give a race-neutral explanation for peremptory challenges was an implicit ruling " that the defendants had made a prima facie showing of racial discrimination.").

And, as this Court found in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69(1986), that once a defendant makes such a prima facie showing the burden shifts to the prosecution to come forward with a neutral

explanation for challenging the jurors which relates to the particular case to be tried. Under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69(1986), the defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming [2019 U.S. Dist. LEXIS 27] the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must then determine whether the defendant has carried his or her burden of proving purposed discrimination. The third step requires the trial court to evaluate the persuasiveness of the justification prosecutor. In this case, Shelley made a timely objection to the prosecutor's removal of all black persons on the venire. Here, the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his actions, and the case should be remanded. Cf. *Whitus v. Georgia*, 385 US, at 549-550, 17 L.Ed 2d 599, 87 S Ct 643; *Hernandez v. Texas*, 347 US, at 482, 98 L. Ed. 866, 74 S Ct 667; *Patton v. Mississippi*, 332 US, at 469, 98 L. Ed. 866, 74 S. Ct 667.


The Eleventh Circuit Court of Appeals, made a ruling contrary to the ruling put forth by this Court in *Batson v. Kentucky*, and contrary to their own circuit precedent. Denying Shelley the protections of the 5th Amendment, due process clause protection and Equal protection as guaranteed by the U.S. Constitution; also denying Shelley the Sixth Amendment protections to a fair and impartial trial. As evidence by the ruling and analysis used previously by the Eleventh Circuit cases and rulings: In *Buiev. Haley*, 321 F.3d 1304, 1316(11th Cir. 2003)(finding only the prosecutor who struck the juror was capable of fulfilling the government's burden to provide a race-neutral reason for the strike), and the district court never made any findings based on other factors that Mr. Lubin was stricken for a race-neutral reason, see *id.* at 1317 (finding the district court can rely on factors other

than the government's given reasons to find an absence of racial discrimination), there was no finding in the district court (and therefore nothing for this Court to rely upon) that the government used its peremptory challenge to strike Mr. Lubin for a non-discriminatory reason. The striking of Mr. Lubin was therefore a Batson violation.

CONCLUSION

Mr. Shelly respectfully submits that this United States Supreme Court, find that a Batson Violation was committed and that Mr. Shelley was denied the 5th Amendment due process clause violaton and denied Equal Protection under the Constitution; and denied a fair trial. Mrd Shelley request that this Court grant this petition for a writ of certiorari.

Respectfully Sibmitted,

/s/  Richard Shelley
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Date: 05/19/19