No. _____

IN THE

Supreme Court of the United States

JAVON PIERRE SHELBY,

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

PETITION FOR A WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
JAMES H. LOCKLIN *
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Tel: 213-894-2929
Fax: 213-894-0081
Email: James_Locklin@fd.org

Attorneys for Petitioner
* *Counsel of Record*

Question Presented

Batson v. Kentucky established a three-step process for evaluating a claim that the government made a peremptory strike in a manner violating the Constitution: first, the defendant must make a prima facie showing that the government exercised the strike for a discriminatory purpose; second, the government must articulate a neutral, non-discriminatory reason for striking the juror; and third, the trial court must decide whether the defendant has carried his burden to prove purposeful discrimination given the totality of the circumstances. 476 U.S. 79, 93-98 (1986). The question presented is:

When a trial court denies a *Batson* motion as to one juror at step one and then, in response to a second *Batson* motion as to a subsequently struck juror of the same race or ethnicity, the prosecutor gives reasons for striking both jurors at step two, must the trial court make a step-three finding as to the first juror?

Related Proceedings

United States District Court (C.D. Cal.):

United States v. Shelby, Case No. CR-18-00700-RGK (January 13, 2020).

United States Court of Appeals (9th Cir.):

United States v. Shelby, Case No. 20-50004 (April 23, 2021).

Table of Contents

Table of Authorities

Cases

U.S. Constitution

Statutes

Rules

Petition for a Writ of Certiorari

Petitioner Javon Pierre Shelby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The decision of the United States Court of Appeals for the Ninth Circuit (App. 2a-6a) is unpublished but is available at 853 Fed. Appx. 131. The district court did not issue any relevant written decision.

Jurisdiction

The court of appeals entered its judgment on April 23, 2021. App. 2a. Under the Court's July 19, 2021, order, the petitioner had 150 days to file a petition for a writ of certiorari from that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const., Amend. V provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

U.S. Const., Amend. XIV, § 1 provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws[.]"

Statement of the Case

A. Legal Background.

In *Batson v. Kentucky*, the Court held that the Equal Protection Clause forbids a prosecutor from exercising peremptory challenges to strike potential jurors on account of their race. 476 U.S. 79, 89 (1986).[1] This prohibition extends to strikes made because the juror belongs to a certain ethnic group. *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (applying *Batson* to strikes against Latinos). "In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019).

Batson established a three-step process for evaluating a claim that the government made a peremptory strike in a manner violating the Constitution: first, the defendant must make a prima facie showing that the government exercised the strike for a discriminatory purpose; second, the government must articulate a neutral, non-discriminatory reason for striking the juror; and third, the trial court must decide whether the defendant has carried his burden to prove purposeful discrimination given the totality of the circumstances. *Foster v. Chatman*, 578 U.S. 1023, 136 S. Ct. 1737, 1747 (2016); *Batson*, 476 U.S. at 93-98. At the third step, a

---

[1] The Fifth Amendment's Due Process Clause includes an equal-protection component. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). *Batson* therefore applies to federal trials. *See, e.g.*, *Alvarado v. United States*, 497 U.S. 543, 543-44 (1990).

district court must decide whether the government was "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244 (quotation marks omitted).

B. Factual Background and Proceedings Below.

A jury found Javon Pierre Shelby guilty of being a felon in possession of a firearm and ammunition. App. 2a. During jury selection, Shelby twice noted that none of the potential jurors initially called were African-American, like him, but the district court denied his requests for a new venire. ER 18-19, 23-24.[2] Understandably vigilant with regard to other jurors of color, Shelby noted that there were also relatively-few potential Latino jurors, and he made a *Batson* motion when the government used its second peremptory strike to remove one of them. ER 20. The district court denied the motion, stating, "it is such a diverse jury, I can't tell you for certain who is or not that particular race." ER 20.[3] A short time later, Shelby made a second *Batson* motion when the government used its third strike,

---

[2] The following abbreviations refer to documents filed in the Ninth Circuit: "ER" refers to the appellant's excerpts of record (docket no. 12). "AOB" refers to the appellant's opening brief (docket nos. 18 & 21). "GAB" refers to the government's answering brief (docket nos. 30 & 36). "ARB" refers to appellant's reply brief (docket nos. 49 & 57). (There are two versions of each brief—one under seal and one redacted—but the redactions are irrelevant to the issues presented in this petition.)

[3] The juror's name (*see* ER 84, line 10) supports defense counsel's observation that he was Latino. *See* ARB 24 n.62.

noting, "This is the second peremptory challenge that the Government – and he is also Latino. That's two Latino jurors." ER 21-22. This time, the district court asked the government to respond. ER 22. The government then offered this reason for both strikes: "Your Honor, him and, actually, the first juror, the reason we – both of them seem to be disengaged." ER 22. Without more, the district court denied the motion, stating only, "I thought – and I had asked him a couple times speak up. I'm going to overrule the *Batson* challenge." ER 22.

On appeal, Shelby claimed that the district court erroneously denied his *Batson* motions.[4] First, he argued that the district court erred by not making the finding required by step three of the *Batson* process. AOB 48-55; ARB 24-26. Therefore, he explained, the Ninth Circuit could (and should) apply de novo review to find that the government struck at least one of the two Latino jurors motivated in substantial part by discriminatory intent. AOB 55-62; ARB 27-30. In the alternative, Shelby argued that even if the district court had made a valid step-three finding, that finding would be clearly erroneous. AOB 62-63; ARB 27-30. Finally, to the extent the Ninth Circuit found that the existing record did not definitively establish whether the government struck one or both jurors with a discriminatory intent, Shelby asked for a limited remand for the district court to make a valid step-three finding. AOB 63-64; ARB 30.

---

[4] Shelby also raised non-*Batson* claims not relevant to this petition.

In a memorandum decision, the Ninth Circuit rejected Shelby's *Batson* claim and affirmed his conviction. App. 2a-6a. "As to the first strike," the Ninth Circuit wrote, "the district court correctly denied the challenge at step one of the *Batson* analysis because Shelby had not made a prima facie showing that the government exercised its strike based on race. After doing so, the court was not obligated to revisit the strike, even after the prosecutor superfluously offered a race-neutral justification for the first strike during the colloquy regarding the second strike." App. 5a. "As to the second strike," the Ninth Circuit went on, "the court did not clearly err in finding that the prosecutor's race-neutral explanation—that the juror seemed 'disengaged'—was valid and non-pretextual. The court observed that the prosecutor's stated reason matched the court's own experience of having to ask the juror to speak up several times during *voir dire*." App. 5a. The Ninth Circuit found that "this is not a case in which the court merely accepted the prosecutor's explanation at face value without assessing it independently." App. 5a-6a.

Reasons for Granting the Writ

When prosecutors exercise peremptory strikes motivated in substantial part by discriminatory intent, they frequently do so ad seriatim. Indeed, the typical purpose is to eliminate all (or at least most) members of a certain race or ethnicity from the jury. Accordingly, a pattern of strikes against such persons is extremely relevant at two stages of the three-step process required by *Batson v. Kentucky*, 476 U.S. 79 (1986). The pattern supports the defendant's position both when he needs

to make prima facie showing that the prosecutor exercised the strikes for a discriminatory purpose (step one) and when he needs to prove purposeful discrimination (step three). Accordingly, when there are multiple strikes against members of the same racial or ethnic group, a court must consider each strike for the bearing it has on the other. Neither the district court nor the Ninth Circuit did that in this case. Even though the petitioner made two *Batson* motions when the government used its second and third peremptory challenges against Latino jurors and then the government offered the same reason for striking both jurors, the lower courts only considered whether the proffered reason was valid as to the second juror. App. 5a-6a; ER 20-22. Doing so was inconsistent with the Court's precedent, demonstrating the need for clarification on how to apply *Batson* to multiple strikes. This case presents an excellent vehicle for the Court to delve into that important issue because the government's purported reason for striking the first Latino juror—the matter ignored by the lower courts—cannot withstand scrutiny.

1. *Batson* forbids a prosecutor from exercising peremptory challenges to strike potential jurors on account of their race or ethnicity. 476 U.S. at 89; *see also Hernandez v. New York*, 500 U.S. 352, 355 (1991) (applying *Batson* to strikes against Latinos). The "'harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black [or Latino] persons from juries undermine public confidence in the fairness of our system of

justice.'" *Johnson v. California*, 545 U.S. 162, 172 (2005) (quoting *Batson*, 476 U.S. at 87). The Constitution therefore "forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019). *Batson* established a three-step process for evaluating a claim that the government made such a peremptory strike:

Step One: The defendant must make a prima facie showing that the government exercised the strike for a discriminatory purpose.

Step Two: The government must articulate a neutral, non-discriminatory reason for striking the juror.

Step Three: The trial court must decide whether the defendant has carried his burden to prove purposeful discrimination given the totality of the circumstances.

See Foster v. Chatman, 578 U.S. 1023, 136 S. Ct. 1737, 1747 (2016); *Batson*, 476 U.S. at 93-98.

2. The first step is not "so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." *Johnson*, 545 U.S. at 170. "Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* In other words, a defendant meets his burden at step one "'by showing that the

totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Id*. at 168 (quoting *Batson*, 476 U.S. at 93-94). "For example, a 'pattern' of strikes against black [or Latino] jurors included in the particular venire might give rise to an inference of discrimination." *Batson*, 476 U.S. at 97.

3. Such a pattern of strikes is also relevant at step three, where the trial court must determine if the defendant has proved that the prosecutor was "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244, 2246 (2019) (quotation marks omitted). Because "all of the circumstances that bear upon the issue of racial animosity must be consulted" at that stage, where a prosecutor strikes two jurors of the same race or ethnicity, a court should consider each strike "for the bearing it might have upon the strike" of the other. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). After all, the proffer of even one pretextual reason "naturally gives rise to an inference of discriminatory intent." *Id*. at 485.

4. Of course, in between these two stages is step two, where the prosecutor gives his reasons for the strikes. Thus, a key difference between steps one and three is that the pattern is considered in light of the proffered reasons at the later stage.

The Court has repeatedly held that once a prosecutor offers a race-neutral reason as step two, a trial court "must" make the step-three finding. *See Flowers*, 139 S. Ct. at 2241, 2243; *Foster*, 136 S. Ct. at 1747; *Snyder*, 552 U.S. at 477; *Johnson*, 545 U.S. at 168; *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) (*Miller-El I*); *Hernandez*, 500 U.S. at 359. To put it another way, the trial court has "the

duty" to go on to step three at that point. *See Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*); *Hernandez*, 500 U.S. at 363; *Batson*, 476 U.S. at 98. The Court has also held that "[o]nce a prosecutor has offered a race neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359.

5. In light of this precedent, when it comes to a pattern of strikes against members of the same racial or ethnic group, the following is true: The pattern is relevant to whether the defendant has met his burden at stage one. But that is moot once the government proffers reasons for the multiple strikes at stage two because the trial court has the duty to go on to step three. At that point, the trial court must consider the totality of the circumstances and determine *as to each strike* whether the prosecutor was motivated in substantial part by discriminatory intent. Because even a single discriminatory strike requires a reversal, the trial court cannot just evaluate the last of the strikes in a vacuum. At a minimum, whether prior strikes were discriminatory informs whether the last strike was too. But even if the prosecutor's reasons for the last strike are valid standing alone, his reasons for other strikes might be the kind of "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Miller-El I*, 537 U.S. at 339 (quotation marks omitted).

6. Despite this precedent, the lower courts ignored the pattern of strikes in this case and reached step three only for the final strike. When the government used its second of six peremptory challenges against a Latino juror (M.V.), the petitioner made a *Batson* motion. ER 20.[5] The district court denied the motion without requiring the government to give reasons for the strike. ER 20. After the government exercised its third peremptory (against juror E.M.), the petitioner again objected, *emphasizing the pattern*: "Your Honor, this would make a *Batson* challenge. This is the second peremptory challenge that the Government – and he is also Latino. That's two Latino jurors." ER 22. This time, the district court asked for a response, and the government tried to justify striking both jurors: "Your Honor, him and, actually, the first juror, the reason we – both of them seem to be disengaged." ER 22. The district court, however, made a ruling only as to the

---

[5] Although the district court said it could not tell "for certain" whom among the prospective jurors was Latino, defense counsel noted that there were "not many," perhaps only three or four. ER 20. It is therefore statistically significant that the government used one-third of its allotted strikes and two-thirds of its invoked strikes to get rid of two Latino jurors. *See* Fed. R. Crim. P. 24(b)(2) (giving government six strikes). It makes no difference whether any Latinos remained on the jury despite the government's unused strikes. Whatever a prosecutor does after a *Batson* motion is made and he is aware that further actions will be scrutinized is of little value in the final analysis. *See Flowers*, 139 S. Ct. at 2246 (noting that prosecutors may accept African-American juror in attempt to obscure otherwise-consistent pattern of striking such jurors).

second juror, E.M., saying, "I had asked him a couple times speak up. I'm going to overrule the *Batson* challenge." ER 22.

The Ninth Circuit similarly considered the government's proffered reason only as to E.M (the second challenged strike). App. 5a-6a. "As to the first strike" of M.V., it found that "the district court correctly denied the challenge at step one of the *Batson* analysis because [the petitioner] had not made a prima facie showing that the government exercised its strike based on race." App. 5a. It then made the ruling at the heart of this petition: "[T]he court was not obligated to revisit the strike, even after the prosecutor superfluously offered a race-neutral justification for the first strike during the colloquy regarding the second strike." App. 5a.

To support that ruling, the Ninth Circuit cited only *United States v. Guerrero*, 595 F.3d 1059 (9th Cir. 2010). In that case, the defendant made a *Batson* motion and the district court denied it because it did not think the juror was a member of a group covered by *Batson*. *Id.* at 1061. During a recess, the district court realized it was wrong about that, so it told the prosecutor, "I just thought you might want to make a record as to your justification for challenging her. I didn't pick up on the fact that she was a minority and subject to a *Batson*[.]" *Id.* The prosecutor then gave reasons for the strike. *Id.* at 1061-62. On appeal, the Ninth Circuit acknowledged that a district court judge cannot complete step two of *Batson* without continuing to step three, but it still affirmed by finding that the defendant had not made out a prima facie case at step one, even as it used the reasons the

government proffered at step two to reach that conclusion. *Id*. at 1063-64. A dissenting judge also noted the rule that once the process reaches step two, the district court must then go on to step three, and he accurately observed that "[w]hile the majority assures us that its decision is consistent with this rule, it does not explain how." *Id*. at 1067 (Gould, CJ, dissenting).

7. The Ninth Circuit's opinion in *Guerrero* and its use of that opinion in this case demonstrate the need for this Court's guidance on the *Batson* process, particularly with regard to multiple strikes against members of the same racial or ethnic group. Standing alone, *Guerrero* requires review because it wrongly holds that a court may not only evade step three after reaching step two by going back to step one, but also that it may consider the reasons proffered at step two to decide whether the defendant met his burden at step one. This defect was compounded by applying *Guerrero* (a single-strike case) to the present situation, where the district court did reach step three, albeit only as to the second of two challenged strikes. Although the Court's above-described precedent should have convinced the Ninth Circuit that it could not disregard the first strike with a step-one finding under those circumstances, its confusion on the matter results from the absence of a case from this Court expressly addressing the important question of how courts must evaluate a series of *Batson* motions when, as frequently happens, a prosecutor strikes multiple members of the same group.

8. This case presents an excellent vehicle to consider that question. First, as explained above, the petitioner made two *Batson* motions and noted the pattern of strikes against Latinos when making the second one, and yet both the district court and the Ninth Circuit reached step three only as to the second strike, even though the government had proffered the same reason for striking both Latino jurors. Thus, this case squarely presents a scenario where the government's proffered reason for striking a juror has never been subjected to step-three scrutiny.

Furthermore, that strike cannot survive the "sensitive inquiry" into all available circumstantial and direct evidence relevant to the government's intent that is required at step three. *Foster*, 136 S. Ct. at 1748 (quotation marks omitted). At this stage, a court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 139 S. Ct. at 2244. The "critical question" is "the persuasiveness of the prosecutor's justification for his peremptory strike[s]." *Miller-El I*, 537 U.S. at 338-39. Again, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id*. at 339 (quotation marks omitted). Basically, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El II*, 545 U.S. at 252. "It does not matter that the prosecutor *might have had* good

reasons to strike the prospective jurors; what matters is the *real* reason they were stricken[.]" *Johnson*, 545 U.S. at 172 (emphasis added) (quotation marks omitted). Consequently, a "*Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II*, 545 U.S. at 252.

Assuming for now that the record supports the district court's purported endorsement of the government's assertion that the second Latino juror (E.M.) was "disengaged,"[6] the record not only fails to show that the first Latino juror (M.V.) was

---

[6] After the government claimed that it struck the Latino jurors because "both of them seem to be disengaged[,]" the district court said only this in denying the *Batson* motion: "I thought – *and* I had asked him a couple times speak up." ER 22 (emphasis added). When the district court had previously asked questions directed to the entire group of jurors, E.M. apparently did not initially respond with the others and was uncertain about his juror number. ER 142. But once the district court instructed E.M. to vocalize his responses, there were no other issues, either as the court continued to question the jurors as a group or when he provided his personal information (that he was a fast-food worker who lived with his mother). ER 142, 145-46. A novice juror exhibiting momentary confusion about the jury-selection process is not unusual, so there was no legitimate basis to describe E.M. as disengaged. In fact, the district court's use of the word "and" in denying the *Batson* motion reflects that it improperly substituted its own reason (it asked E.M. to speak

similarly disengaged; it actually reflects his *active engagement* in the process. When M.V.'s turn to came to provide his personal information (his residence, his employment, other employed adults living in his home, and his ability to be fair), he eagerly provided all of that plainly and efficiently, unlike the previous jurors whom the district court had to walk through each question. *Compare* ER 106 *with* ER 95-106. The district court was impressed that he "got all the answers down" despite having never served on a jury before. ER 106-107. Again demonstrating his active participation in the process, M.V. responded, "I hope with my education I would, yeah." ER 107. This does not sound like someone who is "disengaged" in any sense of the word.[7] Furthermore, whatever "disengaged" means, its suspicious that both

---

up) for the government's reason (he was disengaged). Given these circumstances, the Court cannot presume that the judge credited the government's assertion that E.M. was disengaged. *See Snyder*, 552 U.S. at 479. But even if not speaking up can be legitimately equated to disengagement, the district court (at best) merely confirmed that the government had proffered a race-neutral reason for the strike. It did not make the required step-three finding—that that was the government's *real* reason rather than a pretext to defend strikes "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244 (quotation marks omitted).

[7] The government did not explain what it meant by the Latino jurors "seem[ing] to be disengaged," let alone what particular attributes purportedly exhibited by the jurors demonstrated that trait. *Batson* required the government to "'give a clear and reasonably specific explanation of [its] legitimate reasons for exercising the challenge.'" *Miller-El II*, 545 U.S. at 239 (quoting *Batson*, 476 U.S. at 98 n.20). Its

Latino jurors purportedly exhibited that same vague trait. This is the type of facially-implausible excuse typically found to be a pretext for purposeful discrimination. *Miller-El I*, 537 U.S. at 339.

The nature of the case supports the conclusion that the government was motivated in substantial part by discriminatory intent. The government's case hinged on the testimony of a police officer with a history of dishonesty and other misconduct, who claimed that the petitioner ran and threw away a gun when the officer's patrol car approached. AOB 4-20. A defendant does not need to be the same race as the excused jurors to assert a *Batson* motion. *Flowers*, 139 S. Ct. at 2243. Still, "[r]acial identity" between the defendant and the excused jurors "might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred." *Powers v. Ohio*, 499 U.S. 400, 416 (1991). But such racial identity is not required because "race prejudice stems from various causes and may manifest itself in different forms." *Id*. Although the petitioner is African-American and the jurors at issue were Latino, it is extremely significant that they are all men of color. Justice Sotomayor has observed that although the

---

reason for striking the Latino jurors is not "insulated from appellate review" by being "couched in vague and subjective terms." *Kesser v. Cambra*, 465 F.3d 351, 367 (9th Cir. 2006) (en banc) (quotation marks omitted).

"humiliations" of unlawful police stops can be visited upon anyone, "it is no secret that people of color are disproportionately victims of this type of scrutiny." *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting). The Ninth Circuit has similarly recognized that "[i]n evaluating flight as a basis for reasonable suspicion, [it] cannot totally discount the issue of race" because "[t]here is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement." *United States v. Brown*, 925 F.3d 1150, 1156 (9th Cir. 2019). Given these "racial dynamics in our society" (*id.* at 1157), the government might have assumed that Latinos, particularly males,[8] were less likely to believe the disreputable police officer and to buy its closing argument that the petitioner ran because he was guilty. ER 430, 432. But *Batson* and its progeny have expressly rejected the idea that a prosecutor may legitimately strike a juror based on an assumption or belief that he would be partial to the defendant because of race. *Flowers*, 139 S. Ct. at 2241-42; *Batson*, 476 U.S. at 89.

9. Thus, the government's purported reason for striking M.V. cannot withstand scrutiny. At the very least, it is a close question meriting consideration. But the district court and the Ninth Circuit evaded the issue, concluding that they could ignore the proffered reason entirely by cutting off the analysis for that juror at step one despite the government proffering its reason at step two and the district court

---

[8] *Batson* also precludes strikes based on gender. *Flowers*, 139 S. Ct. at 2243.

proceeding to step three as to the disputed strike of a second Latino juror. Granting review will allow the Court to provide much-needed guidance explaining that this kind of divide-and-conquer approach to multiple *Batson* motions is inappropriate given the totality-of-the-circumstances analysis required at step three. *Cf. United States v. Arvizu*, 534 U.S. 266, 274 (2002) (totality-of-circumstances evaluation of *Terry* stops precludes "divide-and-conquer analysis").

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

September 8, 2021

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

JAMES H. LOCKLIN *
Deputy Federal Public Defender

Attorneys for Petitioner
* *Counsel of Record*