No. 21-5649

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IN THE SUPREME COURT OF THE UNITED STATES

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JAVON PIERRE SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of petitioner's challenges under Batson v. Kentucky, 476 U.S. 79 (1986).

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is not published in the Federal Reporter but is reprinted at 853 Fed. Appx. 131.

## JURISDICTION

The judgment of the court of appeals was entered on April 23, 2021. By order of March 19, 2020, which the Court has since prospectively rescinded, this Court extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on

September 8, 2021. 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 Central District of California, petitioner was convicted of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Pet. App. 2a-6a.

1. On September 8, 2018, a police officer observed petitioner holding a firearm in the parking lot of a shopping center in Compton, California. Presentence Investigation Report ¶ 6. When petitioner saw the officer, he ran behind a parked vehicle. Ibid. The officer's dashboard camera recorded a dark object sliding underneath the parked vehicle. Ibid. Petitioner was arrested, and a loaded 9-millimeter handgun was recovered from underneath the vehicle. Ibid.

A federal grand jury in the Central District of California returned a superseding indictment charging petitioner with possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). First Superseding Indictment 1-2.

2. During jury selection, the district court initially questioned 18 prospective jurors. C.A. E.R. 67-68, 83-134. After the court's questioning, petitioner's counsel stated that "of all the jurors that are up there -- I believe there are eighteen --

none are African-American." Id. at 135-136. The court responded: "That will be noted for the record. I say, as the Judge nowadays with the diversity, I cannot know for sure who is or who is not a particular race, et cetera." Id. at 136. The court denied petitioner's request for a new venire and invited the parties to make their peremptory strikes. Ibid.

The government initially used two peremptory strikes. After it used the second strike to remove potential juror "M.V.," petitioner's counsel asserted that "[t]here are not many Latinos. I see probably about three that are there that I can tell just from -- four there. We would make that challenge." C.A. E.R. 137. The district court responded that petitioner's objection would be "noted for the record again," but the court reiterated its "observation that it is such a diverse jury, I can't tell you for certain who is or [is] not that particular race." Ibid. Petitioner's counsel then asked to make a challenge under Batson v. Kentucky, 476 U.S. 79 (1986), and the court denied the challenge. C.A. E.R. 137.

After the government's first two strikes and five additional strikes by petitioner, the district court seated and questioned seven new potential jurors to replace those who had been released, and then struck one of those newly seated potential jurors for cause. C.A. E.R. 156-157. Petitioner struck two more jurors, after which the prosecutor used a peremptory strike on potential juror "E.M." Id. at 158. In response to that strike, petitioner's

counsel stated: "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." Id. at 159. The court asked the prosecutor if he "wish[ed] to be heard," and the prosecutor stated that "him and, actually, the first juror, the reason we -- both of them seem to be disengaged." Ibid. The court responded, "I thought -- and I had asked him a couple times speak up. I'm going to overrule the Batson challenge." Ibid. After that exchange, petitioner used three more strikes, id. at 160-162, and the court seated and questioned seven additional potential jurors, id. at 163-177. Petitioner again moved for a new venire, and the court denied the motion. Id. at 178-179. Each party used one additional strike, id. at 180, and the jury was empaneled, id. at 181-183.

At the conclusion of the trial, petitioner was convicted, and the district court sentenced him to 33 months of imprisonment, to be followed by three years of supervised release. Judgment 1.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 2a-6a. The court explained that it "review[s] de novo whether the district court properly applied Batson, and if it did, we review its factual findings for clear error." Id. at 5a. The court then determined that the district court had "correctly denied" petitioner's initial Batson challenge to the strike of M.V. "at step one of the Batson analysis because [petitioner] had not made a prima facie showing that the government exercised its

strike based on race." Ibid. And the court of appeals stated that the district 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." Ibid.

The court of appeals also determined that the district court "did not clearly err in finding that the prosecutor's race-neutral explanation [for the second strike] -- that [E.M.] seemed 'disengaged' -- was valid and non-pretextual." Pet. App. 5a. The court of appeals observed that "the prosecutor's stated reason matched the [district] court's own experience of having to ask the juror to speak up several times during voir dire." Ibid. The court of appeals accordingly reasoned that "this is not a case in which the [district] court merely accepted the prosecutor's explanation at face value without assessing it independently." Id. at 5a-6a.

ARGUMENT

Petitioner contends (Pet. 5-18) that the court of appeals erred by affirming the district court's rejection of his challenges under Batson v. Kentucky, 476 U.S. 79 (1986). The court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. In Batson v. Kentucky, this Court held that the Constitution prohibits the use of peremptory challenges to strike

jurors based on their race. 476 U.S. at 89. Inquiry into a possible Batson violation consists of three steps. First, the defendant must establish a prima facie case of discrimination by demonstrating that the "relevant circumstances raise an inference" of racial discrimination. Id. at 96. Second, if the defendant makes such a showing, the prosecution must come forward with a race-neutral explanation for each challenged strike. Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016). Finally, the district court considers the parties' submissions and determines whether the objecting party has proved purposeful racial discrimination. Ibid. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

This Court has made clear that the ultimate question of discriminatory intent is a "'finding of fact'" to which "a reviewing court ordinarily should give * * * great deference." Batson, 476 U.S. at 98 n.21 (citation omitted); see Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019). Accordingly, "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." Flowers, 139 S. Ct. at 2244 (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)).

2. In this case, the court of appeals correctly affirmed the district court's rejection of petitioner's Batson challenges. As the court of appeals explained, the district court properly

denied petitioner's first Batson challenge, pertaining to potential juror M.V., at step one because petitioner had not established a prima facie case that the peremptory strike was based on his race. Pet. App. 5a. Instead, petitioner's counsel appeared to base the challenge entirely on his assertion that there were "not many Latinos" among the potential jurors. C.A. E.R. 137. That assertion was not enough to "permit the trial judge to draw an inference that discrimination ha[d] occurred." Johnson, 545 U.S. 170. And because petitioner had not made out a prima facie showing of discrimination, the judge did not need to proceed to step two of the Batson inquiry by asking the prosecutor for a race-neutral justification. See Foster, 136 S. Ct. at 1747.

The court of appeals also correctly determined that the district court did not "clearly err" in denying petitioner's second Batson challenge, pertaining to potential juror E.M. Pet. App. 5a. After the government struck E.M., and petitioner stated that E.M. was the second Latino juror to be struck, the prosecutor offered a race-neutral explanation for both strikes: that each juror had been disengaged. C.A. E.R. 159. The district court then rejected the Batson challenge to E.M. after observing that the court had itself "asked [E.M.] a couple times [to] speak up," an observation that corroborated the prosecutor's explanation that he had struck E.M. because he was disengaged. Ibid. As the court of appeals explained, the district court's own corroborating observation of E.M. means that this is "not a case in which the

court merely accepted the prosecutor's explanation at face value" without proper analysis. Pet. App. 5a-6a.

3. Petitioner asserts (Pet. 6-12) that the district court's Batson analysis was nonetheless flawed, on the theory that the court was required to revisit the lawfulness of the strike of M.V. after petitioner later challenged the strike of E.M. The court of appeals correctly rejected that theory, explaining that the district court, having rejected the Batson challenge to the first strike at step one, "was not obligated to revisit [that] strike, even after the prosecutor superfluously offered a race-neutral justification for the first strike during the colloquy regarding the second strike." Pet. App. 5a.

Petitioner contends that the court of appeals was mistaken and that the district court was required to revisit the first strike, either because the two strikes involved "members of the same racial or ethnic group," Pet. 6, or because the "trial court has 'the duty' to go on to step three" anytime a prosecutor later offers a race-neutral explanation for a strike, even if the Batson challenge to that strike failed at step one, Pet. 8-9 (citation omitted). That contention is mistaken.

While this Court has recognized that "a 'pattern' of strikes against" prospective jurors of a particular race "might give rise to an inference of discrimination," Batson, 476 U.S. at 97, it has never endorsed a rule that a court must revisit the validity of a strike it rejected at step one of the Batson inquiry any time a

defendant makes a subsequent challenge to a strike involving a member of the same race. Nor is such a rule necessary where -- as here -- a prosecutor provides a race-neutral explanation for the second strike demonstrating it was not part of a pattern of racial discrimination. See pp. 7-8, supra. If such a pattern does not exist after the second strike, it necessarily also did not exist after the first.

In advocating such a rule, petitioner relies exclusively on cases observing that a court "must" undertake a step three analysis where the prosecutor has offered a race-neutral justification and the defendant established a prima facie case at step one. See Pet. 8 (citing cases). Petitioner does not point to any decisions from this Court, or any other court, finding that a court must undertake a step three analysis where the claim failed at step one. Indeed, as the court of appeals observed, the district court's actions complied with existing circuit precedent. See Pet. App. 5a-6a (citing United States v. Guerrero, 595 F.3d 1059, 1062-1063 (9th Cir. 2010)).* And it would make little sense

* Petitioner briefly suggests (Pet. 12) that Guerrero itself warrants this Court's review, on the theory that it "wrongly" held that a district court may "evade step three after reaching step two by going back to step one" or that a court may use step two explanations to support a step one denial. In fact, in Guerrero, the court of appeals affirmed the district court's denial of a Batson challenge at step one because the denial was supported by the "totality of the circumstances," 595 F.3d at 1064, and the court of appeals appropriately rejected the assertion that the step one denial was nonetheless improper merely because -- after the challenge was denied -- the prosecutor accepted the district court's invitation to make a record of the government's

to require a court to evaluate a Batson challenge at step three when the court has already found that the defendant cannot even establish a prima facie case of discrimination.

More broadly, petitioner's assertion that the Court should adopt a rule requiring district courts to revisit prior strikes in certain cases is in tension with Batson itself, which "decline[d]" the invitation "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." 476 U.S. at 99; see Powers v. Ohio, 499 U.S. 400, 416 (1991) (trial courts may develop rules for resolving objections to use of peremptory challenges). Among other things, as a practical matter, it may be difficult or impossible to revisit or undo a prior strike against a juror who has already been excused, and lower courts should have the ability to consider allegations of a pattern of strikes in a sensible manner, consistent with the substance of Batson.

4. Finally, further review is unwarranted because petitioner does not allege any conflict between the decision below and the decisions of the other courts of appeals. Nor does he offer any other compelling reason to grant review of his fact-bound challenge to the district court's rejection of his Batson claims. See United States v. Johnston, 268 U.S. 220, 227 (1925)

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race-neutral explanation, apparently in "an abundance of caution," id. at 1063.

(the Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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