NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SANTOS PETER MURILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a "triviality" exception to the First Amendment's and Sixth Amendment's public trial requirement, and, if so, was a hearing regarding Government discrimination against a potential juror "trivial" such that it could be conducted in a closed back room from which the public was excluded?

2. Whether a police officer violated the Fourth Amendment when, without a warrant, he lifted up a floor mat of a car to inspect an object he thought might be a gun?

PARTIES

All parties to the proceedings are named in the caption of the case.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals in No. 17-30129, which is captioned *United States v. Santos Peter Murillo*,744 Fed. Appx. 378, is an unpublished memorandum decision, issued on October 23, 2018. It is reproduced at pages 1a-6a in the Appendix to this Petition ("Pet. App."). An order issuing an amended memorandum decision, but otherwise denying Mr. Murillo's timely petition for rehearing and for rehearing en banc, was entered on November 29, 2018. The order is reproduced at Pet. App. 7a, and the amended memorandum is reproduced at Pet. App. 8a-13a.

JURISDICTION

The United States District Court for the Western District of Washington had original jurisdiction over this criminal case, pursuant to 18 U.S.C. § 3231. An appeal from that court's final judgment proceeded for review by the Ninth Circuit Court of Appeals, in accordance with 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. The memorandum decision of the Ninth Circuit Court of Appeals was entered on October 23, 2018. The order issuing an amended memorandum decision, but otherwise denying a petition for rehearing and rehearing en banc, was entered on November 29,

2018. This petition is being filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 13(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions:

1. United States Constitution, amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. United States Constitution, amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. United States Constitution, amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Mr. Murillo was convicted in the Western District of Washington of prohibited possession of a firearm (18 U.S.C. § 922(g)(1)), possession of methamphetamine and heroin with intent to distribute (21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) & (C)), and possession of a firearm in furtherance of drug trafficking (18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(C)). On June 19, 2017, the district court imposed a total mandatory 35-year minimum sentence.[1] Pet. App. 14a-20a. Mr. Murillo appealed to the Ninth Circuit. As noted, the Ninth Circuit affirmed. Pet. App. at 1a-13a.

II. STATEMENT OF FACTS

A. *Facts Related to Closed Hearing During Jury Selection*

Portions of the jury selection process took place at "sidebar," including one juror's expression of strong feelings about race discrimination and police violence. Pet. App. at 24a-25a. Peremptory challenges were conducted by striking off names on a piece of paper. Pet. App. at 26a. The sheet itself was sealed in the district court (but later unsealed in the Ninth Circuit), Pet. App. at 36a, with even the docket not reflecting that the sheet had ever been filed. Pet. App. at 37a (not reflecting Dkt. 77).

[1] 25 years for the § 924(c) conviction and 10 years for one of the § 841 counts.

Mr. Murillo's attorneys objected to one of the Government's peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. at 36a. The district court judge told the jurors that he was going to talk to the lawyers about the form they just filled out. Pet. App. at 28a. Then, without discussing his reasons for doing so on the record or asking the parties or anyone else present to comment, the judge heard the *Batson* challenge in a small room, outside of the courtroom, through a door next to the bench. The only people in the room for these proceedings were the judge, a clerk, the court reporter, two prosecutors, two defense attorneys, Mr. Murillo and a member of the U.S. Marshals Service. Pet. App. at 21a-23a. There was no objection to the closed proceedings.

The Government exercised a peremptory challenge to Juror No. 8, who apparently was the only Latino in the pool. Defense counsel pointed out that Mr. Murillo was Hispanic, and raised a *Batson* challenge, pointing out that the challenged juror worked for the Gates Foundation, had been a teacher, and had once worked for the University of California. The AUSA noted that the juror stated in jury selection that he did not think the jury pool was a jury of Mr. Murillo's peers and had questions whether Mr. Murillo could get a fair trial. Defense counsel responded, and the district court judge then sustained the objection. At that point, both the defense and the Government accepted the jury panel and the juror was seated on the jury.

The district court judge did not tell the public what had transpired in the back room after returning to the courtroom. Pet. App. at 28a-31a.

Mr. Murillo argued on appeal that the closed hearing during jury selection violated the First and Sixth Amendments. Because of a lack of objection below, Mr. Murillo argued that the closure constituted plain error under Fed. R. Crim. Proc. 52 and that it also constituted structural error. The Ninth Circuit, however, ruled that the closure was "'trivial' for purposes of the Sixth Amendment, and [did] not implicate the public trial right." Pet. App. at 9a (citing *United States v. Ivester*, 316 F.3d 955, 959-60 (9th Cir. 2003) and *United States v. Sherlock*, 962 F.2d 1349, 1358 (9th Cir. 1992).

B. ***Facts Related to Warrantless Search of Car***

Prior to his arrest, Mr. Murillo was involved in a car accident. When the police arrived on the scene, Mr. Murillo gave someone else's name. The police correctly identified Mr. Murillo and then arrested him for false reporting and on an outstanding felony arrest warrant. Murillo was removed from the scene. A police officer entered the vehicle Murillo allegedly was driving to turn off the engine. The officer claimed he saw the butt of either a real firearm or BB or CO2 gun partially sticking out from under the floor mat. Without a warrant, the officer pulled the floor mat up so that he could find out if the object was a real gun. It turned it was real, and

this gun was the predicate for the 25-year mandatory minimum sentence imposed on Mr. Murillo under18 U.S.C. § 924(c). A subsequent search discovered heroin and methamphetamine.

Mr. Murillo challenged the lifting of the floor mat under the Fourth Amendment, both in the district court and in the Ninth Circuit, as an unconstitutional search. The Ninth Circuit rejected this argument. Pet. App. at 11a-12a.

REASONS FOR GRANTING THE WRIT

This case raises two separate issues, both of which independently justify granting certiorari under Rule 10.

First, the Ninth Circuit approved of a procedure by which the district court resolved a *Batson* challenge in a proceeding held in a back room, writing off the procedure as a "trivial" closure. But this Court has never adopted such an exception to the public trial requirement of First and Sixth Amendments, and such an exception runs counter to centuries of Anglo-American jurisprudence. There is no principled way of applying a "triviality" exception, and the danger is that cases that apply such an exception will be decided in a "result-oriented" fashion. In any case, a proceeding addressing the Government's discrimination against a potential juror on the basis of race or ethnicity can never be "trivial." Certiorari of this issue should be granted under Rule 10(c), as the Ninth Circuit has "decided an important question of federal

law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

This case is a good vehicle for deciding whether a *Batson* challenge can ever be closed to the public because the district court actually made a finding that the Government had improperly tried to exercise a peremptory challenge against a juror based upon ethnicity. In other words, the closed room proceedings did not involve simply an allegation of governmental misconduct, but the misconduct is undisputed in the record and the public's interest in finding out about the Government's attempt to discriminate is high.

Second, the Ninth Circuit's resolution of the search issue conflicted directly with this Court's decision in *Arizona v. Hicks*, 480 U.S. 321 (1987), where this Court held that the movement of stereo equipment in an apartment in order to see serial numbers, without probable cause, was an illegal warrantless search in violation of the Fourth Amendment. *Id*. at 324-27. Certiorari should be granted of this issue, also based on Rule 10(c) as the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court."

I. WRITING OFF A BACKROOM *BATSON* HEARING AS "TRIVIAL" RUNS COUNTER TO THE FORCE OF THIS COURT'S OPEN AND PUBLIC TRIAL JURISPRUDENCE

The Government discriminated against the only Latino juror on the jury panel when it attempted to exercise a peremptory challenge against him. That the Government's motives were improper is undisputed – the district court decided as much when it granted Mr. Murillo's lawyers' challenge under *Batson*. Pet. App. at 30a. Yet, not only was the litigation about the Government's discrimination held in a back room from which the public was excluded, but there was essentially no record made about the Government's behavior. The district judge never made a record in open court about the Government's misconduct; the docket did not reflect the nature of the proceedings in the back room; and even the juror strike sheet was sealed from public view (only to be unsealed after Mr. Murillo appealed).[2]

Allowing this portion of jury selection – argument and findings about the Government's discrimination – to take place in a secret, closed proceeding runs counter to centuries of precedent:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, [footnote omitted] to the excesses of the English Court of Star Chamber, [footnote omitted] and to the French

[2] While the official courtroom was never officially "closed," the district court judge essentially turned the back room into a courtroom from which the public was completely excluded.

> monarchy's abuse of the *lettre de cachet*. [Footnote omitted] All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, [footnote omitted] the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

In re Oliver, 333 U.S. 257, 268-70 (1948).

Following this traditional distrust for secret proceedings, this Court has consistently condemned the closing of courts, either under the First or Sixth Amendments. *See Presley v. Georgia,* 558 U.S. 209 (2010) (*per curiam*); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984).[3] This Court's disapproval of closed proceedings is so strong that it

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[3] The closed proceedings in this case violated both the First and Sixth Amendments. The First Amendment's right of public access exists to protect the rights of criminal defendants:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . .

In re Oliver, 333 U.S. at 270 n. 25 (internal quotes and citations omitted). On the other hand, the public's right to attend criminal hearings has its origins in the

(continued...)

has held that such closures, at least raised on direct appeal (rather than on collateral review), cause "structural error. *See Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017) ("In the direct review context, the underlying constitutional violation—the courtroom closure— has been treated by this Court as a structural error, *i.e.*, an error entitling the defendant to automatic reversal without any inquiry into prejudice."); *id*., 137 S. Ct. at 1908 ("As noted above, a violation of the right to a public trial is a structural error.").[4]

While Justice Brennan once suggested in a footnote in a concurring opinion that some issues could be resolved at sidebar or in chambers, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring), no decision of this Court has ever explicitly adopted an exception to open and public trial provisions of the First and Sixth Amendments for "trivial" closures, nor are there any cases from this Court that have allowed for the litigation over a *Batson*-challenge to be carried out behind closed doors.

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[3](...continued)
Sixth Amendment as well as the First Amendment. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 411-33 (1979) (Blackmun, J, joined by Brennan, White and Marshall, J., concurring in part and dissenting in part).

[4] *See also United States v. Marcus*, 560 U.S. 258, 263 (2010) & *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (both cases listing public trial violations as falling within the category of structural error).

The First and Sixth Amendments require open and public trials so that Government misconduct in particular can be exposed to the public.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions

Waller v. Georgia, 467 U.S. at 46 (internal quotes omitted). Adoption of a "triviality" exception is inconsistent with this historic purpose, particularly in a case involving issues of the Government's attempt to discriminate against a juror based upon ethnicity.[5] Indeed, there appears to be only one published decision that has ever addressed the issue of whether the public could be excluded from litigation over a *Batson* decision motion, a case where a middle-level appellate court in Washington State reversed a conviction on this basis. *State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108, 1114-19 (2008).

The Ninth Circuit departed from these principles and precedent. The court's primary citation for this holding is not any precedent from this Court, but its own precedent in *United States v. Ivester*, *supra*, and *United States v. Sherlock*, *supra*.

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[5] The importance of *Batson* issues is underlined by the recent grant of certiorari in *Flowers v. Mississippi*, No 17-9572, on this question: " Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U. S. 79 (1986), in this case."

Both cases are either distinguishable or no longer "good law" in light of this Court's recent public trial jurisprudence.

In *Ivester*, the Ninth Circuit held that proceedings about juror safety was "administrative" and thus could be closed to the public. *Ivester*, 316 F.3d at 959-60. But even in *Ivester*, the Ninth Circuit also went out of its way to distinguish the context of questioning jurors about security issues from a hearing involving government misconduct:

> Here, questioning the jurors to determine whether they felt safe is an administrative jury problem. The closure here did not infect any witness's testimony. It did not even infect counsel's opening or closing arguments to the jurors. *It did not attack the government*. *Compare Waller*, 467 U.S. at 47 (holding that the right to a public trial attaches to suppression hearings because such hearings resemble a bench trial and frequently attack the conduct of police and prosecutor).

Id. at 960 (emphasis added).

By way of comparison, the *Batson* challenge in this case directly attacked the conduct of the Government, and required a credibility determination about the Government's purported explanations for challenging the juror.[6] Proceedings adjudicating such a motion need to be resolved in full public view, just as the

[6] Resolution of a *Batson* claim is necessarily factual. *Hernandez v. New York*, 500 U.S. 352, 364-65 (1991) (plurality). This Court has made it clear that "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (quoting *Hernandez*, 500 U.S. at 365)).

suppression hearing in *Waller*. *See also United States v. Waters*, 627 F.3d 345, 360 (9th Cir. 2010) (hearing involving defense motion to dismiss based on government misconduct should not have been closed as the hearing would "have benefitted from the 'salutary effects of public scrutiny'") (quoting *Waller v. Georgia*, 467 U.S. at 47).

In *Sherlock*, the Ninth Circuit approved of the exclusion of the defendants' families during a critical witness's testimony, applying a less demanding standard for a so-called "limited" exclusion, holding that the trial judge need only have a "substantial reason" to close the courtroom. *Sherlock*, 962 F.2d at 1357. In contrast to this case, in *Sherlock*, at least, there was a ruling on the record as to the reasons for the limited closure, with there being a significant risk that the witness would be intimidated by the spectators in the courtroom. *Sherlock*, 962 F.2d at 1359 ("The court found that some of the defendants' family members peered and giggled at the witnesses and that their presence during Bennally's testimony would cause her trauma and embarrassment.").

More importantly, *Sherlock* has essentially been superseded by this Court's later decision in *Presley v. Georgia*, *supra*, when it reversed a conviction because of the lack of an "overriding interest" to justify closing one stage of the criminal proceeding -- the voir dire of prospective jurors. *Presley*, 558 U.S. at 214. *Sherlock*'s adoption of a requirement simply that the judge have a "substantial

reason" to close the courtroom does not satisfy *Presley*'s requirement of an "overriding interest."[7]

To be sure, the Ninth Circuit's decisions in *Ivester* and *Sherlock* have not been entirely isolated. The leading case adopting a "triviality" exception is *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996). In *Peterson*, the courtroom was mistakenly closed for 20 minutes during the defendant's testimony. The Second Circuit looked at the four factors cited in *Waller* justifying public trials to conclude that the brief closure did not violate the Sixth Amendment.[8] In the end, according to the Second Circuit, the closure was "extremely short" and "inadvertent," and was followed by a "helpful summation." 85 F.3d at 44. Other decisions have followed *Peterson*'s "triviality" standard.[9]

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[7] After *Presley*, it not even clear that the Ninth Circuit itself still follows all aspects of *Sherlock*. *See United States v. Rivera*, 682 F.3d 1223, 1228-37 (9th Cir. 2012) (finding public trial violation where judge excluded defendant's family which included a young child, from sentencing).

[8] The Second Circuit described these four reasons for public trials to be:

> 1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.

Peterson, 85 F.3d at 43 (citing *Waller*, 467 U.S. at 46-47).

[9] *See, e.g.*, *Gibbons v. Savage*, 555 F.3d 112, 119-21 (2d Cir. 2009) (not (continued...)

Yet, even the Second Circuit has narrowed and limited the scope *Peterson*. *See United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011) (*Gupta I*), *reconsidered and vacated*, 699 F.3d 682, 684, 688-89 (2d Cir. 2012) (*Gupta II*) (overruling decision that applied the *de minimis* doctrine to allow the intentional exclusion of public from voir dire without making any *Waller* findings, and finding the defendant's Sixth Amendment rights were violated). This limitation is appropriate after *Presley*, which involved the exclusion of only one observer from the court during jury selection, a closure that could easily be written off as "trivial."

The problem with a "triviality"exception to the public trial requirement of the Sixth Amendment is that the concept is essentially "rudderless," which leads to conflicting decisions without any firm principles. *See State v. Schierman*, ___ Wn.2d ___, 415 P.3d 106, 199-207 (2018) (Stephens, J., dissenting in part, concurring in part)) (surveying cases). A "triviality" exception essentially leads to result-oriented decisions. A court seeking to affirm a conviction could simply write off a closure as

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[9](...continued)
granting habeas relief where defendant's mother excluded from voir dire); *United States v. Greene*, 431 F. App'x 191, 195-97 (3d Cir. 2011) (unpub.) (court security temporarily excluded defendant's brother from court due to "space" issues); *Braun v. Powell*, 227 F.3d 908, 918-19 (7th Cir. 2000) (exclusion of former member of venire panel from trial); *State v. Schierman*, ___ Wn.2d ___, 415 P.3d 106, 124-27 & 191-94 (2018) (McCloud, J, opinion & Yu, J., concurring /dissenting) (adopting a "de minimis" rule); *People v. Bui*,183 Cal.App.4th 675, 683–689, 107 Cal. Rptr. 3d 585 (2010) (concluding *Presley* did not alter the "de minimis" exception).

"trivial" – just a few minutes in the back room – whereas a court seeking to reverse would come to the opposite conclusion.[10]

Some courts have attempted to determine triviality by examining such factors as "the length of the closure; the significance of the proceedings that took place while the courtroom was closed; and the scope of the closure, meaning whether it was a total or partial closure of the courtroom." *Schnarr v. State*, 2017 Ark. 10, 14, 2017 Ark. LEXIS 19 (2017). Other courts have looked to see whether the closure was inadvertent or not. *See, e.g., United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994) ("The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.").

But none of these factors can be consistently applied, and result in wildly inconsistent decisions. For instance, the D.C. Circuit held that the exclusion of the defendant's eight-year old son and his wife from the courtroom was "trivial" and did not violate the Sixth Amendment. *United States v. Perry*, 479 F.3d 885, 890-91 (D.C.

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[10] In *Gupta II*, the Second Circuit refused to set the contours of a "trivial" closure: "Whatever the outer boundaries of our 'triviality standard' may be (and we see no reason to define these boundaries in the present context), a trial court's intentional, unjustified closure of a courtroom during the entirety of voir dire cannot be deemed 'trivial.'" *Gupta II*, 699 F.3d at 689. However, recognizing a "triviality" exception without specifying the boundaries is fraught with the possibility of arbitrariness.

Cir. 2007) ("an eight-year-old's presence in the courtroom would neither 'ensure that judge and prosecutor carry out their duties responsibly' nor 'discourage[] perjury.'") (quoting *Waller*, 467 U.S. at 46). In contrast, the Ninth Circuit held that the removal of a child (and the adults with him) during a brief 35-minute sentencing was not "trivial." *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012) ("[A] child's ingenuousness may have an intensely sobering effect on the responsible adults, including on the person being sentenced."). There is no reasoned difference between the two cases – one court simply thought that excluding a child is "trivial" while another thought exclusion of a child was not trivial.

Similarly, the Washington Supreme Court recently unanimously reversed robbery convictions, finding structural error when a judge held a ten minute chambers's conference about the admissibility of cross-examination. *State v. Whitlock*, 188 Wn.2d 511, 396 P.3d 310 (2017). Then, less than a year later, without citing its earlier decision in *Whitlock*, the same court, in a capital case, adopted a "de minimis" rule and upheld a 10-minute chambers conference to hear argument and make rulings on "for cause" challenges to jurors. *See State v. Schierman*, 415 P.3d at 124-27 & 191-94 (McCloud, J., opinion & Yu, J., concurring /dissenting). Without a clear rule, there is a risk that the divergent results in the two case stems simply from a desire to reach the "right" result.

This Court should accept certiorari and make it clear that there is no "triviality" exception to the First and Sixth Amendment's open and public trial requirements. Moreover, the Court should make it clear that a hearing addressing the Government's discrimination against a juror based upon ethnicity or race cannot be written off as "trivial." Such a hearing needs to be held in open court as such a hearing implicates the core values of the First and Sixth Amendment, a hearing that addresses the misconduct of a party who attempted to discriminate against jurors based upon race or ethnicity..

II. THE SEARCH OF THE VEHICLE VIOLATED THE FOURTH AMENDMENT

Both in the district court and on appeal, Mr. Murillo argued that the police officer engaged in a warrantless search, in violation of the Fourth Amendment, when he lifted up the floor mat in the Jeep in order to see whether the object he saw was a real gun. The Ninth Circuit rejected this argument, stating that the officer knew "Murillo was wanted on an arrest warrant" and that he "immediately recognized" the gun as a MAC-10. Pet. App. at 12a.[11]

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[11] The original opinion stated that the officer knew that Mr. Murillo was wanted "a felony probation violation warrant." Pet. App. at 5a. Based on Mr. Murillo's petition for rehearing, the panel changed this language because in fact the officer did not know that Mr. Murillo had been convicted of anything in the past – simply, that there was an outstanding felony arrest warrant.

However, the officer did not "immediately recognize" the gun as a MAC-10. Rather, the officer did not recognize the gun as a real MAC-10 until after the warrantless search:

> The weapon was concealed to a point where I could not determine if it was an airsoft or pellet replica, or if a magazine was present. I pulled the floor mat back to expose the firearm, there was no magazine present.

Pet. App. at 38a.

The fact that the officer had to pull the floor mat up and inspect the item without a warrant confirms that the incriminating nature of the item was not immediately apparent. In *Arizona v. Hicks*, *supra*, the police were inside an apartment due to an unrelated shooting incident and noticed expensive stereo equipment that seemed out of place in the "squalid" surroundings. Suspecting that the equipment was stolen, an officer moved the stereo components to be able to see the serial numbers, and then phoned them in, ultimately determining that they had been stolen in a robbery. *Id*. at 323. The Court held that the movement of the equipment, without probable cause, was an illegal warrantless search in violation of the Fourth Amendment. *Id*. at 324-27.

Here, while the officer was able to look at the butt of what could have been either a CO2 pellet gun or a MAC-10, he should have stopped at that point. He did not have the right under the Fourth Amendment to pull up the floor mat and finish

his inspection. All evidence flowing from this illegal search, including all the contents of the car, should have been suppressed under *Wong Sun v. United States*, 371 U.S. 471 (1963).

While the district court judge did not think that the lifting of the floor mat was a search – "I would not call it a search, but a limited inspection" (Pet. App. at 35a) – this conclusion conflicts with *Hicks*. *See Hicks*, 480 U.S. at 328-29 (rejecting Justice O'Connor's suggestion in dissent to create a "cursory inspection" category based on reasonable suspicion: "We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a 'plain view' inspection nor yet a 'full-blown search.'"). The Court recently reaffirmed this principle last term:

> "[T]he ability visually to observe an area protected by the Fourth Amendment does not give officers the green light physically to intrude on it. . . . It certainly does not permit an officer physically to intrude on curtilage, remove a tarp to reveal license plate and vehicle identification numbers, and use those numbers to confirm that the defendant committed a crime

Collins v. Virginia, ___ U.S. ___, 138 S. Ct. 1663, 1673 n.3, 201 L. Ed. 2d 9 (2018).

The Ninth Circuit's decision stands in sharp contrast to this Court's decisions. This Court should accept certiorari and reverse the Ninth Circuit.

CONCLUSION

The petition for writ of certiorari should be granted. This Court should reverse Mr. Murillo's convictions and either remand for a new trial or dismissal.

Dated this 12th day of February 2019.

Respectfully submitted,

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