No.______

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE GERALD COOK, MARCUS ANTHONY FOREMAN, TERRY CARRY HOLLINS, and WILBERT ROSS, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit

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JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under Batson v. Kentucky, 476 U.S. 79 (1986), a prosecutor cannot be motivated by race when making peremptory strikes of venire members during the jury selection process. Relatedly, the Court has long held that equal protection principles bar government employees from implementing racial quotas. See, e.g., City of Richmond v. J.A. Croson Co., 468 U.S. 469 (1989).

The question presented is as follows:

Did the Ninth Circuit's disposition of Petitioners' Batson claim, which minimized the constitutional import of the government prosecutor's offer to empanel an African-American venire member, provided that he could peremptorily strike another African-American venire member, conflict with the Second Circuit's contrary approach in United States v. Nelson, 277 F.3d 164 (2d Cir. 2002), and the Sixth Circuit's in Rice v. White, 660 F.3d 242 (6th Cir. 2011)?

2. It is well-established under Faretta v. California, 422 U.S. 806 (1975), that a defendant in a criminal case has a Sixth Amendment right to represent himself at trial. But the Court has never addressed the standard of review that a federal court of appeals should apply when adjudicating a Faretta claim on direct appeal. Nor has it discussed how a district court should adjudicate an untimely asserted request to proceed pro se while the trial already is in progress.

The questions presented are as follows:

a. Did the Ninth Circuit's disposition, which ostensibly applied a clear-error standard of review to the district court's denial of Petitioners Marcus Foreman's and Terry Carry Hollins's Faretta claims, conflict with every other federal court of appeals that has articulated a standard of review in this context?

b. Did the Ninth Circuit's disposition of Petitioner Wilbert Ross, III's asserted Faretta claim, precluding it categorically because it was time-barred, conflict with the multi-factor balancing tests that the First, Second, Third, Seventh, and Tenth Circuits have adopted?

3. In Hudson v. Palmer, 468 U.S. 517 (1984), the Court held that prisoners serving a custodial sentence do not have any reasonable expectation of privacy in their cells for Fourth Amendment purposes. But the Court has never addressed Hudson's applicability to pretrial detainees.

The question presented is as follows:

Did the Ninth Circuit's disposition of Petitioners Foreman's and Hollins's Fourth Amendment claim, arising from state actors' inserting a warrantless recording device in their pretrial detention cell, conflict with the Second Circuit's opinion in United States v. Cohen, 796 F.2d 20 (2d Cir. 1986), which held that Hudson does not apply to pretrial detainees, and state actors to

search detainees' cells unless they can identify facility-related reasons for the search?

4. In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Court held that under the Sixth Amendment's jury-trial clause, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." But notwithstanding that categorical rule, the Ninth Circuit endorsed the district court's having made extensive findings of fact in this multi-defendant's RICO conspiracy case to clarify a deficient special verdict form – namely, one that did not allow the jury to make particular findings regarding the precise predicate acts that Petitioners allegedly intended to commit that carry a maximum sentence of life imprisonment. See 18 U.S.C. §§ 1962(d) & 1963(a).

The questions presented are as follows:

a. Did the Ninth Circuit's opinion conflict with Apprendi, Sullivan v. Louisiana, 508 U.S. 275 (1993), and their respective progeny by implicitly holding it is consistent with the Sixth Amendment's jury-trial guarantee – and the jury's concomitant responsibility to make findings beyond a reasonable doubt – in a multi-defendant conspiracy case to sentence a defendant to life imprisonment under 18 U.S.C. § 1963(a), when the special verdict form did not

permit the jury to make findings regarding the specific predicate acts attributable to each defendant?

b. Did the Ninth Circuit's Apprendi-related holding conflict with the Eleventh Circuit's opinion in United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001), that vacated a district court's sentence exceeding the statutory maximum in a multi-defendant RICO conspiracy case because the jury did not make findings regarding the predicate acts each defendant had intended to commit?

LIST OF PARTIES

[X] 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:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Southern District of California, United States of America v. Wilbert Ross, III, et al., No. 3:14-cr-01288-DMS. The district court entered judgments on July 20, 2016 (Petitioner Wilbert Ross III); July 27, 2016 (Petitioner Terry Carry Hollins); September 22, 2016 (Petitioner Marcus Anthony Foreman); and September 23, 2016 (Petitioner Jermaine Gerald Cook).

2. United States Court of Appeals for the Ninth Circuit, United States of America v. Wilbert Ross, III, et al., Nos. 16-50260, 16-50277, 16-50357, and 16-50359. The Ninth Circuit entered judgment on April 30, 2019, and denied Petitioners' petition for rehearing en banc and petition for panel rehearing on June 7, 2019.

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No.______

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE GERALD COOK, MARCUS ANTHONY FOREMAN, TERRY CARRY HOLLINS, and WILBERT ROSS, III,

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Respondent.

On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit

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Petitioners Jermaine Gerald Cook, Marcus Anthony Foreman, Terry Carry Hollins, and Wilbert Ross, III (collectively, "Petitioners"), respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 30, 2019.

OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished memorandum disposition and entered judgment on April 30, 2019, affirming Petitioners' convictions and sentences. That disposition is published at United

States v. Ross, 771 Fed. Appx. 345 (9th Cir. 2019).[1] The panel later denied Petitioners' petition for rehearing en banc and panel rehearing on June 7, 2019 .[2] App. 1-6.

JURISDICTION

The Ninth Circuit entered judgment in this case on April 30, 2019, and denied rehearing and rehearing en banc on June 7, 2019. App. 1-6. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows: "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."

The Fifth Amendment to the United States Constitution provides as follows: "No person shall be held to answer for a capital, or otherwise infamous crime,

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[1] A copy of the memorandum disposition is included in the Appendix. See App. 1-4.

[2] A copy of the order denying rehearing is included in the Appendix. See App. 5-6.

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides as follows: "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 defence."

Title 18 U.S.C. § 1962(d) provides as follows: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

Title 18 U.S.C. § 1963(a) provides as follows in pertinent part: "Whoever

violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both . . . ."[3]

STATEMENT OF THE CASE

Although Petitioners dispute that they were involved in this case's operative events, they will endeavor to – as this Court specified in Jackson v. Virginia, 443 U.S. 307 (1979) – present the facts pertinent to their petition in the light most favorable to the government.

A. Case Summary

In a nutshell, the fifth superseding indictment in this case charged Petitioners with conspiring to violate the Racketeering Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970), between 2002 and 2014 in San Diego, California. The grand jury contended that Petitioners were members of a gang called the West Coast Crips. And the superseding indictment further alleged that Petitioners either personally participated, or knew others would do so, in predicate activities furthering a RICO enterprise that among things

[3] Petitioners include complete versions of 18 U.S.C. §§ 1961-1963 in the Appendix. See App. 7-21.

purportedly included an armed robbery, sex trafficking of minors, and homicides. App. 22-49.

B. <u>Fourth Amendment Question</u>

By way of brief factual background, the Fourth Amendment question that Petitioners Foreman and Hollins present arose while authorities in California had detained Foreman and Hollins before trial in 2014 for state criminal offenses. App. 53, 56-57. There, the two men shared a cell with another detainee named Donald Bandy, all of whom were defendants in the underlying federal criminal case. App. 53, 57.

As of mid-March 2014, Detective Louis Maggi of the San Diego Police Department was investigating Paris Hill's murder and other offenses that authorities attributed to a gang to which the three detainees supposedly were affiliated. App. 53. Detective Maggi and some of his colleagues apparently had "regular discussions" about their findings with Kate Harding, an FBI Special Agent employed in the bureau's San Diego field office. App. 54-57. Special Agent Harding suspected that the gang "had killed Paris Hill because of his cooperation with law enforcement," and the agent also thought that an unnamed person was also at risk because she had supposedly spoken with law enforcement officials. App. 56.

Consequently, sometime before March 11 and 18, 2014, Detective Maggi "contacted" Frank Jackson, a Deputy District Attorney in San Diego County, "about placing an electronic recording device" in the cell that Hollins, Foreman, and Bandy jointly occupied. Jackson told Detective Maggi that – at least in his opinion – a warrant would not be necessary. App. 53. Detective Maggi then learned from the county's Detentions Investigation Unit that if he were to supply a suitable "device," the unit would install it in the cell. Id.

After Detective Maggi directed him to do so, Detective Victor David, without obtaining a warrant, installed a recording device in the cell on March 18, 2014. It remained there for three days, after which authorities furnished recordings they obtained from the device to Detective Maggi. App. 53.

The recordings that Detective Maggi obtained, some of which the government proffered as evidence during its case-in-chief at the Appellants' trial (see App. 87), contained inculpatory statements from Foreman and Hollins. Among other things, the two men discussed Paris Hill's murder, including the precise location of Hill's corpse, the apparent motive for the homicide, Defendant Randy Graves's ostensible role in ordering it, and Hill's physical and emotional responses while he was dying. App. 60-61, 103.

Petitioners Foreman and Hollins moved to suppress the jail-cell recordings

from being proffered at trial in the government's case-in-chief, relying principally on the Second Circuit's opinion in United States v. Cohen, 796 F.2d 20 (2d Cir. 1986). The district court denied the motion, determining that those pretrial detainees do not have a reasonable expectation in their cell and adopting the California Supreme Court's reasoning in People v. Davis, 115 P.3d 417 (Cal. 2005), which it based principally on this Court's holdings in Hudson v. Palmer, 468 U.S. 517 (1984), a case involving inmates serving custodial sentences. App. 61A-61B.

On direct appeal, the Ninth Circuit affirmed the denial, but did not address the palpable conflict between Cohen and Davis. Instead, it attempted to distinguish the case's facts from Cohen's, and reasoned that the government agents were justified for security-related purposes in placing the warrantless recording device in the cell that Petitioners Foreman and Hollins occupied. App. 3.

C. ***Batson* Question**

Concerning all four Petitioners, after the government moved to dismiss an African-American juror from the venire during jury selection, Petitioners challenged the strike under Batson v. Kentucky, 476 U.S. 79 (1986). App. 71-72.

The government's prosecutor initially denied that Petitioners had set forth a prima facie case under Batson, but then proffered several putative race-neutral reasons. Surprisingly, however, he closed his argument to the district court by offering to ameliorate the strike by moving up another African-American venire member sufficiently to be empaneled on the petit jury. Without accepting that offer, the district court found the government's stated rationales for striking the African-American venire member sufficiently race-neutral to comply with Batson. App. 73-74, 77.

On direct appeal, Petitioners contended that the government prosecutor's offer to exchange one minority juror for another was proof that the challenged peremptory strike was racially motivated. The Ninth Circuit, however, disagreed, and held in its disposition that the district court's "conclusion was not clearly erroneous," and the strike of the venire member was not invalid when compared to other potential jurors because she had a unique mix of characteristics and therefore was not similarly situated. App. 3. Moreover, the Ninth Circuit determined that although the prosecutor's offer to exchange one American-American venire member for another was "inartful," it was not sufficient to undermine the racially neutral reasoning the government's proffered for the strike. Id.

D. *Faretta* Questions

1. Regarding Petitioner Hollins's Faretta claim, the facts are straightforward. Although Petitioner Hollins had at a hearing on January 14, 2016, expressed some hesitation about proceeding pro se at trial without a continuance – resulting in his withdrawing the request (see App. 66-68) – he unequivocally invoked that right during a hearing fourteen days later. App. 138. He also agreed to every stringent condition that the district court imposed on his invoking Faretta: being shackled at counsel's table, precluded from conducting attorney voir dire, and subjected to the standing attorneys'-eyes-only ("AEO") order that prevented the defendants from learning about the identities of core government witnesses until 48 hours before they were scheduled to testify at trial. App. 139.

Nevertheless, on January 29, 2016, the district court denied Petitioner Hollins's Faretta invocation. It determined principally that Petitioner Hollins had invoked his pro se rights in bad faith, speculating that Petitioner Hollins would later wish at trial to be relieved from the AEO and – barring that – then would seek a continuance. And, in the district court's estimation, that would have placed it in a double bind: either accede to Petitioner Hollins's wishes under the Sixth Amendment or risk running afoul of this Court's requiring that any pro se

defendant's having a "meaningful" opportunity to avail himself of Faretta. App. 69-70; United States v. Farias, 618 F.3d 1049, 1053 (9th Cir. 2010).

Applying a highly deferential clear error standard of review, the Ninth Circuit affirmed. Because it has never articulated the precise standard under which it reviews a district court's denial of a Faretta claim (see United States v. Thompson, 587 F.3d 1165, 1170-71 (9th Cir. 2009)), the Ninth Circuit essentially proclaimed that it would defer boldly to any district court that denies a defendant's Faretta rights based on putative bad faith or delay-related rationales (see, e.g., App. 2-3.

2. As for Petitioner Foreman's Faretta claim, he first notified the district court on January 14, 2016, which was 25 days before the trial date, that he wished to represent himself at trial. App. 63. During questioning by the district court, Petitioner Foreman suggested that he was willing to abide by all of the stringent conditions that the district court placed on his and Hollins's appearing pro se, but one: Petitioner Foreman understandably requested that the district court continue the trial date to permit him to prepare his defense. The district court declined to do so, however, and insisted that the trial would begin as scheduled on February 8, 2016. App. 64-67.

Faced with that prospect, Petitioner Foreman later notified the district court

that he no longer wished to proceed pro se. App. 68.

Affirming what amounted to the district court's having constructively denied Petitioner Foreman's right to proceed pro se, the Ninth Circuit noted that because Petitioner Foreman never re-invoked under Faretta, his claim was "no stronger" than Petitioner Hollins's. But besides a scant citation to Farias (see App. 3), the Ninth Circuit did not otherwise engage that key precedential opinion, much less analyze Petitioner Foreman's claim in depth. Much like it did for Petitioner Hollins's claim, the Ninth Circuit did not articulate a standard of review. Id.

3. At bottom, the issue that underlies Petitioner Ross's Faretta claim is straightforward. During the eleventh trial day, Petitioner Ross's lack of trust for his defense counsel became overwhelming, and he finally decided that he wished to proceed pro se. See, e.g., App. 109-110. Without categorically precluding Petitioner Ross from doing so, the district court instead applied balancing tests that the Second Circuit and Third Circuit used in, respectively, United States v. Matsushita, 794 F.2d 46, 51 (2d Cir. 1986), and United States v. Bankoff, 613 F.3d 358, 373-74 (3d Cir. 2010). Determining that the harm to the trial process would outweigh Petitioner Ross's Sixth Amendment to proceed pro se, the district court denied Petitioner Ross from invoking Faretta at that late stage. See App. 78-83.

On direct appeal, the Ninth Circuit did not adopt the district court's analysis. Instead, it relied on its opinion in United States v. Carpenter, 680 F.3d 1101, 1102 (9th Cir. 2012) (per curiam), that apparently holds that untimely Faretta claims are categorically barred. App. 3.

E. *Apprendi* Question

Shortly before the jury began its deliberations, the district court conferred with the parties regarding the verdict. All of the parties agreed that Apprendi and its progeny required the jury to make specific factual findings for each defendant – namely, that he had at least contemplated that a co-conspirator would commit at least one predicate act with a maximum term of life imprisonment – before the district court could impose a custodial sentence under § 1963(a) exceeding 20 years. Counsel for Petitioner Ross argued that the verdict form needed to be quite specific, mandating the jury to find the precise predicate acts applicable to each defendant. App. 111-113.

After the government's prosecutor disagreed, the district court ultimately did not rule on Petitioner Ross's request. But it later approved the verdict form that the government desired, which did not permit the jury to make particularized findings regarding predicate acts. App. 114-119.

Following closing arguments, the jury convicted Petitioners of violating

§ 1962(d). And it found – without particularizing – that each Petitioner had at least contemplated that a co-conspirator would commit a predicate act with a corresponding maximum term of life imprisonment. App. 120-122. The district court later sentenced Petitioners to life terms. App. 123-134.

On direct appeal, the Ninth Circuit affirmed the sentences. Principally, it reasoned that the "special verdict form" the district court employed foreclosed Petitioners' argument regarding a particularized form under § 1963(a). App. 3-4.

ARGUMENT

1. Petitioners' question presented regarding Batson is straightforward. The Court has long prohibited under the Fourteenth Amendment's Equal Protection Clause – and, against the federal government, corresponding principles incorporated through the Fifth Amendment's Due Process Clause – government-endorsed racial quotas of any kind. Here, the government prosecutor's suggesting that it would cure an objected-to peremptory challenge by restoring another African-American to the petit jury evidenced a race-grounded intent to ensure that no more than one African-American could even theoretically be selected for the petit jury, therefore making the exercised challenge suspect under Batson and its progeny. And in similar circumstances, the Second Circuit in United States v. Nelson, 277 F.3d 164, 207-08 (2d Cir. 2002),

and the Sixth Circuit in Rice v. White, 660 F.3d 242, 256 (6th Cir. 2011), proscribed race-based substitutions similar to what the Ninth Circuit essentially endorsed here, reasoning that Batson-related principles apply for each venire member, regardless of whether the government is willing to accept an African-American on the petit jury.

Thus, because the Ninth Circuit's disposition regarding this question conflicted with both the Court's own Batson-related precedents and opinions from two sister federal courts of appeals, the Court should grant certiorari on Question 1.

2a. Collectively, Petitioners Foreman and Hollins raise a question directed to the standard of review that the Ninth Circuit's disposition ostensibly applied to their Faretta claims. Although the Ninth Circuit has never definitively adopted any standard for reviewing such claims, it instead reviewed the district court's bad-faith factual findings regarding their pretrial conduct for clear error. In essence, then, that highly deferential standard controlled the review, an approach that no other federal court of appeals undertakes in this context. Indeed, the Ninth Circuit's unusual inquiry differs from what several of its sister circuits employ – reviewing the district court either de novo or for an abuse of discretion. See infra at 22-23. Thus, to resolve this palpable circuit conflict – one that likely

would have a determinative impact on Foreman's and Hollins' claims, the Court should grant certiorari on their Faretta question.

2b. Petitioner Ross's Faretta question is slightly different because he admittedly made an untimely motion during trial to represent himself. Much like five of its sister circuits, the Ninth Circuit disposed of Ross's claim categorically because it deemed it time barred. But at least two circuits – the Second and Third – apply a multi-prong balancing test in this context, therefore giving a defendant a chance to avail himself at any stage of his proceedings to proceed pro se if the circumstances (as they were here) are sufficiently compelling and no prejudice would inure to the other parties. See infra at 23-24.

Consequently, to resolve this circuit conflict – one that potentially could result in a reversal here if the Court were to apply a rule similar to the Second Circuit's or Third Circuit's – the Court should grant certiorari on Petitioner Ross's Faretta question.

3. As for the Ninth Circuit's disposition of Petitioners Foreman's and Hollins's Fourth Amendment claim regarding the government's installing a warrantless recording device in their pretrial detention cell, it ostensibly endorsed the California Supreme Court's rationale in Davis that detainees have the same limited Fourth Amendment rights that prisoners serving custodial sentences retain.

But Davis conflicts with the Second Circuit's holding in Cohen that the government must secure a warrant to search a detainee's cell if it does not have any compelling facility-based security rationale to avoid complying with Fourth Amendment procedures. And because the Court – which recognized in Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015), a key distinction between pretrial detainees and custodial prisoners in the § 1983 context – has never definitively addressed whether its holdings concerning inmates in Hudson apply similarly to detainees, the Court should grant certiorari to resolve that conflict.

Further, to the extent the Ninth Circuit's disposition reasoned that the government's installing a recording device within the cell was not a search for Fourth Amendment purposes, that conflicts squarely with the Court's holdings on that subject in Jones v. United States, 565 U.S. 400, 406-08 (2012). Thus, the Court alternatively should grant certiorari to clarify that the government's warrantless trespass of a pretrial detention cell is not distinguishable from installing a GPS tracking device on a car without complying with Fourth Amendment procedures.

4. Notwithstanding the Court's having enunciated what it termed a "bright-line rule" regarding a defendant's Sixth Amendment right to have a jury make factual findings impacting the maximum sentence he could receive –

see Cunningham v. California, 549 U.S. 270, 291 (2007) (internal quotation marks omitted) – its copious Apprendi-related case law leaves a key corollary unanswered: when the jury attempts to make sentencing-related findings, how precise must they be for each defendant in a multi-defendant case?

What seems implicit in the Court's various discussions of Apprendi's crystalline rule, however, is that considering Apprendi's requiring that the jury arrive at its special verdict beyond a reasonable doubt, there is a concomitant mandate that the findings for each defendant must plainly authorize a sentencing enhancement above the statutory maximum. Otherwise, the trial judge would eviscerate the defendant's Sixth Amendment right by making findings to clarify a vague verdict that did not authorize the judge beyond a reasonable doubt to impose an enhanced penal term. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993).

Accordingly, there are three reasons why the Court should grant this petition on question 4. First, as federal and state trial courts increasingly apply Apprendi and its progeny, they need further guidance regarding how precise Apprendi-related findings must be, particularly in a complex multi-defendant case, before a judge can enhance a defendant's sentence above the statutory maximum. This is particularly true in a RICO conspiracy case with multiple unrelated

defendants, thus heightening the risk that a vague special verdict form would not contain specific sentence-related findings necessary to satisfy Apprendi and Sullivan.

Second, the lower courts erred here by not requiring more precise sentencing findings for each defendant before the district court could increase § 1963(a)'s maximum from twenty years to life imprisonment. The jury's inchoate finding suggests only that it had determined unanimously – and, apparently, beyond a reasonable doubt – that each defendant had conspired to commit one of the enumerated offenses. But because the district court authorized the jury to consider all of the government's proffered evidence against each defendant, the jury may have made Pinkerton-related findings[4] that were inapplicable to sentencing-related issues. This case is therefore a worthy vehicle for the Court to clarify Apprendi's and Sullivan's applicability when a jury, because of a deficient form, cannot render a specific-enough verdict beyond a reasonable doubt.

Third, the Ninth Circuit's apparently endorsing the district court's deficient special verdict form and its unauthorized judicial findings directly conflicts with the Eleventh Circuit's differing approach in Nguyen, a multi-defendant RICO conspiracy case in which the jury had also been asked to make special findings

[4] See Pinkerton v. United States, 328 U.S. 640, 646-47 (1946).

germane to § 1963(a)'s statutory maximum. Because the Eleventh Circuit more faithfully followed the Court's categorical directive in Apprendi, certiorari is warranted to clarify how precise a jury's sentencing findings must be before a district court can make a quantum leap beyond § 1963(a)'s default maximum of twenty years and potentially sentence a defendant to life imprisonment.

I. QUESTION NO. 1

A. *Batson* Prohibits Any Racial Animus in Jury Selection, and the Court Has Long Prohibited Racial Quotas

Simply put, regarding Petitioner's Batson claim the government's offer essentially to switch one minority venire member for another is quintessentially the type of racial-balancing approach that Batson invalidated. See Batson, 476 U.S. at 95 ("A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.") (internal quotation marks omitted)). Although the Ninth Circuit determined that the district court's reasoning was not clearly erroneous, it unfortunately did not factor into its analysis the government's offer to substitute one African-American juror for another, apparently because the district court did not comment on the prosecutor's statement when it rejected the Appellants' Batson challenge under the third prong of that case's framework. App. 3, 77.

B. <u>The Ninth Circuit's Disposition on This Question Conflicts With Opinions From the Second and Sixth Circuits</u>

Significantly, however, by not considering the prosecutor's impermissible offer when examining whether the government's proffered rationales for striking the venire member were indeed discriminatory, the Ninth Circuit's analysis conflicts with opinions from, respectively, the Sixth Circuit and Second Circuit. See Rice, 660 F.3d at 256 ("[T]he trial judge erroneously believed that . . . Batson violations may be 'cured' by reference to the ultimate racial composition of the [petit jury]."); Nelson, 277 F.3d at 207-08 (holding that it was impermissible for the district court to balance the number of African-American and Jewish jurors in a racially charged case). See also Strickland v. State, 980 So.2d 908, 915 (Miss. 2008) ("The Batson doctrine is not concerned with racial, gender, or ethnic balance on petit juries . . . . Rather, it is concerned exclusively with discriminatory intent on the part of the lawyer against whose use of his peremptory strikes the objection is interposed.").

Indeed, earlier this year, the Court emphasized in Flowers v. Mississippi, 139 S. Ct. 2228 (2019), that "'the central concern'" of equal protection principles is "to put an end to governmental discrimination on account of race.'" Id. at 2240-41 (quoting Batson, 476 U.S. at 85). But unfortunately, the Ninth Circuit's

disposition did not show sufficient fealty to that unassailable principle, particularly considering the Court's longstanding abolition of racial quotas in the governmental sphere. See, e.g., City of Richmond v. J.A. Croson Co., 468 U.S. 469, 477-79 (1989).

At bottom, then, the Ninth Circuit's approach toward the government prosecutor's Batson-violative balancing offer creates an unnecessary conflict with at least two of its sister circuits. Given the Court has long held that a Batson error is structural (see, e.g., Gray v. Mississippi, 481 U.S. 648 (1987)), it should grant certiorari at a bare minimum to resolve a palpable circuit conflict regarding prosecutorial peremptory strikes exercised for race-based reasons – as occurred here against a backdrop in which the government's prosecutor was willing to accept a token African-American juror, a racial quota in other words, but none additional among the remaining eleven. And because Flowers illustrates that race-based problems unfortunately recur commonly in jury selection processes throughout the United States, that would give the Court another vehicle to reemphasize that racial animus is anathema to equal justice under the law.

II. QUESTION NO. 2

A. There is a Distinct Conflict Among the Federal Courts of Appeals Regarding the Precise Standard of Review They Apply to *Farreta* Claims

Concerning Petitioners Hollins, Foreman, and Ross, the Ninth Circuit reviewed their respective Faretta claims under a highly deferential clear error standard of review, despite that court's having never definitively settled how much deference it accords to the district court on that issue on direct appeal. See, e.g., Thompson, 587 F.3d at 1170-71. Instead, the Ninth Circuit essentially proclaimed that it would defer boldly to any district court that denies a defendant's Faretta rights based on putative bad faith or delay-related rationales. See, e.g., App. 2-3.

In so doing, however, the Ninth Circuit's disposition essentially filled a jurisprudential vacuum in a way that conflicts with how its sister circuits review Faretta claims on direct appeals. See, e.g., United States v. Conlan, 786 F.3d 380, 390 (5th Cir. 2015) (reviewing Faretta claim de novo); Bankoff, 613 F.3d at 374 (applying an abuse of discretion standard); United States v. Jones, 489 F.3d 243, 247 (6th Cir. 2007) (applying de novo review); United States v. Bush, 404 F.3d 263, 290 (4th Cir. 2005) (conducting de novo review overall, while reviewing underlying "findings of historical fact" for clear error); United States v. Bowker, 372 F.3d 365, 385 (6th Cir. 2004) (reviewing for an abuse of discretion), vacated

on other grounds by Bowker v. United States, 543 U.S. 1182 (2005); United States v. Noah, 130 F.3d 490, 499 (1st Cir. 1997) (same); United States v. Swinney, 970 F.2d 494, 498 (8th Cir. 1992) (same); United States v. Mayes, 917 F.2d 457 (10th Cir. 1990) (same); United States v. Oakey, 853 F.2d 551, 553 (7th Cir. 1988); Matsushita, 794 F.2d at 51-52 (same).

Consequently, to reconcile the Ninth Circuit's de facto adopting what amounts to a clear-error standard of review for Faretta claims with the less-deferential approaches that its sister circuits have taken, the Court should grant certiorari. Simply put, considering the pervasive split between the federal courts of appeals on this important legal question – one that, on hypothetical remand from the Court, likely would have a tangible effect on how the Ninth Circuit ultimately decides meritorious Faretta claims from three of the Petitioners – the Court should step in to ensure uniformity on a subject that federal criminal defendants litigate routinely on direct appeal.

B. The Ninth Circuit's Disposition of Petitioner Ross's Untimely *Faretta* Claim Conflicts With the Second, Third Circuit, and Tenth Circuits' Approaches

In adjudicating Petitioner Ross's Faretta claim, the Ninth Circuit disposed it by interpreting its case law to preclude categorically any such claim that a defendant filed untimely in the district court. See supra at 11-12. But that

reasoning conflicted squarely not only with the nuanced balancing tests that the Second and Third Circuit used in, respectively, Matshusita and Bankoff, but also the Tenth Circuit's multi-faceted inquiry in Mayes, 917 F.2d at 462. See also Noah, 130 F.3d at 497-98 (holding that a district court "may deny a defendant's" untimely "request to act as his own lawyer"); Oakey, 853 F.2d at 553 (7th Cir. 1988) (noting that a district court has "discretion" to deny an untimely Faretta motion). At least five other circuits, however, have adopted categorical time bars similar to what the Ninth Circuit applied here.[5]

Consequently, to resolve this deep inter-circuit conflict regarding this important and oft-recurring legal question in criminal cases, the Court should grant certiorari regarding this question unique to Petitioner Ross.

III. QUESTION NO. 3

A. There is a Distinct Conflict Between the Second Circuit, Several State Supreme Courts, and the Ninth Circuit's Ostensible Disposition Here Regarding Whether Pretrial Detainees Have Greater Fourth Amendment Rights Than Prisoners Who Are Serving Custodial Terms

The Ninth Circuit's disposition further erred by reasoning that Cohen is

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[5] See United States v. Edelmann, 458 F.3d 791, 809 (8th Cir. 2006); United States v. Young, 287 F.3d 1352, 1354-55 (11th Cir. 2002); United States v. Martin, 25 F.3d 293, 295-96 (6th Cir. 1994); United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979); Chapman v. United States, 553 F.2d 886, 887, 895 (5th Cir. 1977).

distinguishable because there was apparently a non-case-based rationale for conducting the warrantless search. App. 3. But Cohen notably held that such a search is outside the Fourth Amendment's scope if done only for internal security-related reasons – presumably, to protect other detainees or preserve order within the facility. See Cohen, 796 F.2d at 24. Thus, the non-case-based rationale that the government proffered here – eliciting evidence to protect a cooperating witness, see App. 56 – did not fall within Cohen's exception.

Consequently, without any meaningful basis to distinguish this case from Cohen, an appreciable conflict therefore exists between the Second Circuit in Cohen and the California Supreme Court in Davis.[6] And several other state supreme courts have endorsed Cohen's reasoning, holding that state actors must have a warrant to search a pretrial detainee's cell for non-facility-based rationales. See, e.g., Rogers v. State, 783 So.2d 980, 990-92 (Fla. 2001); State v. Henderson, 517 S.E.2d 61, 62-64 (Ga. 1999); State v. Neely, 462 N.W.2d 105, 112 (Neb. 1990).[7]

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[6] As support, the Ninth Circuit cited United States v. Mayer, 560 F.3d 948, 956 (9th Cir. 2009). But that case concerned a warrantless search of a probationer's residence (see id.) – a longstanding categorical exception to the Fourth Amendment – and therefore is inapposite.

[7] But see State v. Wiley, 565 S.E.2d 22, 32-33 (N.C. 2002); State v. O'Rourke, 792 A.2d 262, 265-67 (Me. 2001); Soria v. State, 933 S.W.2d 46, 60

The Court should therefore grant certiorari to resolve this conflict.[8]

B. The Ninth Circuit's Disposition Conflicts With the Court's Plain Holding in *Jones* Regarding Physical Trespasses in Spaces Where a Person Has Even a Limited Reasonable Expectation of Privacy

Eschewing the reasons that the district court proffered for denying Petitioners Foreman's and Hollins's motion to suppress, the Ninth Circuit's disposition instead reasoned that the Second Circuit's opinion in Cohen is distinguishable because, among other things, it did not involve a "physical search." App. 3. But notwithstanding that Cohen's Fourth Amendment-based rule does not circumscribe itself purely to in-cell searches by jail employees (see Cohen, 796 F.2d at 23-24), the Ninth Circuit's rationale conflicts squarely conflicts with the Court's broad holding in Jones that a state actor's inserting a digital device into one's private space constitutes a common-law trespass, therefore making it a search under the Fourth Amendment. Jones, 565 U.S. at 406-08.

Simply put, there is no meaningful distinction between the digital tracking

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(Tex. Crim. App. 1996); State v. Apelt, 861 P.2d 634, 649 (Ariz. 1993);

[8] Petitioners further observe that although arising in the § 1983 context, Kingsley lends further support to constitutional distinctions between pretrial detainees and inmates serving custodial sentences. See Kingsley, 135 S. Ct. at 2472-76.

device that authorities secretly inserted into the defendant's car in Jones (see Jones, 565 U.S. at 402-03) and the digital recorder that jail employees placed in Petitioners Foreman's and Hollins' pretrial detention cell. Indeed, it is notable that Petitioner Foreman, Petitioner Hollins, and Bandy undertook active measures to preclude employees from overhearing their conversations. See App. 58.

Thus, the Ninth Circuit's disposition's overlooking Jones's plain import in this context is yet another reason why the Court should grant certiorari.

IV. QUESTION NO. 4.

A. ***Apprendi, Sullivan*, and Their Respective Progeny Require Jury Findings That are Clear Beyond a Reasonable Doubt Before a Trial Court Can Sentence Above the Statutory Maximum**

As all of this case's parties and the district court correctly recognized, Apprendi, its progeny, and related cases plainly required the jury to make findings before the district court could impose a sentence exceeding the twenty-year maximum established in § 1963(a). This Court has repeatedly reaffirmed that a sentencing judge is not authorized under the Sixth Amendment to impose a term lengthier than the maximum supported by a general verdict without the jury's making specific factual findings beyond a reasonable doubt concerning

enhancements.[9] But the government and the defendants diverged regarding the special verdict's specificity. See App. 113. And the district court (and, at least implicitly, the Ninth Circuit) endorsed a form that did not require the jury to make particularized findings about the predicate acts attributable to each of the seven defendants. Consequently, as Petitioners discussed supra (at 13), the jury ultimately returned a special verdict that the defendants had committed (or

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[9] See, e.g., Apprendi, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); Ring v. Arizona, 536 U.S. 584, 588 (2002) (describing Apprendi as precluding a defendant from being "exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.") (alteration in original, original emphasis, internal quotation marks omitted); Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) ("Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – not matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt."); Blakely v. Washington, 542 U.S. 296, 303 (2004) ("Our precedents make clear . . . that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.") (original emphasis)); Cunningham, 549 U.S. at 274-75 ("As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant."); United States v. O'Brien, 130 S. Ct. 2169, 2174-75 (2010) ("In other words, while sentencing factors may guide or confine a judge's discretion in sentencing an offender within the range prescribed by statute, judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury.") (emphasis added, internal citations and quotation marks omitted)).

contemplated that others would commit) at least one of four enumerated acts, but the form did not permit the jury to make specific findings as to which predicate acts Petitioners contemplated they and/or co-conspirators would commit.

Because Apprendi and its progeny only involved cases in which the trial judge had not permitted the jury to make constitutionally-required findings, the Court has never had to address how precise those findings must be under the Sixth Amendment to authorize a sentence exceeding the statutory maximum. Nevertheless, those cases and prior ones construing the Court's landmark holding in In re Winship, 397 U.S. 358 (1970), point strongly toward requiring the jury's special findings to be clear beyond a reasonable doubt before a judge can impose an enhanced sentence.

For instance, in Apprendi, the Court discussed how a sentencing judge cannot impose a term "*exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Apprendi, 530 U.S. at 483 (original emphasis, followed by added emphasis). Additionally, Apprendi noted that "[i]t is equally clear that such facts must be established by proof beyond a reasonable doubt." Id. at 490 (internal quotation marks omitted). And Justice Scalia in his separate concurrence observed that any sentencing-enhancing fact has to be "determined *beyond a reasonable doubt by the unanimous vote of 12 of* [the

defendant's] *fellow citizens*." Id. at 498 (Scalia, J., concurring) (original emphasis).[10]

Further, in Blakely, the Court held that "the relevant 'statutory maximum'" for Apprendi purposes "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Blakely, 542 U.S. at 303-304 (original emphasis). Quite significantly, the Court also held that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." Id. at 304 (emphasis added, internal citations and quotation marks omitted). And it further noted in Cunningham that facts requisite to a judge's imposing a sentence exceeding the statutory maximum must be "inherent in the jury's verdict . . . ." Cunningham, 549 U.S. at 274 (emphasis added).

Moreover, the Court's decisions construing its landmark holding in Winship that the Sixth Amendment requires a jury to render a unanimous verdict on each required element beyond a reasonable doubt (see Winship, 397 U.S. at 364),

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[10] See also Ring, 536 U.S. at 610 (Scalia, J., concurring) (". . . I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt.") (emphasis added)).

further require Apprendi-related findings to authorize sentence enhancements under the same constitutional standard. As Justice Scalia's opinion for a unanimous Court in Sullivan explained, "[i]t would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt." Sullivan, 508 U.S. at 278 (original emphasis). Justice Scalia further observed that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." Id. at 280.[11]

At bottom, then, the implicit rule that Petitioners identify makes eminent sense in any criminal case involving multiple defendants who supposedly played drastically different roles. Because the government often uses Rule 801(d)(2)(E)

[11] See also United States v. Gaudin, 515 U.S. 506, 514 (1995) (". . . [T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."); Court of Ulster Cty. v. Allen, 442 U.S. 140, 156 (1979) (. . . [I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt.") (original emphasis)).

of the Federal Rules of Evidence[12] and Pinkerton principles to impute a putative conspirator's activities to all of his supposed co-conspirators, it becomes vital for sentencing-enhancing purposes for the jury's verdict to reflect that it has made clear, individualized findings for each defendant regarding his precise culpability. Otherwise, the special verdict risks – as occurred in this case – becoming an undifferentiated morass that the sentencing judge cannot decipher without making his or her own Apprendi-violating findings. And there is a particular need for such a rule in RICO conspiracy cases because – almost needless to say – there is a quantum difference between the twenty-year statutory maximum and the life term potentially available if the jury makes Apprendi-required findings.

Simply put, when different clusters of defendants in a conspiracy case supposedly were involved in unrelated activities, a vague special verdict is tantamount to the type of uncertain jury findings that, as Sullivan held, violates the Sixth Amendment. Certiorari is therefore warranted to instruct lower federal courts and state courts with criminal jurisdiction about the specificity that the Sixth Amendment requires before a judge can sentence above the statutory maximum. The Ninth Circuit's ostensible holding not only conflicts with this

[12] "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a conspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

Court's holdings in Apprendi, Winship, Sullivan, and their respective progeny, but also concerns an important question of federal law that the Court should settle definitively. See Sup. Ct. R. 10(c).

B. The Ninth Circuit's Disposition Conflicts With *Apprendi*'s and *Sullivan*'s Requirements That a Jury Must Make Clear Sentencing Findings Regarding Each Defendant

This case presents a good opportunity for the Court to craft an explicit rule out of the principles regarding jury findings that it set forth in Apprendi, Winship, Sullivan, and their respective progeny. As Petitioners alluded to supra, the government was required in this RICO conspiracy case to prove beyond a reasonable doubt that a defendant agreed that he or a co-conspirator would commit at least two predicate racketeering acts. See United States v. Salinas, 522 U.S. 52, 65 (1997). And all of the parties (including the government) ostensibly agreed that the district court could not impose a sentence exceeding twenty years without a special jury finding that a particular defendant conspired to commit a racketeering act that – under federal or California law – carried a life maximum. See supra at 12.

But as Petitioners noted supra (at 13), the jury's special verdict form (over the objections of defense counsel) did not require it to make specific findings regarding each defendant. Rather, the jury was required to find unanimously only

that a defendant joined the conspiracy with knowledge that a co-conspirator would commit one of four enumerated offenses. By failing, though, to permit the jury to make particular findings concerning which of the acts each defendant personally contemplated, the district court – and, the Ninth Circuit, by at least implicitly adopting its approach – improperly insulated the jury from the more-than-theoretical possibility in this complicated case of making findings that the evidentiary record simply did not support.

Accordingly, the district court's special verdict form did not comport with Apprendi's and its progeny's requiring that the jury – particularly in a multi-defendant conspiracy case – make sentencing-related findings that clearly authorize the judge beyond a reasonable doubt to sentence a defendant above the statutory maximum. And because the constitutional problems encountered in this complex, multi-defendant conspiracy case are likely to recur in future such cases – and particularly within the RICO conspiracy context under § 1963(a) – without the Court's explicit guidance, certiorari is therefore warranted.

C. The Ninth Circuit's Disposition Conflicts With the Eleventh Circuit's Opinion in *Nguyen*

Nguyen involved six defendants who were convicted by a jury in the Northern District of Georgia of substantive RICO and RICO conspiracy counts.

The jury also specifically found that five of them had committed various predicate acts. Nguyen, 255 F.3d at 1338-39 & n.2. But regarding the conspiracy counts, the district court did not permit the jury to make findings regarding the particular predicate acts that a defendant committed or conspired to commit. Id. at 1341-42. The district court then proceeded to sentence two of the defendants to life imprisonment and three others to terms exceeding the twenty-year statutory maximum. That meant the district court had at least implicitly found that all five of those defendants had committed, or contemplated that others would commit, a predicate act bearing a maximum penalty of life imprisonment.

On direct appeal, the Eleventh Circuit observed that the verdict form's section regarding the conspiracy counts did not ask the jury "to find which predicate acts each defendant had agreed to commit or which acts each defendant knew or intended would be committed as part of a pattern of racketeering activity." Id. at 1342 (emphasis added). As such, that made the verdict "necessarily ambiguous as to which predicate acts supported the guilty verdicts on the conspiracy count." Id. Accordingly, after applying Apprendi's core holding to the jury's conspiracy-related findings, the Eleventh Circuit concluded that because "[t]he jury failed to find that any of the defendants had committed a predicate act that had a potential penalty of life imprisonment," the sentences for five of the

defendants (all of which exceeded the twenty-year statutory maximum) had to be vacated. Id. at 1343-44 & nn.12-13.

In this case, the jury's special verdict form requested that it make findings regarding whether a defendant perpetrated at least one of the four enumerated acts. See supra at 12-13. But much like in Nguyen, the form did not require the jury to make findings as to the particular act that each particular defendant contemplated to further the putative RICO conspiracy. See Nguyen, 255 F.3d at 1342. Consequently, by not vacating Petitioners' life sentences, the Ninth Circuit's disposition – arising in a case similar to Nguyen because both involved multiple defendants charged with violating § 1962(d) – conflicted with Nguyen's contrary adherence to Apprendi's core principles.

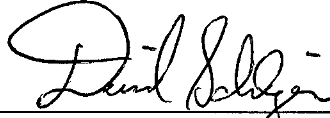
Accordingly, because the conflict between the Ninth Circuit and Eleventh Circuit's dueling approaches toward Apprendi-related principles in the § 1962(d) context are, if anything, quite likely to recur in the federal courts of appeals without the Court's guidance, certiorari is therefore warranted. See S. Ct. R. 10(a).

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Dated: September 5, 2019

Respectfully submitted,



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