No. 19-6190

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE GERALD COOK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly rejected petitioners' claim under Batson v. Kentucky, 476 U.S. 79 (1986).

2. Whether the court of appeals properly reviewed for clear error the district court's determination that self-representation motions by petitioners Foreman and Hollins under Faretta v. California, 422 U.S. 806 (1975), were made for purposes of delay.

3. Whether the court of appeals erred in determining that petitioner Ross's Faretta motion had been untimely.

4. Whether the court of appeals correctly determined that jail-cell audio recordings of petitioners Foreman and Hollins did not violate the Fourth Amendment.

5. Whether petitioners' life sentences were imposed in violation of the Sixth Amendment, where a special verdict form indicates that the jury unanimously found that the government had proven beyond a reasonable doubt the statutory predicate for a life sentence as to each petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 771 Fed. Appx. 345.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2019. A petition for rehearing was denied on June 7, 2019. (Pet. App. 6.) The petition for a writ of certiorari was filed on September 5, 2019. 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 Southern District of California, petitioners were convicted of conspiracy to conduct enterprise affairs through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Ross Judgment 1; Hollins Judgment 1; Foreman Judgment 1; Cook Judgment 1. Petitioner Ross was also convicted of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a), (b), and (c) (2012); and sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a) and (b) (2012). Ross Judgment 1. Petitioners were sentenced to life imprisonment. Ross Judgment 2; Hollins Judgment 2; Foreman Judgment 2; Cook Judgment 2. The court of appeals affirmed. Pet. App. 1-4.

1. Petitioners are members of the West Coast Crips (WCC), a street gang with a base of operations in southeastern San Diego. Gov't C.A. Br. 3-4. The WCC engages in illegal acts affecting commerce, including drug trafficking, sex trafficking, robbery, murder, and money laundering, making it an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961, et seq. Gov't C.A. Br. 3; see 18 U.S.C. 1961(4). Between 2012 and 2014, petitioners engaged in racketeering activity that included several murders, Gov't C.A. Br. 6-8, 11-14, 16-18, 22-29; attempted murder, id. at 18-21; robbery, id. at 10-11; and sex trafficking, id. at 14-16. In total, petitioners were involved in at least nine separate acts of racketeering.

On July 29, 2012, 19-year-old Joseph Hutchins was shot and killed while riding his bike and wearing a red shirt -- the color of a rival gang the Bloods -- near a location where police had received reports of a Crip-Blood fight in progress. Gov't C.A. Br. 6. Two witnesses gave a description of the shooter consistent with petitioner Cook. Immediately after the shooting, Cook arrived at the nearby home of Miyah Mosley and threw an object the size of a handgun over the fence and into the backyard of another apartment in the complex. Id. at 6-7. When Mosley knocked on the door of the apartment to ask the resident if she could retrieve an object from his backyard, a man jumped over the fence and retrieved the object before she did. Id. at 7. After Cook left Mosley's apartment, he suddenly stopped seeing her or visiting her apartment, despite the fact that they had been dating for two years. Ibid.

On December 2, 2012, Andres Caldera was murdered in retaliation for two Hispanic males having jumped another WCC member the previous month. Gov't C.A. Br. 8. An African-American man approached Caldera on the street and, after making a demand for gang affiliation, shot Caldera under the chin. Id. at 8-9. The bullet recovered from Caldera's body was a perfect match to a handgun found in Foreman's possession four days later. Id. at 9. Cellphone location data likewise connected Foreman to the murder. Ibid.

On December 6, 2012, the owner of a recycling center in southeastern San Diego was robbed of $1,000 by three African-American men, all of whom entered his office with handguns. Gov't C.A. Br. 10. Police subsequently undertook a search for a red Camaro seen by witnesses in the vicinity of the robbery. When a detective investigating the robbery moved toward a speeding red Camaro later that day, it accelerated and then slowed to a halt, after which the passengers tried to flee. Id. at 10-11. All three occupants were apprehended; Hollins had been the driver, and Foreman and Ross had been the passengers. Ibid. Foreman was carrying a bandana that contained the handgun used to kill Caldera days earlier. Id. at 11. In a post-arrest lineup, a recycling center employee positively identified Foreman and Ross as participants in the robbery. Ibid.

On April 6, 2013, a local resident found the body of Measha l Fairley, a WCC member, lying on the sidewalk in front of the resident's home, dead of a gunshot wound to the head. Gov't C.A. Br. 11-12. A fresh cigarette butt near Fairley's body contained DNA from both Hollins and Cook. Id. at 12. GPS data also placed Ross, who was subject to GPS monitoring at the time as a term of bail for a state case, at the scene of the crime. Id. at 12-13. Evidence at trial indicated that the murder was likely motivated by the perception that Fairley had cooperated with police in violation of WCC rules. Id. at 14.

In October 2013, Ross drove two women to Oakland, where both women spent five days engaging in prostitution. Gov't C.A. Br. 15. One of the prostitutes, Sharika, testified that Ross was her pimp and that she gave all of the money she earned on the trip to Ross. Ibid. Ross used force to compel Sharika to engage in prostitution, including by physically assaulting her when she attempted to return to San Diego. Ibid. The other prostitute, Shawnella, was 15 years old. Id. at 16. She gave all the money she made on the trip to Sharika, who in turn gave it to Ross. Ibid.

On November 1, 2013, Chyrene Borgen was killed by a gunshot wound to the head after attending a Halloween party with Hollins, Foreman, and Cook. Gov't C.A. Br. 17. Borgen had been close to Fairley and had criticized the WCC for Fairley's murder in public posts on Facebook. Id. at 16. Hollins, Foreman, Cook, and Ross later took a congratulatory "selfie" at the exact spot where Borgen was shot. Id. at 17-18 (citation omitted). Recorded conversations involving another WCC member also implicated petitioners in Borgen's murder. Id. at 18.

On December 1, 2013, Krystal Sharkey, who had been friends with Fairley and Borgen and had also publicly criticized the WCC, was shot four times by WCC member Antwaren Roberts. She survived and decided to cooperate with police. Gov't C.A. Br. 18-20. Hollins subsequently tracked her down and directed her not to testify against Roberts. Id. at 21. Although Sharkey initially

consented in an effort to placate Hollins, she ultimately disobeyed his instruction and testified at Roberts's trial, where Roberts was convicted of attempted murder. Ibid.

On March 1, 2014, WCC member Paris Hill was murdered after choosing to cooperate with officers investigating the homicide of J.J. Rees, which arose from WCC activities. Gov't C.A. Br. 22-24. Six WCC members, including Ross, were charged in J.J. Rees' homicide and received Hill's statements to police in pretrial discovery. Id. at 25. Hill was murdered a few days before he was set to testify at Ross's preliminary hearing in that case. Ibid. Wiretapped communications showed that Hollins and Cook referred to Hill as a "snitch," and that Hollins sought advice from a more senior gang member, who confirmed that Hill should be killed. Id. at 26 (citation omitted). On the night of Hill's murder, Hollins and his girlfriend, Dyonne Faulkner, picked Hill up and transported him to a party attended by other WCC members. Id. at 26-27. A security guard later permitted Hollins, Hill, and other gang members to exit the party and then watched them walk down the road. Id. at 27. The next morning, Hill's body was found lying on the sidewalk in the location where the security guard had seen the group walking, with a single gunshot to the head. Ibid.

2. A federal grand jury in the Southern District of California returned a fifth superseding indictment charging petitioners with RICO conspiracy, in violation of 18 U.S.C. 1962(d). Fifth Superseding Indictment 1-23. Ross was additionally

charged with sex trafficking of a minor, in violation of 18 U.S.C. 1591(a), (b), and (c) (2012); and sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a) and (b) (2012). Fifth Superseding Indictment 25-26. Petitioners proceeded to trial. Gov't C.A. Br. 30.

a. Before trial, Foreman and Hollins moved to suppress recordings of conversations they had in a jail cell following Hill's murder. D. Ct. Doc. 403 (Nov. 19, 2014). FBI Agent Katie Harding, who was leading the federal RICO investigation of the WCC, had feared that the WCC was planning to assassinate Faulkner (Hollins's girlfriend) for cooperating with authorities in the investigation of Hill's murder. C.A. Supp. E.R. 310, 318. Agent Harding believed that the WCC was unlikely to kill Faulkner, however, without input from Hollins. Id. at 318. During their pretrial detention for other state crimes, Hollins and Foreman were housed together in the same jail cell along with Donald Butler, another WCC member. Id. at 319; Gov't C.A. Br. 89. The cell was on the ground floor, adjacent to a common area, and included an intercom system that inmates could use to contact deputies, and which deputies could use to listen inside the cell. C.A. Supp. E.R. 319. To prevent deputies from listening to their conversations, inmates often placed wet paper in the perforated holes of the intercom box. Ibid.

San Diego Police Detective Louis Maggi called a deputy district attorney and asked what would be needed to insert a covert

recording device into the cell to monitor the conversation among the three cellmates. C.A. Supp. E.R. 220, 229. The deputy district attorney told him that because the detainees had no expectation of privacy in the jail cell, no search warrant was required, and an officer who worked at the jail installed a recording device in the cell. Id. at 220. The device was in place for 72 hours, and captured conversations where Hollins described the exact location where Hill's body was found, detailed the last moments before Hill died, proclaimed that he still loved Hill and intended to look out for Hill's children, and confirmed that a senior gang member authorized the hit on Hill. Id. at 320, 322.

The district court denied Foreman's and Hollins's motion to suppress, finding that they had no reasonable expectation of privacy in their jail cell conversation and that the recording was justified to ensure the safety of a cooperating witness (i.e., Faulkner). C.A. E.R. 140-142.

b. Following the indictment, the district court declared the case complex under 18 U.S.C. 3161(h), established deadlines for discovery and pretrial motions, and set a trial date one year out, June 1, 2015, to provide the parties sufficient time to complete discovery and pretrial litigation. Gov't C.A. Br. 35-36. The court moved the trial date only twice: first to January 4, 2016, so that the death penalty could be considered for petitioner Hollins and another co-conspirator, and second to February 8, 2016,

when petitioner Ross's counsel lost her home. C.A. Supp. E.R. 172, 376-377, 625-631.

On January 14, 2016, 20 months after petitioners were first indicted, after the district court had concluded its hearing on the motions in limine, and just three weeks before trial, Foreman and Hollins stated that they desired to represent themselves. C.A. E.R. 31; Gov't C.A. Br. 35-38. The district court conducted the colloquy required by Faretta v. California, 422 U.S. 806 (1975), see C.A. E.R. 32-39, and although both petitioners insisted they were not seeking to delay the trial, they nevertheless requested a continuance. Id. at 42, 46-47. When the district court indicated that it would not modify the trial date, petitioners accused the court of bias and, after consultation with counsel, withdrew their requests for self-representation. Id. at 43-46, 58-59.

On January 28, 2016, petitioner Hollins renewed his Faretta motion. Gov't C.A. Br. 40. The court denied the motion, finding that it was not brought in good faith but instead was made for purposes of delaying the trial and gaining access to cooperating witness identities. C.A. E.R. 67-74. The court made the same findings with respect to Foreman's Faretta motion, although Foreman had never renewed his motion after withdrawing it. Id. at 74.

c. Jury selection took place on February 8-9, 2016. Gov't C.A. Br. 70. The venire included three available African-American

jurors: Jurors 67, 14, and 47. Ibid. Juror 67 was excused for cause because he knew one of the law enforcement witnesses, and his son had been the victim of a homicide that the witness was investigating. Ibid. Juror 14 was a divorced mother of two children, one of whom had special needs; was employed as a temporary office worker; lived in the East Village of downtown San Diego, which was within the turf of the WCC for drug sales; and had once witnessed an assault in Los Angeles that was never prosecuted because the victim would not come forward. Ibid. Juror 47 was a retired engineer who lived with his wife in suburban San Diego; had eight children; had a father who was a career police officer and former police chief; and had twice witnessed domestic violence assaults. Id. at 70-71.

The government used a peremptory challenge to strike Juror 14. C.A. Supp. E.R. 826. Hollins's counsel raised an objection under Batson v. Kentucky, 476 U.S. 79 (1986). C.A. Supp. E.R. 831. The stated reason for the objection was that all four defendants were African-American; Juror 14 was African-American; and Juror 14 had said nothing that excused her for cause. Id. at 831-832. The government identified numerous race-neutral reasons for exercising the peremptory challenge: Juror 14 was a temporary worker who might hold it against the government if she were not paid during a six-to-eight-week trial; she was responsible for care of a special-needs child; she lived in an area within the WCC's turf and might fear rendering a guilty verdict (a reason for

which the government had struck another juror); she had witnessed a crime that was not prosecuted because the victim would not come forward; and she was shaking when answering the juror questionnaire. Id. at 833-835. The prosecutor also offered to allow Juror 47 -- the only other remaining African-American venireperson -- to serve on the jury. Id. at 832.

The district court overruled the Batson objection, finding that the race-neutral reasons identified by the government were supported by the record and that there was no purposeful discrimination. C.A. Supp. E.R. 836. Ultimately, the case was tried before a jury consisting of seven Caucasian jurors, four Hispanic jurors, and one Asian juror. Gov't C.A. Br. 75.

d. On February 18, 2016 -- the seventh day of trial -- petitioner Ross requested to represent himself. C.A. E.R. 77; Gov't C.A. Br. 42. As a result of witness-intimidation issues that had arisen during the course of the investigation, the government had sought, and the district court had granted, an "attorney's eyes only" protective order limiting disclosure of the identity of witnesses to the murders and other violent crimes alleged as racketeering acts in this case. C.A. Supp. E.R. 28-40, 362-368. Under the terms of that order, petitioners' lawyers learned the identities of prosecution witnesses in advance of trial to allow for investigation, but those identities were not disclosed to petitioners themselves until 48 hours before each witness was set to testify. Id. at 670-674.

Ross voiced frustration with the limits imposed by the protective order, which allegedly hindered his ability to provide his lawyer information to ensure effective cross-examination, and informed the court that he "might as well represent [himself]." C.A. E.R. 77-79 (capitalization omitted). The district court denied Ross's Faretta motion as untimely, observing that it was made "nearly two weeks" and "30 witnesses" into trial. Id. at 89 (capitalization omitted). The court explained, however, that it would permit Ross's counsel to re-cross-examine the specific witnesses with respect to whom Ross felt he had insufficient time to provide information to counsel. Id. at 86, 91.

e. The maximum penalty for violating the RICO statute or conspiring to violate it is 20 years of imprisonment, unless the "violation is based on a racketeering activity for which the maximum penalty includes life imprisonment," in which case the statutory maximum increases to life imprisonment. 18 U.S.C. 1963(a). The government presented evidence of four different racketeering acts underlying the charged RICO conspiracy that carried a maximum punishment of life in prison: (1) murder; (2) conspiracy to commit murder; (3) sex trafficking of a minor; and (4) sex trafficking by force, fraud, or coercion. Gov't C.A. Br. 128-129.

The district court used a special verdict form that required the jury to decide whether the government had proved beyond a reasonable doubt that each defendant, in the course of his

participation in the RICO conspiracy, agreed that a co-conspirator would commit at least one of the above-listed offenses in furtherance of the conspiracy. C.A. E.R. 176. The jury was further instructed that it had to agree unanimously on at least one of the listed racketeering acts for each defendant. Ibid. Ross and Cook requested that the special verdict form be modified to require jurors to specify which of the four listed acts each particular defendant agreed would be committed, but the district court did not adopt that modification. C.A. E.R. 166-170, 174.

f. The jury found petitioners guilty of RICO conspiracy, in violation of 18 U.S.C. 1962(d). Ross Judgment 1; Hollins Judgment 1; Foreman Judgment 1; Cook Judgment 1. The jury also found Ross guilty of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a), (b), and (c) (2012); and sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a) and (b) (2012). Ross Judgment 1. The jury answered "yes" for each defendant on the special verdict form asking whether it had unanimously determined beyond a reasonable doubt that the defendant had agreed that a co-conspirator would commit at least one of the four alleged predicates for which a life sentence is authorized. C.A. E.R. 176. Petitioners were sentenced to life imprisonment. Ross Judgment 2; Hollins Judgment 2; Foreman Judgment 2; Cook Judgment 2.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-4.

The court determined that Hollins, Foreman, and Ross were not wrongly denied self-representation rights under Faretta. Pet. App. 2-3. It found that the "district court's finding that Hollins made his request for purposes of delay and not in good faith was not clearly erroneous." Pet. App. 2 (emphasis omitted). The court of appeals explained that because Hollins made the request shortly before trial and after the district court had imposed limitations on the ability of the defendants to learn the identity of witnesses, the district court "had reason for concern that self-representation * * * would put both the trial date and the discovery limitation in jeopardy." Id. at 2-3. The court of appeals further explained that Foreman's request was "no stronger" than Hollins's, and that Foreman had withdrawn his request for self-representation and never renewed it. Id. at 3. And with respect to Ross, the court found that because he made his request in the middle of trial, the district court "did not err in denying this untimely request." Ibid. (citing United States v. Carpenter, 680 F.3d 1101, 1102 (9th Cir.) (per curiam), cert. denied, 568 U.S. 1038 (2012)).

The court of appeals also determined that the district court had permissibly denied Hollins's Batson challenge after the government used a peremptory challenge on Juror 14. Pet. App. 3. The court noted the government's race-neutral reasons for the strike -- including "the potential juror's employment status, two children requiring childcare, residence in a neighborhood where

drug dealing was controlled by defendants' gang, prior experience witnessing a crime where the victim did not press charges, and nervousness" -- and saw no clear error in the district court's finding that the strike had not been purposefully discriminatory. Ibid. The court of appeals acknowledged that the government's offer to substitute Juror 47 for Juror 14 had been "inartful," but explained that the offer "did not refute [the] race-neutral reasons for challenging Juror No. 14 in this context." Ibid.

The court of appeals next determined that the district court "permissibly denied [the] motion to suppress recordings of Hollins, Foreman, and a third alleged gang member during pretrial detention." Pet. App. 3 (emphasis omitted). The court of appeals observed that this Court had held in Hudson v. Palmer, 468 U.S. 517 (1984), that a convicted criminal does not possess a Fourth Amendment expectation of privacy while incarcerated, and that the Supreme Court of California in People v. Davis, 115 P.3d 417 (2005), applied that holding to pretrial detainees. Pet. App. 3 (citing Hudson, 468 U.S. at 530, and Davis, 115 P.3d at 428-429). The court also noted that the Second Circuit in United States v. Cohen, 796 F.2d 20 (1986), permitted a pretrial detainee to challenge the warrantless physical search of his cell intended solely to bolster the prosecution's case. Pet. App. 3. The court explained, however, that it need not weigh in on any conflict between Davis and Cohen, because "this case is unlike Cohen": "There was no physical search here" and "the search was not

intended solely to bolster the prosecution's case." Ibid. The court found that, in those circumstances, "[t]he [district] court did not abuse its discretion in finding that these defendants had no reasonable expectation of privacy in their jail cell conversation and that law enforcement recorded their conversation based on real concerns about witness safety." Ibid.

Finally, the court of appeals determined that the district court did not violate the Sixth Amendment or Apprendi v. New Jersey, 530 U.S. 466 (2000), in imposing life sentences based on the special verdict form requiring the jury to find unanimously and beyond a reasonable doubt that each defendant had agreed that a co-conspirator would commit at least one of four listed offenses with a maximum penalty of life imprisonment. Pet. App. 3. The court explained that a maximum sentence of life imprisonment is permissible for a RICO conspiracy conviction "if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment," ibid. (citing 18 U.S.C. 1963(a)), and that the special verdict form showed that the jury made the finding necessary to trigger this provision as to each petitioner, id. at 3-4.

ARGUMENT

Petitioners contend that (1) the prosecutor's offer to empanel an African-American juror following the peremptory strike of another African-American juror violated equal protection principles (Pet. 19-21); (2) the court of appeals erred by

reviewing the district court's denial of Foreman and Hollins's self-representation claim pursuant to Faretta v. California, 422 U.S. 806 (1975), under a clear-error standard (Pet. 22-23); (3) the court of appeals erred in affirming the denial of Ross's Faretta claim on timeliness grounds (Pet. 23-24); (4) the jail-cell recordings of Foreman and Hollins discussing Hill's murder violated the Fourth Amendment (Pet. 24-27); and (5) the special verdict form was deficient because it did not ask the jury to specify which predicate racketeering act it attributed to each defendant (Pet. 27-36). Each contention lacks merit, and the court of appeals' unpublished decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that the Constitution prohibits the use of peremptory challenges to strike prospective jurors based on their race. Id. at 89. Inquiry into a possible Batson violation consists of three steps. First, the defendant must make out a prima facie case of discrimination, such as by showing a pattern of strikes against members of a particular racial group. Id. at 96-97. The burden then shifts to the prosecution to offer race-neutral explanations for the challenged strikes. Johnson v. California, 545 U.S. 162, 168 (2005); Batson, 476 U.S. at 94. Finally, the trial court must evaluate those explanations and decide whether the opponent of the

strike has proved purposeful racial discrimination. Johnson, 545 U.S. at 168.

In this case, when petitioners raised a Batson challenge to the use of a peremptory strike on Juror 14, the prosecutor identified several race-neutral reasons for the strike. C.A. Supp. E.R. 833-835. Petitioners do not suggest that those reasons were insufficient or pretextual. Instead, they contend (Pet. 19-21) that the prosecutor's further, independent offer to seat Juror 47 -- the only other remaining African-American venireperson -- reflects an impermissible effort at racial balancing and the mistaken view that the ultimate racial composition of a jury can cure a Batson violation. But as the court of appeals explained, although the prosecutor's (unaccepted) offer may have been "inartful," it "did not refute [the] race-neutral reasons for challenging Juror No. 14." Pet. App. 3. And petitioners provide no sound reason for this Court to review the lower courts' fact-bound resolution of their claim.

Petitioners err in asserting (Pet. 13-14) that the court of appeals' decision conflicts with the Second Circuit's decision in United States v. Nelson, 277 F.3d 164, 207-208, cert. denied, 537 U.S. 835 (2002), and the Sixth Circuit's decision in Rice v. White, 660 F.3d 242, 256 (2011), cert. denied, 567 U.S. 914 (2012). In Nelson, the district court "viewed [the empaneled jury] as insufficiently racially and religiously diverse." 277 F.3d at 207. Accordingly, after an African-American juror was excused for

illness, "the court sua sponte removed a second, and white, juror from the main panel and then filled the two newly open places on the jury with an African American and a Jewish juror." Ibid. Both of these new jurors "were selected from the list of alternate jurors out of order" and "ahead of the non-African-American, non-Jewish jurors who were next in line." Ibid. In reversing, the Second Circuit explained that the parties' attorneys obviously could not have used their peremptory strikes to achieve this outcome under Batson, "[a]nd what the district court could not allow the parties to do, it also could not do of its own motion." Ibid. And in Rice, the Sixth Circuit acknowledged -- and rejected -- a state trial court's "erroneous[] belie[f] that Batson demands racial balance and that Batson violations may be 'cured' by reference to the ultimate racial composition of the panel." 660 F.3d at 256.

Neither decision is implicated here, because no racial balancing of the jury occurred in this case. The district court did not seat Juror 47 in exchange for a peremptory strike of Juror 14. It therefore did not facilitate, and the court of appeals did not "endorse[]" (Pet. 14), any race-based substitution. To the contrary, the district court expressly agreed with petitioners' counsel that substituting an additional minority juror would "not [be] a cure" "for a Batson violation." C.A. Supp. E.R. 836 (capitalization omitted). And petitioners identify no court of appeals that has found a Batson violation based solely on a

prosecutor's unaccepted offer of substitution, where the strike was amply supported by stated race-neutral factors, as was the case here.

2. Petitioners Hollins and Foreman contend (Pet. 22-23) that the court of appeals incorrectly applied a clear-error standard of review to the district court's denial of their self-representation claim. In Faretta, this Court recognized a Sixth Amendment right for a defendant in a criminal case to represent himself. 422 U.S. at 819. That right, however, "is not absolute." Martinez v. Court of Appeal of California, 528 U.S. 152, 161 (2000). "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Id. at 162. As a result, a self-representation request must generally be timely, ibid., and a court may deny the right when its exercise would disrupt the trial, see Faretta, 422 U.S. at 834 n.46.

Here, the district court denied Hollins's request to represent himself after finding that the motion was made in bad faith and for purposes of delay. And although Foreman had withdrawn his Faretta motion, the court found the same as to him. C.A. E.R. 67-74. In affirming the district court's denial, the court of appeals determined that the district court's findings regarding the purpose of petitioners' motions were not clearly erroneous. Pet. App. 2. That determination comported with circuit precedent recognizing that a finding that a Faretta motion was

made for purposes of delay represents a finding of fact appropriately reviewed for clear error. See Burton v. Davis, 816 F.3d 1132, 1159 (9th Cir. 2016) ("We review a district court's determination that a Faretta motion was not a delay tactic for clear error."); United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986) (per curiam) (recognizing that a district court's factual findings underlying the denial of a Faretta motion are reviewed for clear error). It also comported with this Court's precedents. See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014) ("Traditionally, decisions on * * * questions of fact are reviewable for clear error.") (internal quotation marks omitted).

Hollins and Foreman assert (Pet. 22-23) that no other court of appeals applies clear-error review to a district court's denial of a Faretta motion, and that a circuit conflict exists regarding whether to apply de novo or abuse-of-discretion review. But the court of appeals applied clear-error review to the district court's specific factual findings, not its Faretta holding overall. Pet. App. 2. Petitioners do not cite any decision of another circuit applying anything other than a clear-error standard to district court findings of fact in the Faretta context. Nor do they cite a decision reversing the denial of a Faretta motion despite finding no clear error in a district court's finding that it was made for purposes of delay and not in good faith.

The decisions that Hollins and Foreman cite applying a de novo standard of review all involve questions of law rather than questions of fact. See United States v. Jones, 489 F.3d 243, 247 (6th Cir. 2007) (reviewing "de novo the legal question of the scope of the right to self-representation"); United States v. Bush, 404 F.3d 263, 270, 272 (4th Cir. 2005) ("We review a district court's denial of a defendant's right to self-representation de novo" and "the district court's findings of historical fact" -- including whether a request was designed to "delay and manipulate" -- "for clear error."). Although United States v. Conlan, 786 F.3d 380 (5th Cir. 2015), states without elaboration that "[w]e review de novo the constitutional permissibility of [a defendant's] attempt to represent himself," id. at 390 (citation and emphasis omitted; brackets in original), Fifth Circuit case law confirms that this standard encompasses clear-error review of findings of fact, see United States v. Weast, 811 F.3d 743, 748 ("We review this constitutional challenge de novo, but scrutinize the district court's underlying factual findings for clear error only."), cert. denied, 137 S. Ct. 126 (2016). And because a "district court would necessarily abuse its discretion if it based its ruling on * * * a clearly erroneous assessment of the evidence," Highmark Inc., 572 U.S. at 563 n.2, decisions that petitioners cite for the proposition that some circuits apply abuse-of-discretion review necessarily would not conflict with the decision below.

3. Petitioner Ross contends (Pet. 23-24) that the court of appeals incorrectly deemed his Faretta motion categorically time-barred because it was filed after trial began, rather than applying a balancing test. Faretta itself did not address the timeliness of the defendant's request to represent himself beyond observing that it was made "weeks before trial." 422 U.S. at 835. As noted, however, this Court has subsequently recognized that a defendant's Sixth Amendment right to represent himself is "not absolute," and "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Martinez, 528 U.S. at 161-162. The court of appeals' decision in this case comports with those principles. Ross made his request "nearly two weeks into the trial, approximately 30 witnesses into the trial," and the district court found that "delay would be inevitable if [Ross] were allowed to represent [him]self." C.A. E.R. 89, 91 (capitalization omitted). Nothing in the court of appeals' unpublished memorandum either binds future panels of that court or precludes a district court from exercising its discretion to grant an untimely request in the presence of countervailing considerations.

Ross asserts (Pet. 23-24) that a conflict exists over the proper standard for evaluating untimely Faretta requests. He claims (Pet. 24) that several courts of appeals, including the court below, apply a categorical bar to such requests, whereas others hold that "the legitimate interests of the defendant must

be balanced against the potential disruption of the proceedings in progress." United States v. Matsushita, 794 F.2d 46, 51 (2d Cir. 1986). Any tension, however, does not warrant this Court's intervention. Ross does not cite any case in which a court of appeals applying a balancing test overturned the denial of a defendant's untimely request to represent himself. And it is especially unlikely that applying Ross's preferred test would have any effect in this case, given that the district court expressly applied the balancing test from Matsushita, whose approach petitioner himself endorses. C.A. E.R. 89-94 ("balanc[ing] the prejudice against [Ross's] legitimate interest in representing [him]self against the potential disruption of trial," and concluding the request should be denied) (capitalization omitted).

4. Petitioners Foreman and Hollins err in contending (Pet. 24-27) that the admission of jail-cell recordings in which they discussed Hill's murder violated the Fourth Amendment. In Hudson v. Palmer, 468 U.S. 517 (1984), this Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Id. at 526. "The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." Ibid. The Court found "the interest of

society in the security of its penal institutions" outweighed "the interest of the prisoner in privacy within his cell." Id. at 527. "The administration of a prison," the Court explained, "is at best an extraordinarily difficult undertaking," but "it would be literally impossible to accomplish the prison objectives * * * if inmates retained a right of privacy in their cells." Ibid. (citation and internal quotation marks omitted). And a prisoner's privacy interest in his jail cell "is already limited by the exigencies of the circumstances: A prison shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." Ibid. (citation and internal quotation marks omitted). The Court viewed it to be "accepted by our society that '[l]oss of freedom of choice and privacy are inherent incidents of confinement.'" Id. at 528 (quoting Bell v. Wolfish, 441 U.S. 520, 537 (1979)) (brackets in original).

Although Hudson involved the search of a convicted prisoner's cell, its reasoning applies equally to a pretrial detainee's expectation of privacy in his cell. "There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." Wolfish, 441 U.S. at 546 n.28. "In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial," ibid., or to protect "the safety of any other person and

the community," United States v. Salerno, 481 U.S. 739, 741 (1987); 18 U.S.C. 3142(e)(1). Furthermore, just like a convicted prisoner's cell, a pretrial detainee's cell "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." Hudson, 468 U.S. at 527 (citation omitted). Here, the cell in which Hollins and Foreman were detained included an intercom system through which inmates could speak to officers and officers could listen to inmates. C.A. Supp. E.R. 319. In addition, in Bell v. Wolfish, supra, the Court observed with respect to pretrial detainees that "[l]oss of freedom of choice and privacy are inherent incidents of confinement," 441 U.S. at 537 -- the same observation it made with respect to convicted prisoners in Hudson, see 468 U.S. at 528. And in a case upholding the warrantless search of a pretrial detainee, this Court relied upon and discussed with approval Hudson's holding that there is no Fourth Amendment protection against searches of inmate lockers and cells -- suggesting that Hudson is equally applicable to both prison inmates and pretrial detainees. See Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510, 1516-1517 (2012).

Petitioners assert (Pet. 24-25) that the decision below conflicts with the Second Circuit's decision in United States v. Cohen, 796 F.2d 20 (1986), as well as several state supreme court decisions that have endorsed Cohen's reasoning. The court in Cohen took the view that in the context of a search of a detainee's cell that had been initiated solely by the prosecutors assigned to his

case in order to gather evidence for the prosecution, and was not "even colorably motivated by institutional security concerns" or other "legitimate penological objectives," the detainee "retain[ed] an expectation of privacy within his cell sufficient to challenge [that] investigatory search." Id. at 23-24. But as the court of appeals explained, "this case is unlike Cohen." Pet. App. 3. The recording in this case was not justified "solely to obtain information" for the prosecution. See Cohen, 796 F.2d at 24. Law enforcement officials were aware of credible death threats against Faulkner, Hollins's girlfriend and a cooperating witness, and reasonably believed that any assassination attempt would be discussed with Hollins in advance. C.A. Supp. E.R. 318. As the court of appeals here recognized, because "law enforcement recorded [petitioners'] conversation based on real concerns about witness safety," Cohen would not apply. Pet. App. 3. The Second Circuit itself has clarified, subsequent to Cohen, that the "investigation and prevention of ongoing illegal inmate activity" -- such as witness interference -- "constitute legitimate penological objectives." United States v. Workman, 80 F.3d 688, 699 (2d Cir.) (citation omitted), cert. denied, 519 U.S. 938 and 519 U.S. 955 (1996).

Petitioners argue that Cohen is limited to "internal security-related reasons," such as "protect[ing] other detainees." (Pet. 25.) But preventing illegal activity by inmates does relate to prison security and, in any event, Cohen refers to "legitimate

penological objectives" generally. 796 F.3d at 23. Regardless, a factbound dispute over the proper application of Cohen does not merit this Court's review. Nor does the court of appeals' further distinction of Cohen on the ground that it involved a physical search, as opposed to the use of an electronic listening device, warrant review. Contrary to petitioners' contention (Pet. 26-27), the insertion of the electronic listening device into their cell was not a common-law trespass that might implicate the Fourth Amendment under United States v. Jones, 565 U.S. 400 (2012), because neither petitioner had a property interest in the cell, see id. at 405. And petitioners identify no court of appeals that has held otherwise.

In any event, this case would be a poor vehicle for considering the asserted Fourth Amendment claim, for two reasons. First, the good-faith exception to the warrant requirement would prevent suppression of the evidence even if it were obtained in violation of the Constitution. See Davis v. United States, 564 U.S. 229 (2011). The exception applies when the "police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." Id. at 238 (citation omitted). That standard is satisfied here: the recording device was installed at the request of a California law enforcement officer who consulted a state prosecutor before he acted; the California Supreme Court had squarely held almost a decade earlier that pretrial detainees have no reasonable expectation of privacy in their jail cells, see

People v. Davis, 115 P.3d 417, 429-430 (2005); and Ninth Circuit precedent was to the same effect, see, e.g., United States v. Van Poyck, 77 F.3d 285, 291 & n.10, cert. denied, 519 U.S. 912 (1996). Second, any error was harmless. A RICO conspiracy requires proof of an agreement to commit "at least two" racketeering acts. 18 U.S.C. 1961(5). The government here proved nine acts, and the jail cell recordings pertained only to two. And even as to the acts discussed in those recordings, the government introduced voluminous additional evidence of guilt. Gov't C.A. Br. 101-103.

5. Finally, petitioners contend (Pet. 27-36) that the special verdict form used by the district court did not support their life sentences because it did not require the jury to specify which predicate racketeering act it attributed to each defendant. Under the Sixth Amendment, any fact other than a prior conviction that increases the penalty for the crime "beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The maximum penalty for violating the RICO statute is 20 years of imprisonment, unless the "violation is based on a racketeering activity for which the maximum penalty includes life imprisonment," in which case the maximum penalty increases to life imprisonment. 18 U.S.C. 1963(a).

In this case, the district court used a special verdict form that required jurors to make a finding about whether each petitioner had agreed that at least one of four listed acts

carrying a life maximum -- murder; conspiracy to commit murder; sex trafficking of a minor; and sex trafficking by force, fraud, or coercion -- would be committed in the course of the charged RICO conspiracy. C.A. E.R. 176. Such a finding would trigger the statutory provision permitting life imprisonment. Because the jury unanimously marked the special verdict form "yes" for each petitioner, the life sentence imposed on each petitioner satisfies Apprendi and the Sixth Amendment.

Petitioners claim (Pet. 33-34) that by failing to require the jury to specify a particular predicate act for each defendant, the special verdict form "insulated the jury from the more-than-theoretical possibility" that its findings were unsupported by the evidence (Pet. 34). But petitioners have not explained why the problem they describe is more than theoretical, given that they have made no sufficiency challenge to any of the racketeering acts on appeal or in their petition for a writ of certiorari. It therefore does not matter to petitioners' life sentences which predicate act the jury found for any given petitioner.

Petitioners err in asserting (Pet. 34-36) that the court of appeals' decision conflicts with the Eleventh Circuit's decision in United States v. Nguyen, 255 F.3d 1335, 1343-1344 (2001). As the court of appeals recognized (Pet. App. 3-4), no such conflict exists. In Nguyen, the jury found that the defendants had committed various predicate acts punishable by less than life in prison, but "failed to find that any of the defendants had

committed a predicate act that had a potential penalty of life imprisonment." Id. at 1343 & n.12. Accordingly, the problem in Nguyen was not that the verdict form was insufficiently specific -- as petitioners claim here -- but rather that the jury simply failed to make the requisite findings altogether. No similar failure occurred in this case, where the special verdict form expressly required the jury to find that each petitioner had agreed that at least one of four listed acts carrying a life maximum would be committed in the course of the charged RICO conspiracy, and the jury answered "yes" for each of them. C.A. E.R. 176; see Pet. App. 3-4 ("Because of the special verdict form, this case does not raise the same concerns as" Nguyen).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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