No. 19-6190

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 REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

United States Constitution

INTRODUCTION

Petitioners Jermaine Gerald Cook, Marcus Anthony Foreman, Terry Carry Hollins, and Wilbert Ross, III (collectively, "Petitioners") presented several questions in their petition for a writ of certiorari. Illustrating the seriousness with which it views them, the government not only opposes the writ's issuance, but also focuses on each question's merits and the underlying case's suitability as a vehicle for resolving it. Petitioners reply below seriatim.

I. QUESTION NO. 1 (BATSON)

A. Introduction

Acknowledging – as it must – the fundamental principles animating Batson and its progeny (see Petition (Pet.) at 17-18), the government principally responds by contending that its prosecutor's unaccepted offer to balance the jury racially by substituting an African-American venire member for another African-American, whom the government had peremptorily stricken, eliminates any constitutional complications. Brief in Opposition (Brief in Opp.) at 18-19. Quite notably, though, the government does not – as it does with its some of its responses elsewhere in its Brief in Opposition– directly assert that the underlying case is an unsuitable vehicle for resolving Petitioners' Batson-related question. See Brief in

Opp. at 16-21, 24, 28-31.

As Petitioners will explain further, the government's response here fundamentally misapprehends Petitioners' Batson theory, which focuses on what the prosecutor's offer signified about the impermissible animus that motivated him to exercise the peremptory strike on the African-American venire member that preceded his impermissible offer to balance racially.

B. The Government Misapprehends Why the Ninth Circuit's Disposition Conflicts With Racial-Balancing Opinions From the Second and Sixth Circuits

1. Seeking to minimize its prosecutor's serious error, the government contends initially that "Petitioners do not suggest that" the reasons he stated for using a peremptory strike on an African-American venire member "were insufficient or pretextual." Brief in Opp. at 18. But simply put, this is not correct.

Indeed, as Petitioners earlier alluded to at length (see Pet. at 19-20), they do contend the prosecutor's impermissible offer to balance the jury racially to demonstrate that pretext indeed existed. See, e.g., Pet. at 20 (citing to and quoting Strickland v. State, 980 So.2d 908, 915 (Miss. 2008)). At bottom, Petitioners contend that the prosecutor's remarks demonstrate that he actually was focused on the petit jury's racial composition – not the stated reasons that he proffered for the strike.

Thus, far from being "'inartful,'" (Brief in Opp. at 18) they instead resulted in a Batson violation, one that the Ninth Circuit could not cure by casting the dispute as being factual in nature. And in so doing, the Ninth Circuit's disposition conflicted with contrary approaches that the Second and Sixth Circuits employed in published opinions. Pet. at 20.

2. Attempting to illustrate that a circuit conflict does not exist with the Second Circuit's opinion 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), regarding this question, the government contends principally that – unlike those cases – Petitioners here did not accept the prosecutor's impermissible offer to balance the jury racially by substituting an African-American into the petite jury. Brief in Opp. at 18-19. But Petitioners' theory regarding this question does not hinge on that immaterial distinction.

Instead, as Petitioners have already discussed at length (see Pet. at 19-21), what was significant about the prosecutor's remarks is not that he was unsuccessful in his racial-balancing ambitions but, rather, that he even made the offer. That is, Petitioners contend that the offer itself was constitutionally improper because it illustrated – for purposes of Batson's final prong, focusing on whether the prosecutor's proffered reasons for the strike were pretextual (see Pet.

at 19-20) – that constitutionally prohibited racial-based rationales had motivated him, therefore rendering pretextual all of the stated reasons that he had offered for the strike. And, consequently, the Ninth Circuit's disposition of this question conflicted with Nelson and Rice by not evaluating that strike through Batson's intricate multi-pronged lens.

3. Focusing narrowly on this case's unique factual pattern, the government asserts that Petitioners have not identified a published opinion from a federal court of appeals that presents a similar improper offer that the defendants rejected. Brief in Opp. at 19-20. But if anything that further favors a grant of certiorari.

Indeed, not only does the Ninth Circuit's disposition conflict with the governing principles that Nelson and Rice set forth in cases involving racial balancing, but it also presents a conundrum for defense counsel, who might appreciate a government offer of further minority participation on the petit jury but not want to condone a Batson violation by so accepting. Thus, the Court should grant certiorari on this question to resolve both the inter-circuit conflict and a factual scenario that will likely recur – and vex defense counsel – without the Court's guidance.

II. QUESTION NO. 2 (FARETTA)

A. Petitioners Foreman's and Hollins's Pretrial Invocations

1. The government contends initially that the Ninth Circuit's affirming the district court's findings regarding Petitioners Foreman's and Hollins's supposed bad-faith and delay-related motives for invoking their Faretta rights was consistent with that court's longstanding precedents. See Brief in Opp. at 21 (citing Burton v. Davis, 816 F.3d 1132, 1159 (9th Cir. 2016); United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986) (per curiam)). But that unassailable argument overlooks the gravamen of Petitioners Foreman's and Hollins's question presented: that such a deferential standard of review involving a fundamental right of a criminal defendant conflicts with what every other federal court of appeals applies when reviewing a Faretta claim. See Pet. at 22-23.

2. Apparently realizing this, the government next asserts that there is no difference between the Ninth Circuit's ostensible clear-error standard of review and that which any other federal court of appeals applies under Faretta. Brief in Opp. at 22. That not only presumes, however, that the Ninth Circuit's approach – elevating a factual finding into a conclusive determination regarding a defendant's Sixth Amendment rights – is correct, but also is inconsistent with how other circuits have approached this question.

Indeed, in describing the Fourth Circuit's opinion in United States v. Bush, 404 F.3d 263 (4th Cir. 2005) (see Pet. at 22), the government's own parenthetical quotation notes that circuit's ultimate Faretta determination, after reviewing factual issues for clear error, occurs after a de novo review. See Brief in Opp. at 22 ("'We review a district court's denial of a defendant's right to self representation de novo' and 'the district court's finding of historical fact' – including whether a request was designed to 'delay and manipulate' – 'for clear error.'" (quoting Bush, 404 F.3d at 270, 272). And the Fifth Circuit opinion that the government quotes from approvingly (see Brief in Opp. at 22) has language similar to Bush's. United States v. Weast, 811 F.3d 743, 748 (5th Cir.) ("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).

3. The government further argues cursorily that no conflict exists between the Ninth Circuit's disposition and those federal courts of appeals opinions that Petitioners Hollins and Foreman cite that apply an abuse-of-discretion standard of review. But as the Ninth Circuit's own abuse-of-discretion formulation illustrates, that review is more intricate than determining merely whether there had been a "'clearly erroneous assessment of the evidence'"

(Brief in Opp. at 22 (quoting Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U,S, 559, 563 n.2 (2014)). See, e.g., United States v. Hinkson, 585 F.3d 1247, 1261-64 (9th Cir. 2009) (en banc). Thus, contrary to what the government contends, the Ninth Circuit's approach in that context illustrates that a standard less deferential than clear-error review plainly could have outcome-determinative effects.

4. Finally, the government argues that Petitioners Foreman and Hollins do not cite to a specific case in which a federal court of appeals affirmed a district court's factual findings in the Faretta context, but nevertheless reversed based on a less-deferential standard of review. Brief in Opp. at 21. If the government is suggesting that such a precise congruence is necessary before a requisite circuit conflict could exist, that would mean that the Ninth Circuit's outlier approach – declining to articulate a standard for Faretta claims and essentially allowing what amounts to clear-error review – could never get reconciled with its sister circuits' approaches, which are themselves divergent. See Pet. at 22-23. And a split would therefore remain into perpetuity.

But instead, the Court should grant certiorari, and then ultimately permit the Ninth Circuit to decide, under a correctly applied standard of review, whether to reverse Petitioners Foreman and Hollins's convictions.

B. Petitioner Ross's Invocation During Trial

1. Initially, the government contends that Petitioner Ross did not have an absolute right to represent himself after the trial began. Brief in Opp. at 23. But that position is somewhat of a strawman. Indeed, Petitioner Ross does not contend otherwise. Rather, as he argued earlier (see Pet. at 23-24), the Ninth Circuit's disposition conflicts with three of its sister circuits that have adopted multi-pronged tests to determine whether a defendant can proceed pro se after the district court has already empaneled a jury. Quite notably, the government appears to at least implicitly acknowledge – as it must – that such a circuit split exists. See Brief in Opp. at 23-24.

2. Having at least alluded to a conflict, the government makes several arguments concerning why – at least in its estimation – this case is a poor vehicle for the specific question that Petitioner Ross presents. Brief in Opp. at 23-24. But each is unavailing.

First, the government contends that Ninth Circuit's "unpublished disposition" does not "either bind[] future panels or preclude[] a district court from exercising its discretion to grant an untimely request in the presence of countervailing considerations." Brief in Opp. at 23. But this is so only in the most literal sense. That is, although the disposition itself is non-binding, it cited a Ninth

Circuit opinion it deemed to be controlling on this question, establishing a categorical rule that an untimely Faretta request is barred per se. See App. 3 (discussing United States v. Carpenter, 680 F.3d 1101, 1102 (9th Cir. 2012) (per curiam)). Consequently, the "discretion" to which the government alludes does not exist.

Second, the government observes that Petitioner Ross did not "cite any case applying a balancing test overturned the denial of a defendant's untimely request to represent himself. Brief in Opp. at 24. But this is – if anything – irrelevant because the facts that Petitioner Ross presents, demonstrate that a test similar to what the Second, Third, and Tenth Circuits use could have led to a different result. Indeed, Petitioner Ross was willing to proceed pro se immediately. And the other Petitioners had trial counsel, therefore obviating some of the difficulties Petitioner Ross might have otherwise encountered in representing himself. See App. 78-83, 109-110. Thus, Petitioner Ross certainly could have prevailed if the Ninth Circuit had applying a multi-prong balancing test.

Finally, the government contends that Petitioner Ross's Faretta claim already failed after the district court applied the Second Circuit's test that it promulgated in United States v. Matsushita, 794 F.2d 46, 51 (2d Cir. 1986). Brief in Opp. at 24. But this overlooks the Ninth Circuit's having ducked that

issue because it deemed itself bound by precedents applying a categorical time-bar rule to in-trial Faretta requests. Thus, it is an open question regarding how the Ninth Circuit on remand would resolve Petitioner Ross's Faretta claim under a test similar to Matsushita's.

III. QUESTION NO. 3 (FOURTH AMENDMENT)

A. The Court Has Never Opined Definitively Regarding Whether *Hudson's* Rule Applies to Pretrial Detainees

Initially, the government argues that the Court's opinion in Hudson v. Palmer, 468 U.S. 517, 526-28 (1984), precluding inmates serving a custodial sentence from asserting Fourth Amendment rights against warrantless jail-cell searches, applies similarly to detainees who are awaiting trial. The government also contends that Hudson and later opinions from the Court construing it have implicitly resolved the question in the government's favor. Brief in Opp. at 25-26.

Petitioners Foreman and Hollins fundamentally disagree with the government's jurisprudential assessment,[1] and contend that this is a sufficiently

[1] Petitioners Foreman and Hollins observe, for example, that the Court in Bell v. Wolfish, 441 U.S. 520, 534 (1979), held notably that its rule regarding a pretrial detainee's generalized "right" to – among other things – "be free of punishment" is concomitant with "any express guarantee of the Constitution" that a litigant "challenge[s]" in a particular case. Here, of course, Petitioners Foreman and Hollins assert such a "guarantee" under the Fourth Amendment. And Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510, 1516-1517 (2012), limited its reading of Hudson to a particular context: ". . . [C]orrectional officials

important question that the Court should resolve definitively following full merits briefing and oral argument. Indeed, considering the Second Circuit in United States v. Cohen, 796 F.2d 20 (2d Cir. 1986), and several state supreme courts have reached conclusions different from the government's desired rule (see Pet. at 25), the Fourth Amendment calculus in the pretrial detention context is controverted, therefore warranting certiorari.

B. Contrary to the Government's Arguments, *Cohen* is On Point

Recognizing Cohen's importance in the certiorari context, the government attempts to distinguish it from the present case. Principally, the government contends that its putative "'real concerns about witness safety'" here (Brief in Opp. at 27 (quoting App. 3)) make Cohen inapplicable. See also Brief in Opp. at 27-28.

But Cohen made plain that Fourth Amendment exceptions in pretrial-detention facilities attach only when there are "legitimate needs of institutional security." Cohen, 796 F.2d at 23 (emphasis added). And try as it may, the government simply cannot contort Cohen's core holding regarding

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must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." Id. at 1517. Almost needless to say, the present case does not involve "contraband" in Petitioners Foreman's and Hollins's pretrial detention cell.

intrinsic security measures at the facility to justify a warrantless search to protect someone who resides outside of it.[2]

A conflict therefore exists between the Ninth Circuit's disposition and Cohen (and several state supreme courts, see Pet. at 25). The Court should grant certiorari to resolve it.

C. This Case is a Strong Vehicle to Resolve the Conflict

Apparently concerned that a conflict genuinely exists regarding the Fourth Amendment question that Petitioners Foreman and Hollins presents, the government articulates two reasons why this case is not a proper vehicle to resolve it. Neither is availing, however.

1. Initially, the government asserts that the Fourth Amendment's good-faith exception ultimately precludes Petitioners Foreman's and Hollins's claim. Brief in Opp. at 28-29. But the Ninth Circuit never addressed that defense, therefore making it a live issue on remand – not an alternative holding that would make this case a poor vehicle for review – if the Court were to grant certiorari and

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[2] Notwithstanding the government's argument that the Second Circuit limited Cohen's holding in United States v. Workman, 80 F.3d 688, 699 (2d Cir. 1996) (Brief in Opp. at 27) – a case that did not even cite Cohen – Petitioners Foreman and Hollins observe that the appellant who asserted the Fourth Amendment claim (Green) was an inmate serving a custodial sentence when the putative violation occurred, not a pretrial detainee. See Workman, 80 F.3d at 693-94, 698-99. Workman therefore is inapposite.

reverse. And Petitioners Foreman and Hollins observe that it is an open question regarding whether a non-binding state supreme court opinion about the Fourth Amendment to the United States Constitution (People v. Davis, 115 P.3d 417, 429-30 (Cal. 2005)) and the Ninth Circuit's not-on-point opinion in United States v. Van Poyck, 77 F.3d 285, 291 & n.10 (9th Cir. 1996),[3] would permit reasonable law enforcement officers to have "an objectively reasonable good-faith belief that their conduct is lawful." Davis v. United States, 564 U.S. 229 (2011).

2. The government also contends that any Fourth Amendment error here was "harmless" beyond a reasonable doubt within the case's overall context. Brief in Opp. at 29. But as with the government's good-faith defense, the Ninth Circuit never addressed this in its disposition. And contrary to a case such as Milton v. Wainwright, 407 U.S. 371, 372-73 (1972), those inculpatory statements were not cumulative to others that a trial court properly admitted, therefore making them more conspicuous to the jury here. See also Berkemer v. McCarty, 468 U.S. 420, 443-45 (1984).

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[3] Van Poyck involved a pretrial detainee who had consented to having his telephone calls recorded. Van Poyck, 77 F.3d at 290. The Ninth Circuit held that voluntary act, plus the facility's internal "institutional safety" needs and his not having a reasonable expectation of privacy in the telephonic conversations, defeated his Fourth Amendment claim. Id. at 290-91. Almost needless to say, there is a vast difference between that fact pattern and what Petitioners Foreman's and Hollins's case presents.

IV. QUESTION NO. 4 (APPRENDI)

Without questioning the crux of Petitioners' argument regarding the rule of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), and concomitant unanimity requirement that the Sixth Amendment sets forth (see Pet. at 27-33), the government proffers two short arguments regarding this question. Neither is availing, however.

First, the government contends that because Petitioners did not make a "sufficiency challenge to any of the racketeering acts on appeal," the "problem they describe is" entirely "theoretical." Brief in Opp. at 30. But because the jury's special verdict questions regarding the predicate sentencing-enhancement acts lacked the requisite specificity, Petitioners could not make such a motion during the case's post-trial phase, given that they could not divine from the verdict form which particular offense the jury attributed to each of them. See Pet. at 33-34. And that vagueness is precisely why the Court should grant certiorari to clarify this important issue.

Second, the government argues that the Ninth Circuit's disposition does not conflict with Eleventh Circuit's opinion in United States v. Nguyen, 255 F.3d 1335, 1343-44 (11th Cir. 2001), because there "the jury simply failed to make the requisite findings altogether." Brief in Opp. at 31. What is problematic for the

government, however, is that the Nguyen's rule sweeps more broadly than the government characterizes it, requiring a jury "to find which predicate acts each defendant had agreed to commit or which acts each defendant knew or intended would be comitted as part of a pattern of racketeering activity." Nguyen, 255 F.3d at 1342 (emphasis added).

Consequently, because a circuit conflict does indeed exist, the Court should grant certiorari.

CONCLUSION

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

Dated: December 20, 2019

Respectfully submitted,

s/ David A. Schlesinger

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on December 20, 2019, as required by Supreme Court Rule 29, I served Petitioners Jermaine Gerald Cook's, Marcus Anthony Foreman's, Terry Carry Hollins's, and Wilbert Ross, III's JOINT REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to him, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

The Honorable Noel J. Francisco, Esq.
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Additionally, I mailed a copy of the motion and the petition to each of the Petitioners by depositing envelopes containing the documents in the United States mail, postage prepaid, and sending them to the following addresses:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2019

s/David A. Schlesinger

_____

DAVID A. SCHLESINGER
Declarant