No.

In the

Supreme Court of the United States

Yessenia Jimenez,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government violated *Batson v. Kentucky*, 476 U.S. 79, (1986), in the trial of a female Hispanic New York City police officer when it used peremptory challenges on three of the four female Hispanic prospective jurors and provided pretextual and factually incorrect reasons for its strikes.

2. Whether Ms. Jimenez was improperly prevented from cross-examining and introducing evidence that was crucial to the defense argument that the sole purpose for Ms. Jimenez's trips to Massachusetts were social in nature rather than part of any narcotics conspiracy.

3. Whether the government's reference, in its summation, to Ms. Jimenez's Fifth Amendment rights in order to impeach her trial testimony, violated her due process rights and should have resulted in a mistrial.

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The decision of the United States Court of Appeals for the Second Circuit was unpublished, issued as a summary order, and is available at 2021 U.S. App. LEXIS 5223 (2d Cir. Feb. 23, 2021). (Pet. App. A.[1])

JURISDICTION

The Second Circuit filed its decision on February 23, 2021. (Pet. App. A.) This Court has jurisdiction to review the Second Circuit's decision on a writ of certiorari pursuant to 28 U.S.C § 1254(1).

STATUTORY AND EVIDENTIARY PROVISIONS INVOLVED

The constitutional provisions at issue in this case are the due process clause of the Fourteenth Amendment, Section 1, the Fifth Amendment, and the Sixth Amendment. The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment provides:

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[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

> No person shall be held to answer for a capital, or otherwise infamous crime, 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 offense 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 reads:

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

The evidentiary provision involved is Rule 611 of the Federal Rules of evidence, which provides:

> (a) **Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
> (1) Make those procedures effective for determining the truth;
> (2) Avoid wasting time; and
> (3) Protect witnesses from harassment or undue embarrassment.
>
> (b) **Scope of Cross-Examination.** Cross examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
>
> (c) **Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
> (1) On cross-examination; and
> (2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

STATEMENT OF THE CASE

1. The Charges

By superseding indictment filed August 1, 2018, Ms. Jimenez, a thirty-two-year-old Hispanic police officer was charged with participating in a conspiracy to commit narcotics trafficking, possessing narcotics with the intent to distribute them, and possessing a firearm in furtherance of the charged narcotics offenses. (C.A.J.A. at 46-51.) The superseding indictment charged Ms. Jimenez with conspiring with Luis Soto, Pablo-Garcia Ontiveros, Jesus Lopez, Perry Mahan, and Herbito Duarte-Gutierrez to distribute and possess one kilogram and more of mixtures containing heroin and fentanyl and five kilograms or more of mixtures containing cocaine in violation of 21 U.S.C. §§ 846, 841(b)(1)(A). (C.A.J.A. at 46-47.) The superseding indictment also charged Ms. Jimenez and Luis Soto with possessing with the intent to distribute a detectable amount of heroin and fentanyl on March 13, 2018, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B). (C.A.J.A. at 47-48.) Lastly, the superseding indictment charged Ms. Jimenez and Luis Soto with possessing a firearm in furtherance of the charged narcotics offenses in violation of 18 U.S.C. § 924(c)(1)(A)(i). (C.A.J.A. at 48.)

2. Trial - Voir Dire

On March 4, 2019, the trial commenced against Ms. Jimenez. (C.A.J.A. at 32.) The jury pool was convened and provided with questionnaires. (C.A.J.A. at 235.) There were five prospective jurors who informed the district court that they had relatives who had been convicted of criminal offenses. Two of those five prospective

jurors were Hispanic females, *i.e.*, prospective juror number 4, a twenty-three-year-old Bronx, New York resident, and prospective juror number 12, a twenty-four-year-old Bronx, New York resident. (C.A.J.A. at 258, 289.)

In explaining the situation to the district court, prospective juror number 4 stated, "[m]y father, he was in jail for a bit when I was younger, so - my parents are divorced so I don't know much about it. But I know he was in jail when I was growing up." (C.A.J.A. at 257.) When the district court asked if she knew why her father was in jail, prospective juror number 4 responded, "I think it was like a firearm possession, but I'm not sure." (C.A.J.A. at 257.) When asked by the district court whether there was "[a]nything about that fact, that your father was convicted of a crime and did time, that you think would affect your ability to be a fair juror in this case?", prospective juror number 4 responded, "[n]o." (C.A.J.A. at 257.)

Prospective juror number 12 disclosed to the court that she had an uncle, whom she was not close to, who was convicted of drug possession about three years ago. (C.A.J.A. at 287-288.) When asked by the district court if there was anything about the experience with her uncle that would affect her ability to be a fair juror, prospective juror number 12 responded, "[n]o." (C.A.J.A. at 288.)

There were three other prospective jurors who were not Hispanic females who disclosed to the district court that they had close relatives that had been convicted of crimes. (C.A.J.A. at 254-255, 331-333, 339-340.) Like prospective juror numbers 4 and 12, these three prospective jurors informed the district court that their relative's

criminal conviction would not affect their ability to be a fair and impartial juror in Ms. Jimenez's case. (C.A.J.A. at 254-255, 331-333, 339-340.)

There were two prospective jurors who disclosed that they had a close family member murdered. Prospective juror number 12, a 24-year-old Hispanic female and Bronx, New York resident, explained that her brother had been murdered. (C.A.J.A. at 284, 289.) The district court questioned prospective juror number 12 extensively about her feelings related to her brother's murder. (C.A.J.A. at 284-287.) Prospective juror number 12 told the district court that she felt some resentment towards the police over the way her brother's case was handled but agreed that she could listen to testifying police witnesses in Ms. Jimenez's case fairly. (C.A.J.A. at 286.) When asked by the district court if she would be able to listen to the evidence and decide the case fairly, prospective juror number 12 responded, "[y]es." (C.A.J.A. at 287.) When the government challenged prospective juror number 12 for cause, in denying the request the district court found that "I sort of take this as like maybe she's not entirely eager to be on a jury, but, I mean, none of this sort of adds up to somebody who's not going to listen fairly." (C.A.J.A. at 288.)

There was one other prospective juror who had a close family member murdered, he told the district court that it would "not consciously" affect his ability to be a fair juror in the case. (C.A.J.A. at 321-322.)

There were three prospective jurors who expressed to the district court that they had opinions with respect to narcotics. One of those prospective jurors (who was ultimately empaneled as a juror in the case) stated that she had "strong

feelings about narcotics and what they do to people." (C.A.J.A. at 279.) One prospective juror initially told the district court with respect to narcotics laws, "just to be honest, I don't think I could be impartial about some of that stuff." (C.A.J.A. at 293.)

The third juror who expressed an opinion about narcotics to the district court was prospective juror number 16, a twenty-six-year-old, Hispanic, Bronx resident originally from the Dominican Republic. (C.A.J.A. at 298, 300.) With respect to prospective juror number 16's position concerning narcotics, she explained to the district court that she had graduated from medical school in the Dominican Republic and was currently working with substance abusers in a psychiatric department while trying to obtain her residency in the United States. (C.A.J.A. at 300.) While she acknowledged that she had ethical opinions about "mental health and physical and about the use of – substance abuse in patients," she affirmatively expressed that she could listen to the evidence and make a fair judgment with respect to the charges against the defendant. (C.A.J.A. at 300-301.)

Prior to the parties exercising their peremptory strikes, four Hispanic female prospective jurors remained. (C.A.J.A. at 347.) With its first five peremptory challenges, the government struck three of the four prospective female Hispanic jurors, *i.e.*, juror numbers 4, 12, and 16. (C.A.J.A. at 344-346.) The defense raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). (C.A.J.A. at 347.) After first concluding that the government had exercised strikes against female

Hispanic jurors, the district court ordered the government to proffer its explanations for striking each of the three prospective female Hispanic jurors. (C.A.J.A. at 347.)

With respect to prospective juror number 4, the government proffered the following explanation: "she was somebody who had – her father had spent time in jail for firearm possession, and we had concerns that that might affect her ability to fairly address the firearm possession charge at issue in this case." (C.A.J.A. at 347.)

With respect to prospective juror number 12, the government proffered the following explanation: "it's another person who had a family history of conviction for drug possession, which we thought was something that was – you know, because this is a case for drug possession. She also expressed that she had a bad experience with the police in regard to her father's murder, and she was resentful of the criminal justice system because of that experience." (C.A.J.A. 347-348.) There were two factual inaccuracies in the government's proffered explanation. First, prospective juror number 12 was the first prospective juror the government sought to strike because of a family member with a prior drug conviction. Second, it was prospective juror number 12's brother who was murdered not her father. (C.A.J.A. at 284.)

The government proffered the following explanation with respect to prospective juror number 16: "she also expressed some real hesitation about dealing with the drug issues, the issue in this case. ... She had a, sort of a strong emotional reaction to the discussion of heroin." (C.A.J.A. at 348.) The defense pointed out that prospective juror number 16's emotional reaction had nothing to do with heroin but a difficult situation that her family was dealing with in family court concerning her

eight-year-old nephew and allegations of sexual abuse by his parents. (C.A.J.A. at 348-349; 301-302.)

The government did not use preemptory challenges to strike the three other prospective jurors, none of whom were Hispanic females, who disclosed to the district court that they had relatives who had prior criminal convictions. (C.A.J.A. at 344-346.) Despite its proffered reason for striking prospective juror number 12, the government did not strike the prospective juror who told the court that his father's murder would "not consciously" affect his ability to be a fair juror in the case. (C.A.J.A. at 321-322, 344-346.)

In addition to prospective juror number 16, the government exercised a peremptory challenge to strike one of the two other prospective jurors who expressed strong feelings about narcotics, specifically, they moved to strike the prospective juror who initially told the district court with respect to narcotics laws, "just to be honest, I don't think I could be impartial about some of that stuff." (C.A.J.A. at 293, 344-346.) However, they did not move to strike the prospective juror (who was ultimately empaneled as a juror in the case) who stated that she had "strong feelings about narcotics and what they do to people." (C.A.J.A. at 279, 344-346.)

The district court failed to make an explicit finding as to the government's proffered explanation for prospective juror number 16. (C.A.J.A. at 350.) Instead, the court made an unsolicited comment that, "I have to tell you, the juror who's so emotional about the nephew, I also have some questions about her command of English." (C.A.J.A. at 350.) While prospective juror number 16 spoke with an accent,

the trial record is clear that she had no problem expressing herself in English or understanding or answering the questions posed by the district court. (C.A.J.A. at 299-302.)

The district court found that the reasons proffered by the government for prospective juror numbers 4 and 12 were reasonable race and gender neutral explanations but noted that she was "watching for the next one." (C.A.J.A. at 350.)

3. The Trial Evidence

At trial, the government called eight witness and Ms. Jimenez testified in her defense. Below is a summary of the relevant trial testimony.

A. Steven Millwater and Patrick Quinn

The government called two law enforcement officers involved in arresting Ms. Jimenez on March 13, 2018. The government's first witness was Steven Millwater, an NYPD detective and a drug enforcement task force officer with the Drug Enforcement Administration ("DEA"). (C.A.J.A. at 158.)

Detective Millwater testified that in the evening of July 21, 2017, he was conducting surveillance inside a building located at 3066 Buhre Avenue, Bronx, New York. (C.A.J.A. at 186.) He explained that he believed that apartment 1B at that address was a stash house for narcotics and was waiting for a search warrant to search the apartment. (C.A.J.A. at 187-188.) While waiting for the search warrant he saw a person, who he now knows to be Luis Soto, approach apartment 1B carrying a plastic bag containing $40,000 packaged in bundles with rubber bands. (C.A.J.A. at 188-189.) After he placed Luis Soto under arrest, he obtained the search warrant

for the apartment and conducted a search which resulted in a seizure of 27 kilograms of assorted narcotics including fentanyl, heroin, cocaine, and mixtures of the same. (C.A.J.A. at 189.) That night was the first time that Detective Millwater had ever heard of Luis Soto. (C.A.J.A. at 191.)

Detective Millwater explained that they had obtained a "pen and ping" on Luis Soto's phone that allowed them to track the movements of the phone using global positioning ("GPS"). (C.A.J.A. at 162-163.) Through the course of their investigation, law enforcement identified 1015 Boynton Avenue, Bronx, New York as a possible location used by the narcotics organization they were investigating. (C.A.J.A. at 161.) Through surveillance on Luis Soto's phone, Detective Millwater learned that the phone traveled to Massachusetts on March 11, 2018, and traveled back to New York City late on March 12, 2018. (C.A.J.A. at 196.)

Detective Millwater testified that in the early morning hours of March 13, 2018, he and two other agents, William Blanco and Patrick Quinn, observed a car occupied by three individuals approach 1015 Boynton Avenue, Bronx, New York. (C.A.J.A. at 163.) He observed Luis Soto exit the vehicle from the rear passenger side with a duffel bag that, after a search, contained cash packaged in bundles with rubber bands. (C.A.J.A. at 164.) Detective Millwater testified that Ms. Jimenez was sitting in the front passenger seat with her identification and New York City Police Department badge in her hand saying, "I'm on the job." (C.A.J.A. at 165.) On cross examination, Detective Millwater conceded that when a police officers says they are "on the job" it does not necessarily mean the person is currently working but just

identifies them as being a police officer. (C.A.J.A. at 199.)

Detective Millwater further testified that on the floor of the vehicle near Ms. Jimenez was her purse with her firearm and currency packaged in bundles with rubber bands. (C.A.J.A. at 165.) He explained that they seized a total of approximately $50,000, approximately $25,000 from a bag with which Luis Soto exited and $25,000 from Ms. Jimenez's purse. (C.A.J.A. at 218.)

After seizing the money, Ms. Jimenez's gun, and her badge, Detective Millwater and Agent Blanco went upstairs to Ms. Jimenez's apartment with her. (C.A.J.A. at 173.) Ms. Jimenez provided them with verbal and written consent to search her apartment, but they waited for a search warrant to be issued before effectuating the search, which they conducted in the early morning of March 13, 2018. (C.A.J.A. at 173.) Detective Millwater testified that there were three closets in Ms. Jimenez's apartment, one containing female clothes, one with assorted stuff, and a third closet that contained clothing consistent with a thirty-year-old male and had no female clothing in it. (C.A.J.A. at 205.) He testified that in the closet containing the clothing consistent with a thirty-year-old male, he recovered a bag containing fentanyl and a mixture of heroin and fentanyl. (C.A.J.A. at 175-176, 178-179.) He testified that he also recovered a notebook that he believed to be a drug ledger from the nightstand in the bedroom that did not have a safe on it. (C.A.J.A. at 181, 185-186.)

Patrick Quinn, a DEA special agent, also testified concerning the circumstances of Ms. Jimenez's March 13, 2018 arrest. (C.A.J.A. at 679, 683.) He

testified that he first became involved in an investigation concerning Luis Soto and Ms. Jimenez in January 2018. (C.A.J.A. at 680.) He explained that they had come to his attention after he seized $70,000 and a cellular telephone from an individual named Juan Carlos Delgado. (C.A.J.A. at 681.) The telephone had messages containing a code with a money pickup and a number that belonged to Luis Soto. (C.A.J.A. at 681.) He was able to determine that the number belonged to Luis Soto because they obtained court ordered GPS surveillance on the telephone and learned that the number belonged to Luis Soto and that he lived at 1015, Boynton Avenue, Bronx, New York, with Ms. Jimenez. (C.A.J.A. at 681-682.)

Agent Quinn further testified that GPS surveillance on Luis Soto and Ms. Jimenez's telephones showed that the telephones traveled to Massachusetts on March 11, 2018, and that they appeared to stay in a hotel in Massachusetts overnight. (C.A.J.A. at 683.)

Agent Quinn testified that around 1:00 a.m. on March 13, 2018, he and two other law enforcement officers established surveillance outside of 1015 Boynton, Avenue, Bronx, New York, in a vehicle a few car lengths from the vehicle in which Luis Soto and Ms. Jimenez were passengers. (C.A.J.A. at 685.) He explained that they observed the vehicle park in front of 1015 Boynton, Avenue, Bronx, New York, and Luis Soto exited the vehicle and begin removing several bags from the trunk, at which point the officers activated their emergency lights and made contact with all three passengers in the vehicle. (C.A.J.A. at 686.) The driver of the vehicle identified himself as Walmis Guzman and told the officers that they were coming from New

Jersey, which they knew to be untrue because of the GPS surveillance. (C.A.J.A. at 689.) Walmis Guzman was asked to step out of the vehicle and they conducted a pat down search for weapons. (C.A.J.A. at 689.) While they were conducting the pat down search, Detective Millwater saw a large amount of currency in Ms. Jimenez's purse. (C.A.J.A. at 689.) Agent Quinn testified that they took all three individuals into custody and seized a total of approximately $52,000 (approximately $25,000 from Luis Soto and approximately $25,000 from Ms. Jimenez's purse) as well as some cellular telephones. (C.A.J.A. at 690.) After all three individuals were arrested and processed, Walmis Guzman was released and no charges were ever brought against him. (C.A.J.A. at 690-691.)

B. Felix Morel Moreta

The government's case rested largely on the credibility of Felix Morel Moreta, a cooperating witness who testified pursuant to a cooperation agreement with the government. (C.A.J.A. at 424.)

Mr. Morel testified that he worked for Luis Soto in connection with Luis Soto's narcotics dealing, specifically, he would pick-up and drop-off drugs and money as directed by Luis Soto. (C.A.J.A. at 382-384.) He testified that Luis Soto lived in Ms. Jimenez's apartment and that the closet in the back of the apartment next to the bathroom (where drugs were seized) was Luis Soto's closet. (C.A.J.A. at 386, 439-440.) Mr. Morel testified that Ms. Jimenez was a part of the narcotics conspiracy, however, on cross-examination he conceded that he did not know what her role was and he did not know exactly what she knew or was aware of. (C.A.J.A. at 384, 496-

497.) He noted that he had never seen Ms. Jimenez handling narcotics. (C.A.J.A. at 396.)

Mr. Morel knew that Ms. Jimenez was a police officer. (C.A.J.A. at 398.) He testified that while Ms. Jimenez always carried a gun in her holster, he never saw her pull her gun from its holster. (C.A.J.A. at 399, 443.) He also acknowledged that he would go on money or drug pickups alone or with Luis Soto, and that neither of them ever possessed a firearm on these runs. (C.A.J.A. at 443-444.) He also conceded that when he pled guilty to the narcotics charges against him, he made no reference to a woman being involved in the conspiracy. (C.A.J.A. at 496.) However, Mr. Morel testified that he would send coded messages to Luis Soto and Luis Soto told him that when he could not get in touch with him, he should send the coded messages to Ms. Jimenez. (C.A.J.A. at 414.) On one occasion, Mr. Morel sent Ms. Jimenez a coded message with a picture of a dollar bill but she did not respond to it and when he tried to call her the next day, she did answer his call. (C.A.J.A. at 452.)

Mr. Morel testified that he took trips to Massachusetts with Luis Soto and sometimes with Luis Soto and Ms. Jimenez to drop-off or pick-up money or drugs. (C.A.J.A. at 388-391.) Mr. Morel testified that Mr. Soto had a lot of family in Massachusetts. (C.A.J.A. at 445.) He also explained that when he went to Massachusetts with only Luis Soto, those trips were quick, just there and back, but that when he went to Massachusetts with both Luis Soto and Ms. Jimenez they would usually stay overnight or a couple days and spend a lot of time with Luis Soto's family and friends. (C.A.J.A. at 449, 508-509.)

The district court precluded the defense from eliciting testimony from Mr. Morel that he knew Ms. Jimenez's teenage son; the defense attempted to elicit this information from Mr. Morel in support of its theory that Ms. Jimenez's relationship with Mr. Morel was purely social in nature and not related to drug dealing. (C.A.J.A. at 429-434.) In the same vein, the district court precluded the defense from introducing photographs depicting Ms. Jimenez, Mr. Morel, and Luis Soto engaged in social activities in Massachusetts with Luis Soto's family and friends. (C.A.J.A. at 434-436, 450-451.) The defense explained to the district court that the pictures were admissible as they were relevant evidence in support of the defense's theory that the trips Ms. Jimenez took to Massachusetts with Luis Soto and Mr. Morel were for the sole purpose of spending time with Luis Soto's family and friends. (C.A.J.A. at 434-436.)

C. Patricio Alvarez Caputo and Pablo Garcia Ontiveros

The government called two additional witnesses who testified pursuant to cooperation agreements with the government, neither of whom had ever engaged in any type of criminal activity with Ms. Jimenez.

Patricio Alvarez Caputo testified that in 2018, he began working for someone in Mexico by the name of El Señor in connection with narcotics trafficking from Mexico to the United States. (C.A.J.A. at 525.) He further testified that El Señor asked him to find information about "a married couple" that worked for him who had been arrested and "the wife was a police officer." (C.A.J.A. at 527-528.) He explained that he found an article about the couple and it included a picture of Yessenia

Jimenez. (C.A.J.A. at 528-530.) He further testified that he had never personally met Yessenia Jimenez and he had no personal knowledge that she was involved in possessing or selling drugs, his only knowledge of her was what El Señor had told him. (C.A.J.A. at 531.)

The third cooperating witness called by the government was Pablo Garcia Ontiveros. He testified that in 2016, he started working with others in connection with a narcotics conspiracy and was told that his boss would be a man in Mexico he knew as Señor. (C.A.J.A. at 565-566.)

Mr. Ontiveros testified that on January 27, 2017, he drove a pick-up truck to New York in connection with his work for Señor. (C.A.J.A. at 568-569.) When he arrived in New York, he called a telephone number that he was given and spoke to a man by the name of Caballito, who he later learned was Luis Soto. (C.A.J.A. 569-570.) Luis Soto directed Mr. Ontiveros to go to a hotel in the Bronx and check into a room. (C.A.J.A. at 570-571.) He explained that Luis Soto met him outside of the hotel around noon. (C.A.J.A. at 572.) Luis Soto was in a sports utility vehicle ("SUV") and appeared to be in the passenger seat before he exited the vehicle. (C.A.J.A. at 572-575.) Mr. Ontiveros did not get a good view of the driver of the SUV but thought that it may have been a woman. (C.A.J.A. at 575.) Mr. Ontiveros testified that he gave Luis Soto the keys to the pick-up truck he had driven to New York, and Luis Soto told him he would call him when the truck was ready. (C.A.J.A. at 575.) Later that day, Luis Soto called him and said the truck was parked outside and ready, and asked him to meet him in the SUV outside the hotel. (C.A.J.A. at 575-576.) Luis Soto was in

the passenger seat of the SUV and there was a woman driving, however, it was very dark so Mr. Ontiveros did not really get to observe the woman. (C.A.J.A. at 576-577.) Luis Soto handed Mr. Ontiveros the keys to the pick-up truck and a bag containing $8,000. (C.A.J.A. at 577-578.) It was Mr. Ontiveros' understanding that the money was payment for drugs that Luis Soto had removed from the pick-up truck. (C.A.J.A. at 577-578.)

On cross-examination, Mr. Ontiveros testified that he was arrested in April 2018, and shortly after his arrest he began cooperating with the government. (C.A.J.A. at 595.) At Mr. Ontiveros' first proffer in the Summer 2018, he was shown pictures of Luis Soto and Ms. Jimenez but did not recognize them. (C.A.J.A. at 596-597.) He was shown their pictures again at a second proffer session with the government but he did not recognize them again. (C.A.J.A. at 597-598.) The government kept showing him pictures of Luis Soto and Ms. Jimenez. (C.A.J.A. at 598.) Eventually, during a proffer session subsequent to a court conference at which both Luis Soto and Ms. Jimenez were present as defendants, he told the government that the people in the pictures could have been the people he met at the restaurant and that he recognized them from court. (C.A.J.A. at 598.) After the court conference, Luis Soto told Mr. Ontiveros that the woman in court (*i.e.*, Ms. Jimenez) was Luis Soto's woman. (C.A.J.A. at 609.)

D. Reginald Donaldson

The government called one expert witness, Reginald Donaldson, who testified concerning his findings in analyzing records and data pertaining to four cellular

telephones.

Mr. Donaldson testified that based on his analyses he knew: (1) that a phone subscribed to Ms. Jimenez connected to a cell site tower near 1440 Sheridan Expressway, Bronx, New York in the afternoon of January 27, 2017, however, he admitted on cross-examination that he had not been asked to do the same analysis for that phone and date using the address 1015 Boynton Avenue, Bronx, New York (C.A.J.A. at 652-653, 676); (2) that a phone subscribed to Ms. Jimenez and a "burner phone" used by Luis Soto both connected to a cell site tower near 3066 Buhre Avenue, Bronx, New York in the evening of July 21, 2017 (C.A.J.A. at 659); (3) that a phone subscribed to Ms. Jimenez and "burner phones" used by Luis Soto and Felix Morel Moreta were all in the vicinity of 1015 Boynton Avenue, Bronx, New York on November 15, 2017 (C.A.J.A. at 667-668); (4) that burner phones used by Luis Soto and Felix Morel Moreta were both in the vicinity of 1015 Boynton Avenue, Bronx, New York on January 29, 2018 (C.A.J.A. at 669-670); and (5) that over the span of approximately one year the two telephones subscribed to Ms. Jimenez made eight trips to Massachusetts (C.A.J.A. at 673).

E. Yessenia Jimenez

Ms. Jimenez testified in her defense. Mr. Jimenez testified that Luis Soto introduced her to Felix Morel Moreta. (C.A.J.A. at 719). She explained that Mr. Morel was frequently at her apartment with Luis Soto, often while she was asleep. (C.A.J.A. at 723.) She testified that she had no knowledge of Luis Soto or Mr. Morel ever bringing large amounts of money into her home and she had no knowledge of

either of them ever bringing drugs into her home. (C.A.J.A. at 724.) She also testified that she had taken many more than eight trips to Massachusetts with Luis Soto, closer to 15 or 20. (C.A.J.A. at 727-729.) She explained that the purpose for these trips was to see Luis Soto's family and friends and that on these trips they would go on social outings like the beach, nightclubs, out to eat, and attend family events. (C.A.J.A. at 729-730, 762.)

She testified that on March 11, 2018, she went with Luis Soto and her cousin to Massachusetts to celebrate Luis Soto's cousin's birthday. (C.A.J.A. at 732.) They went to a nightclub in Massachusetts and then decided to stay in a hotel because it was late. (C.A.J.A. at 733-734.) They spent the next day with Luis Soto's family and then drove back that evening. (C.A.J.A. at 733-734.) She testified that she drove for the first half of the trip and then her cousin took over and she slept for the remainder of the trip. (C.A.J.A. 734.) She explained that when she woke up, they were in front of 1015 Boynton Avenue, Bronx, New York and her purse was in the back seat. She explained that after they arrived Luis Soto and her cousin got out of the vehicle to unload their bags, at which point she went to grab her purse and noticed there was money inside it that had not been there before. (C.A.J.A. at 735, 792-794.) As she went to grab her bag, police officers made their presence known; she told them she was on the job to indicate that she was police officer not that she was currently on duty. (C.A.J.A. at 735-736.) She told the officers she wanted to go upstairs to check on her son and they accompanied her upstairs. (C.A.J.A. at 737.) Once upstairs they asked if they could search the apartment and she gave them consent to do so.

(C.A.J.A. at 737.) They asked her where Luis Soto's stuff was and she took them to his closet, in which they found drugs. (C.A.J.A. at 737.) The officers seized her purse and the money that was inside it. (C.A.J.A. at 794.) She never asked the DEA to return the money because it was not hers in the first place. (C.A.J.A. at 794.) She explained that she was no longer with Luis Soto and that had she known about his past or what he was involved in she would never have allowed him in her home or around her son. (C.A.J.A. at 797.)

4. The Government's Summation

In its summation the government commented on and asked the jury to ponder Ms. Jimenez's post arrest silence stating:

> And by the way, the defendant didn't try to tell the agents that night that the money had just appeared in her bag and she didn't know where it came from. Wouldn't that be something you would mention when you're being arrested? She never said that to anybody until she took the stand at this trial. Why? Because she made that up later.

(C.A.J.A. at 838-839.) The defense moved for a mistrial on the ground that the government violated Ms. Jimenez's due process rights by commenting on her constitutionally guaranteed right to remain silent. (C.A.J.A. at 853.) Despite commenting that she initially had the same reaction as the defense (C.A.J.A. at 854), the district court declined to grant a mistrial based on its finding that she was "confident" that the prosecutor was not "intending to comment on her right to remain silent." (C.A.J.A. at 855.) In response to an explanation proffered by the prosecutor, the district court noted that she thought it was "very close." (C.A.J.A. at 856.) After

denying the defense's request for a mistrial, it agreed to provide the following limiting instruction to the jury:

> Okay, ladies and gentlemen, during his summation, Mr. Rehn said that the defendant did not tell the agents that money had just appeared in her bag and she didn't know where it came from. He asked: Wouldn't that be something that you would mention when you are being arrested? The defendant had a constitutional right to remain silent when she was arrested. You may not consider her failure to discuss the money in her bag at the time of her arrest for any reason, nor may you draw any adverse inference against the defendant from the fact that she later testified that she didn't know where the money came from. The burden of proof in a criminal case is always on the government. The defendant has no burden to disprove her guilt.

(C.A.J.A. at 858.)

5. Proceedings Below

On March 7, 2019, the jury returned a verdict convicting Ms. Jimenez of all three counts. (C.A.J.A. at 936-938.) On September 18, 2019, the district court entered the judgment and conviction against Ms. Jimenez. (C.A.J.A. at 36-41.) On September 24, 2019, Ms. Jimenez filed a timely notice of appeal. (C.A.J.A. at 977.). Ms. Jimenez raised three issues on appeal to the United States Court of Appeals for the Second Circuit: (1) whether in the trial of a Hispanic female, the government violated *Batson v. Kentucky*, 476 U.S. 79, (1986), by striking three of the four female Hispanic prospective jurors and providing pretextual reasons for its strikes; (2) whether the district court abused its discretion by preventing the defense from cross-examining the government's cooperating witness and introducing evidence that was crucial to the defense argument that the sole purpose for Ms. Jimenez's trips to Massachusetts were social in nature rather than part of any narcotics conspiracy;

and (3) whether the government's improper summation argument using Ms. Jimenez's post-arrest silence to impeach her trial testimony violated her due process rights and should have resulted in a mistrial. (*See* Pet. App. A at 3.)

In an unpublished, summary order, the Second Circuit held that: (1) "the district court did not commit clear error when it chose to credit the government's race- and sex-neutral explanations for its peremptory strikes" (*id.* at 5); (2) "the district court did not abuse its discretion in imposing reasonable limits on defense cross-examination" (*id.* at 6); and (3) "even if the government impermissibly referenced Ms. Jimenez's post-arrest silence, any error was harmless" (*id.* at 7.). Accordingly, the Second Circuit affirmed Ms. Jimenez's conviction. (*See id.* at 8.)

REASONS FOR GRANTING THE PETITION

1. The Government Violated *Batson v. Kentucky* When It Excluded Three Of Four Female Hispanic Prospective Jurors and Provided Baseless Pretextual Explanations For Its Strikes

The government violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by striking three of the jury pool's four female Hispanic prospective jurors for baseless pretextual reasons. In this trial of a young female Hispanic police officer, the prosecution sought to exclude all similarly situated jurors, and after being questioned about their challenges, it provided baseless pretextual explanations. The district court should have rejected the government's pretextual explanations and reseated the improperly struck female Hispanic jurors. The district court's failure to do so was clear error.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that a prosecutor's use of a peremptory challenge in a criminal case may not be based solely

on race. In the years since Batson was decided, the Supreme Court has emphasized that "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019). Gender as well as race can be the basis for a *Batson* challenge. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 144-45 (1994) (holding "that gender, like race, is an unconstitutional proxy for juror competence and impartiality."). The applicable standard of review for *Batson* challenges where the defense challenges the trial judge's finding regarding discriminatory intent is clear error. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

Under *Batson*, the following three-step process is used to evaluate claims that a prosecutor used peremptory challenges to strike prospective jurors because of race and/or gender:

> First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Dretke, 545 U.S. 231, 277 (2005) (Thomas, J., dissenting) (internal alterations, quotations and citations omitted); *Snyder*, 552 U.S. at 472. An inference of discrimination may arise where there is "a 'pattern' of strikes against [a particular race of] jurors included in the particular venire[.]" *Batson*, 476 at 97.

"[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity

must be consulted." *Snyder*, 552 U.S. at 478. The following applicable factors are relevant to a determination of whether a prosecutor evinced a discriminatory intent: (1) "statistical evidence about the prosecutor's use of peremptory strikes against [one class of] prospective jurors as compared to [] prospective jurors [not in that class] in the case;" (2) "side-by-side comparisons of [one class of] prospective jurors who were struck and [] prospective jurors [not in that class] who were not struck in the case;" and (3) "a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing[.]" *Flowers,* 139 S. Ct. at 2243 (finding that the government's decision to strike five of the six prospective black jurors was evidence suggesting that the government "was motivated in substantial part by discriminatory intent.")

One of the most powerful indicia of discriminatory intent is a "side-by-side comparison" of jurors who were struck against those who were not struck an analysis that was not performed here. *Miller-El*, 545 U.S. at 241. Such a "comparison can suggest that the prosecutor's proffered explanations for [a certain class of] prospective jurors were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2248. The "plausibility" of an explanation proffered by the government that is reasonable on its face can be "severely undercut by the prosecution's failure to object to other panel members who expressed views much like" the struck juror in a targeted class. *Miller-El*, 545 U.S. at 248.

In this case, the defense made a *prima facie* showing that the government manifested a discriminatory intent in exercising three of its then five used

peremptory challenges to strike three of the four female Hispanic prospective jurors. (C.A.J.A. at 347); *see Batson*, 476 U.S. at 97 ("a 'pattern' of strikes against [a particular race of] jurors included in the particular venire might give rise to an inference of discrimination."). The government used three of its six preemptory challenges to strike three of the four female Hispanic prospective jurors. (C.A.J.A. at 344-346, 350-351.) The government did not exercise strikes on six of the seven prospective jurors who gave responses similar to those proffered by the government as race and gender-neutral explanations for striking three of the four female Hispanic prospective jurors. (C.A.J.A. at 254-255, 277-279, 291-294, 321-322, 331-333, 339-340, 344-346.) The purported race and gender-neutral explanations proffered by the government, when examined side by side with the similar responses given by prospective jurors the government did not strike, were clearly pretextual. *See Miller-El*, 545 U.S. at 248 (noting that the fact that the reason proffered by the prosecutor "also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.").

The government proffered the following explanation with respect to prospective juror number 4: "she was somebody who had – her father had spent time in jail for firearm possession, and we had concerns that that might affect her ability to fairly address the firearm possession charge at issue in this case." (C.A.J.A. at 347.) There were three other prospective jurors who disclosed to the district court that they had close relatives that had been convicted of crimes. (C.A.J.A. at 254-255, 331-333, 339-340.) Like prospective juror number 4, those three prospective jurors

informed the district court that their relative's criminal conviction would not affect their ability to be a fair and impartial juror in Ms. Jimenez's case. (C.A.J.A. at 254-255, 331-333, 339-340.) The government did not strike any of those three prospective jurors. (C.A.J.A. at 344-346.)

The government proffered the following explanation with respect to prospective juror number 12: "it's another person who had a family history of conviction for drug possession, which we thought was something that was – you know, because this is a case for drug possession. She also expressed that she had a bad experience with the police in regard to her father's murder, and she was resentful of the criminal justice system because of that experience." (C.A.J.A. 347-348.) The first indicator of the government's discriminatory intent was the two factual inaccuracies in the government's proffered explanation. *See Flowers*, 139 S. Ct. at 2250 (2019) ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent."). First, it was the first prospective juror the government was seeking to strike because of a family member with a prior drug conviction. Second, it was juror number 12's brother who was murdered not her father. (C.A.J.A. at 284.) These inaccuracies combined with the fact that the proffered explanations applied equally to prospective non-female and Hispanic jurors the government did not move to strike, are compelling proof that they were pretextual reasons proffered to conceal a discriminatory intent.

The district court questioned prospective juror number 12 extensively about her feelings related to her brother's murder. (C.A.J.A. at 284-287.) Prospective juror

number 12 told the district court that she felt some resentment towards the police over the way her brother's case was handled but agreed that she could listen to testifying police witnesses in Ms. Jimenez's case fairly. (C.A.J.A. at 286.) When asked by the district court if she would be able to listen to the evidence and decide the case fairly, prospective juror number 12 responded, "[y]es." (C.A.J.A. at 287.) There was one other prospective juror who had a close family member murdered who told the district court that it would "not consciously" affect his ability to be a fair juror in the case. (C.A.J.A. at 321-322.) That juror was not female or Hispanic and the government did move to strike that juror. (C.A.J.A. at 344-346.) When asked by the district court if there was anything about the experience with her uncle being convicted of a drug offense that would affect her ability to be a fair juror, prospective juror number 12 responded, "[n]o." (C.A.J.A. at 288.) There were two other prospective jurors who voiced concerns about narcotics, only one of whom was struck by the government. (C.A.J.A. at 277-279, 291-294, 344-346.) The government did not move to strike a prospective juror (who was ultimately empaneled as a juror in the case) who stated that she had "strong feelings about narcotics and what they do to people." (C.A.J.A. at 279, 344-346.)

When the government tried to make a challenge for cause with respect to prospective juror number 12, the district court denied the request explaining "I sort of take this as like maybe she's not entirely eager to be on a jury, but, I mean, none of this sort of adds up to somebody who's not going to listen fairly." (C.A.J.A. at 288.)

The government proffered the following explanation with respect to prospective juror number 16: "she also expressed some real hesitation about dealing with the drug issues, the issue in this case. ... She had a, sort of a strong emotional reaction to the discussion of heroin." (C.A.J.A. at 348.) As pointed out by the defense, prospective juror number 16's emotional reaction had nothing to do with heroin but was the result of a difficult situation that her family was dealing with in family court concerning her eight-year-old nephew and allegations of sexual abuse by his parents. (C.A.J.A. at 348-349; *see also* C.A.J.A. at 301-302.) When the district court asked juror number 16 if there was anything about the situation with her nephew that would affect her ability to be a fair juror in the case, she replied, "[n]o." (C.A.J.A. at 302.)

With respect to prospective juror number 16's position concerning narcotics, she simply explained to the district court that she had graduated from medical school in the Dominican Republic and was currently working with substance abusers in a psychiatric department while trying to obtain residency in the United States. (C.A.J.A. at 300.) While she acknowledged that she did have ethical opinions about "mental health and physical and about the use of – substance abuse in patients" she replied, "yes, I can" when asked by the district court if she could listen to the evidence and make a fair judgment with respect to the charges against the defendant. (C.A.J.A. at 300-301.)

There were two other prospective jurors who voiced concerns about narcotics, only one of whom was struck by the government. (C.A.J.A. at 277-279, 291-294, 344-

346.) The government did not move to strike a prospective juror (who was ultimately empaneled as a juror in the case) who stated that she had "strong feelings about narcotics and what they do to people." (C.A.J.A. at 279, 344-346.)

The reasons proffered by the government for striking three of the four prospective female Hispanic jurors were pretextual reasons proffered in an attempt to disguise a discriminatory intent. *See, e.g., Miller-El*, 545 U.S. at 265 ("The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny."). "The Constitution forbids striking even a single prospective juror for a discriminatory purpose" in order to win a trial whether a tactic is strategically understandable or not. *Flowers*, 139 S. Ct. at 2244 (finding that the government's decision to strike five of the six prospective black jurors was evidence suggesting that the government "was motivated in substantial part by discriminatory intent."). Discriminatory strategy has no place in our justice system. It was not strategically permissible to exclude all prospective jurors who, like Ms. Jimenez, were female and Hispanic because they may sympathize with the defendant. By doing so they violated *Batson* and allowed "racial [and gender] discrimination [to] seep[] into the jury selection process" in violation of Ms. Jimenez's constitutional rights. *Id.* at 2243.

Furthermore, the district court performed no analysis and simply credited the government's explanations and found that its clearly pretextual reasons rebutted any suggestion of discrimination. Allowing this error to stand permits "racial [and

gender] discrimination [to] seep[] into the jury selection process." *Id.* at 2243. The district court should have reseated those discriminatorily struck jurors.

2. The District Court's Unreasonable Limits on the Defense's Cross-Examination of the Government's Most Important Witness Deprived Ms. Jimenez of a Fair Trial and Deprived the Jury of Essential Facts

The district court abused its discretion by preventing the defense from cross-examining a co-conspirator about the nature of the trips he made with Ms. Jimenez to Massachusetts. Essential to Ms. Jimenez's defense was the government's lack of evidence that the trips Ms. Jimenez made to Massachusetts were for anything other than social visits to her boyfriend's friends and family. The defense had photographic evidence and expected testimonial evidence of the dozens of social events over the course of multiple trips in which the witness and Ms. Jimenez participated while in Massachusetts. The district court's unreasoned decision to preclude this testimony as well as its unreasoned decision to disallow photographic evidence containing the defendant and the witness in social situations in Massachusetts about which he was testifying, was irrational, improper, and denied Ms. Jimenez a fair trial.

The Sixth Amendment of the United States Constitution "guarantees the defendant the right to cross-examine the witnesses against her." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). "The scope and extent of cross-examination are generally within the sound discretion of the trial court." *United States v. Pedroza*, 750 F.2d 187, 195 (2d Cir. 1984) (internal citations omitted). Federal Rule of Evidence 611 instructs the trial courts to supervise the mode of interrogating witnesses for

effectiveness and the ascertainment of the truth. *See United States v. Maldonado-Rivera*, 922 F.2d 934, 956 (2d Cir. 1990).

"Wide latitude should be given to the defense when a government witness in a criminal case is being cross-examined." *Pedroza*, 750 F.2d at 195-96 (citing *United States v. Masino*, 275 F.2d 129, 132 (2d Cir. 1960)); *United States v. Weiss*, 930 F.2d 185, 197 (2d Cir. 1991). The defense should be given wide latitude in cross-examining prosecution witnesses because the "Confrontation Clause gives 'a defendant the right not only to cross-examination but to effective cross-examination.'" *United States v. Ulbricht*, 858 F.3d 71, 118 (2d Cir. 2017) (quoting *United States v. Mallay*, 712 F.3d 79, 103 (2d Cir. 2013)). The trial court can only impose reasonable limits on cross examination to protect against harassment, prejudice, confusion of the issues, waste, witness safety, repetitive interrogation, or marginally relevant evidence. *See United States v. Cedeño*, 644 F.3d 79, 81 (2d Cir. 2011); *Mallay*, 712 F.3d at 103; *Jones v. Spitzer*, No. 01 Civ. 9754 (HB) (DWG), 2013 U.S. Dist. LEXIS 4499, *77-78 (S.D.N.Y. Mar. 26, 2003). "[A] restriction on the right to confront an adverse witness may be unconstitutional if it is 'arbitrary or disproportionate to the purposes the restriction is designed to serve.'" *Spitzer*, 2013 U.S. Dist. LEXIS 4499 at 77-78 (citing *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) and quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). "The trial judge's discretion 'cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.'" *Pedroza*, 750 F.2d at 196 (quoting *Gordon v.*

United States, 344 U.S. 414, 423 (1953) and *United States v. Harris*, 501 F.2d 1, 8 (9th Cir. 1974)).

In this case, on direct examination Mr. Morel testified that his trips to Massachusetts, including those with Ms. Jimenez, were for the purpose of drug dealing. The defense was entitled to impeach Mr. Morel's credibility and establish that the trips to Massachusetts were of a social nature for Ms. Jimenez. The defense was entitled to pursue this line of inquiry and further introduce photographic evidence of the social nature of the trips when Ms. Jimenez was present. It was a reasonable theory that Ms. Jimenez accompanied her boyfriend on trips to his hometown and that while she was there visiting with their friends and his family, unbeknownst to Ms. Jimenez, Messrs. Morel and Soto were also conducting an illegal drug business. While the district court enjoyed a fair amount of discretion over the conduct of the examination of witnesses, it should have given defense counsel wide latitude in cross-examining Mr. Morel. The defense was entitled to cross-examine Mr. Morel and establish, at a minimum, that his trips to Massachusetts with Ms. Jimenez involved mostly social activities. And that his drug related activities did not involve Ms. Jimenez.

The district court's limits on defense counsel were not intended to nor did they protect against harassment, prejudice, confusion of the issues, waste, witness safety, repetitive interrogation, or marginally relevant evidence. The district court's limits ensured that only the government's theory regarding the trips to Massachusetts was presented and prevented the defense from strengthening its argument that Ms.

Jimenez had no knowledge of Messrs. Morel and Soto's drug dealing activities and that she traveled to and from Boston for purely social reasons.

Furthermore, the court did not allow the defense to introduce photographic evidence, within the relevant time frame, establishing that the witness and Ms. Jimenez engaged in numerous social activities while in Massachusetts. The defense informed the court that it had approximately one hundred photos but that it was only asking to introduce two. (C.A.J.A. at 435-436.) The court wrongly excluded the evidence as irrelevant. The jury was entitled to hear testimony and receive evidence that supported the defense theory that for Ms. Jimenez, the trips to Massachusetts were purely social and not part of any narcotics conspiracy. The trial court improperly shut that down and ensured that only a theory consistent with the government's theory was presented through its most important witness.

That evidence was essential for the fact finder to evaluate the defense's arguments that Ms. Jimenez had no knowledge of Messrs. Morel and Soto's drug dealing activities in Massachusetts. Furthermore, that evidence was essential for the jury to evaluate Ms. Jimenez's own testimony regarding her trips to Massachusetts. If the jury had concluded that Ms. Jimenez's Massachusetts trips were social, it may very well have concluded that she was not a knowing participant in the charged narcotics conspiracy. After all, Mr. Morel testified that he had no idea what her role was in the conspiracy. (C.A.J.A. 497 – "[t]he thing is that I cannot say whether she knew or didn't know. I cannot – I don't know whether or not she knew or did not know because what I used to do was I would just go home and that was it.")

The district court abused her discretion in limiting the defense's cross-examination of Mr. Morel. The details of his various trips to Massachusetts, especially those where he alleged he was with Ms. Jimenez, were crucial to the case. Therefore, the court's unreasonable curtailment of defense counsel's cross-examination deprived Ms. Jimenez of her Sixth Amendment right to confront the witnesses against her and the case should be remanded for a new trial.

3. The Government Denied Ms. Jimenez Due Process By Improperly Using Her Post-Arrest Silence Against Her

The government's reference, in its summation, to Ms. Jimenez's post-arrest silence in order to impeach her trial testimony violated her due process rights and should have resulted in a mistrial. Instead, the court deemed it "very close" and concluded, that she was confident that the government did not intend to comment on Ms. Jimenez's right to remain silent without specifying any basis for that belief. The government's use of Ms. Jimenez's post-arrest silence was a clear *Doyle* violation, egregious, and should have resulted in an ordered mistrial.

It is "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). The rationale "rests on the fundamental unfairness of implicitly assuring a suspect that [her] silence will not be used against [her] and then using [her] silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986). "Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute 'egregious misconduct'" and the defendant must show that she

suffered substantial prejudice. *United States v. Shoreline Motors*, 413 Fed. Appx. 322 (2d Cir. 2011) (summary order) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974).

However, once a *Doyle* violation has been established, the government is faced with the heavy burden to establish that the error was harmless. *United States v. Cline*, No. 06-50109, 2007 U.S. App. LEXIS 8043, *4 (9th Cir. 2007) (citing *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001)); *United States ex rel. Musolino v. Scully*, No. 87 Civ. 6606 (JMW), 1989 U.S. Dist. LEXIS 6546, *10 (S.D.N.Y. Jun. 12, 1989). This Court considers "the severity of the misconduct, the measures adopted to cure it, and the certainty of conviction in the absence of the misconduct." *Id.* (quoting *United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995), and others).

Ms. Jimenez enjoyed the constitutional right to demand that the government not use her silence against her to impeach her defense in the case. *Doyle* is not a new or novel concept and the government was well-aware that Ms. Jimenez had a constitutional right to remain silent following her arrest. It properly respected that right and correctly did not cross-examine her regarding her post-arrest silence, however, concerned about the jury crediting Ms. Jimenez's trial testimony, it disregarded her constitutional rights and directly asked the jury to hold her silence against her. The government argued:

> And by the way, the defendant didn't try to tell the agents that night that the money had just appeared in her bag and she didn't know where it came from. Wouldn't that be something you would mention when

> you're being arrested? She never said that to anybody until she took the stand at this trial. Why? Because she made that up later.

(C.A.J.A. 838-39.)

The government's use of her post-arrest silence substantially prejudiced Ms. Jimenez. Furthermore, the trial court's limiting instruction was insufficient to alleviate this error. The violation was not harmless error. This egregious error compounded by the court's refusal to permit crucial cross-examination of the government's most important witness, amounted to substantial prejudice requiring a reversal and a new trial.

CONCLUSION

The Court should grant the petition for a writ of certiorari and vacate the decision of the Second Circuit Court of Appeals.

Respectfully Submitted,

/s/

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