CASE NO. _____
SUPREME COURT OF THE UNITED STATES

JENNIFER MCFARLAND **PETITIONER**

V.

UNITED STATES OF AMERICA **RESPONDENT**

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the government's preemptory strike of Prospective Juror 128, the sole black venireperson in the 31-member pool of potential jurors, violated Ms. McFarland's right to Equal Protection.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – Jennifer McFarland

Respondent/Appellee/Plaintiff – United States of America

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

I. Cases **Page No.**

Statutes, Rules, and Guidelines

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Jennifer McFarland, by court-appointed counsel, respectfully requests that a Writ of Certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Sixth Circuit in the case of *United States v. Jennifer McFarland*, No. 20-5310, filed on October 4, 2021 and attached to this Petition as Appendix B.

OPINIONS BELOW

Ms. McFarland's appeal to the Sixth Circuit was taken from the Judgment entered following her convictions for narcotics offenses. *See* Appendix A. On October 4, 2021, the Sixth Circuit issued an unpublished opinion affirming Ms. McFarland's convictions and sentence. *See* Appendix B. The Sixth Circuit subsequently denied Ms. McFarland's petition for rehearing en banc on December 8, 2021. *See* Appendix C. This petition for a writ of certiorari now follows.

JURISDICTION

The Sixth Circuit issued an unpublished opinion affirming Ms. McFarland's convictions and sentence on October 4, 2021. *See* Appendix B. The Sixth Circuit denied Ms. McFarland's timely petition for rehearing en banc on December 8, 2021. *See* Appendix C. Ms. McFarland invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V: "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."

STATEMENT OF THE CASE

On July 18, 2019, Jennifer McFarland was indicted in the Eastern District of Kentucky. [R. 1: Indictment, Page ID # 1-6]. Ms. McFarland and co-defendant Richard Duerson were charged with conspiracy to distribute narcotics. *Id*. at Page ID # 1-2. Ms. McFarland also was charged with possession of methamphetamine and cocaine with intent to distribute. *Id*. at Page ID # 3.

Trial began on November 25, 2019. [R. 44: Minute Entry for Pretrial Conference and Jury Trial, Day 1, Page ID # 138-39]. The deputy clerk noted that forty-eight potential jurors were initially present. [R. 93: Transcript, Voir Dire, Page ID # 502, Lines 4-5]. Thirty-one jurors remained following for cause strikes. *Id*. at Page ID # 547-48.

At the conclusion of voir dire, defense counsel informed the district court that there was "only one black juror, Number 128, and apparently the government has struck her." *Id*. at Page ID # 550, Lines 17-20. Counsel then asked the government to articulate its rationale for striking "the only person of color on the entire jury panel[.]" *Id*. at Lines 22-24.

The government said Prospective Juror 128 indicated that she "had family members that have been convicted of crimes and had entire been incarcerated or been serving time in jail." *Id*. at Page ID # 551, Lines 5-7. The government also claimed the voir dire questions about domestic violence asked by defense counsel suggested Prospective Juror 128 might show "some sympathy" for her. *Id*. at Lines 16-18. Counsel asked for clarification about the government's reference to questions asked during voir dire. *Id*. at Page ID # 552, Lines 12-15. The government said counsel's question about domestic violence created a concern that Juror 128 "may be inclined to view Ms. McFarland in a more sympathetic light due to those issues." *Id*. at Page ID # 552-53, Lines 18-25, 1-3. Of note, Juror 128 did not respond when defense counsel asked the jury panel about prior experience with domestic violence. *Id*. at Page ID # 539-41.

The district court concluded that the government had stated a proper "racially neutral reason for striking the juror; that is, the concern has been expressed about jurors that have had family members subject to incarceration, jail,

or prison as a result of…drugs or other matters." *Id*. at Page ID # 553, Lines 13-17. The court noted that it "could present an issue of sympathy[.]" *Id*. at Lines 17-18. Juror 128 was excluded, producing an all-white jury in a case involving two black defendants. *Id*. at Page ID # 554, Lines 3-5.

Following deliberations, the jury convicted Ms. McFarland on all counts. [R. 48: Jury Verdict, Page ID # 149-52]. The Court later overruled Ms. McFarland's request for a downward variance and sentenced her to 151 months of incarceration. [R. 67: Judgment, Page ID # 282].

REASONS FOR GRANTING THE WRIT

I. The government's preemptory strike of Prospective Juror 128, the sole black venireperson in the 31-member pool of potential jurors, violated Ms. McFarland's right to Equal Protection.

"Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2242 (2019). "In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Id*. at 2241. *See also Batson v. Kentucky*, 476 U.S. 79, 95 (1986). This Court recognized in *Batson* that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. "Use of peremptory strikes based impermissibly

on race affects the rights of each impermissibly stricken venireperson as well as the rights of the criminal defendant." *Drain v. Woods*, 595 Fed.Appx. 558, 567 (6th Cir.2014) (citing *Powers v. Ohio*, 499 U.S. 400, 404-08 (1991)).

Ms. McFarland and her co-defendant Richard Duerson are both black. *See* Appendix B, Panel Decision, Page 3. A total of thirty-one prospective jurors were called for their joint trial. Only Juror 128 was black. *Id*. During voir dire, the district court asked if anyone on the jury panel "or members of your family have been involved in a criminal matter other than traffic matters? And that could either be as a party of a witness, or perhaps even as a complaining party." *Id*. Many members of the panel responded with answers that "strayed from the district court's question[.]" *Id*. Jurors 128, 187, and 206 each stated that "although they had family members who had been convicted and imprisoned for drugs and other offenses, they would be able to try the case impartially." Juror 160 responded that her husband's niece and niece's husband were "pretty involved in drugs" but that "I don't think it would affect me any." *Id*. at Page 4.

The district court excused for cause all jurors who stated they could not be impartial. *Id*. The government then used three of its preemptory challenges to excuse Jurors 128, 187, and 206. *Id*. The government did not strike Juror 160, and she ultimately served on the jury.

Ms. McFarland and Mr. Duerson both objected to the government's preemptory strike of Juror 128, noting that she was the only black member of the jury pool. *Id*. The government responded that it struck Jurors 128, 187, and 206 because "they had family members that have been convicted of crimes and had either been incarcerated or been serving time in jail." *Id*. The government acknowledged that each of the jurors indicated "they could be fair," but said those issues raised a "concern[.]" The district court accepted the government's explanation as permissible and overruled the defense's objection. *Id*.

On appeal, the Sixth Circuit recognized that a comparative juror analysis was appropriate and emphasized that a "side-by-side comparison of some black potential jurors who were struck with white ones who were not" could show "that the only material distinction between the removed black and the retained white individuals is their race." *Id*. at Page 6 (citing *United States v. Atkins*, 843 F.3d 625, 631 (6th Cir.2016) (citing *United States v. Torres-Ramos*, 536 F.3d 542, 559 (6th Cir.2008)). The Court noted that "[t]here is no requirement that the compared jurors be similar situated in every respect[.]" *Id*. (citing *Atkins*, 843 F.3d at 631-32). Instead, it is sufficient that "the differences identified by the prosecution 'seem far from significant.'" *Id*. (quoting *Miller-El v. Dretke*, 545 U.S. 231, 247 (2005)).

The Sixth Circuit recognized that the *Batson* issue in this case was "something of a close call[.]" *See id*. at Page 7. The Panel dismissed the government's suggestion that Jurors 128 and 160 had distinct backgrounds, instead emphasizing that they "*were* similarly situated because they both had relatives who were involved in drugs, and they both stated that they could try the case impartially." *Id*. (emphasis in original).

The Sixth Circuit ultimately concluded that the "comparative-juror analysis is somewhat suggestive of discrimination[,]" but it rejected Ms. McFarland's challenge because there was no other evidence that the government had an "unlawful motive" for striking Juror 128, "such as a pattern of using preemptory strikes in a way that suggests discrimination or differences in the manner in which it questioned the jurors." *Id*. (citing *Miller-El*, 545 U.S. at 255-63). The Panel relied on this lack of additional evidence of a pattern of discrimination to conclude that proof "of a discriminatory motive" in this case was in "equipoise—that is, although a comparative-juror analysis is somewhat suggestive of discrimination, no other evidence in the voir dire transcript corroborates that conclusion." *Id*.

The Sixth Circuit's decision is inconsistent with this Court's prior precedents and undermines Ms. McFarland's right to Equal Protection. Contrary to the government's argument, the Panel found that Jurors 128 and 160 were similarly situated for purposes of *Batson* analysis "because they both had relatives

who were involved in drugs, and they both stated that they could try the case impartially." Appendix B, Panel Decision, Page 7. Yet the government struck Juror 128 while allowing Juror 160 to remain in the jury pool. Like Juror 128, both Ms. McFarland and Mr. Duerson were black. Juror 160 was white. Juror 128 was excluded, while Juror 160 ultimately served on the jury. The only difference between Jurors 128 and 160 was "their race." *Atkins*, 843 F.3d at 631 (citing *Torres-Ramos*, 536 F.3d at 559).

Despite these circumstances, the Sixth Circuit dismissed Ms. McFarland's *Batson* claim because it found no evidence of "a pattern" of "peremptory strikes" by the government "suggest[ing] discrimination or differences in the manner in which it questioned the jurors." Appendix B, Panel Decision, Page 7 (citing *Miller-El*, 545 U.S. at 255-63). This conclusion entirely ignores the fact that Juror 128 was the only black member of the 31-member pool of potential jurors. There were no other black potential jurors for the government to question or to exclude, thus it is necessarily impossible for Ms. McFarland to provide evidence of a pattern of discrimination in the voir dire process.

The Sixth Circuit's decision undermines constitutional protections for defendants like Ms. McFarland who are tasked with selecting a jury from a large pool that includes only a single member of her relevant ethnic group. Requiring evidence of a discriminatory pattern under such circumstances ignores this Court's

recognition that the peremptory challenge process is inherently discriminatory, permitting "those to discriminate who are of a mind to discriminate." *Batson*, 479 U.S. at 98. This Court must not permit the Panel's decision to stand in this case or as precedent in future cases involving the same circumstances.

Also contrary to the Sixth Circuit's findings, the record does contain evidence that the government's purported justification for excluding Juror 128 "reeks of afterthought." Appendix B, Panel Decision, Pages 7-8 (citing *Miller-El*, 545 U.S. at 247). Despite being referenced in the briefing, the Panel's decision makes no mention of the government's second proffered rationale for striking Juror 128—that her responses to a voir dire question about domestic violence suggested she might show "some sympathy" for Ms. McFarland. [R. 93: Transcript, Voir Dire, Page ID # 551, Lines 16-18]. In particular, the government said the domestic violence question created a concern that Juror 128 "may be inclined to view Ms. McFarland in a more sympathetic light due to those issues." *Id*. at Page ID # 552-53, Lines 18-25, 1-3.

The government's explanation "reeks of afterthought" because Juror 128 did not respond to defense counsel's question about domestic violence. Juror 127 did. *See id*. at Page ID # 539-41; *Miller-El*, 545 U.S. at 247. The government's impulse to grasp at any potential justification to exclude the only black member of the jury pool underscores its discriminatory intent, while its treatment of Juror 127

demonstrates its true purpose. Juror 127 reported that she truly had been a victim of domestic violence, but she was white. Despite citing the same rationale to exclude Juror 128, the government did not exercise a peremptory challenge to excuse Juror 127. Indeed, Juror 127 became a member of the jury hearing the case. *See id*. at Page ID # 554-55, Lines 23-25, 1-6. As with Jurors 128 and 160, the only difference between Jurors 128 and 127 was "their race." *Atkins*, 843 F.3d at 631 (citing *Torres-Ramos*, 536 F.3d at 559). This second example of the government treating Juror 128 differently than other similarly situated white jurors is the best evidence of a pattern of discrimination available given that Juror 128 was the sole black member of the jury pool. Despite this, the Sixth Circuit made no mention of it. This omission was particularly egregious given that the Panel dismissed Ms. McFarland's argument by insisting the record contained no evidence of a pattern of discrimination.

The Equal Protection issue in Ms. McFarland's case is a question of exceptional importance. Unlike other cases referencing patterns of discriminatory conduct by prosecutors during voir dire, the jury pool in this case contained only one member of Ms. McFarland's ethnic group. This Court should grant certiorari to clarify that pattern evidence cannot be required to substantiate a *Batson* challenge under these circumstances. In the alternative, this Court should grant certiorari to determine whether the government's second proffered justification for

excluding Juror 128 sufficiently demonstrates its unconstitutional discriminatory intent to establish a *Batson* violation.

CONCLUSION

For the foregoing reasons, Ms. McFarland respectfully asks this Court to grant her petition for the issuance of a writ of certiorari for the purpose of vacating her convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jarrod J. Beck, counsel for Petitioner Jennifer McFarland, do hereby certify that the original and ten copies of this Petition for Writ of Certiorari were mailed to the Office of the Clerk, Supreme Court of the United States, Washington, DC 20543. I also certify that a true copy of the Petition was served by mail with first-class postage prepaid upon Assistant United States Attorney Francisco Villalobos, 260 West Vine Street, Suite 300, Lexington, Kentucky 40507-1612.

This 1st day of March, 2022.

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JARROD J. BECK

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