4/10/22

No. 22-161

In the
Supreme Court of the United States

ROBERT NIETO and DARRICK R. VALLODOLID,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has repeatedly affirmed the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986) and refused to allow state or federal courts to peel back the fundamental protections the Fourteenth Amendment provides. Yet in violation of this Court's precedents and the rationale behind them, the decision below held that even if a prosecutor's explanation is directly tied to a juror's race or ethnicity, courts will turn a blind eye and find that the reason is "race neutral." An important aspect of *Batson* was ensuring the public's faith in the judicial system, but these very clear displays of avoiding *Batson* violations through illogically expanding the definition of "race neutral" eradicate public confidence in the system's fairness.

As to sentencing, the Government sought to impose a sentence that is well above what was permissible under either federal or state law. Petitioners were sentenced to life in prison on Count I under federal law, which does not allow a life sentence unless the underlying applicable state law does. Here, however, the underlying state law also does not allow for a life sentence, except in limited circumstances where specific conditions are met. It is undisputed that those conditions were not satisfied here. Accordingly, Petitioners' life sentences were impermissible under the statutory scheme enacted by Congress.

The questions presented are:

1. Whether Mr. Nieto's and Mr. Vallodolid's convictions should be reversed because the Government's peremptory striking of qualified

Hispanic prospective jurors violated the Equal Protection Clause.

2. Whether a lawful sentence of life imprisonment may be imposed under Title 18 Section 1963(a) when the Government does not establish that it is entitled to seek such a sentence.

PARTIES TO THE PROCEEDING

Petitioners, the defendants-appellants below, are Robert Nieto and Darrick R. Vallodolid. Respondent, the plaintiff-appellee below, is the United States of America.

STATEMENT OF RELATED CASES

This is a direct appeal from the Seventh Circuit's decision in *United States of America v. Nieto*, Case No. 19-2209, and *United States of America v. Vallodolid*, Case Nos. 19-2209, 19-3408. Messrs. Nieto and Vallodolid appealed their convictions from a judgment in the Northern District of Indiana, No. 15-cv-72.

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PETITION FOR WRIT OF CERTIORARI

The courts below made serious procedural and substantive errors that deprived Petitioners of both a fair trial and a fair sentencing.

First, the Government struck all but one Hispanic juror in a trial involving two Hispanic defendants accused of activities related to the Latin Kings, a predominantly Hispanic gang. When asked to provide ethnicially neutral reasons, the Government could only point to statements two prospective jurors had made regarding their experiences as Hispanic persons in the United States. If such pretextual explanations may be permitted, then any prospective juror honest about how their race or ethnicity has influenced their world views could be struck—even where the juror repeats over and over that he or she could be objective.

Second, both Petitioners were charged under 18 U.S.C. § 1962, the Racketeering Influenced and Corrupt Organizations Act ("RICO"), the criminal penalties for which are laid out in 18 U.S.C. § 1963. Section 1963(a) contains a maximum sentence of twenty years unless the underlying "violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." Yet the Indiana state statute that outlines the maximum for the underlying racketeering activity only permits a life sentence, as the district court sentenced Petitioners to, in limited circumstances where specific conditions are met. It is undisputed that those conditions were not satisfied here. Accordingly, Petitioners' life sentences were impermissible under the statutory scheme enacted by Congress.

The clear violation of *Batson* requires a new trial, but at the very least Petitioners must be resentenced under RICO. Either way, critical constitutional and statutory issues are at stake and the Court's review is imperative.

OPINIONS BELOW

The opinion of the Seventh. Circuit is reported at 29 F.4th 859 and reproduced at App. 1–24. The district court's decision on Petitioners' *Batson* motion is unreported and reproduced at App. 289. The district court's sentencing opinion is unreported and reproduced at App. 25–43.

JURISDICTION

The judgment of the Seventh Circuit was entered on March 28, 2022. Petitioners obtained an extension to submit their petitions to August 10, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or 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." It also involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

This case involves Title 18 United States Code, Section 1963(a), dictating criminal penalties for violations of the Racketeering and Corrupt Influences

Act, Title 18 United States Code, Section 1962, stating: "Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both . . . ." The Indiana State Code, Chapter 35, Section 50-2-3 which fixes a sixty-five (65) year mandatory maximum penalty for a violation of murder under Chapter 35, Section 42-1-1. And Indiana State Code Chapter 35 Section 50-2-9(a) which permits the State to seek "a sentence of life imprisonment without parole for murder" if it alleges an aggravating circumstance, provides notice of the allegation, and when conviction is obtained by way of a jury, under 50-2-9(d) and (e) the jury, after it hears evidence of the aggravating and mitigating circumstances recommends life imprisonment.

STATEMENT OF THE CASE

A. Factual Background for Mr. Nieto

Mr. Nieto, who identifies as Hispanic, became a Latin King in 1986. App. 2, 5. He was incarcerated from 2001 and 2007. *Id.* at 2. Upon his release, he returned to Gary, Indiana, where held various positions as a Latin King until the end of 2012 or beginning of 2013. *Id.* At that point, Mr. Nieto was "stripped" because he had not been paying dues he collected back to Chicago. App. 386–89.

On December 2, 2013, four men attempted to rob Anthony Martinez, during which Mr. Correa was shot and killed. App. 4, 427–28. Mr. Nieto was indisputably not there during the attempted robbery, but earlier in the day, one of the men involved testified that Mr.

Nieto had told him there was marijuana in Mr. Martinez's house. App. 430–31. Mr. Nieto supposedly listened to the police scanner during the robbery, but hearing nothing, went to sleep, only later to be woken up to the sound of gunshots. App. 4, 424–26. The jury heard no mitigating evidence related to Mr. Nieto and did not make a sentencing recommendation

B. Factual Background for Mr. Vallodolid

On April 12, 2009 at approximately 5:30 p.m. Victor Lusinki was shot in the head with a .22 caliber gun and killed on the 1200 block of Truman Ave. in Hammond, Indiana. App. 390–92, 394–95. Lusinski was not a gang member and was not from the area. App. 421–22.

Four eyewitnesses saw the murder: two sets of Hispanic brothers, approximately ten to eleven years old, who lived nearby and were playing across the street from the shooting. App. 396–98, 401–02, 405, 408–10; *cf.* 398–99.

All the witnesses told investigators immediately after the shooting that the shooter was either black or dark skinned. App. 392–93, 399–403, 405–07, 410–13, 440–41. Vallodolid is light-skinned, Hispanic. App. 5.

The police went door to door, talked to residents, and distributed a flyer containing specific information about the shooting. App. 411–14, 443–44. The flyer provided the date, time, and location of the shooting, the age of the victim, a description of the victim, and that the victim was riding a bike. App. 443–44. Police visited Josh Roberts' home; Roberts' cooperated with the Government and testified against Vallodolid. App. 413–14.

Roberts and four other cooperating Latin Kings, who were the beneficiaries of extraordinary plea deals, testified at trial that Mr. Vallodolid made statements of admission related to the murder. This testimony was inconsistent, contradictory and contained evidentiary problems regarding the reliability of the testimony (*i.e.*, Roberts testified certain events occurred when they could not have).

Nevertheless, Mr. Vallodolid was convicted at trial by way of a special verdict for the murder of Luskinski and found to have committed the murder while committing or attempting to commit criminal gang activity. App. 44–50. The jury did not hear any mitigating evidence related to Vallodolid and did not make a sentencing recommendation.

C. Procedural Background

Mr. Nieto and Mr. Vallodolid, along with nine others, were indicted in the fourth superseding indictment for conspiring to participate in racketeering activity under 18 U.S.C. § 1962(d) and conspiring to possess with intent to distribute and distribute cocaine, marijuana, and Alprazolam under 21 U.S.C. §§ 841(a)(i), 846. App. 66–112. All but three of the defendants pled guilty to the charges. Mr. Nieto and Mr. Vallodolid were tried together beginning on May 14, 2018. App. 113–16, 178. Both were found guilty of (1) racketeering and drug conspiracy, (2) separate acts of murder, and (3) distribution in excess of five kilograms of cocaine and 100 kilograms of marijuana. App. 34–57. Petitioners were sentenced to life in prison. App. 466–74, 509–18.

1. Voir Dire

During *voir dire*, a total of 45 prospective jurors appeared. App. 116, 188, 228, 258, 290, 308, 313, 317, 322, 341, 356, 361, 365, 370. Thirteen prospective jurors were removed for cause. App. 185, 225–26, 304, 316–17, 338, 341, 353, 361, 365. Of the 32 remaining qualified prospective jurors, five were Hispanic. App. 187, 226, 253, 286, 355. The Government used six of the seven peremptory strikes it was allowed. App. 186, 226, 253, 286. Notably, the Government exercised three of those six peremptory strikes to remove qualified Hispanic prospective jurors: Mr. Acosta, Ms. Gonzalez, and Mr. Garcia. *Id.*[1]

During questioning, Mr. Acosta stated that, while he believed marijuana should be legal so the Government could tax it, he would "be fine with" following the rules of law the District Court provided. App. 213–14. The Government nonetheless used a peremptory strike to remove him from the jury. App. 226.

Ms. Gonzalez stated she was "very disappointed with the state of the United States" and did not "agree with many of the current orders relating to immigration, mental health[, etc.]" App. 251. She further explained that the United States is "a country of all immigrants, [her] family included," and that she was concerned that there had been "a change of life for many individuals, without even giving them the opportunity to even . . . hear their side of the story or to seek help or assistance." App. 251–52. She clarified

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[1] The Government used another peremptory strike to remove Ms. Losiniecki, a practicing Muslim, from the jury. App. 180, 186.

that she could take offense to "some of the rhetoric" surrounding immigration "knowing that [she has] family or relatives that may have gone through certain things[.]" App. 252. However, she confirmed she could set these views aside and fairly apply the law. *Id.* Still, the Government used a peremptory strike to remove her from the jury. App. 253.

Like Mr. Acosta, Mr. Garcia stated that he personally did not support the "war on drugs" because "it hasn't done anything." App. 266. He also stated that he has "a couple uncles in law enforcement." *Id.* He indicated that he felt the justice system is "biased against people who don't have means or [are] not wealthy" and he had "been subjected on several occasions to unwarranted harassment by law enforcement for looking a certain way [and he thus could not] erase the justice system." App. 284. Nonetheless, he confirmed he would be able to set aside those views, follow the law, and fairly decide the case. App. 283.

The Government sought to strike Mr. Garcia for cause, contending that he did not answer questions "truthfully and candidly." App. 284–85. The District Court disagreed and overruled the Government's challenge for cause because the mere fact that Mr. Garcia had "negative experiences with law enforcement . . . did not mean he" would be unable to "set those aside and decide the case based on the evidence[.]" App. 285. Indeed, Mr. Garcia repeatedly said he could. App. 266, 283.

The Government then sought to use a peremptory strike to remove Mr. Garcia from the jury. App. 286. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), defense

counsel objected to the Government's use of peremptory strikes to remove Mr. Garcia and Ms. Gonzalez. App. 287. For Mr. Garcia, the Government claimed he "misstated that the justice system was flawed and biased against people who are not wealthy" and that he expressed "[disdain] for the police and the justice system." App. 287. For Ms. Gonzalez, the Government claimed she "expressed distaste and dismay" with current immigration policies and rhetoric. *Id.* The Government further posited that, even though this was not an immigration case, she could not be impartial because "someone who has anger towards the U.S. government over immigration issues could take that out on the Department of Justice." App. 288. The District Court concluded that these were ethnicity-neutral reasons for striking Mr. Garcia and Ms. Gonzalez and thus overruled defense counsel's *Batson* objections. App. 289.

Overall, the Government used its peremptory strikes to exclude 60% of qualified Hispanic prospective jurors but only 11% of qualified non-Hispanic prospective jurors. As a result, only one Hispanic was seated on the final jury that decided Petitioners' fate. App. 461–63.

2. Verdict and Sentencing

After an 11-day trial, Mr. Nieto and Mr. Vallodolid were found guilty of racketeering and drug conspiracy. App. 459–61. With respect to Count I, both Mr. Nieto and Mr. Vallodolid were also found guilty of committing the murder "while committing or attempting to commit criminal gang activity" and "conspir[ing] to distribute or possess with intent to distribute [five] kilograms or more of . . . cocaine." *Id.*

With respect to Count II, the jury also found that for Mr. Nieto and Mr. Vallodolid, "the offense involved distribution . . . or possession with intent to distribute" five or more kilograms of cocaine and 100 kilograms or more of marijuana. *Id.*

On June 13, 2019, Mr. Nieto was sentenced to life in prison. App. 473. His base offense level started at 43 (life) for Count I because of the Correa murder and was raised to 49 based on certain enhancements and his conviction on Count II. App. 466. The District Court entered final judgment on June 17, 2019. App. 25–33.

The Court determined that Mr. Vallodolid's mandatory maximum for the murder was life imprisonment. App. 517–18. Relying upon the murder, Vallodolid was sentenced to life imprisonment. *Id.*

For both Mr. Nieto and Mr. Vallodolid, at sentencing, the Court, not the jury, made findings of fact regarding the crime and considered mitigating evidence regarding the crime and Mr. Vallodolid's history and characteristics. App. 466–74, 509–18.

3. The Seventh Circuit Decision

The Seventh Circuit concluded there was "no error in the findings underpinning the district court's *Batson* ruling." App. 7. With respect to Ms. Garcia, the court found that "[d]isagreeing with U.S. immigration policy . . . is not dependent on ethnicity," and that Mr. Garcia's believe that the criminal justice system was "biased against people of lesser means," was not "rooted . . . exclusively in [his] Hispanic heritage." App. 8 Although it was undisputed that the Government struck a greater proportion of qualified Hispanic

jurors than non-Hispanic jurors, the court deemed the sample size too small to warrant drawing any conclusions. App. 8–9. The court acknowledged that Ms. Gonzalez's and Mr. Garcia's views may well have been influenced by their Hispanic heritage, and the none of the non-Hispanic jurors had similarly negative views of the Government's treatment of minorities. Nonetheless, the court said this did not amount to purposeful discrimination. App. 10.

Regarding Petitioners' challenge to his life sentence, the Seventh Circuit held that the jury's determination of an aggravated factor under Indiana Law, Ind. Code. § 35-50-2-9(b)(1)(I), was sufficient for the District Court to raise the mandatory maximum to life imprisonment pursuant to 18 U.S.C. § 1963(a). App. 21–24, 104. The Seventh Circuit made this determination despite conceding that Indiana law requires a bifurcated proceeding before a jury prior to imposing a life sentence for murder. *Id.* The Seventh Circuit reasoned that § 1963(a) did not impute state law sentencing procedure, despite the text of § 1963(a)'s reference to a state law's mandatory maximum. *Id.* In support, the Seventh Circuit relied on cases holding that state law procedures were not applicable to determinations of guilt based upon state law predicate offenses under 18 U.S.C. § 1962(d). *Id.* The Seventh Circuit did not rely on any cases interpreting the procedures required under § 1963(a) or with respect to federal sentencing when those procedures conflict with state law.

REASONS FOR GRANTING THE PETITION

The decision below squarely conflicts with this Court's repeated affirmation of *Batson*. The district court permitted the Government to proffer an explanation for its striking of almost all of the prospective Hispanic jurors that is blatantly pretextual.

The Seventh Circuit affirmed the district court's flawed reasoning and further held that no inferences could be drawn from the Government striking all but two Hispanic jurors. The Seventh Circuit's rationale hinged on the small pool of Hispanic prospective jurors and the small number of peremptory challenges. This defies logic and this Court's precedent.

The importance of this case goes well beyond Petitioners. Permitting prosecutors to strike jurors based on their honest answers regarding their experiences as minorities undermines the public's faith in the justice system as well as the system's fairness for individual defendants. In short, this prosecution was a direct affront both to this Court's precedent and to our constitutional design, this Court should grant certiorari and reverse.

Additionally, the district court sentenced both Petitioners well above what is permissible under both the applicable federal and state laws, which requires resentencing both Petitioners on Count I. This implicates both Petitioners' sentences as well as the need to clarify the scope of RICO's criminal penalties.

I. The Decision Below Squarely Conflicts With The Holdings And Logic Of This Court's Precedents.

Discrimination in the administration of justice "strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and our legal system." *Rose v. Mitchell*, 443 U.S. 545, 564 (1979). To protect these fundamental values and in recognition of the widespread use of peremptory strikes to keep minorities off of juries, this Court's opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibits prosecutors from exercising their peremptory strikes on the basis of race. This holding, guaranteeing the equal protection of both defendants and prospective jurors, acknowledged that "public respect for our criminal justice system will be strengthened if we ensure that no citizen is disqualified from jury service because of his race[, ethnicity, or sex]." *Id.* at 99. The prosecution's discrimination in its use of peremptory strikes "offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 40, 42 (1991).

Batson prohibited not just overt instances of discrimination based on race, but additionally the discrimination against jurors on the assumption that jurors of a particular race or ethnicity "as a group" will be unable to consider the government's case against a defendant. 476 U.S. at 89. *Batson*'s three-part test requires that defendants first make a prima facie case of discrimination, after which the prosecution "must provide race-neutral reasons for its peremptory strikes," which then requires the court to "determine whether the prosecutor's stated reasons were the

actual reasons or instead were a pretext for discrimination." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019).

In the almost 40 years since *Batson* was decided, this Court has "vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers*, 139 S. Ct. at 2243. Allowing the Seventh Circuit's decision to stand would result in the very same type of back-sliding that *Batson* was intended to stanch.

Indeed, the Seventh Circuit's opinion turns a blind eye to the experiences of Hispanic-Americans today and effectively abrogates *Batson*, rendering its protections unavailable for any prospective juror honest about her experiences as a person of her race or ethnicity. Specifically, the decision below misapplies *Batson*'s second and third prongs in finding that the prosecution had responded with an ethnicity-neutral[2] reason and that Petitioners had not carried their burden of showing that the Government engaged in purposeful discrimination. App. 7.

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[2] While the District Court described Petitioners' *Batson* challenge as based on "race," the United States Census Bureau categorizes "Hispanic" as an ethnicity and defines it as "a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." App. 289. For clarity and consistency with the terminology used by the District Court, *e.g.*, *id.*, this petition uniformly employs the term "Hispanic," intended to mean the definition afforded the term by the Census Bureau. *See Hernandez v. New York*, 500 U.S. 352, 355 (1991) (using "race" and "ethnicity" interchangeably in ruling on *Batson* challenge to the striking of Hispanic jurors).

A. The Seventh's Circuit Opinion Directly Contradicts this Court's Precedent.

The Seventh Circuit cursorily dismissed Petitioners' *Batson* arguments in holding that the prosecution had come forward with sufficiently ethnicity-neutral reasons and Petitioners had not shown the prosecution disparately struck Hispanic jurors. App. 7–9. The prosecution's reasons were not ethnically neutral and its use of peremptory strikes disparately impacted Hispanic prospective jurors.

1. The Prosecution's Rationale Was Pretextual, At Best.

In defending its use of a peremptory strike at the second step of *Batson*, the prosecution must "state [its] reasons as best [as it] can and stand or fall on the plausibility of the reasons [it] gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

The prosecution struck Ms. Gonzalez as "she expressed distaste and dismay . . . with the current . . . tenor in the country as far as immigration goes" and that "someone who has anger towards the U.S. government over immigration issues could take that out on the Department of Justice" (App. 287–88) and Mr. Garcia as he "expressed such d[i]stain for the police and the justice system" (*id.* at 287). Neither of these reasons are ethnically neutral—Mr. Garcia's experiences with law enforcement were related to his ethnicity and Ms. Gonzalez stated that her views on immigration had to do with her Hispanic heritage.

Ms. Gonzalez stated that in the United States, "we come from a country of all immigrants, [her]

family included" and despite that, there had been a "change of life for many individuals, without even giving them the opportunity to even . . . hear their side of the story or to seek help or assistance." App. 251–52. A week before Petitioners' trial, "the Attorney General of the United States announced a 'zero tolerance policy,' under which all adults entering the United States illegally would be subject to criminal prosecution, and if accompanied by a minor child, the child would be separated from the parent." *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018), *enforcement granted in part*, 415 F. Supp. 3d 980 (S.D. Cal. 2020). Courts cannot blind themselves to the reality that enforcement of immigration policies affect Hispanic people disproportionately. *E.g.*, John Dwight Ingram, *Racial and Ethnic Profiling*, 29 Thurgood Marshall L. Rev. 55, 52 (2003).

Although the district court and the Government described Ms. Gonzalez as having "anger towards the U.S. government" and as being "offended," Ms. Gonzalez never described herself as angry, and the term "offended" was the court's, not hers. Specifically, the court told Ms. Gonzalez that her opinion "was perfectly fair and permissible" and then asked whether she was "in some ways . . . offended by some of the rhetoric." App. 252. Ms. Gonzalez's response was that she "can take offense to it, knowing that [she has] family or relatives that may have gone through certain things[.]" *Id.*

The trial was not an immigration case, as the prosecution conceded. App. 287. Nonetheless, the court held that Ms. Gonzalez would potentially "take

out" her feelings regarding immigration "on the government." App. 289. The court credited the Government's claim that Ms. Gonzalez would draw some connection between the Attorney General and the AUSAs trying the case, despite Ms. Gonzalez never referencing the Attorney General or expressing any awareness that the Attorney General or the family-separation policy was somehow connected to the AUSAs. App. 251–52, 289.

Mr. Garcia likewise stated that his experience growing up in Chicago involved him getting "messed with by cops all the time," "pulled over for no reason," and "searched." App. 283. He then stated that the criminal justice system is biased against people who do not have means. *Id.* The prosecution originally attempted to strike Mr. Garcia for cause and accused him of not having answered the Court truthfully during *voir dire*.[3] App. 285. In rejecting the prosecution's for-cause challenge, the District Court held that just because Mr. Garcia had "negative experiences with law enforcement" did not necessarily mean that he could not "set those aside and decide the case based on the evidence." App. 285. As Justice Sotomayor stated, "it is no secret that people of color are disproportionate victims of this type of [police] scrutiny." *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J. dissenting). Yet in ruling on Petitioners' *Batson* motion, the District Court stated

[3] The prosecution made no similar accusation of a non-Hispanic prospective juror who originally stated he could be impartial, but when followed up with by the Court stated that his connections with law enforcement meant "[i]t would be hard" for him to find for the Petitioners. App. 304.

that these two jurors were "very close to being cause challenges." App. 289. Excluding these jurors further punishes them for being honest with the District Court about issues the Hispanic community faces, of which most if not all Americans are aware. Tellingly, no non-Hispanic jurors reported having similar experiences, further illustrating the connection between the ethnicity of these prospective jurors and the Government's strikes.

2. The Prosecution Disproportionately Struck Hispanic Jurors.

The prosecution used its peremptory strikes to exclude Hispanic prospective jurors in a ratio significantly higher than that by which the Government excluded non-Hispanic prospective jurors. Six of the 45 prospective jurors were Hispanic. App. 187, 226, 253, 286, 338, 355. One of them, a potential alternate, was excused for cause at the suggestion of the prosecution. App. 338. Of the five remaining qualified Hispanic prospective jurors, all but two were removed by the prosecution's peremptory strikes. App. 186, 226, 253, 286. The prosecution thus removed 60% of qualified Hispanic prospective jurors with peremptory strikes. By contrast, the prosecution used peremptory strikes against only 11%—3 out of 27—of the non-Hispanic qualified prospective jurors. As a result, the prosecution ensured that the jury that convicted a Hispanic defendant for his alleged associations with a Hispanic gang included only one Hispanic juror. App. 461–63

The decision below ignored these clear indications of disparate treatment and instead held that the Seventh Circuit's precedents "cautioned against

finding intentional discrimination from statistical analysis rooted in a small data set." App. 9. Yet this defies this Court's precedent and logic—where a racial or ethnic minority makes up a small percentage of the population, this further cautions courts to pay *more* attention to disproportionate striking of those prospective jurors. *See Flowers*, 139 S. Ct. at 2239–40 ("Given that blacks were a minority of the population, in many jurisdictions the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors. So prosecutors could routinely exercise peremptories to strike all the black prospective jurors and thereby ensure all-white juries."). The Seventh Circuit's refusal to draw any inferences from a "small data set," when minorities will almost always be just that, defies law and reason.

B. The Decision Below Effectively Abrogates *Batson*.

If Mr. Garcia's and Ms. Gonzalez's explanations can be characterized as race or ethnically neutral, then *Batson* is *de facto* abrogated.

The jury system's "greatest benefit[] is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922). Even one instance of excluding a juror belonging to a marginalized group can have the effect of impairing that "public confidence in the fairness of our system of justice" and the civic participation that stands only next to voting as a citizen's substantial opportunity to participate in the democratic process. *Batson*, 476 U.S. at 87.

Where the prosecution's stated rationale is impermissibly biased, courts "cannot just look away" even when the prosecution attempts to give that explanation a neutral spin. *Flowers*, 139 S. Ct. at 2250. Yet the decision below effectively discredits Ms. Gonzalez's and Mr. Garcia's experiences and turns a blind eye to how their statements to the District Court were connected to their ethnicity.

While it is true that a person of any race or ethnicity can have negative experiences with the police of the immigration system, it is no secret that members of the Hispanic community are uniquely affected in a way that non-Hispanic persons are not, consistent with the Seventh Circuit's observation. App. 9. Over 90% of persons deported in recent years are Hispanic.[4] And despite making up less than 20% of the population, Hispanic persons make up approximately one third of the prison population and are more likely to be pulled over and searched by the police.[5] The experiences that Mr. Garcia and Ms. Gonzalez described are not unique to them, but they are experiences common to members of the Hispanic community.

The decision below has effects outside of just Petitioners—the prosecutor's stated "neutral" reasons

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[4] Golash-Boza, Tanya & Hondagneu-Soleto, Pierrette, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 Lat. Stud. 271 (2013).

[5] *Compare USA QuickFacts*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/RHI725220?#RHI725220, *with Inmate Ethnicity*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp.

could easily have been in a case in which a Black prospective juror stated they had had negative experiences with the police or were supporters of the Black Lives Matter movement. Yet if every person affected by policies or practices of the government is irreparably biased and unable to serve on a jury, despite their stating they can remain fair and unbiased, then *Batson* no longer provides protection. This kind discriminatory use of peremptory challenges to use a person's unique experiences that are inextricably tied to their status as a minority, is precisely what *Batson* protects against. *Flowers*, 139 S. Ct. at 2240. Justice Marshall predicted exactly such an outcome and warned against it. If the decision below stands, his prediction is now the reality for ethnic and racial minorities in American courtrooms:

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed 'uncommunicative,' or 'never cracked a smile' and, therefore 'did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case'? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Batson, 476 U.S. at 105–06 (citations omitted). Allowing these peremptory challenges further undermines the public's perception of the justice system—one already dangerously low due to how widespread discrimination in jury selection is. *See Jamison v. McClendon*, 476 F. Supp. 3d 386, 422 n.284 (S.D. Miss. 2020) ("[R]acial discrimination remains rampant in jury selection."); *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J. concurring) ("Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem."); Bright, Stephen B., *Rigged; When Race and Poverty Determine Outcomes in the Criminal Courts*, 14 Ohio St. J. Crim. L. 263, 286 (2016) ("The lack of any movement on the part of the Supreme Court, state courts, and the legislatures speaks volumes with regard to the lack of any commitment to prevent racial discrimination in jury selection."). The Court should grant certiorari to ensure *Batson*'s protections remain and criminal defendants are given equal protection under the laws, as the Constitution commands.

II. The Courts Below Ignored 18 U.S.C. 1963(a)'s Requirements for Imposing a Life Sentence.

The District Court failed to accurately assess the mandatory maximum sentence for count one, racketeering conspiracy, holding that the maximum penalty was life imprisonment and sentencing Petitioners to life imprisonment. App. 466–74, 509–18. However, under Indiana law a life sentence is only

available after a bifurcated proceeding during which the jury recommends a life sentence given aggravating *and* mitigating factors. IC 35-50-2-9(d)-(e). This procedure was not provided in this case. Therefore, Petitioners' maximum sentence on the murders should have been sixty-five years on count one and the case should be remanded for resentencing. *See United States v. Powell*, 652 F.3d 702, 710 (7th Cir. 2011) (a defendant cannot waive an unlawful sentence).

The maximum term of imprisonment for racketeering conspiracy is twenty years "or [] life if the violation is based on a racketeering activity for which maximum penalty includes life imprisonment." 18 U.S.C. § 1963(a). Congress included this increase in 1988 so that the racketeering predicate predict the defendant committed would align with state punishments. 134 Cong. Rec. 32703 (1988); *Martinez v. United States*, 803 F.3d 878, 883 (7th Cir. 2015); *United States v. Nguyen*, 255 F.3d 1335, 1343–44 (11th Cir. 2001). If the racketeering activity is based upon state law, the penalty under the state law offense applies. *Martinez*, 803 F.3d at 878. In Indiana, the maximum penalty for murder is sixty-five years, IC 35-50-2-3(a) (2012), unless certain procedures are satisfied, in which case, a life sentence is available. Under those procedures, the jury must first determine guilt. IC 35-50-2-9(d). Then, in a *separate* proceeding, the State presents evidence of an aggravating factor, which are enumerated in the statute. The defense presents mitigating evidence on both the alleged aggravating factor and the defendant. The jury then deliberates a second time and decides whether the penalty may be increased to life imprisonment. IC 35-50-2-9(a)-(e).

Here, the Government sought and obtained a life sentence even though it did not establish that "the violation [w]as based on a racketeering activity for which the maximum penalty includes life imprisonment." § 1963(a). Although the Government provided notice of an aggravated factor and asked the jury to make a determination on the aggravated factor, the Petitioners were not permitted to present mitigating evidence in a separate proceeding, and as a result, the Government could not establish entitlement to a life sentence as a matter of law. IC 35-50-2-9(a)-(e).

In holding that the Government permissibly sought a life sentence, the Court did not rely on cases interpreting § 1963(a). Indeed, none exist. Instead, the Court relied upon cases which assessed whether state procedural laws applied to a determination of guilt under 18 U.S.C. § 1962, when one of the predicate acts is a state law offense under § 1961(A)(1). *See United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988) (state law prohibition of a conviction for both conspiracy and substantive offense inapplicable); *United States v. Paone*, 782 F.2d 386, 393 (2d Cir. 1986) (state law prohibition that a gambling offense cannot stand based only on uncorroborated accomplice testimony in applicable); *United States v. Licavoili*, 725 F.2d 1040, 1046 (6th Cir. 1984) (state law prohibition of a conviction for both conspiracy and substantive offense in applicable); *United States v. Frumento*, 563 F.2d 1083, 1087 (3d Cir. 1977) (state acquittal for predicate offense inapplicable).

These cases do not address the issue in this case, which is whether the Government meets its burden of

establishing entitlement to seek a life sentence if the predicate state statute anywhere mentions the word "life."

Such an interpretation of § 1963(a) is contrary to its plain language. Section 1963(a) provides that one who violates § 1962 "shall be . . . imprisoned . . . for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." The language could not be clearer: a life sentence is only available if the racketeering activity "includes" that sentence. In Indiana, racketeering activity only "includes" a life sentence is specific requirements are met. It is undisputed that those requirements were not met here.

When Congress wants to make a life sentence automatically available, it knows how to do so. In fact, Congress made such amendments to other sections of Title 18 at the same time as it added the life-sentence language to § 1963(a). *See, e.g.*, 18 U.S.C. § 401(b)(1)(A) (amended in 1988 to provide "[i]f any person commits a violation . . . after two or more prior convictions for a felony drug offense have become final, such person *shall be sentenced to a mandatory term of life imprisonment* without release."). That is not what Congress did when it amended §1963(a) in 1988, and thus, the Government must meet its burden to establish that it is entitled to a life sentence. The Government failed to do so here.

Had the Government attempted to meet this burden, the jury may not have awarded the Government a life sentence. Remand for resentencing so that the lawful mandatory maximum sentence may be considered is necessary.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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