

(ORDER LIST: 568 U.S.)

MONDAY, FEBRUARY 25, 2013

CERTIORARI -- SUMMARY DISPOSITIONS

11-42 CHILDERS, WYON D. V. FLOYD, WARDEN

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Johnson v. Williams*, 568 U.S. ____ (2013).

11-1497 BYRNE, STEPHEN E. V. WOOD, HERRON & EVANS, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *Gunn v. Minton*, 568 U.S. ____ (2013).

11-8384 PETERSON, JOHN K. V. SEAMAN, PANDITA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Chafin v. Chafin*, 568 U.S. ____ (2013).

11-9422 DAVIS, ANTOINE T. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Henderson v. United States*, 568 U. S. ____ (2013).

ORDERS IN PENDING CASES

12M93 JACKSON, DARWIN V. HARTLEY, WARDEN

12M94 NATKUNANATHAN, SIVATHARAN V. CIR

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

12-7907 DELGADO, MELODY V. ILLINOIS

12-8217 J. C. B. V. PENNSYLVANIA STATE POLICE

12-8321 BOUCHAT, CHRISTOPHER E. V. MARYLAND

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until March 18, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

12-414 BURT, WARDEN V. TITLOW, VONLEE N.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

12-609 KANSAS V. CHEEVER, SCOTT D.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

CERTIORARI DENIED

11-807 BROWN, KEVIN N. V. BOBBY, WARDEN

11-1381 POBLETE, GERARDO V. ARIZONA

11-1414 DIAZ-PALMERIN, JULIO V. UNITED STATES

11-1473 CHAU, THO M. V. MASSACHUSETTS

11-7376 NOLING, TYRONE V. BOBBY, WARDEN

11-8643 DOAN, THAI H. V. UNITED STATES
11-9261 SMITH, DETRICK C. V. UNITED STATES
11-9642 SHAHLY, MAJID V. FLORIDA
11-10826 ALSHAIF, SHAMAKH V. NORTH CAROLINA
11-10846 GAITAN, FRENSEL V. NEW JERSEY
12-304 LARBIE, EVELYN M. V. LARBIE, DEREK
12-332 CHAIDY, JERMIA V. HOLDER, ATT'Y GEN.
12-348 BUTT, ERIC L. V. UTAH
12-391 MENDOZA, MARIO V. UNITED STATES
12-439 MATHUR, SHAHZAD V. UNITED STATES
12-485 GRIFFIN, DONALD V. UNITED STATES
12-488 VANDEBRAKE, STEVEN K. V. UNITED STATES
12-493 PASICOV, CRAIG J. V. HOLDER, ATT'Y GEN.
12-517 TEAMSTERS LOCAL UNION NO. 523 V. NLRB, ET AL.
12-570 REGENTS OF UNIV. OF CA, ET AL. V. CALDERA PHARMACEUTICALS, INC.
12-579 DANIELCZYK, WILLIAM P., ET AL. V. UNITED STATES
12-588 GUERRERO-CASTRO, JULIO V. UNITED STATES
12-632 BEECH, AMANDA V. HERCULES DRILLING COMPANY
12-638 ZAHL, KENNETH V. KOSOVSKY, KAREN, ET AL.
12-639 HUANG, HONG V. NAPOLITANO, SEC. OF HOMELAND
12-657 CASH ADVANCE NETWORK, INC. V. FELTS, ANDREA J.
12-756 HAYS, RODNEY E. V. GAULEY BRIDGE, WV, ET AL.
12-757 ELLIOT, BARBARA M., ET AL. V. NEW YORK, NY, ET AL.
12-762 MARSH, T. BRENT R. V. AKERS, RONDAL, ET AL.
12-766 PUBLIC LANDS FOR THE PEOPLE V. DEPT. OF AGRICULTURE, ET AL.
12-806 UNITED HEALTHCARE INSURANCE CO. V. ACCESS MEDIQUIP L.L.C.
12-814 BALL, JONATHAN V. NEW HAMPSHIRE
12-816 STONER, MARTIN V. YOUNG CONCERT ARTISTS, INC.

12-821 MARQUEZ, LYDIA, ET AL. V. PHOENIX, AZ, ET AL.
12-823 BLACK, MARIE L. V. COLUMBUS PUBLIC SCHOOLS
12-826 BUTLER, JOSEPH P. V. BOARD OF APPEAL ON MOTOR VEHICLE
12-830 FORD, CHRISTOPHER F. V. DONLEY, SEC. OF AIR FORCE
12-832 CATSIFF, ROBERT V. McCARTY, TIM, ET AL.
12-841 CAMPBELL, LEON E. V. CADMAN, JAMES G., ET AL.
12-848 BLACK FARMERS ASSOC., INC. V. VILSACK, SEC. OF AGRIC., ET AL.
12-849 SMITH, DAVID R. V. TENNESSEE NATIONAL GUARD
12-858 ASTER, HERMAN V. ANTHEM BLUE CROSS LIFE
12-878 LAO PEOPLE'S DEMOCRATIC REPUBLIC V. THAI-LAO LIGNITE CO., ET AL.
12-886 TAYLOR, ERIC V. KING, ALLEN, ET AL.
12-892 NEW, MICHAEL G. V. UNITED STATES
12-908 THOMS, TRACE, ET UX. V. UNITED STATES
12-936 NAMER, ROBERT V. FEDERAL TRADE COMMISSION
12-5240 CARBAJAL, ANDRES V. UNITED STATES
12-5338 DAVIS, JOSEPH M. V. FLORIDA
12-5491 MARTINEZ-PORTA, ANTONIO V. UNITED STATES
12-5691 SAN NICOLAS, MARC A. V. DEXTER, WARDEN
12-5915 ESPARZA, JUAN I. V. UNITED STATES
12-6421 ARTUSO, JOHN V., ET AL. V. UNITED STATES
12-6485 SRIVASTAV, SANJEEV A. V. UNITED STATES
12-6553 ENRIQUEZ, HECTOR L. V. CALIFORNIA
12-6747 MARSHALL, JAMES C., ET UX. V. COLLIER COUNTY, FL, ET AL.
12-6797 ABRAHAM, WILLIAM V. UAW INTERNATIONAL UNION, ET AL.
12-6838 RODRIGUEZ, RAYMOND V. UNITED STATES
12-6920 ROBERTSON, DEBRA I. V. CREE, INC.
12-6972 BATISTA, LUIS M. V. UNITED STATES
12-7008 ROZIER, KEVIN D. V. UNITED STATES

12-7043 AYALA-LOPEZ, CARLOS L. V. UNITED STATES
12-7099 BURWELL, BRYAN V. UNITED STATES
12-7330 McCUISTION, DAVID W. V. WASHINGTON
12-7374 WHITFIELD, LARRY V. UNITED STATES
12-7418 McCULLOUGH, DARRYL B. V. UNITED STATES
12-7473 AMOS, CHRISTOPHER V. UNITED STATES
12-7486 TSCHACHER, BRET V. UNITED STATES
12-7810 SHEHATA, MARK F. V. COLE, DANA
12-7832 WILLIAMS, JOSEPH M. V. NATCHITOCHEs, LA, ET AL.
12-7833 THOMPSON, RICARDO D. V. CREWS, SEC., FL DOC, ET AL.
12-7834 THOMAS, ANTHONY V. FL DOC
12-7836 YAUTENTZI-CAPRIANO, ANGEL V. NOOTH, SUPT., SNAKE RIVER
12-7842 FRASER, CLYDE V. GMAC MORTGAGE, LLC
12-7843 HILL, JEWEL D. V. NATIONWIDE MUTUAL INS., ET AL.
12-7844 GLICA, JAMES V. McDONALD, WARDEN
12-7850 FUNES, MARIO A. V. LOUISIANA
12-7852 HUDGINS, JOSEPH P. V. CARTLEDGE, WARDEN
12-7853 FRANKLIN, DENNIS V. ILLINOIS
12-7854 GLAIR, RICHARD J. V. LOS ANGELES, CA, ET AL.
12-7857 HIRAMANEK, ADIL V. SUPERIOR COURT OF CA, ET AL.
12-7858 GUY, TRAYVON, ET AL. V. INGLEWOOD, CA, ET AL.
12-7863 BROWN, TORRELL V. LOUISIANA
12-7870 HENDERSON, NICKOLAS V. MISSISSIPPI
12-7871 GRAVELY, RICHARD L. V. CHARLESTON, WV
12-7873 ZARR, EDWIN S. V. CREWS, SEC., FL DOC
12-7878 CRAFT, SCOTT J. V. AHUJA, ANITA, ET AL.
12-7881 STONE, LaQUAN D. V. VIRGINIA
12-7882 ROBINSON, ANTHONY L. V. EVANS, WARDEN

12-7888 PARKS, EDWARD F. V. MOHAVE CTY. SHERIFF'S DEPT.
12-7899 MOON, ADRIAN V. VASQUEZ, WARDEN
12-7905 SANDOVAL, HERMAN G. V. BEARD, SEC., CA DOC, ET AL.
12-7906 STANCLE, JOSEPH V. CLAY, WARDEN
12-7914 KIMBRELL, CHRISTOPHER V. BUTTS, SUPT., PENDLETON
12-7921 MINK, TED V. ARIZONA, ET AL.
12-7925 JORDAN, LAMAR E. V. HEDGPETH, WARDEN
12-7927 SAMUEL, ALEXANDER V. BLOOMBERG, MAYOR, ET AL.
12-7929 RODRIGUEZ, FERNANDO V. ARKANSAS
12-7935 MORA, UVALDO V. JACQUEZ, WARDEN
12-7940 YOUNG, HENRY E. V. FRAKER, SUPT., CLALLAM BAY
12-7953 KOROMA, JOSEPH V. V. ASTRUE, COMM'R, SOCIAL SEC.
12-7972 PINGEL, JAMES E. V. ARIZONA, ET AL.
12-7982 NICKELS, GREGORY W. V. HOBBS, DIR., AR DOC
12-7996 VANOVER, QUILL V. BRUNSMAN, WARDEN
12-8018 WILSON, ANTHONY D. V. U.S. AIR FORCE
12-8030 MOSBY, ROGER D. V. HOLMES, CHIEF JUDGE, USDC ED AR
12-8032 KRIDER, CHARLES C. V. CONOVER, WARDEN, ET AL.
12-8036 PORTILLO, EDWARD V. ADAMS, WARDEN, ET AL.
12-8037 LLOYD, DAVID V. ASTRUE, COMM'R, SOCIAL SEC.
12-8044 BALL, EARL V. RYAN, DIR., AZ DOC, ET AL.
12-8058 JIMENEZ, JOSE V. LEE, SUPT., GREEN HAVEN
12-8063 MURRAY, GEORGIA V. JOHN D DINGLE VETERANS HOSP.
12-8065 MELLERSON, DWAYNE V. USDC WD NY
12-8069 GONZALEZ-AGUILERA, C. MICHAEL V. PREMO, SUPT., OR
12-8085 WILLIAMS, OMAR D. V. HEATH, SUPT., SING SING
12-8086 WILSON, CHARLES I. V. ARKANSAS
12-8087 WHITE, TOMMY L. V. EPPS, COMM'R, MS DOC, ET AL.

12-8116 LE, JOHNSON V. LONG, WARDEN
12-8138 LANCASTER, DOYLE D. V. HOUSTON, DAVID R.
12-8151 ELMER, MICHAEL V. FLORIDA
12-8159 DOMBOS, FRANK J. V. JANECKA, WARDEN, ET AL.
12-8168 ESTEY, JEAN R. V. CREWS, SEC., FL DOC, ET AL.
12-8172 BUSH, THOMAS K. V. USDC ND GA, ET AL.
12-8175 BRIDGES, DANNY V. NORTH CAROLINA
12-8234 GAYLE, DENROY V. UNITED STATES
12-8241 NICHOLS, JERRY L. V. CREWS, SEC., FL DOC
12-8252 CRISSWALLE, ANDRA R. V. PENNSYLVANIA
12-8263 BONNANO, LOUIS V. USDC ED TN
12-8280 McCARVILL, BRIAN C. V. PREMO, SUPT., OR
12-8281 NESBITT, THOMAS E. V. NEBRASKA
12-8284 ALEXANDER, LISA V. UNITED STATES
12-8287 SMITH, MICHAEL J. V. UNITED STATES
12-8288 WOODLAND, WILLIE V. UNITED STATES
12-8289 WALKER, IVEY V. UNITED STATES
12-8290 WEBB, MARKEITH J. V. UNITED STATES
12-8296 GREEN, RICHARD L. V. UNITED STATES
12-8301 LEWIS, PHILLIP D. V. UNITED STATES
12-8302 GLAVE, MICHAEL V. GLEBE, SUPT., STAFFORD CREEK
12-8304 HENDERSON, CARL V. UNITED STATES
12-8309 HALES, TIMOTHY L. V. UNITED STATES
12-8310 FOX, CHAVEZ D. V. UNITED STATES
12-8311 LARA, JOAQUIN V. UNITED STATES
12-8315 DYNES, SHAUN P. V. UNITED STATES
12-8319 PEPPERS, RONALD C. V. UNITED STATES
12-8320 MACK, TANYA V. V. UNITED STATES

12-8326 RODRIGUEZ-PORTILLO, ROSARIO V. UNITED STATES
 12-8330 JACKSON, DAMON V. UNITED STATES
 12-8331 TRINIDAD-COTTO, LUIS V. UNITED STATES
 12-8335 REEDOM, JAMES V. VILSACK, SEC. OF AGRICULTURE
 12-8339 MURELLO-GOMEZ, JUAN A. V. UNITED STATES
 12-8342 PLAZA-ANDRADES, IVAN V. UNITED STATES
 12-8344 CARRAZCO-GALVAN, RUBEN V. UNITED STATES
 12-8345 DOMINGUEZ-DEVALLE, LUIS V. UNITED STATES
 12-8347 MOTHERSHED, GEORGE L. V. OK, EX REL. OK BAR ASSN., ET AL.
 12-8349 MAK, CHI V. UNITED STATES
 12-8350 LAGOS, RONY O. V. UNITED STATES
 12-8351 JACKSON, KENNETH V. UNITED STATES
 12-8352 ERCOLE, JOSEPH R. V. LaHOOD, SEC. OF TRANSPORTATION
 12-8353 ANDERSON, ERIC S. V. UNITED STATES
 12-8356 McGRUDER, TIMOTHY K. V. UNITED STATES
 12-8359) ARELLANO-GARCIA, SIXTOS V. UNITED STATES
)
 12-8408) OROZCO-RIOS, MAURICIO V. UNITED STATES
 12-8360 ADOH, CYPRIAN O. V. UNITED STATES
 12-8361 ADAMS, EDWARD J. V. UNITED STATES
 12-8365 FAZIO, COSMO V. UNITED STATES
 12-8369 OUSLEY, ANTHONY A. V. UNITED STATES
 12-8370 ROBINSON, DEVON V. UNITED STATES
 12-8371 MORAN-ELIAS, ADAN V. UNITED STATES
 12-8375 RODRIGUEZ, ALEXIS V. UNITED STATES
 12-8382 BARTEL, JOHN L. V. UNITED STATES
 12-8383 ADAMS, MICHAEL V. UNITED STATES
 12-8392 COLLINS, ANTHONY V. UNITED STATES
 12-8394 BARNETT, TERECE V. UNITED STATES

12-8398 NESBITT, JULIUS V. UNITED STATES
12-8399 SADDLER, CHRISTOPHER V. UNITED STATES
12-8402 VARGAS-SOTO, JOSE V. UNITED STATES
12-8404 SELLERS, FREDERICK V. UNITED STATES
12-8406 SAINT-SURIN, ANTOINE F. V. UNITED STATES
12-8407 MASON, KEITH V. UNITED STATES
12-8409 MORENO-HERNANDEZ, LUIS A. V. UNITED STATES
12-8410 PEREZ-PINON, HERIBERTO V. UNITED STATES
12-8416 DOBBINS, KEVIN V. UNITED STATES
12-8426 BIRD, RONDA R. V. UNITED STATES
12-8427 BAHENA-ARANDA, LAZARO V. UNITED STATES
12-8433 McINTOSH, CARLTON T. V. UNITED STATES
12-8434 CENTENO NUNEZ, FRANKLIN R. V. UNITED STATES
12-8438 PFEIFFER-EL, MALCOLM E. V. UNITED STATES, ET AL.
12-8441 PAXSON, DONALD V. UNITED STATES
12-8442 DORMAN, ADONIS A. V. UNITED STATES
12-8443 DEW, MISTY V. UNITED STATES
12-8447 WRIGHT, EDMOND V. UNITED STATES
12-8450 JUAREZ-OLVERA, JOSE V. UNITED STATES
12-8461 GREEN, DONALD V. LOCKETT, WARDEN
12-8474 GEHRINGER, TODD R. V. UNITED STATES

The petitions for writs of certiorari are denied.

12-164 FIGUERO-SANCHEZ, ROGELIO V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

12-239 MINNESOTA V. SAHR, MICHAEL W.

The motion of respondent for leave to proceed *in forma*

pauperis is granted. The petition for a writ of certiorari is denied.

12-492 PEARSON, WARDEN V. WINSTON, LEON J.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

12-646 NELSON, FLORINE, ET AL. V. ROCHESTER, NY

The motion of New York State Coalition of Property Owners and Businesses for leave to file a brief as *amicus curiae* is granted. The motion of Cato Institute, et al. for leave to file a brief as *amici curiae* is granted. The motion of Institute for Justice for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

12-812 ANAYA-AGUILAR, JOSE V. HOLDER, ATT'Y GEN.

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

12-7840 GREEN, JAMES T. V. COURT OF CRIMINAL APPEALS OF TX

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*).

12-7869 BONIECKI, TEDDY L. V. STEWART, DONALD, ET AL.

The petition for a writ of certiorari before judgment is denied.

12-7917 MARTIN, ROBERT V. SKORY, JASON M., ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*). Justice Alito took no part in the consideration or decision of this motion and this petition.

12-8257 AMAWI, MOHAMMAD Z. V. UNITED STATES

12-8307 FASANO, STEVEN M. V. UNITED STATES

12-8424 SESSOMS, COLLIER D. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

HABEAS CORPUS DENIED

12-8456 IN RE ROBIN ROLAND

12-8475 IN RE DEONTAE J. GORDON

12-8539 IN RE JEFFREY M. BURKS

The petitions for writs of habeas corpus are denied.

12-8540 IN RE STEVIE W. JOHNSON

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus

is dismissed. See Rule 39.8.

REHEARINGS DENIED

12-499 TOWNSEND, LORRAINE V. UNITED STATES
12-501 CULLEN, WILLIAM V. PELHAM MANOR, NY, ET AL.
12-506 HETTINGA, HEIN, ET AL. V. UNITED STATES
12-509 BUCKLAND, HERBERT, ET UX. V. BUCKLAND, DOUGLAS, ET AL.
12-537 MCKAY, ANTHONY K. V. CHICAGO TRANSIT AUTHORITY
12-5656 ROMERO, JAMES M. V. APKER, WARDEN
12-6480 HATCHES, ANTHONY V. UNITED STATES
12-6511 RANGEL, ADRIAN G. V. SCHMIDT, THOMAS, ET AL.
12-6697 TOWBRIDGE, OTIS L. V. SGT. TACKER, ET AL.
12-6706 BOOKER, WILLIE J. V. GODINEZ, DIR., IL DOC
12-6795 LLORENTE, JOSE U. V. HOLDER, ATT'Y GEN.
12-6811 SHULICK, JOHN J. V. MICHIGAN, ET AL.
12-6904 LYONS, GEORGE V. FLORIDA
12-6922 CODY, KELLYANN R. V. BUTERA, JOHN C., ET AL.
12-7022 GERBER, ROBERT G. V. ISABELLA GERIATRIC CENTER, INC.
12-7096 POTTER, ISAAC A. V. TOEI ANIMATION INC., ET AL.

The petitions for rehearing are denied.

12-358 SNYDER, MARGE, ET AL. V. NY EDUCATION DEPT., ET AL.
12-7065 HENRY, LEON F. V. UNITED STATES

The petitions for rehearing are denied. Justice Sotomayor took no part in the consideration or decision of these petitions.

Statement of SOTOMAYOR, J.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

BONGANI CHARLES CALHOUN *v.* UNITED STATES

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

No. 12–6142. Decided February 25, 2013

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, respecting the denial of the petition for writ of certiorari.

I write to dispel any doubt whether the Court’s denial of certiorari should be understood to signal our tolerance of a federal prosecutor’s racially charged remark. It should not.

Petitioner Bongani Charles Calhoun stood trial in a federal court in Texas for participating in a drug conspiracy. The primary issue was whether Calhoun knew that the friend he had accompanied on a road trip, along with the friend’s associates, were about to engage in a drug transaction, or whether instead Calhoun was merely present during the group’s drive home, when the others attempted to purchase cocaine from undercover Drug Enforcement Agency (DEA) agents. Two alleged co-conspirators who had pleaded guilty testified to Calhoun’s knowledge. Law enforcement officers also testified that they discussed the drugs with Calhoun immediately before they broke cover to arrest the group, and that Calhoun had a gun when he was arrested. In his defense, Calhoun testified that he was not part of and had no knowledge of his friend’s plan to purchase drugs, that he did not understand the DEA agents when they spoke to him in Spanish only, and that he always carried a concealed firearm, as he

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was licensed to do. It was up to the jurors to decide whom they believed.

The issue of Calhoun’s intent came to a head when the prosecutor cross-examined him. Calhoun related that the night before the arrest, he had detached himself from the group when his friend arrived at their hotel room with a bag of money. He stated that he “didn’t know” what was happening, and that it “made me think . . . [t]hat I didn’t want to be there.” Tr. 125–126 (Mar. 8, 2011). (Calhoun had previously testified that he rejoined the group the next morning because he thought they were finally returning home. *Id.*, at 109.) The prosecutor pressed Calhoun repeatedly to explain why he did not want to be in the hotel room. Eventually, the District Judge told the prosecutor to move on. That is when the prosecutor asked, “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, This is a drug deal?” *Id.*, at 127.

Calhoun, who is African-American, claims that the prosecutor’s racially charged question violated his constitutional rights. Inexplicably, however, Calhoun’s counsel did not object to the question at trial. So Calhoun’s challenge comes to us on plain-error review, under which he would ordinarily have to “demonstrate that [the error] ‘affected the outcome of the district court proceedings.’” *Puckett v. United States*, 556 U. S. 129, 135 (2009) (quoting *United States v. Olano*, 507 U. S. 725, 734 (1993)). Yet in his petition for writ of certiorari, Calhoun does not attempt to make that showing. Instead, Calhoun contends that the comment should lead to automatic reversal because it constitutes either structural error or plain error regardless of whether it prejudiced the outcome. Those arguments, however, were forfeited when Calhoun failed to press them on appeal to the Fifth Circuit. Given this posture, and the unusual way in which this case has been

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litigated, I do not disagree with the Court's decision to deny the petition.*

There is no doubt, however, that the prosecutor's question never should have been posed. "The Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U. S. 279, 309, n. 30 (1987). Such argumentation is an affront to the Constitution's guarantee of equal protection of the laws. And by threatening to cultivate bias in the jury, it equally offends the defendant's right to an impartial jury. Judge Frank put the point well: "If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent. He should not be permitted to summon that thirteenth juror, prejudice." *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631, 659 (CA2 1946) (dissenting opinion) (footnote omitted). Thus it is a settled professional standard that a "prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-5.8(c), p. 106 (3d ed. 1993).

By suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here

*The prosecutor's comment was not an isolated one, but Calhoun similarly failed to challenge the reprise. During defense counsel's closing argument, counsel belatedly criticized the prosecutor's question. On rebuttal, the prosecutor responded: "I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay, you got African-American[s] and Hispanics, do you think it's a drug deal? But there's one element that's missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]? None of them are real estate investors." Tr. 167-168 (Mar. 8, 2011).

Statement of SOTOMAYOR, J.

tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation. There was a time when appeals to race were not uncommon, when a prosecutor might direct a jury to “consider the fact that Mary Sue Rowe is a young white woman and that this defendant is a black man for the purpose of determining his intent at the time he entered Mrs. Rowe’s home,” *Holland v. State*, 247 Ala. 53, 22 So. 2d 519, 520 (1945), or assure a jury that “I am well enough acquainted with this class of niggers to know that they have got it in for the [white] race in their heart,” *Taylor v. State*, 50 Tex. Crim. 560, 561, 100 S. W. 393 (1907). The prosecutor’s comment here was surely less extreme. But it too was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason.

It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century. Such conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice. In discharging the duties of his office in this case, the Assistant United States Attorney for the Western District of Texas missed the mark.

Also troubling are the Government’s actions on appeal. Before the Fifth Circuit, the Government failed to recognize the wrongfulness of the prosecutor’s question, instead calling it only “impolitic” and arguing that “even assuming the question crossed the line,” it did not prejudice the outcome. Brief for United States in No. 11–50605, pp. 19, 20. This prompted Judge Haynes to “clear up any confusion—the question crossed the line.” 478 Fed. Appx. 193, 196 (CA5 2012) (concurring opinion). In this Court, the Solicitor General has more appropriately conceded that the “prosecutor’s racial remark was unquestionably improper.” Brief in Opposition 7–8. Yet this belated ac-

Statement of SOTOMAYOR, J.

knowledge came only after the Solicitor General waived the Government's response to the petition at first, leaving the Court to direct a response.

I hope never to see a case like this again.