

## Calhoun v. United States: Justice Sotomayor calls prosecutor to task for racially biased questions

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For the most part, cases decided by the [Supreme Court of the United States](#) are cases that the Court has elected, as a matter of its discretion, to decide. There are very few criminal cases that the Supreme Court must hear. When a litigant attempts to ask the United States Supreme Court to hear a case, he or she must file what is known as a [petition for certiorari](#). Only a fraction of petitions for certiorari are granted each year, and most petitions for certiorari are denied by the entry of a simple form order of denial.

Recently, the United States Supreme Court denied certiorari in a case known as *Calhoun v. United States*, a federal drug case prosecuted in the Western District of Texas. What made the Calhoun case different than other cases where certiorari is denied was a statement filed by [Justice Sonia Sotomayor](#), joined by [Justice Stephen Breyer](#). In the statement, Justice Sotomayor expressed outrage concerning certain aspects of the prosecutor's conduct in the trial of the case. Justice Sotomayor's comments merit attention.

Mr. Calhoun was tried in federal court in Texas on drug charges. The main issue in the trial was whether Mr. Calhoun knew that the people in his company were about to engage in a drug transaction with someone else (who was actually and undercover DEA agent). Mr. Calhoun testified at his trial that he had no idea that his friends were about to engage in a drug transaction. During Mr. Calhoun's testimony, the prosecutor cross-examined him about an event that occurred the night before he was arrested, in which he was present in a hotel room with a group of people, when his friend arrived with a bag full of money. Mr. Calhoun testified that he left the hotel room because he did not know what was happening and the presence of the money made him think that he did not want to be there.

During cross-examination, the prosecutor pressed him on the issue of why he did not want to be there, ultimately asking Mr. Calhoun "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?"

Incredibly, Mr. Calhoun's lawyer did not object to the question. However, during closing arguments, his counsel apparently pointed out the racist nature of this question. In response, during the government's closing argument, the prosecutor responded "I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Ok, you got African-American[s] and Hispanic[s], 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."

Mr. Calhoun appealed his conviction and sentence, but his appeal was denied by the United States Court of Appeals for the Fifth Circuit. He therefore petitioned the United States Supreme Court to review the case. The Court ultimately denied the petition, principally because no objection had been raised to the prosecutor's questioning during the trial. Before the Supreme Court, Calhoun attempted to argue that the comment should lead to automatic reversal regardless of whether prosecutor's conduct did not cause him any undue prejudice at the time of trial. The Supreme Court rejected this argument because it had not been raised on appeal. In essence, Mr. Calhoun's petition for a writ of certiorari was denied on procedural grounds.

However the conduct of the prosecutor in this case so disturbed Justice Sotomayor, that she apparently felt compelled to issue a statement. Justice Sotomayor wrote:

By suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation...[the prosecutor's] comment was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason...we expect the government to seek justice, not to fan the flames of fear and prejudice.

Justice Sotomayor also found troubling the government's efforts to downplay the wrongfulness of the line of questioning. The government had previously suggested that the question was simply "impolitic" and argued that even if the question had "crossed the line", it did not prejudice the outcome. In summary, Justice Sotomayor issued the statement in this case

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...I hope never to see a case like this again.

Anyone who believes that racial prejudice has been eradicated from our criminal justice system would be well-advised to read Justice Sotomayor's Calhoun statement in its entirety. All involved in the criminal justice system must strive each day, in each case, to help ensure that cases are decided on their merits, unaffected by bias and prejudice.

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