No. _____

In The
Supreme Court of the United States

MAURICE McLAIN, a/k/a Mo,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fourth Circuit Court of Appeals' opinion conflicts with this Court's decisions in *Rutledge v. United States*, 517 U.S. 292 (1996), *Currier v. Virginia*, 585 U.S. _____ (2018), and *Santobello v. New York*, 404 U.S. 257, 262 (1971), because the court of appeals ruled that petitioner Maurice McLain could be prosecuted a second time in this federal RICO case for a nonfatal shooting for which he was already serving a ten-year federal imprisonment sentence, in violation of the *Double Jeopardy Clause* and his plea agreement with the United States.

II. Whether the Fourth Circuit Court of Appeals' opinion conflicts with this Court's decision in *Tibbs v. Florida*, 457 U.S. 31, 42-43 (1982), and, inferentially, with *Wong Sun v. United States*, 371 U.S. 471, 488-489 (1962), because the court of appeals upheld a jury verdict that conflicts with the physical and forensic evidence in this case and that was substantially predicated upon a single cooperator's testimony whose sentence was greatly reduced by the government and the district court in consideration of his testimony. If a defendant's uncorroborated confession is insufficient to sustain a conviction, how much less sustainable is a conviction based on a single cooperator's "testimony" that conflicts with the undisputed physical and forensic evidence?

III. Whether the Fourth Circuit Court of Appeals' opinion overlooks and inferentially conflicts with this Court's decision in *Richardson v. United States*, 526 U.S. 838 (1999), because the opinion sustains the RICO conviction here where the

verdict form failed to require the jury to agree unanimously regarding the acts of racketeering activity to which petitioner Maurice McLain consented.

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Petitioner Maurice McLain was convicted of a single count of RICO conspiracy, 18 U.S.C. § 1962(d), and sentenced to 40 years' imprisonment consecutive to a ten-year term he was already serving for some of the same crimes. The United States Court of Appeals for the Fourth Circuit, without oral argument, summarily affirmed the conviction and sentence in an unpublished *per curiam* opinion, *United States v. Maurice McLain* (4th Cir., February 28, 2018, March 16, 2018) (App. A).

JURISDICTION

The district court had jurisdiction over this criminal case under 18 U.S.C. § 3231. The Fourth Circuit Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 1294 and 18 U.S.C. § 3742. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 16, 2018 (App. B), and a motion for rehearing was denied on April 24, 2018, within ninety days before the filing of this petition (App. C).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

18 U.S.C. § 1962(c), in pertinent part, makes it "unlawful for any person . . . associated with any enterprise, . . . the activities of which affect interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ."

18 U.S.C. § 1961(5), in pertinent part, says "'pattern of racketeering activity' requires at least two acts of racketeering activity . . ."

18 U.S.C. § 1961(1), in pertinent part, defines "racketeering activity" as "(A) any act . . . involving murder . . . [or] robbery . . . (D) any offense involving . . . the felonious . . . dealing in a controlled substance . . ."

18 U.S.C. § 1963(a), in pertinent part, says "[w]hoever violates any provision of section 1962 . . . shall be . . . 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) . . ."

Virginia Code § 18.2-32 says "[m]urder, other than capital murder, by . . . premeditated killing, or in the commission of . . . robbery . . . is murder of the first degree, punishable as a Class 2 felony. . . All [other] murder . . . is murder of the second degree and is punishable by confinement . . .for not less than five nor more than forty years."

Virginia Code § 18.2-10(b) punishes Class 2 felonies by "imprisonment for life or for any term not less than 20 years . . ."

The Fifth Amendment to the United States Constitution provides in relevant part that no person shall "be subject for the same offense to be twice put in jeopardy of life . . ." U.S. CONST., AMENDMENT V.

STATEMENT OF THE CASE

Double Jeopardy and Plea Agreement Violations

On August 13, 2012, petitioner Maurice McLain, pursuant to a plea agreement, pleaded guilty to conspiracy to distribute and to possess with intent to distribute marijuana and to discharge of a firearm in furtherance of a drug trafficking offense (JA 2929)[1] relative to the nonfatal shooting of Alex Turner in the leg after Turner sold fake marijuana to McLain and Douglas Ashby on July 21, 2011 (JA 2926-2927). In the plea agreement, the government agreed that it would "not further criminally prosecute the defendant in the Eastern District of Virginia for the specific conduct described in the indictment or statement of facts." (JA 2933.) McLain was sentenced to 15 years' imprisonment on December 14, 2012 (JA 2920-2921).

On March 9, 2015, McLain was indicted in a single count of Thug Relations (TR) racketeering conspiracy (JA 56). Included in the charged conspiracy conduct were the July 21, 2011, marijuana conspiracy and Alex Turner shooting (JA 67). Arguing that prosecuting McLain again for the marijuana conspiracy and Turner shooting violated the August 13, 2012, plea agreement and his *Double Jeopardy* protections, McLain moved to strike the marijuana conspiracy and the Turner shooting from the second superseding indictment and to exclude evidence thereon at trial (JA 205-209). After a hearing, the district court denied the motion (JA 382-383). McLain appealed (JA 384-387), but the appeal was suspended.

[1] All citations and references to the Joint Appendix (JA) refer to the Appendix filed in the United States Court of Appeals.

At the trial of the racketeering conspiracy, Turner testified over McLain's renewed objection (JA 2017, 2364-2366). Though the August 13, 2012, plea agreement and statement of facts and the December 14, 2012, judgment were already admitted as evidence (JA 638-639, 2920-2937), the district court allowed Turner to testify to the marijuana conspiracy, to the shooting, and to McLain's supposed threats to kill him (JA 2368-2370).

In addition to the Turner shooting, the second superseding indictment charged McLain with participating in the July 5, 2007, murder of Aaron Sumler (JA 64) and in the January 10, 2008, nonfatal shooting of Brenda Lindsay (JA 65). (JA 2541.) Yet even the government's principal witnesses against McLain, including Robbie Bowles and Aronte Jarvis, did not view McLain as part of a TR gang (JA 927, 1474-1475, 1632, 2188).

Sumler Homicide

Before the Sumler murder, government witness Robbie Bowles (JA 2939-2942) biked to the local store (JA 1448, 1477), walked to the local store (JA 1470), and bought cigarettes (JA 1418), but did not buy cigarettes (JA 1470-1471). That night, Sumler and "L" approached a hallway door in building 13209 from the left (JA 1424-1426, 1473; App. G).[2] Douglas Ashby, also known as Mance, stopped and asked Sumler for a cigarette, attempting to rob him, but shot and killed him instead in the mix (JA 1579, 1639-1640). Sumler identified Mance as his shooter. (JA 1476.)

[2] All citations and references to the Appendix (App.) refer to the Appendix filed in this Court.

Though Bowles testified McLain was the second shooter, Bowles admitted to Aronte Jarvis that he had himself shot Sumler (JA 1579, 1592). While Bowles testified he did not carry a firearm on July 5, 2007, though he usually did (JA 1413, 1475, 1481), he pleaded guilty to Sumler's murder merely because he was present (JA 1475). (Indeed, Bowles was involved in several other shootings (JA 1449-1450).)

After the Sumler shooting, Bowles ran towards the street (JA 1426), rode his bike away from the crime scene (JA 1470), and rode the neighborhood bike away from the scene (JA 1480-1481), while the others ran behind building 13209 (JA 1426; App. D). Bowles did not see Alkeda Harris as she was not at home (JA 1473), but he did see McLain's brother, Mike-Mike, in the area (JA 1478).

Bowles never discussed shooting Sumler with McLain before or after the shooting (JA 1480). Several times during his testimony Bowles was told to put his hand down from his mouth (JA 1435, 1444, 1462, 1477-1478). Bowles was then serving a 35-year sentence (JA 1482-1483), but he will be released in less than 15 years now, www.bop.gov/inmateloc/. For his "substantial assistance," Bowles received a substantial sentence reduction.

Bowles was the government's only witness to the Sumler murder, but paid informant Alkeda Harris testified she saw Bowles, Douglas Ashby, and McLain on the street before the murder (JA 1335-1336, 1372, 1376), and they all ran from the front of building 13209 past her apartment window in building 13214 after the murder (JA 1338-1340, 1473; App. D). As stated, Bowles never saw her (JA 1337, 1473), and she saw no one else (JA 1372). Harris's testimony directly conflicts with

Bowles's since he ran towards the street (JA 1426) or rode his bike or the neighborhood bike away from the scene (JA 1470, 1480-1481), while the others ran behind building 13209 (JA 1426). Harris cannot be correct if Bowles is, and vice versa.

Sumler was killed by a single gunshot wound of the chest (JA 1525) though he suffered a second nonfatal wound to his buttock. A 9mm casing (Item 7) was found 18 feet around the right-hand side of building 13209 with seven .380 casings, three of which were also around the right-hand side of the building and not within sight of the doorway entered by Sumler. The 9mm casing was farthest from the doorway. The other four .380 casings were near the corner of the building and within sight of the doorway. (JA 1738, 1745-1747, 1761-1762, 2919; App. E-G.) All the recovered bullets and fragments, including the fatal bullet, were from the .38 class of firearms which includes 9mm bullets. There were two sets of bullets recovered and two sets of casings recovered, but the bullets could not be matched to the casings without the firearms. No other firearms or shootings were associated with the instant casings or bullets. Further, there were no lab reports for DNA or latent prints. (JA 2073-2075.) Twice the government and the Newport News Police Department lost or destroyed portions of the investigative file and a video surveillance tape that captured Sumler's murder (JA 1748-1749).

More than two years after the Sumler murder and sometime after October 30, 2009, Mustafah Muhammad (Moody) met McLain (JA 2304, 2343). Moody testified at trial that, within 30 days of the initial meeting, McLain confessed his participation

in the Sumler homicide. No one else was present for the discussion though Douglas Ashby walked up as the discussion ended as it occurred at his home. According to Moody, Sumler was exiting a car and McLain shot him because Sumler would not sell drugs to McLain. (JA 2244, 2343-2345.) Why Sumler would not sell to McLain was not explained. Why McLain, who was selling drugs daily, would need another young street dealer as a drug source was not explained, and why neither the physical evidence (no casings found near cars or parking lot) nor Bowles's story matched Moody's was not explained. Moody, who is violent, hateful, and angry (JA 2348), was "lying his ass off" (JA 1624). By testifying, Moody was performing his magic show to make his prison time disappear (JA 2348-2350, 2605). He had been sentenced to 26 years (JA 2336), but he will now be released in less than five years on April 24, 2023, www.bop.gov/inmateloc/.

Defense witness Tyrone Johnson testified that Sumler approached the building where he was shot from the back near building 13211 (JA 2632, 2916; App. D). Bowles, Douglas Ashby (Mance), Anthony Ashby (Boosey), and Ronnie Rooks crossed the street from Keda Harris's building and struggled with Aaron (AJ) Sumler on the side of the building where the shell casings were found (JA 2632-2634, 2916-2919; App. E-G). Douglas Ashby shot Sumler (JA 2634, 2638). Then the others also fired (JA 2634-2635). Rooks had a 9mm firearm. McLain did not cross the street towards Sumler and did not participate in the shooting. Bowles is pitting that on him. (JA 2632-2635, 2638, 2642-2643.) The next morning, Rooks and Anthony Ashby (Boosey) saw Sumler's blood in the doorway and bragged about the shooting

(JA 2635). Boosey mentioned the Sumler murder to Andrea Hunt (JA 2647), and Boosey and Rooks discussed the Sumler murder with Angie Almanza and others when Rooks said he had numbers under his belt (JA 2656). Rooks also pulled a gun and smacked Alkeda Harris in the face when she laughed after he said the police knew everything about Sumler's murder (JA 1375-1376). Rooks has carried a .38 revolver (JA 2180).

Though McLain shot Turner with a .40 caliber firearm not associated with the Sumler or any other shooting (JA 2372, 2629, 2938), the jury found McLain had aided and abetted the premeditated murder of Aaron Sumler (JA 2912).

Brenda Lindsay Shooting

On January 8, 2008, Jocko Copeland hatched a plan to steal exotic marijuana from the Lindsays (JA 1633, 2087). Copeland was at the Lindsays' home that day and learned they had exotic marijuana (JA 2088). That evening, Copeland, Justin Mason (Flux), Aronte Jarvis, and Douglas Ashby drove to the Lindsay home in Copeland's car (JA 1557, 2095). Victims Brenda Lindsay and Robert Lindsay both testified they saw only one person at their door on January 8, 2008, when she was shot (JA 1498-1499, 1502, 2092-2093). Initially, Flux knocked on the door (JA 2090), but government witness Aronte Jarvis knocked the second time and shot Ms. Lindsay (JA 1568, 1636-1637). Jarvis fired four shots through the door. None hit a window. (JA 1505, 1513-1514, 1568, 2091.) While Jarvis testified McLain was present for the attempted marijuana robbery, only Jarvis and Douglas Ashby were armed. Each

had a 9mm firearm. (JA 1559-1561.) As shown, however, the Lindsay victims saw only Flux, Jarvis, and Copeland's car.

The 9mm firearm Jarvis shot Ms. Lindsay with was fired in other shootings not associated with McLain (JA 2111-2115, 2131, 2497-2498). Further, all four casings collected from the Lindsay home were fired from the same 9mm firearm (JA 2457-2458), and the casings and all the bullets as well were probably fired from the same firearm (JA 2499-2500). Thus, only Jarvis shot that night.

Jarvis said Flux drove Jarvis's hard-to-start car to the Lindsays with the others inside (JA 1562-1563), but only Copeland's car was seen by the victims. Why Jarvis did not drive his own hard-to-start car he does not explain. Jarvis said Douglas Ashby shot through a window (JA 1625, 1637), but the forensic evidence shows Ashby did not fire at all and not through a window. Similarly, Jarvis's testimony about McLain is a fabrication as no victim saw him. Copeland's car, not Jarvis's, was seen. Thus, Copeland was there, not McLain. Jarvis merely substituted McLain for Copeland so Jarvis's life sentence for murder could be reduced with a release date of February 7, 2030, less than 12 years from now, www.bop.gov/inmateloc/.

Jury Taint and Prejudice

In its opening statement, in an attempt to show premeditation, the government told the jury that it would hear testimony that, the day before the Sumler murder, Kenneth Matthews and James Johnson were sitting outside on lawn chairs at Aqueduct Apartments and three men walked up, staring at, and trying to intimidate,

them (JA 571). Though Matthews and Johnson had been brought to the local Western Tidewater Regional Jail by the government (JA 965), the government called neither to testify to the events described in the government's opening statement. Further, when describing the Brenda Lindsay shooting, the government told the jury McLain was armed (JA 573) when the government knew he was not (JA 597, 1559-1561). Then the government described the Alex Turner shooting (JA 574), an event that should have never been disclosed to the jury. Thus, the opening statement was tainted with information the jury should have never heard.

Moreover, during the trial, the government elicited testimony it had agreed not to elicit. Government witness Kevin Ashby testified that McLain participated in a home invasion burglary (JA 1885-1886) that the government had agreed not to mention. The government said the violation was inadvertent because the home invasion had been confused with another, but, since no noncharged conduct was to be offered, the government never informed the district court how it became confused. While a limiting instruction was given, the damage had been done. (JA 1902-1905.)

During its closing argument, the government accused the defense of placing defense witness Tyrone Johnson in Western Tidewater Regional Jail near the government witnesses so he could overhear them discuss their testimony (JA 2725). The government knows full well that it, through the United States Marshals Service, not the defense, determines the placement of witnesses. The government was attempting to convince the jury that the defense had acted improperly when it was the government that acted improperly by its false accusation. During every phase

of the trial, these misrepresentations unfairly and unduly prejudiced the jury against McLain.

Further, the district court truncated McLain's attempt to show that Bowles and Jarvis were motivated to fabricate their testimony in exchange for anticipated significant reductions in sentence. Jarvis was serving life imprisonment for murder. When counsel asked Jarvis about anticipating his time cut, the district court immediately intervened and stopped counsel from inquiring into an area other counsel had explored even though the district court recognized that counsel represented a different defendant (JA 1644). Neither did the district court permit McLain to inquire about witnesses selling cases (JA 1645). After the government on redirect had questioned Jarvis about his cooperation and substantial assistance, the district court showed its support for the government: "Mr. Jarvis, do you understand that no matter how truthful you are, no matter how many cases you testify in, no matter how many times the government asks to reduce your sentence, that only the sentencing judge will make that determination?" (JA 1649-1650.) Jarvis will be released in 12 years.

Similarly, when McLain inquired of Bowles about the percentage reduction he hoped for, the district court cut off counsel and said other counsel had covered the subject (JA 1483). And when McLain argued in closing that Bowles had an incentive to fabricate because he anticipated that his sentence may be cut in half, the district court interrupted counsel to set "the record straight" as if counsel had misled the jury

(JA 2805), though subsequently Bowles's sentence was cut approximately in half by the district court.

Further, when government witness Bernard Lewis disclosed he was housed at Western Tidewater Regional Jail with 30 people "dealing with" the case, the district court cut off Mr. Lewis after he had named several, but clearly not all the, witnesses with whom he had opportunity to discuss the case and their testimony (JA 963-966).

Moreover, the district court refused to admit statement against interest testimony of individuals who participated in the Sumler homicide. For example, the district court refused to allow the jury to hear testimony about statements made by Douglas Ashby (Mance) who admitted his participation in and outside court (JA 1478-1479) and testimony about statements made by Anthony Ashby (Boosey) who had bragged about the murder (JA 2635, 2646-2648).

Verdict Form and Instruction

While the government acknowledged the instant RICO case was like CCE cases (JA 368), unlike in a CCE case, the verdict form for Count One: RICO conspiracy for McLain (JA 2943) did not require the jury to unanimously agree on the two racketeering activities that McLain had agreed should be conducted. Further, the 2007 Sumler homicide (which was not charged as a capital offense) and the 2008 Brenda Lindsay shooting did not occur within five years of the March 9, 2015, indictment (JA 55), and the district court refused to give McLain's proposed jury instruction re the statute of limitations (JA 2356-2358, 2729-2730).

Severance

McLain was tried with Eric and Herbert Pridgen who were convicted of three murders and other shootings in which McLain was not charged (JA 2908-2911). Pretrial, McLain had asked to be tried separately from the Pridgen brothers since he was not charged in any of their violent acts (JA 210ff, 376-380). In denying the motion (JA 380), the district court said McLain was responsible for the Pridgens' violent acts as a coconspirator (JA 378) regardless, apparently, of whether he participated in the act or agreed that the act should be committed, or whether the act was foreseeable. The jury labored under the same confusion, and the district court agreed with McLain that the risk of his conviction was higher (JA 379) but, nevertheless, denied the motion.

Sentencing

At sentencing, the government repeatedly erroneously stated the jury had found McLain was a shooter in the Sumler homicide (JA 3106, 3121-3122). Further, in sentencing McLain, the district court relied on paragraphs 9 through 19 of the presentence investigation report (JA 3124), but the district court had refused to resolve McLain's objections to those very paragraphs (JA 2995-2997, 3104-3105). Then the district court referred to "any number of acts of criminal conduct" (JA 3124) that the district court did not identify and with which McLain had not been charged. The district court also referred to "anybody else that you, through your conduct, caused to be killed." (JA 3128.) The district court believed McLain was responsible for the homicides committed by others (JA 378) and sentenced him to 40 years'

imprisonment consecutive to the ten years McLain continues to serve for shooting Turner in the leg (JA 3132-3133).

Appeal

Ignoring *Rutledge v. United States*, 517 U.S. 292 (1996), and *Santobello v. New York*, 404 U.S. 257, 262 (1971), the Fourth Circuit Court of Appeals, without oral argument or explanation, in an unpublished *per curiam* opinion, affirmed the district court's ruling "that McLain's successive prosecution was not barred by double jeopardy" and did "not run afoul of his [2012] plea agreement."

Ignoring the conflicts with the physical and forensic evidence and without addressing petitioner McLain's arguments, the Fourth Circuit upheld the jury's verdict that McLain was guilty of RICO conspiracy and implicitly upheld the jury's finding that McLain had aided and abetted the premeditated murder of Aaron Sumler, without saying so. The Fourth Circuit merely said there was ample evidence to support McLain's guilt of the crime charged. The Fourth Circuit also ignored McLain's argument that the jury's finding doubled his sentence by elevating McLain's maximum sentence from 20 years to life imprisonment and merely stated the 40-year consecutive sentence was presumed reasonable.

Finally, the Fourth Circuit did not even mention petitioner McLain's argument under *Richardson v. United States*, 526 U.S. 838 (1999), that the verdict form failed to require the jury to agree unanimously regarding the acts of racketeering activity to which McLain consented, apparently disposing of the argument as a "trial management decision."

REASONS FOR GRANTING WRIT

I. The Fourth Circuit Court of Appeals' opinion conflicts with this Court's decisions in *Rutledge v. United States*, 517 U.S. 292 (1996), *Currier v. Virginia*, 585 U.S. _____ (2018), and *Santobello v. New York*, 404 U.S. 257, 262 (1971), because the court of appeals ruled that petitioner Maurice McLain could be prosecuted a second time in this federal RICO case for a nonfatal shooting for which he was already serving a ten-year federal imprisonment sentence, in violation of the *Double Jeopardy Clause* and his plea agreement with the United States.

As shown (*supra*, pp. 2-3), in 2012, McLain entered into a plea agreement with the government whereby he pleaded guilty to the Alex Turner shooting and marijuana conspiracy. In the plea agreement, the government agreed not to criminally prosecute McLain for the same conduct again. In the instant RICO conspiracy, the government prosecuted McLain again for the very same conduct. At the time of the RICO conspiracy prosecution, McLain was serving a 15-year sentence for the Turner shooting and drug conspiracy. The government included the shooting and the conspiracy in the RICO conspiracy. McLain is now serving the 15-year sentence and another 40 years imposed for the RICO conspiracy, though five years run concurrently. Thus, the government violated the plea agreement and McLain's protections against being tried and punished twice for the same conduct and offenses.

Further, proving the Turner shooting established part of an element of the RICO conspiracy—a pattern of racketeering activity—two acts of racketeering activity, 18 U.S.C. §§ 1961(1) and (5) and 1962(c) and (d). Thus, the Turner shooting is a lesser included offense of the instant RICO conspiracy. Yet a lesser included offense is the same offense for Double Jeopardy purposes. This Court has "often concluded that two different statutes define the 'same offense,' typically because one

is a lesser included offense of the other." *Rutledge v. United States*, 517 U.S. 292 (1996). "Historically, courts have treated greater and lesser-included offenses as the same offense for double jeopardy purposes, so a conviction on one normally precludes a later trial on the other." *Currier v. Virginia*, 585 U.S. _____ (2018) (citations omitted). Moreover, the government here admits (4th Cir. Ct. Doc. 69, Brief of the United States, at 57) it used the Turner shooting "to prove [McLain's] participation in the charged RICO Conspiracy." Thus, the shooting must be a lesser included offense of the racketeering conspiracy for same offense and Double Jeopardy purposes, and the sentence on the RICO conspiracy which was based, in part, on the Turner shooting was a prohibited second punishment, *ibid*. McLain's conviction and sentence on the racketeering conspiracy is a prohibited second conviction and punishment.

Moreover, as stated, by prosecuting McLain a second time for the conduct covered by the 2012 plea agreement for which he has already been convicted and sentenced, the government did not allow McLain the benefit of his bargain. The United States is bound by its agreements and must keep its promises, *Santobello v. New York*, 404 U.S. 257, 262 (1971). It did not. Allowing a second prosecution renders the plea agreement vacuous, meaningless, and unenforceable.

Finally, by allowing Turner to testify about being shot in his leg by McLain and McLain's supposed simultaneous threats to kill him, after the 2012 statement of facts, plea agreement, and judgment were already in evidence by consent, the district court allowed the jury's passions to be inflamed with such unfairly prejudicial and

needlessly cumulative evidence, *Old Chief v. United States*, 519 U.S. 172 (1997). Certainly, after evidentiary admission of the referenced documents, nothing further was necessary to prove McLain shot Turner in the leg. Even the government admits (4th Cir. Ct. Doc. 69, Brief of the United States, at 68) "McLain never challenged the evidence showing that he committed the Alex Turner shooting," but the government nevertheless insisted Turner testify over McLain's objection--the only purpose of which testimony was to inflame the jury's passions about an issue that was not contested—McLain shot Turner. Where "such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." *Green v. United States*, 355 U.S. 184, 198 (1957).

II. The Fourth Circuit Court of Appeals' opinion conflicts with this Court's decision in *Tibbs v. Florida*, 457 U.S. 31, 42-43 (1982), and, inferentially, with *Wong Sun v. United States*, 371 U.S. 471, 488-489 (1962), because the court of appeals upheld a jury verdict that conflicts with the physical and forensic evidence in this case and that was substantially predicated upon a single cooperator's testimony whose sentence was greatly reduced by the government and the district court in consideration of his testimony. If a defendant's uncorroborated confession is insufficient to sustain a conviction, how much less sustainable is a conviction based on a single cooperator's "testimony" that conflicts with the undisputed physical and forensic evidence?

There is no substantial evidence supporting the jury's finding that petitioner McLain aided and abetted Aaron Sumler's premeditated murder (*supra*, pp. 4-7). Bowles was the government's only witness to the murder as he admitted to Jarvis that he shot Sumler himself. Douglas Ashby, whom Sumler identified as his killer, did not testify. The forensic evidence established two firearms were used but could not verify more. Other physical evidence also contradicts Bowles's testimony of

McLain's participation. Bowles testified on direct and on cross examination that Sumler approached the door where he later lay dying from the left of the front side of the building (JA 1424-1425, 1473; App. G), but half of the shell casings are as much as 18 feet around the right side corner of the building and not within sight of the door (JA 1738, 1745-1747, 1761-1762, 2632-2635, 2916-2919; App. D-G). Since bullets do not travel through brick walls and do not round corners of buildings at 90-degree angles, the shooting could not have occurred as described by Bowles. Undisputed physical evidence does not lie. Further, Bowles contradicted himself repeatedly regarding how he arrived at the murder scene (on foot, by bike) and, more significantly, how he departed. Bowles said he rode his or a neighborhood bike away from the area while Ashby and McLain ran around the back of the building, but paid informant Alkeda Harris, who did not see the murder, testified she saw the three standing on the street together before the murder and all three running together past her window after. Her building (13214) is not behind building 13209 where Sumler was killed (App. D). Bowles testified he never saw Harris as she was not at home that day. Curiously, Harris saw no one else though Mike-Mike McLain and others were in the area.

Two years after the murder, Moody claims he alone heard another version of the Sumler homicide from McLain that conflicts not only with the physical evidence but with the other witnesses' versions. Moody testified that Sumler was exiting a car when McLain shot him because Sumler refused to sell drugs to McLain. Bowles, however, never said anything about Sumler exiting a car, and no shell casings were

found in or near a street or parking lot. Further, Bowles testified Douglas Ashby intended to rob Sumler. Moody offered no explanation why McLain, an admitted drug dealer, would need to be supplied by a street dealer or why Sumler would not sell drugs to a willing buyer. Jarvis, who testified McLain participated in a conversation after the murder, without saying anything specific, said Moody was "lying his ass off." Both Moody and Jarvis expected and received huge sentence reductions for their testimony.

Due process to sustain a conviction demands that cooperator testimony not be contradicted by others' testimony and objective facts. The U.S. Constitution requires the testimony of two witnesses to the same act of treason in order to sustain a conviction, or confession by the traitor in open court, *U.S. Constitution, Article III, Section 3*, and western civilization has long required the testimony of two witnesses to establish any fact. ("One witness shall not rise up against a man for any iniquity, or for any sin, . . . at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established," *Deuteronomy 19:15* (KJV); "In the mouth of two or three witnesses shall every word be established," *II Corinthians 13:1b* (KJV).) A person's life or liberty should not be deprived on the word of any other one person, especially where that person is testifying in anticipation of receiving a benefit such as decades of sentence reduction. This Court and the public can have no confidence in such testimony or any conviction based thereon. This Court has long held that an uncorroborated confession will not sustain a conviction. *Wong Sun v. United States*, 371 U.S. 471, 488-489 (1962). If a defendant's own admission to a crime is not

sufficient to sustain a conviction, how much less trustworthy is accusing testimony by a codefendant seeking a sentence reduction. Hundreds of wrongly convicted persons have been set free as a result of DNA exonerations, www.innocenceproject.org. Thousands have been exonerated by DNA and other means, www.reuters.com/article/us-usa-crime-race-idUSKBN16E0H2?DCMP=NWL-pro_top. These are cases where the police and prosecutors, the victims and witnesses, and the judges and juries all were proven wrong by DNA testing or otherwise. DNA testing will not set McLain free. There is no DNA to test.

As shown, the testimony of the government witnesses, here, is self-contradictory, contradictory of each other, and contradicted by the physical evidence. Moreover, government witness Bowles was serving a 35-year sentence when he testified against McLain (JA 1482-1483), but he will be released in less than 15 years now. Jarvis was sentenced to life imprisonment for murder and hoped for a 65% sentence reduction based on his testimony and cooperation with the government (JA 1536, 1619). Apparently, his wish was granted--Jarvis will now be released in less than 12 years. Jarvis understood he received credit for each conviction he contributed to (JA 1643). Other government witnesses wanted McLain convicted so their sentences would be reduced (JA 2014-2015). They coached each other and attempted to influence a defense witness (JA 2604-2607, 2611-2612, 2623). Moody's testimony was a magic show designed to make his time disappear (JA 2348-2349). According to Jarvis, Moody was lying, but Moody's 26-year sentence was reduced to an April 24, 2023, release date, in less than five years.

While there is insufficient evidence to prove beyond a reasonable doubt that McLain participated in Sumler's murder, there is no evidence the murder was premeditated by McLain or anyone else. Bowles never discussed the murder with McLain before or after (JA 1480), and Bowles testified Douglas Ashby was attempting to rob Sumler, not that the murder was planned. Jarvis testified similarly—robbery was the motive. (JA 1579, 1639-1640.) The indictment charged the murder only as willful, deliberate, and premeditated, with malice, and not as part of a robbery (JA 68). Thus, the jury was asked to determine only whether the murder was premeditated (JA 2943). It was not given the choice of murder in the commission, or attempted commission, of robbery. The jury's finding is unsupported by the evidence.

Tyrone Johnson provided the only explanation of the Sumler homicide that comports with the physical evidence. Johnson testified Sumler approached building 13209 from its back near building 13211 (App. D). Bowles, Douglas Ashby (Mance), Anthony Ashby (Boosey), and Ronnie Rooks crossed the street from Keda Harris's side, struggled with Sumler on the side of building 13209, and shot him. Sumler fled around the corner to the front of building 13209 into the doorway where he collapsed. The forensic and physical evidence matches perfectly. The 9mm casing (Item 7) was found on the side of the building farthest from the doorway. Seven .380 casings were found along Sumler's path to the doorway. (JA 2632-2635, 2916-2919; App. E-G.) McLain stayed on Keda Harris's side of the street, did not cross the street, and did not participate in the shooting (JA 2632-2635, 2642-2643). The next morning, Rooks

and Boosey bragged about the shooting (JA 2635). Bowles and Douglas Ashby pleaded guilty to charges that include the murder (JA 24). Unlike the government witnesses, Johnson cannot receive a sentence reduction and has nothing to gain.

Similarly, there is no substantial evidence that McLain participated in the Brenda Lindsay shooting (*supra*, pp. 7-9). Jarvis was the only government witness who suggested McLain was even present. The victims, Brenda and Robert Lindsay, did not see McLain at their home. Nor do they know him. The Lindsays saw only shooter Jarvis, Flux, and Copeland's car. Thus, the only evidence against McLain is the self-serving testimony of murderer Jarvis who was seeking the reduction of his life sentence to a release date in 12 years. Jarvis's testimony conflicts not only with the victims' testimony but with the physical and forensic evidence as well. Jarvis testified that Douglas Ashby fired his 9mm through a window, but the forensic and physical evidence and the testimony of the victims confirm that only Jarvis fired four rounds and not through any window. All the recovered shell casings were fired from Jarvis's gun. There is no evidence Ashby fired a shot, and Jarvis does not recall any other firearms in the car or in McLain's possession. Further, Jarvis claims his car was driven to the Lindsay home by Flux, but victim Robert Lindsay testified he saw Copeland's car that night. The evidence does not support Jarvis's claim that McLain participated in the Brenda Lindsay shooting. The evidence supports Copeland's presence, not McLain's.

Thus, there is not substantial evidence to support the jury's verdict of guilt beyond a reasonable doubt on Count 1—RICO conspiracy, and there is no evidence

supporting the jury's finding that McLain aided and abetted Sumler's premeditated murder.

As shown (*supra*, pp. 9-11), the government tainted the jury and prejudiced McLain, in its opening statement, by referring to evidence it never even attempted to offer, and, in its closing argument, by unfairly suggesting defense counsel had planted a defense witness in a jail in order to overhear government witnesses comparing their testimony. Attempting to convince the jury that the Sumler murder was planned, the government, in its opening statement, told the jury they would hear evidence that, the day before the murder, Kenneth Matthews ("L") and James Johnson, Sumler's friends, were sitting on lawn chairs at Aqueduct Apartments when three men approached and somehow intimidated them. The government called neither witness at trial though both had been brought to the local Western Tidewater Regional Jail by the government. Neither did the government even attempt to prove the alleged occurrence through any other witness. Thus, the only "evidence" of premeditation came from the mouth of a prosecutor in opening statement. The government's opening statement poisoned the jury and prejudiced McLain with "information" the government never attempted to prove—information that went to the very heart of the government's case, premeditated murder. Further, the government, in its opening statement, told the jury McLain was armed at the Brenda Lindsay shooting when the government knew he was not. Indeed, its witness, Aronte Jarvis, informed the government at least two days before trial that he did not recall seeing McLain with a firearm. The government, however, ignored its own

witness and told the jury McLain was armed. Again, the government tainted the jury to McLain's prejudice with false and misleading information.

Moreover, the Alex Turner shooting was also described in the opening statement, but should not have been, since prosecution of that conduct violated McLain's prior plea agreement and his *Double Jeopardy* protections. Thus, with respect to each and every act of racketeering with which McLain was charged, the government overstepped its bounds in its opening statement, tainted the jury with comments about evidence it would not and should not hear, and denied McLain a fair trial.

Then, in its closing argument, the government compounded the error by accusing the defense of placing witness Tyrone Johnson in Western Tidewater Regional Jail near government witnesses so he could overhear them comparing their testimony. The government knew that it, and it alone, determines where witnesses are placed, but attempted to convince the jury that the defense had somehow manipulated Johnson's placement.

Finally, the government elicited testimony in violation of its agreement with McLain. The government had agreed not to offer evidence of alleged home invasions and violated that agreement through witness Kevin Ashby. When confronted, the government claimed inadvertence and confusion with another home invasion, but no other alleged home invasion was to be addressed either, so the violation appears more intentional than inadvertent.

Several times during the trial, the district court refused to allow McLain to offer evidence of witness collusion, fabrication, and confession. Since McLain admitted he shot Alex Turner in the leg, the government's case against McLain was predicated on a single witness to the other two events. Bowles testified McLain participated in the Sumler homicide, and Jarvis testified that McLain participated in the Brenda Lindsay shooting, and Jarvis and Moody testified that McLain had participated in conversations confirming his participation in the Sumler murder but offered no specifics. McLain denied participating in all but the Turner shooting, which he readily admitted, so the defense of the case focused on impeaching the few government witnesses since there was absolutely no physical evidence supporting the government's allegations. Indeed, as shown, the physical evidence soundly refutes the government's case.

The district court truncated McLain's attempt to show that Bowles and Jarvis were motivated to fabricate their testimony in exchange for anticipated significant reductions in sentence. Jarvis and Bowles were both serving extensive prison sentences. When counsel asked each witness about anticipating his time cut, the district court immediately stopped counsel from inquiring. But, after the government on redirect questioned Jarvis about his cooperation and substantial assistance, the district court supported the government: "Mr. Jarvis, do you understand that no matter how truthful you are, no matter how many cases you testify in, no matter how many times the government asks to reduce your sentence,

that only the sentencing judge will make that determination?" (JA 1649-1650.) Jarvis's sentence for murder was reduced to a release date in 12 years.

Further, when McLain argued in closing that Bowles had an incentive to fabricate because he anticipated that his sentence may be cut in half, the district court interrupted counsel, discredited the defense, and showed its disdain for the argument by setting "the record straight" as if counsel had misled the jury (JA 2805), though subsequently Bowles's sentence was cut approximately in half by the district court.

Moreover, the district court refused to allow government witness Bernard Lewis to name the other witnesses with whom he had opportunity to discuss the case and their testimony, and the district court refused to admit statement against interest testimony of individuals who participated in the Sumler homicide. During every phase of the trial, McLain was denied a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319 (2006). He was denied due process.

Since half of the shell casings were found as much as 18 feet around the right-side corner of the building and not within sight of the door Sumler entered, the government knows the shooting could not have occurred as described by Bowles. Thus, the government refuses to acknowledge its own physical and undisputed forensic evidence. The forensic evidence established two firearms never associated with McLain were used but could not verify more, and the shell casings show Bowles

was not truthful, but Tyrone Johnson was.[3] Thus, the jury's finding is unsupported by the evidence. This Court and the public can have no confidence in a jury verdict that is contradicted by undisputed physical evidence that cannot lie. Due process so demands.

Moreover, without the jury's finding that McLain had somehow participated in the premeditated murder of Sumler, McLain could not have been sentenced to more than 20 years' imprisonment, 18 U.S.C. §§ 1962(d) and 1963(a), because the government charged the Sumler murder exclusively as premeditated, not based on robbery or another motive, and the jury was asked to find only premeditation. Had the jury not found premeditation, then McLain's maximum penalty under Virginia law would have been 40 years, Virginia Code § 18.2-32, which is insufficient to trigger the enhanced penalty of life imprisonment under 18 U.S.C. § 1963(a). While the evidence may have shown robbery was the motive, the evidence did not prove premeditation beyond a reasonable doubt. Since McLain could only be sentenced to more than 20 years based on the unfounded premeditation theory charged in the indictment and presented to the jury, his sentence of 40 years is duplicative, unreasonable, unlawful, and unconstitutional, 18 U.S.C. §§ 1962(d) and 1963(a); Virginia Code § 18.2-32.[4]

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[3] The government called Johnson's own commonwealth's prosecutor to testify he had a bad reputation with her and a few of her fellow prosecutors, placing the power and prestige of her office squarely behind and aligned with the federal prosecutors. A more limited, biased "community" is hard to imagine.

[4] At sentencing, the district court referred to "any number of acts of criminal conduct" (JA 3124) that the district court did not identify and with which McLain had not been charged. The district court also referred to "anybody else that you, through your conduct, caused to be killed" (JA 3128), but McLain had not caused "anybody else" to be killed. McLain was not even implicated in any other homicide—none.

III. The Fourth Circuit Court of Appeals' opinion overlooks and inferentially conflicts with this Court's decision in *Richardson v. United States*, 526 U.S. 838 (1999), because the opinion sustains the RICO conviction here where the verdict form failed to require the jury to agree unanimously regarding the acts of racketeering activity to which petitioner Maurice McLain consented.

While the government acknowledged the instant RICO case was like CCE cases (*supra*, p. 11), unlike in a CCE case, the verdict form for the single Count One: RICO conspiracy for McLain did not require the jury to unanimously agree on the two racketeering activities that McLain had agreed should be conducted. *Richardson v. United States*, 526 U.S. 838 (1999). Clearly, the jury found, contrary to the physical and forensic evidence, that McLain participated in the 2007 premeditated murder of Sumler, but the jury did not determine whether McLain participated in the Brenda Lindsay shooting (also contrary to the evidence) or whether to again hold McLain responsible for the Alex Turner shooting for which he was already punished, in violation of his prior plea agreement and *Double Jeopardy* protections. Thus, this Court cannot tell whether the jury unanimously found that McLain agreed that any two racketeering activities should be committed, and, if so, which two. (JA 2943.)

The RICO conspiracy statute is violated when persons agree to violate RICO which in turn requires, here, that the persons agree to conduct an enterprise's affairs through a pattern of racketeering activity which in turn requires two acts of racketeering activity. 18 U.S.C. §§ 1961(5) and 1962(c) and (d). While the jury was asked whether McLain participated in the Sumler murder, the jury was not asked to find that McLain had agreed to any other act of racketeering activity. Thus, the jury was not asked to unanimously determine an essential element of the offense that

could have been committed in more than one way. This Court cannot therefore determine whether the jury unanimously found that McLain agreed that any two racketeering activities should be committed. Part of the jury may have voted to convict for one alleged act, and part of the jury could have voted to convict for another. But unanimity is required for each of two acts where multiple acts are alleged. *Richardson v. United States*, 526 U.S. 838 (1999). While *Richardson* held that the jury must be unanimous as to the acts that comprise a CCE, not a RICO conspiracy, the government, here, conceded that the instant RICO case is like a CCE case. Thus, the verdict form was improper because the jury was not asked to unanimously agree that McLain had agreed that the same two racketeering acts be conducted.

Further, the 2007 Sumler homicide (which was not charged as a capital offense) and the 2008 Brenda Lindsay shooting did not occur within five years of the March 9, 2015, indictment, 18 U.S.C. § 3282, and the district court refused to give McLain's proposed jury instruction re the statute of limitations. Consequently, this Court cannot tell whether the jury found McLain responsible for the Turner shooting a second time (within the period of limitations), or whether the jury found McLain responsible in the Lindsay shooting (outside the period of limitations), neither, or both. Absent inclusion of the Turner shooting in the RICO conspiracy, the government cannot meet its threshold burden of showing the conspiracy extended into the limitations period, *Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714, 721 (2013), and the jury was not properly instructed. Again, McLain's conviction violates due process.

CONCLUSION

Prosecution of McLain for RICO conspiracy was barred by his prior plea agreement with the government, the *Double Jeopardy Clause*, and the *Due Process Clause*. The verdict form did not require the jury to unanimously find two acts of racketeering activity that McLain had agreed should be conducted.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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