NO. _____

In The
Supreme Court of the United States

ALVIN GAITAN BENITEZ, a/k/a Pesadilla, a/k/a Lil Pesadilla, a/k/a Lil Tuner, a/k/a Tooner, a/k/a Lil Tunnel,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Jeffrey D. Zimmerman
Counsel of Record
JEFFREY ZIMMERMAN, PLLC
108 North Alfred Street
Alexandria, Virginia 22314
(703) 548-8911
jzimmerman@jeffreyzimmerman.com

Amy L. Austin
THE LAW OFFICE OF AMY L. AUSTIN, PLLC
101 Shockoe Slip, Suite M
Richmond, Virginia 23219
(804) 343-1900
amyaustinlawyer@gmail.com

Counsel for Petitioner

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THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED IN AFFIRMING THE DENIAL OF A MOTION FOR SEVERANCE BY ALVIN BENITEZ FROM CODEFENDANT MANUEL GUEVARA WHERE GUEVARA PRESENTED AN ANTAGONISTIC DEFENSE THE CORE OF WHICH WAS TO CAST BLAME ON BENITEZ, REQUIRING HIS CONVICTION IN ORDER FOR GUEVARA TO BE ACQUITTED, AND DENYING BENITEZ A FAIR TRIAL?

II. WHETHER PETITIONER'S CONVICTIONS MUST BE VACATED ON THE GROUND THAT THE GOVERNMENT FAILED TO PROVE THE JURISDICTIONAL ELEMENT OF THE AFFECT OF INTERSTATE COMMERCE?

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IN THE
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PETITION FOR
WRIT OF CERTIORARI

NOW COMES ALVIN GAITAN BENITEZ, Petitioner herein, and requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision filed on July 2, 2018, affirming the petitioner's conviction and sentence.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit filed a published opinion on July 2, 2018, affirming the petitioner's conviction and sentence. *United States v. Chavez*, 894 F.3d 593 (4th Cir. 2018).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court Rules for Certiorari to review the published opinion of the Fourth Circuit Court of Appeals issued on July 2, 2018.

CONSTITUTIONAL AUTHORITY INVOLVED

The Due Process Clause is implicated, and a fair trial is denied, where codefendants have antagonistic, mutually exclusive defenses. *See, e.g., United States v. Romanello*, 726 F.2d 173, 178 (5th Cir. 1984).

The gang activity alleged in this case is beyond the scope of Congress' power under the Commerce Clause over crimes traditionally prosecuted by the states. *See*, e.g., *United States v. Garcia,* 143 F. Supp. 2d 791 (E.D. Mich. 2000); *United States v. Morrison,* 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000).

STATEMENT OF THE CASE

On June 25, 2015, a grand jury convening in the United States District Court for the Eastern District of Virginia, Alexandria Division returned a nine-count Third Superseding Indictment charging thirteen defendants with Conspiracy to Commit Murder in Aid of Racketeering, in violation of Title 18, U.S.C. § 1959(a)(5) (Count 1); Attempted Murder in Aid of Racketeering, in violation of Title18, U.S.C. § 1959(a)(5) and 2 (Count 2); Possession of a Firearm in Furtherance of a Crime of Violence, in violation of Title 18, U.S.C. §§ 924(c)(1)(A), (b)(i), and 2 (Count 3); Murder in Aid of Racketeering, in violation of Title 18, U.S.C. 1959(a)(1) and 2 (Count 4); Accessory After the Fact, in violation of Title 18, U.S.C. § 3 (Count 5); Murder in Aid of Racketeering, in violation of Title 18, U.S.C. § 1959(a)(1) and 2 (Count 6); Murder in Aid of Racketeering, in violation of Title 18, U.S.C. § 1959(a)(1) and 2 (Count 7); Use of a Firearm During a Crime of Violence Causing Death, in violation of Title

18, U.S.C. §§ 924(c) and (j)(1) (Count 8); and Felon in Possession of a Firearm, in violation of Title 18, U.S.C. § 922(g)(1) (Count 9).

Petitioner Alvin Gaitan Benitez was charged in Counts 5 and 6. Codefendant Manuel Ernesto Paiz Guevara was also charged in Count 6, Murder in Aid of Racketeering. Jury trial began on March 21, 2016.

At trial, Manuel Guevara sought to place the blame for his alleged conduct squarely on his co-defendants, including Alvin Benitez. Prejudice appeared in this case in his opening statements and subsequently at every opportunity throughout his trial cross-examinations. Defendants Benitez repeatedly sought a severance due to this antagonistic defense that denied him a fair trial.

Benitez filed his initial motion for severance on April 3, 2016. It was adopted by his co-defendants on April 4-5, 2017. There was a hearing on the motion on April 7, 2016. The district court denied the motion. As the prejudice continued to build day after day and deny these co-defendants a fair trial, a renewed motion for a severance was filed on April 13, 2016. It was denied without a hearing on April 14, 2016. Seeking again to obtain a fair trial, a joint motion for severance was filed on April 17, 2016. The trial concluded without a ruling on this motion.

On May 9, 2016, Mr. Benitez was convicted on both counts. He was sentenced on December 2, 2016 to a period of 180 months incarceration as to Count 5 and life imprisonment as to Count 6, to run consecutively, followed by a total supervised release term of five years. The petitioner filed a timely, written Notice of Appeal on December 9, 2016.

On July 2, 2018, a panel of the United States Court of Appeals for the Fourth Circuit issued an opinion affirming the petitioner's conviction and sentence. *United States v. Chavez*, 894 F.3d 593 (4th Cir. 2018).

STATEMENT OF THE FACTS

Alvin Benitez, Omar Castillo, Christian Cerna and Manuel Guevara were charged in Count 6 of the third superseding indictment, alleging the murder in aid of racketeering of Gerson Adoni Martinez Aguilar on or about March 29, 2014. Benitez, Castillo and Cerna had essentially similar defenses. Each argued that (1) **he was not present at the murder**, and (2) it was not planned or authorized; that is, it was not in aid of racketeering. By contrast, Guevara presented an irreconcilable, mutually exclusive and antagonistic defense that (1) **he was present at the murder with these codefendants** and (2) it was a murder planned by the codefendants who duped him into participating.

Prejudice appeared in this case in the opening statements on March 30, 2016, when Guevara's counsel sought to place the blame squarely on his co-defendants. He argued that Guevara was the only person on trial who was not a member of MS-13, that the co-defendants planned to murder Aguilar, but left Guevara out of the plan and that they duped him into participating. This was directly antagonistic to the opening statements of the remaining co-defendants charged in Count 6, that they were not present at the Aguilar murder, that they were falsely blustering about it and that the murder was not in aid of racketeering.

The following day, March 31, 2016, during his cross-examination of government gang expert Sgt. Claudio Saa, Guevara's counsel continued his defense of blaming these codefendants for Aguilar's murder. He sought testimony to suggest that the co-defendants planned the murder and would have kept Guevara in the dark about the murder due to his allegedly lesser position in the gang. This directly contradicted the cross-examinations by codefendants that blustering and false bravado is common in the gang and that the government witnesses cannot be trusted when they implicate the codefendants.

The unfair prejudice continued to build. On April 13, 2016, during his cross examination of government witness Jose Aparicio-Garcia, counsel for Guevara continued to essentially serve as an additional prosecutor at trial. Directly contrary to the "blustering" defenses presented by the co-defendants, Guevara's counsel elicited testimony that Garcia had recorded each of them as a "credible source" regarding their participation in the charged conduct:

Q. [Guevara's counsel]: And you also want to get information directly from -- when you're getting information about what a certain person did, you want to get information from that person about their perspective, right?

A. [Garcia] Yes.

Q. Not just what other people were saying about them, right?

A. Yes.

Q. You want to go to that person?

A. Yes.

Q. Because that's the most credible source, right?
A. Yes.

Q. You want to hear it from their own mouth?

A. Yes.

….

Q. Okay. And so, just kind of going down, not -- not the complete list, but a short list of some of the people whose own mouths that you went to and who told you from themselves what they did, okay? Leopardo? [Cerna]

A. Yes.

Q. And these are all recorded things that they told you what they did, right?

A. Yes.

Q. Pesadilla? [Benitez]

A. Yes.

….

Q. And a bunch of other people?

A. Yes.

Q. And, it's true that you heard directly from every defendant in this courtroom about what they did, except for Solitario [Guevara], right?

A. Yes.

(JA 4246-4249).

This can only be described as an active attempt to bolster and rehabilitate a central government witness, eliciting that each codefendant had essentially confessed to the murder of Aguilar in Count 6. Following this cross-examination, as the prejudice continued to build day after day and deny these co-defendants a fair trial, a renewed motion for a severance was filed on April 13, 2016. It was denied without a hearing on April 14, 2016. Throughout the trial, numerous motions for severance were erroneously denied by the district court.

REASONS WHY THE WRIT SHOULD ISSUE

A. THE CIRCUIT COURT ERRED IN AFFIRMING THE DENIAL OF A MOTION FOR SEVERANCE BY ALVIN BENITEZ FROM CODEFENDANT MANUEL GUEVARA WHERE GUEVARA PRESENTED AN ANTAGONISTIC DEFENSE THE CORE OF WHICH WAS TO CAST BLAME ON BENITEZ, REQUIRING HIS CONVICTION IN ORDER FOR GUEVARA TO BE ACQUITTED, AND DENYING BENITEZ A FAIR TRIAL

Federal Rule of Criminal Procedure 14 provides for relief from prejudicial joinder. "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." *Fed. R. Crim. Pro 14(a).* The Supreme Court has emphasized that in joint trials, "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *See United States v. Johnson*, 478 F.2d 1129, 1132 (5th Cir. 1973) (citing *Schaffer v. United States*, 362 U.S. 511, 516 (1960)).

A severance is required when it appears at trial that a defendant cannot obtain a fair trial due to the antagonistic defense of any co-defendant. *See Johnson*, 478 F.2d at 1131. "[A]n accusation by counsel is sufficient to create an antagonistic defense" where it states the core of his client's defense and casts blame on the co-defendant. *United States v. Romanello*, 726 F.2d 172, 178 (5th Cir. 1984). This generates trial conditions "so prejudicial to the co-defendant under multiple attack [i.e., by the government and his co-defendant's lawyer] as to deny him a fair trial. *Id.* at 178 n.6 (brackets in original). "The dangers inherent in joint trials become intolerable when the co-defendants become gladiators, ripping each other's defenses apart. In their

antagonism, each lawyer becomes the government's champion against the co-defendant." *Id.* at 182.

In upholding the district court's denial of severance, the Fourth Circuit erroneously stated that "[t]he core of Guevara's defense was perfectly consistent with the core of the defense presented by Benitez, Castillo, and Cerna – everyone was essentially disclaiming personal responsibility for Aguilar's death." *See United States v. Chavez,* 894 F.3d 593, 606 (4th Cir. 2018). This is as misleading as it is absurd. In any and every homicide trial, defendants – in one form or another – are seeking to disclaim responsibility for an individual's death. Under this approach, no severance could ever be granted in a murder case no matter how antagonistic the defenses presented.

Moreover, the circuit court mischaracterized and ignored the antagonistic defenses in this case. The court stated that "Guevara argued at trial that he was not guilty in part because he, unlike others involved in Aguilar's murder, lacked foreknowledge of the murder plot." *Id.* This is completely wrong. Benitez and other codefendants did not argue that they "lacked foreknowledge of the murder plot." *Rather, they argued that they were not present at the murder.* They were not there, notwithstanding some false bravado that suggested otherwise. The core of Guevara's defense – by stark contrast -- was that Benitez and others were present at the murder and duped and forced him into participating.

Guevara's counsel acted as a second prosecutor in the room. The core of his defense was to cast blame on his codefendants, who argued that they had absolutely nothing to do with the murder. To place them at the scene of the crime when they said

they were not there. To rip apart their defenses and require their conviction in order to be acquitted. In such a circumstance, severance was mandated and the failure to grant it was reversible error. *See Johnson*, 478 F.2d at 1131; *Romanello*, 726 F.2d at 178, 182.

B. PETITIONER'S CONVICTIONS MUST BE VACATED ON THE GROUND THAT THE GOVERNMENT FAILED TO PROVE THE JURISDICTIONAL ELEMENT OF THE AFFECT OF INTERSTATE COMMERCE

The government did not, and could not, prove the jurisdictional element of the affect on interstate commerce in this case since there was no economic component alleged in interstate commerce and petitioner's activities did not affect interstate commerce within the meaning of RICO under the de minimus test. *See*, e.g., *United States v. Garcia,* 143 F. Supp. 2d 791 (E.D. Mich. 2000); *United States v. Morrison,* 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000).

The Supreme Court's definition of "engaging in commerce," establish that economics are the lynchpin of the Commerce Clause. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *United States v. Lopez*, 514 U.S. 549, 577 (1995). "In those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611 (2000). Moreover, even under a generous interpretation of what it means for a connection to commerce to be de minimus, the conduct alleged in this case cannot

satisfy the required jurisdictional nexus. *See United States v. Wang*, 222 F.3d 234 (6th Cir. 2000). The assertion of federal jurisdiction over this conduct violated the principles of federalism and usurped for the federal government a police power that is constitutionally reserved to the states. *See Garcia,* 143 F. Supp. 2d at 795. A reversal of Petitioner's convictions and sentence is mandated.

CONCLUSION

The Court should grant the petition herein and reverse the petitioner's convictions and sentence consistent with the arguments presented.

ALVIN GAITAN BENITEZ, by counsel

Jeffrey D. Zimmerman
JEFFREY ZIMMERMAN, PLLC
108 N. Alfred St.
Alexandria, Virginia 22314
(703) 548-8911
jzimmerman@jeffreyzimmerman.com

Amy L. Austin
THE LAW OFFICE OF AMY L. AUSTIN, PLLC
101 Shockoe Slip, Suite O
Richmond, Virginia 23219
(804) 343-1900
amyaustinlawyer@gmail.com