No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Criminal Justice Act

QUESTIONS PRESENTED

1. Whether in order to be legally sufficient, evidence supporting a conviction of violent crime in aid of racketeering must demonstrate that the defendant was actually a member of the alleged enterprise or sought to join the enterprise?

2. Whether evidence that the defendant occasionally sold drugs with members of the alleged enterprise is sufficient to establish an enterprise-related motive?

3. Whether compelling a defendant to participate in a joint trial in which he is charged with very few racketeering acts results in unfair spillover prejudice when he is acquitted of racketeering and racketeering conspiracy?

4. Whether, as urged in Petitioner's Pro Se brief, Petitioner's rights to due process and a fair trial were violated by the Government's failure to timely disclose 3500 material regarding prosecution witness Michael Farmer?

5. Whether, as urged in Petitioner's Pro Se brief, Petitioner's rights to due process and a fair trial were violated because the evidence of the drug conspiracy and drug-related murder was legally insufficient?

6. Whether, as urged in Petitioner's Pro Se brief, the district court improperly instructed the jury with respect to aiding and abetting?

7. Whether, as urged in Petitioner's Pro Se brief, the district court improperly instructed the jury with respect to "use" of a firearm?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States of America against Christian John and Marvin Johnson.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the Second Circuit, by unpublished summary order, reproduced in the appendix at App. 1, affirmed the judgment of the United States District Court for the Eastern District of New York. The Order of the Second Circuit denying panel rehearing and rehearing en banc is reprinted in the appendix at App. 6. The ruling of the district court is reprinted at App. 7.

JURISDICTION

The initial order of the court of appeals was entered on September 12, 2018. The Petitioner timely filed a petition for rehearing, which was denied by the court of appeals by order filed November 26, 2018. This petition for a writ of certiorari is being timely filed within ninety days of the denial of the petition for rehearing, in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides the following, in pertinent part:

> No person shall be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI, provides the following, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

18 U.S.C. § 1959 provides the following, in pertinent part:

> Violent crimes in aid of racketeering activity --
> a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished--
> (1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both

STATEMENT OF THE CASE

1. The charges arose in connection with criminal activity attributed to an alleged racketeering enterprise called the "Hull Street Crew," alleged to have existed from 2000 to 2011 in Brooklyn, New York. Petitioner was a late addition to a prosecution of leadership and other members of the alleged enterprise, including eventual co-defendant and co-appellant Christian John, who was alleged to have been the leader of the enterprise. The overall racketeering charges included nine murders and attempted murders, including a conspiracy to murder Petitioner himself, but Petitioner was alleged to have been involved in only a single one of those crimes, the murder of an individual named Kevin Obermuller in 2006, as well as a conspiracy to distribute narcotics.

Petitioner was acquitted of both racketeering and racketeering conspiracy, but was convicted on the offenses related to the Obermuller homicide, as well as the narcotics and Hobbs Act counts. In light of the verdict, Petitioner renewed his Rule 29 motions post-trial, and moved for a new trial pursuant to Federal Rule of Criminal Procedure 33. In particular, Petitioner alleged that the evidence was insufficient as a matter of law with respect to the murder in aid of racketeering count and the drug-related murder count, and the quantity of drugs attributable to the marijuana and

cocaine distribution conspiracy, and finally that a new trial was warranted due to the inconsistency of the verdicts in which he was found guilty of murder in aid of racketeering despite necessarily having been found not to have been a member of the alleged racketeering enterprise.

2. By Memorandum and Order dated January 23, 2017, the district court denied the motion in its entirety, along with the motions of co-defendant John. In determining that the evidence was sufficient with respect to the murder in aid of racketeering count, the court stated as follows, in unelaborated fashion:

> As discussed in connection with John's motions, there was sufficient evidence that the Hull Street crew was an enterprise engaged in a pattern of racketeering activity. There was also sufficient evidence that Johnson was involved in the enterprise's drug-distribution and dog-fighting activities at the time of the murder, and the jury could reasonably infer that Johnson sought to solidify his membership in the organization by emulating the violent tactics of its leader. (A 17)

The district court did not refer to any specific evidence that Petitioner was, in fact, a member of the enterprise, nor did it discuss how the jury might have inferred that Petitioner sought to enhance his position in the enterprise.

With respect to its determination that the evidence was sufficient as to the drug-related murder count, the court stated:

> A killing is drug-related if "(a) one motive for that killing was related to the drug conspiracy, or (b) [the defendant's] position in or control over the conspiracy facilitated the commission of the murder." United States v. Aguilar, 585 F.3d 652, 662 (2d Cir. 2009). Obermuller supplied Johnson with cocaine. Although the dispute the led to Obermuller's death apparently arose after he failed to pay for a vehicle he had purchased from Johnson, there was testimony that Johnson plotted to get what he felt Obermuller owed him by robbing him of his cocaine and drug proceeds. (A 17)

Regarding the drug conspiracy count, the court stated the following:

> [S]everal witnesses testified that Johnson sold crack. In particular, Michael Farmer—who sold crack for Johnson for several months—testified that Johnson was able to unload about $1000 worth of crack every day or two. Given the stipulated street value of the drug, Johnson's $1000 worth of crack would translate to about twenty grams every "day or two," a quantity that would reach the 280-gram threshold after only two to four weeks. (A 16)

Finally, with respect to the motion for the new trial based on the inconsistent verdicts, the district court acknowledged the patent contradiction between the acquittals and the conviction, noting that "the government's theory was that Johnson was a member of John's gang[, and i]t is difficult to square a finding that Johnson killed Obermuller to maintain or enhance his position in that organization with a finding that he was not a member of it." (A 18) Nevertheless, the court concluded that an inconsistent verdict is not grounds for a new trial." (A 18, citing United

States v. Powell, 469 U.S. 57, 65 (1984)). The court hypothesized:

> The possibility of jury lenity is certainly present in this case. The jury could have easily concluded that Johnson murdered Obermuller to enhance his position in the racketeering enterprise, but decided that he should not be held to the same level of culpability as John for the enterprise's activities. This may mean that the jury misunderstood or ignored the Court's instruction that members of a racketeering enterprise are guilty of racketeering, even if they are not involved in all of the enterprise's activities or have not been members throughout its existence. But any such error inured to Johnson's benefit.
>
> Johnson further argues that he was prejudiced by the evidence introduced on counts in which only John was charged. As with John's "spillover prejudice" argument, the fact that the jury acquitted Johnson on some counts demonstrates that it was able to consider each count and each defendant separately. (A 18-19)

3. Petitioner raised multiple issues on appeal—including sufficiency of the evidence regarding his participation in the charged enterprise as to the VICAR murder count and his involvement in a drug conspiracy as to the drug related murder, and that he was hurt by spillover prejudice. Petitioner's co-appellant, Christian John, also raised several issues, including sufficiency of the evidence regarding the existence of the charged enterprise. Petitioner was also granted permission to file a supplemental brief, in which he raised several arguments, including

principally that the prosecution had relied heavily on perjured testimony from the cooperating witnesses.

4. The Court of Appeals rejected all the appellants' arguments. In doing so, the court stated the following, in pertinent part:

> Both defendants challenge the sufficiency of the evidence supporting their convictions. "In challenging the sufficiency of the evidence to support his conviction, a defendant bears a heavy burden." United States v. Josephberg, 562 F.3d 478, 487 (2d Cir. 2009). "In reviewing such a challenge, we are required to view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and we must affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt." Id. (citations omitted).
>
> Viewing the evidence offered at trial in the light most favorable to the government, the jury reasonably could have found beyond a reasonable doubt that John and Johnson are guilty of the crimes for which they were convicted. The evidence supporting the federal racketeering conviction was sufficient for the jury to find that John, along with others, "associated together for a common purpose of engaging in a course of conduct" as shown by "evidence that the various associates function[ed] as a continuing unit." United States v. Burden, 600 F.3d 204, 214 (2d Cir. 2010) (internal quotation marks omitted). Because this evidence underlies the majority of John's convictions, its sufficiency undermines the majority of his arguments on appeal. Similarly, the evidence the government offered at trial was sufficient for the jury to find beyond a reasonable doubt that John and Johnson are guilty of the drug-related convictions as well as the convictions arising from the murder of Kevin Obermuller. (A 3-4)

With respect to the spillover prejudice issue, which was based on the fact that Petitioner was forced to go to trial in a case where his co-defendant faced many charges and inevitably involved extensive evidence of serious criminality having nothing to do with Petitioner, the Court of Appeals concluded as follows:

> Johnson asserts that his convictions should be vacated because he was denied a fair trial due to spillover prejudice the jury likely held because he and John were tried as co-defendants. "The absence of [prejudicial] spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others." United States v. Hamilton, 334 F.3d 170, 183 (2d Cir. 2003). "[W]here the record indicates that the jury was able to distinguish between counts or between defendants, and to assess separately the evidence pertinent to each, we have found no basis for concluding that a new trial was warranted because of prejudicial spillover." Id. Here, we are confident Johnson's convictions were not the result of prejudicial spillover or the jury's confusion as to the evidence. The jury found John guilty of the charged racketeering counts while finding Johnson not guilty on those same counts. Nor does the record provide any basis to conclude that the jury, when deciding Johnson's guilt, was unable to put aside any prejudicial feelings incited by the evidence relevant to John's charges. (A 4-5)

The panel also added without elaboration that:

> We have considered John's and Johnson's remaining arguments, including those raised in their pro se supplemental briefs, and find them to be without merit. (A 5)

5. In his Petition for rehearing, Petitioner argued that the panel's opinion overlooked or misapprehended an

important argument with respect to the proof regarding Petitioner's membership in the charged enterprise and whether it was motivated by maintaining or increasing his position in the enterprise. As noted above, the Second Circuit declined to grant either panel or en banc rehearing.

REASONS FOR GRANTING THE PETITION

The Court Should Grant Certiorari To Make Clear That, In Order To Be Legally Sufficient, Evidence Supporting A Conviction Of Violent Crime In Aid Of Racketeering Must Demonstrate That The Defendant Was Actually A Member Of The Alleged Enterprise Or Sought To Join The Enterprise.

1. The unusual circumstances of this case, particularly the fact of Petitioner's acquittal of both substantive racketeering and racketeering conspiracy charges while nevertheless being convicted of murder in aid of racketeering, highlight the need for the Court to establish a clear standard for the evidence required to prove a violent crime was committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity" under 18 U.S.C. §1959(a). This is an appropriate case for this Court to grant Certiorari and make clear that a loose association with members of a purported enterprise at various times is not enough to support the statute's motive requirement.

The various Courts of Appeals have addressed the question of the degree to which position, or desire to gain a position, within an enterprise must be established, generally operating on an assumption that the defendant is in fact a member of the enterprise. See United States v. Pimentel, 346 F.3d 285, 295 (2d Cir. 2003) ("we have

consistently held that "the motive requirement is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership"); United States v. Fernandez, 388 F.3d 1199, 1233 (9th Cir. 2004), modified, 425 F.3d 1248 (9th Cir. 2005) ("For all the reasons explored above—the importance of individuals within an associated-in-fact enterprise, the violent methods used to enforce the Eme's strict rules, and the fact that maintenance of an individual's position within an organization that contains two rival factions can hinge on eliminating threats to one's power and prestige within the group—we hold that a rational trier of fact could have found that these defendants conspired to murder their rivals in order to secure their own positions within the Eme and maintain its overall cohesion as a single organization"); United States v. Fiel, 35 F.3d 997, 1004 (4th Cir. 1994) ("The legislative history indicates that the phrase was added to proscribe murder and other violent crimes committed 'as an integral aspect of membership' in such enterprises" (quoting S.Rep. No. 225, at 304, reprinted in 1984 U.S.C.C.A.N. at 3483)).

2. The arguably more fundamental question of whether a jury can infer a membership-related motive at all where there is no evidence of membership, only loose association at various times, has apparently been left unanswered. Throughout this case, the absence of evidence against Petitioner personally has been overshadowed by the considerable evidence introduced against others, including his co-appellant John. Unfortunately, that continued at the appellate level, where the Court of Appeals' Summary Order discussed the basis for John's conviction of the racketeering charges, namely that he and others, "'associated together for a common purpose of engaging in a course of conduct' as shown by 'evidence that the various associates function[ed] as a continuing unit,'" but made no specific determination as to the evidence against Petitioner relating to the charged enterprise.

As a result, it is difficult to ascertain the evidence on which the Court of Appeals relied to reach that conclusion, or to be confident that the Court of Appeals fully evaluated or apprehended the important issue regarding whether there was sufficient evidence either that Petitioner was a member of the charged enterprise or that the murder was committed for the purpose of gaining entrance to or maintaining or increasing position in the charged enterprise.

The district court had provided little, if any, elaboration beyond that, stating only that "[t]here was also sufficient evidence that Johnson was involved in the enterprise's drug-distribution and dog-fighting activities at the time of the murder, and the jury could reasonably infer that Johnson sought to solidify his membership in the organization by emulating the violent tactics of its leader." (A 17)

The evidence cited by the Government, both at the Rule 29 stage and on appeal, was that Petitioner had engaged in some drug dealing and dog fighting with members of the enterprise, but as the district court instructed the jury, mere association or even a business relationship with some of the members of the enterprise is not enough, and the defendant must actually have been a member of the enterprise. (Petitioner Ct. of App. Brf. at 23-24, citing Trial Tr. at 3553 (court's charge to jury)) Moreover, the Government made no effort to even address, let alone refute, the considerable affirmative testimony from its own witnesses that Petitioner was not a member of the charged enterprise. (Petitioner Ct. of App. Brf. at 24-27) Nor was the Government able to provide any additional basis in support of its claim that Petitioner was a member of the enterprise.

The Government's efforts to conjure an enterprise-related motive for the Obermuller homicide were likewise unavailing. The Government essentially engaged in circular reasoning to assert that any act performed in combination with the members of the enterprise necessarily signified a motivation to maintain or increase Petitioner's own purported position. (Gov. Ct. of App. Brf. at 58-59) Notably, although the Government referred to a supposedly "well-established pattern of the enterprise to rob drug dealers of narcotics and narcotics proceeds" (Gov. Ct. of App. Brf. at 58), the Government did not and could not cite any evidence that Petitioner participated in any such conduct, and indeed Petitioner was not charged with any such conduct. (Gov. Ct. of App. Brf. at 58-59)

Accordingly, the Government was forced to fall back on a speculative and unsupported claim that Petitioner, "by associating with members of the enterprise, was aware that committing a violent act would establish his position in the enterprise." (Gov. Ct. of App. Brf. at 59) There was, in fact, no such evidence.

The Government did acknowledge the considerable evidence that there was a dispute over the sale of a car, but relied on the familiar principle that advancing one's position need not be the sole or even principal motive for the conduct.

(Gov. Ct. of App. Brf. at 59-60) The Government's argument turned that principle on its head, however, since there was in fact no evidence of any enterprise-related motive, and there was at least evidence that at the time of the Obermuller homicide, Petitioner and Obermuller were engaged in a dispute about the vehicle. (Petitioner Ct. of App. Brf. at 22-23) Thus, any consideration of competing motives as contemplated in other VICAR cases was unnecessary under the circumstances here.

The Court should grant Certiorari to make clear that the statute's motive requirement does in fact require legally sufficient proof that the defendant was a member in fact or sought membership, and to conclude that such requirement was not satisfied here.

The Court Should Grant Certiorari To Address Directly The Severe And Unfair Spillover Prejudice caused By The Unreasonable Decision To Try Petitioner Jointly With John In An Unwarranted RICO Prosecution, And Find That It Deprived Him Of A Fair Trial.

3. Although Petitioner's acquittal on the racketeering and racketeering conspiracy counts was inevitable in light of the paucity of evidence, that Petitioner ever faced those charges in the first place created prejudice that just as inevitably made it impossible for him to receive a fair trial

with respect to the other counts. Because of the resulting serious spillover prejudice, including the vast amount of evidence admitted against John which had nothing to do with Petitioner, the acquittals warranted a new trial on the remaining counts, and the district court's refusal to grant deprived Petitioner of his rights to due process and a fair trial.

In Zafiro v. United States, 506 U.S. 534 (1993), the Court recognized the risk of unfair prejudice "might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant," and that "[w]hen many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened." Id. at 539. The Court added that "[t]he risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here." Id.

This Court has recognized under analogous circumstances that significant spillover prejudice arising from vacated counts can warrant reversal on the remaining counts. See United States v. Bruno, 383 F.3d 65, 91 (2004) (reversal of RICO convictions required vacating defendant's false statement conviction "given the enormous amount of

prejudicial spillover evidence admitted to prove the RICO enterprise and its extensive criminal activities"); see also United States v. Rooney, 37 F.3d 847, 856 (2d Cir. 1994) (vacating conviction and ordering new trial); United States v. DiNome, 954 F.2d 839, 845 (2d Cir. 1992) (once the RICO charges were dismissed, the conspiracy-related evidence was "irrelevant yet highly prejudicial in the context" of the remaining fraud charges and that "[i]nstead of being swamped by this mass of irrelevant evidence, these charges should have been tried separately," which "could have been completed in a very short period of time, with the risk of spillover prejudice entirely eliminated," and ordering new trial).

4. The dangers envisioned by the Court were manifest here, in that the overwhelming amount of unfairly prejudicial evidence relating to the substantive RICO charge and the RICO conspiracy charge tainted Petitioner's right to a fair trial on the remaining counts of conviction. Petitioner identified five substantial ways in which he was prejudiced: 1) the sheer specter of an enterprise, far-ranging in violent criminal conduct and temporally extending for over ten years, combined with the Government's unsupported claim that Petitioner was a member of the enterprise hung like dark cloud over the entirety of the case; 2) highly prejudicial evidence of dog fighting—necessarily viewed negatively by jurors—

admissible because of the RICO charge, since gambling on dog fighting was charged with the RICO Count as Racketeering Act Fifteen; 3) the admission of evidence of five other homicides, four attempted murders, torturing of Farmer and other people, other violent robberies and criminal activities with which Petitioner was not charged and in which he had no participation; 4) the admission of evidence of John's plan and scheme to kill Petitioner himself because of something that had happened in the past, which suggested to the jury that John wanted Petitioner dead because he was present when Obermuller was killed and suggested that he had participated in the torture death of Obermuller; and 5) the vast volume of evidence of violent crimes admitted against John and having nothing to do with Petitioner so lengthened the trial as to unfairly prejudice Petitioner causing the jury to feel obligated to convict him of something even where the evidence was weak and insufficient.

Had Petitioner been tried alone, much of this evidence would have been inadmissible which would have resulted in not only a much shorter trial, but a much fairer one.

To be sure, as the district court noted, these factors must be considered in light of the fact that the jury did acquit Petitioner of the two racketeering counts. (A 19) But this Court has not held that an acquittal on some counts

rules out unfair spillover prejudice, and there are several reasons why that should not in fact be the end of the inquiry. First, the acknowledged inconsistency in the verdict casts doubt on the integrity of the jury's ability to evaluate the separate counts independently. Indeed, if, as the district court posited, the jurors may simply have been an exercise of juror lenity, that cuts against the idea that the jurors fairly considered the facts and law as to each count. Of course, the inconsistency can just as easily have been attributed to juror confusion as to the multiple counts, facts, and legal requirements as to each, and may have reflected a compromise whose goal was to assure that Petitioner was convicted of something after they had heard all the unfairly presented evidence and concluding that he must be guilty of something.

After all, it is difficult to imagine how a juror could simply "throw out" all such highly-charged evidence without retaining any trace of improper bias against Petitioner. The racketeering charges were a central part of the Government's case, taking up a significant amount of testimony in the six-week span of trial. Considering the weakness of the prosecution's theory regarding Petitioner's purported racketeering liability—and frankly, neither the district court nor the Court of Appeals made a serious effort to show

such a relationship on Petitioner's part—any uncertainty about the evidence's prejudicial effect on the jury must be weighed against the Government and in favor of Petitioner.

Ultimately, it is a mystery why Petitioner was added to the case in the eleventh hour, but that decision—when he could have been tried separately—denied him a fair trial, and subjected him to unfair spillover prejudice. The Court should grant certiorari to make clear, first, that the fact of a partial acquittal is not sufficient on its own to defeat a showing of otherwise unreasonable spillover prejudice, and second, to make clear that the circumstances here are an example of exactly how the abuse of the joinder rule results in such spillover prejudice.

The Court Should Grant Certiorari To Directly Address The Arguments Raised in Petitioner's Argument In His Pro Se Supplemental Brief.

5. In a pro se supplemental brief, Petitioner raised several issues, including that the Government had violated Brady v. Maryland, 373 U.S. 83 (1963), in failing to timely disclose 3500 material regarding prosecution witness Michael Farmer, and instead knowingly allowing Farmer to testify falsely in implicating Petitioner in the Obermuller homicide. Specifically, Petitioner alleged the following:

Marvin Johnson was arrested on January l3th, 2014 based on a affidavit in support of arrest warrant (l4M017) dated January l0th, 2014 containing false information from one Government witness Michael Farmer. Desmond James, Michael Farmer, Kia McKenzie, Christian John and Shaquan Jones where in Federal Custody years before Johnson's arrest for crimes unrelated to Johnson. At some point Kia McKenzie and Michael Farmer were both housed in the S.H.U. at the Metropolitan Detention Center. While there Michael Farmer tells Kia McKenzie that he is going to make up false accusations and he is going to bring up the murder that happened on Madison Street. See Tr.Pg.999 or Exhibit-#1. Michael Farmer eventually followed through with his plan and relayed the false information to the Government.

Michael Farmer told the Government that Johnson lived at 186 Madison and the building was abandoned. Also the building had several squatters. Approximately one day after the victim was killed CWl-(Michael Farmer) was at the defendant Marvin Johnson mothers house with Johnson and another individual (John Doe) when John Doe began to sing a rap song about a murder where a man was burnt in a fire. The defendant Marvin Johnson responded by laughing. Thereafter, John Doe told CWl-(Michael Farmer) that Johnson admitted to him that he and another person killed a man over a drug dispute and burned him in the basement of 186 Madison Street. See Complaint Affidavit, Pg.4 and 5 (14M017) attached as Exhibit #2. "This statement from cooperating witness Michael Farmer is what lead to Marvin Johnson's initial arrest.

Three weeks before Johnson's trial Johnson began to receive 3500 Jencks Act Material from the Government. The 3500 Jencks Act Material revealed the identity of the people in Johnson's Complaint Affidavit to support arrest warrant. The 3500 revealed that the cooperating witness CW1 in Johnson's Complaint Affidavit was named Michael Farmer and John Doe was a friend of both Farmer's and Johnson's by the name of Jerome Chapman. This information was revealed in Michael Farmer's 302-Proffer-Session dated 10-10-2013. Page 5 of 8

attached as Exhibit #3. "It reads, "Farmer learned from Jerome Chapman that Johnson and John Doe were involved in a murder where John poured lighter fluid on a subject in the basement of Johnson's residence and lit him.

Jerome Chapman eventually told Farmer the details of what occurred at Johnson's residence. Rome told Farmer that someone tried to rob Johnson and John was in the bathroom. John struck the subject in the head and brought him to the basement of the residence where he was tied up. John then went to purchase lighter fluid and lit the guy.

See Michael Farmer's proffer session dated 10-10-2013 Pg. 5 of 8 attached as Exhibit #3. This is the information Michael Farmer provided to the Government which lead to Marvin Johnson's arrest on a Complaint Affidavit to support arrest warrant. See (l4M017) attached as Exhibit #2. A few months after Farmer provided the information the Government reaches out to Jerome Chapman about the information that Michael Farmer provided to them concerning the fire and murder at 186 Madison, Jerome Chapman was interviewed by the Government on two occassions. Once on June 6, 2014 and again on September 21, 2014 a few weeks before Johnson's trial was scheduled to commence. Jerome Chapman did not corroborate Michael Farmer's statement to the Government concerning the fire and murder at 186 Madison. Jerome chapman actually stated the complete opposite to what Michael Farmer told the Government. Chapman stated in his first interview with the Government that he knew about the fire and later asked Johnson about the fire at 186 Madison, and Johnson replied it was nothing just a fire. See Government Exhibit 3500 JC1-attached as Exhibit #4. Chapman's second interview with the Government Chapman told the Government that he had received phone calls from people asking if Marvin died due to the fire on Madison Street. Chapman also relayed to the Government that Johnson had told him the place was already sold and that Johnson got another place. See Government Exhibit 3500 JC3- attached Exhibit #5. (Pro Se Supplemental Brief at 1-3)

Petitioner went on to argue the following with respect to the Government's failure to turn over the 3500 material in a timely fashion:

> Marvin Johnson's attorneys filed a motion to have all Brady Material handed over prior to trial. See docket entry 197, attached as Exhibit 6. Jerome Chapman's 3500 was turned over to Johnson's attorneys days after Michael Famer had already testified. The Government had interview Jerome Chapman months prior to Johnson's trial and had more than enough time to hand Jerome Chapman's 3500 over to Johnson's attorneys prior to trial. "In short" Farmer testified on direct examination about the supposed rapping on Johnson's mother's stoop where Jerome Chapman was allegedly rapping about a man being burned in a basement on Madison Street. Farmer testified that Johnson replied by saying Rome you crazy. Farmer was asked Okay did there come a time after that you saw Jerome Chapman again? Farmer responded yes. Farmer was then asked without getting into the specifics of what you discussed, did the topic of the person being burned in the basement come up? Farmer responded yes. Johnson's attorney quickly objected. The objection was overruled. Despite the objection being overruled, AUSA Ms. Cohen quickly changes the subject. See Tr. pgs. 199-200-201-202 attached as Exhibit 7. The reason AUSA Ms. Cohen told Michael Farmer without getting into the specifics of what he and Jerome Chapman discussed in regard to the person being burned in the basement is because Jerome Chapman had already been interviewed twice by the Government and did not corroborate any of Michael Farmer's statements made to the Government, Michael Farmer was still allowed to testify to it, with the Government knowing it to be false, perjured testimony. See Tr. pgs. 199-200-201-202 attached as Exhibit 7.
>
> Jerome Chapman was under subpoena from the Government to testify as a witness, but later released after being interviewed and not corroborating any of Michael Farmer's statements. Marvin Johnson's attorney had no idea Jerome

> Chapman had been interviewed by the Government on those two occasions. Neither did Johnson's attorneys have any idea Jerome Chapman was under subpoena from the Government until Jerome Chapman's 3500 Jencks Act Material was turned over to Johnson's attorneys days after Michael Farmer had already testified. Due to receiving Chapman's Jencks Material 3500 after Michael Famer had already testified, Johnson's attorneys were unable to cross examine Michael Farmer on his false statements he made to the Government about the specifics about what happened with the fire and killing of Keven Obermuller at 186 Madison that was supposedly told to him by Jerome Chapman, which information lead to Marvin Johnson's arrest. Johnson's attorneys was also unable to cross examine Michael Farmer on his testimony of Jerome Chapman rapping on Johnson's mother's stoop about a man being burned in a basement on Madison Street and Johnson saying Rome you crazy. All due to Johnson's attorneys not receiving Jerome Chapman's Jencks 3500 prior to trial or prior to Michael Famer testifying. (Pro Se Supplemental Brief at 5-7)

6. Petitioner further argued that the only basis for his conviction was the spillover prejudice from being tried jointly with Christian John, who was charged with many other crimes including five additional murders having nothing to do with Petitioner, and which would have been inadmissible but for the joinder. He expressly argued the following:

> Dr. Zhang testified on direct examination that she performed the D.N.A. testing in connection with the murder of Kevin Obermuller. See Tr. Pg. 2299 attached as Exhibit # 79. Dr. Zhang testified on cross examination that she received a D.N.A. sample from Marvin Johnson and she was able to determine Marvin Johnson's D.N.A. profile. Dr. Zhang testified that she compared Marvin Johnson's D.N.A. to D.N.A. found on the evidence collected from the crime scene of Kevin Obermuller's murder at 186 Madison. Dr. Zhang testified that Marvin Johnson

> was excluded as a contributor to all the evidence tested for D.N.A. See Tr. Pg. 2311-2312 attached as Exhibit #80. (Pro Se Supplemental Brief at 60)

In further support of the argument that he had been the victim of spillover prejudice, Petitioner noted that:

> Eyewitness Maliza Joseph Gabriel did not identify Marvin Johnson as one of the men she observed exit 186 Madison Street the night of the fire at 186 Madison Street. The following day after the fire at 186 Madison Street, November 28, 2006, next door neighbor to 186 Madison Street Ms. Maliza Joseph Gabriel was interviewed by New York Police Department Detectives about what she observed. "In short" Ms. Gabriel said the last man to exit 186 Madison Street the night of the fire was the man who lives in the street level apartment at 186 Madison. Detectives then shows Ms. Gabriel a photo array containing a picture of Marvin Johnson from a few months prior DWI arrest. Ms. Gabriel observed the photo array and did not identify Marvin Johnson as one of the men she observed the night of the fire nor did Ms. Gabriel identify Marvin Johnson as the man she knows who stays at 186 Madison Street. See Government Exhibit 3500 MP12 attached as Exhibit #81.
>
> The Government and Marvin Johnson's attorney also stipulated during Johnson's trial that Ms. Gabriel was shown a photo array and did not identify Marvin Johnson to be one of the men she observed exit 186 Madison the night of the fire. (Pro Se Supplemental Brief at 64-65)

Additionally, Petitioner pointed out other flaws in the prosecution case against him directly, indicating that his conviction was necessarily affected by the spillover prejudice:

> Detective Panachi testified that he spoke to Shaquan Jones in regards to Shaquans fingerprints being found on the crime scene of Kevin

> Obermuller's murder at 186 Madison. See Tr. Pg. 136-137 attached as Exhibit #21. Shaquan Jones was interviewed by Detectives on March 28th, 2008. Shaquan stated that he use to buy marijuana from 186 Madison Street and he heard that someone had gotten killed inside of the location, and he heard it was a fire and thats all he knew. Jones stated that he would hang out inside 186 Madison and smoke and drink for a while with a person named Bones who usually sold the marijuana. Jones stated that Bee-Ray the spot owner did not like him to hang out inside of the location. See Government Exhibit 3500 SHJ1 attached as Exhibit #22.
>
> Jones eventually testified to this matter on cross examination. Jones testified that he made up the names and entire story he told to the Detectives. See Tr. Pg. 2218~2219-2220 attached as Exhibit #23. Marvin Johnson testified on cross examination that 186 Madison "was a weed spot, and the person who sold the weed out of 186 Madison name was Bones. See Tr. 3065, attached as Exhibit. #25.
>
> Ms. Grace Kimbrough tenant at 186 Madison testified that she knows Bourne, and that Bourne would go in and out of 186 Madison Street with a lady, and Bourne would stay for a few hours and then leave. See Tr. Pg. 108 attached as Exhibit #27. (Pro Se Supplemental Brief at 12-13)

7. In addition to the argument in his main brief alleging that the evidence of the drug conspiracy and drug-related murder was legally insufficient, Petitioner raised the argument in his pro se supplemental brief:

> In United States v Desinor (CA2, 2008) 525 F.3d 193, 2008 US App. LEXIS 9831 May 8, 2008, The Second Circuit held-To convict a defendant of engaging in a narcotics conspiracy resulting in murder, or engaging in a narcotics conspiracy while engaging in conspiracy to murder, under 21 USC 848(e)(1)(A), the government need only prove beyond a reasonable doubt that one motive for the killing,

or conspiracy to kill was related to the drug conspiracy. Section 848(e)(1)(A) requires the jury to find a substantive connection between the killing and the narcotics conspiracy.

***

Here the evidence showed the complete opposite to what is required to sustain a conviction under Title 21 USC 848(e)(1). There was no evidence presented, that Kevin Obermuller had anything to do with the Drug Conspiracy, charged in Count Three. Neither was there any evidence presented that Kevin Obermuller had anything to do with drugs at all.

Marvin Johnson was charged with a drug related murder of Kevin Obermuller, Count Seven in violation of 21 USC 848(e)(1). Their was plainly insufficient evidence to charge and or convict Marvin Johnson of this Count.

NOTE:
Shaquan Jones was the only person, to testify that Kevin Obermuller sold drugs.

Shaquan Jones testified that Christian John was the person who told him that Marvin Johnson was buying bricks and half bricks of cocaine from Kevin Obermuller. See Tr. Pg. 2000-2001 attached as Exhibit #10.

Shaquan Jones testified on cross examination that Marvin Johnson never told him that Kevin Obermuller was supplying him with bricks of cocaine. See Tr. Pg. 2255 attached as Exhibit #63. Shaquan Jones testified on cross ·examination that he had no way of knowing one way or another whether Kevin Obermuller was selling weed or cocaine. He had no personal knowledge of it. See Tr. Pg. 2256 attached as Exhibit #64.

Shaquan Jones testified on direct examination that he and Christian John did not know Kevin Obermuller from anywhere. See Tr. Pg. 2064 attached as Exhibit #16.

Kevin Obermullers best friend Rondell Bourne testified on direct examination that he has never

seen Kevin Obermuller sell any kind of drug. He has never seen Kevin sell marijuana, or cocaine. Mr. Bourne also testified that he has never seen Kevin possess marijuana other than what the two of them smoked. See Tr. Pg. 2682~2683 attached as Exhibit #65.

Kevin Obermuller's girlfriend Ashanti Dasiguar testified on cross examination that Kevin Obermuller worked a construction job full-time Monday through Saturday, and Kevin did not sell marijuana nor did Kevin use or sell cocaine. See Tr. Pg. 2390-2391 attached as Exhibit #66.

Marvin Johnson testified on direct examination that Kevin Obermuller did not sell any drugs. Johnson testified that Kevin just smoked marijuana. See Tr: Pg. 3040 attached as Exhibit #67. (Pro Se Supplemental Brief at 33-37)

8. Petitioner also argued that the district court had improperly instructed the jury with respect to aiding and abetting:

Marvin Johnson's offenses for 18 USC 1951(a) and 2, 924(C)(1) and 2, 18 USC 1959(a)(1) and 2, 21 USC 848(e)(1) and 2, were all charged under the alternative theory of aiding and abetting. The Court's instruction is clearly erroneous and misleading because it failed to emphasize to the jury that the defendant had to have "advance knowledge". Nor did the Court direct the Jury to determine when knowledge arose to convict the defendant as an Aider and Abettor.

General Instructions on Aiding and Abetting liability such as the instructions given here, are insufficient and plainly erroneous. A jury instruction is erroneous if it misleads the Jury as to the correct legal standard or does not adequately inform the Jury on the law. "See United States v Prado, 815 F.3d 93 (CA2, 2015).

In Rosemond v United States, 188 L. Ed. 2d 248 (2014), The US Supreme Court declared, "What

> matters for purposes of gauging intent, and so what Jury Instructions should convey, is· that the defendant has chosen with full knowledge to participate in the illegal scheme-not that, if all have been left to him he would have planned the identical crime. "The blanket instruction to the Jury given by the District Court in Petitioner's case did not provide true guidance as to the true nature of one who is an Aider and Abettor as required by the Big Court in Rosemond. Also the District Court did not direct the Jury to determine when defendant obtained the requisite knowledge i.e., to decide whether Petitioner knew about the illegal scheme with full knowledge in sufficient time to withdraw from the crime, knowledge that enables him to make legal (and indeed, moral) choice.
>
> Therefore, the Jury Instruction was insufficient and lacking so the most intrical requirement "advance knowledge" by the petitioner, to sustain these convictions. Dimaya v Lynch, 803 F.3d 1110 (CA9, 2015), Lynch v Dimaya, 137 S.Ct. 535, 196 L. Ed. 2d 399 (2016). (Pro Se Supplemental Brief at 49-51)

9. With respect to the firearms charged of which he was convicted, Petitioner argued as follows:

> There was no evidence presented at trial that Marvin Johnson used brandished or discharged any firearm in relation to a crime of violence and or drug trafficking crime. Furthermore had the Jury been properly instructed that 18 USC 924(C)(l)(A) definition of "use" meant active employment of a firearm meaning an operating factor where the gun was fired and in some way caused the serious injury of a person in relation to the predicate offense as defined in Bailey. There's a reasonable probability that the Jury would have beyond a reasonable doubt found Marvin Johnson "not guilty" and returned a "not guilty" verdict for a 18 USC 924(C)(1)(A) offense. United States v Prado, 815 F.3d 93 (CA2, 2015). The Jury was uncertain by the unexplained proper meaning of 924(C)(1)(A) "use" as opposed to brandishing, displaying, or referring to firearm to

further underlying crime. Thereby thinking brandishing, displaying or referring to firearm to further underlying crime all meant the same as "use". Such ambiguous separate and distinct offenses constituted the same crime when in truth they only confused the jury and left them to only guess what offense Marvin Johnson had committed.

Congress intended every Statute subsection (i) (ii) or (iii) of 924(C)(1)(A) to identify different offenses not one single offense described different ways as commonly understood. Johnson v United States, 135 S.Ct. 2551 (2015), The Supreme Court declared "we are convinced that the indeterminancy of the wide ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges.

Increasing a defendants sentence-under the Clause denies Due Process Of Law. (Count Five) charged Marvin Johnson with Unlawful Use/Possession Of A Firearm. The Court charged the Jury that the Underlying crimes in Count Five are the crimes charged in Counts One, Two, Three and Four.

See Jury instructions page 60 Exhibit #76. Marvin Johnson did not have a "Special Verdict" "Sheet", so it is impossible to determine what Marvin Johnson was convicted of under Count Five. (1) was it in relation to a Drug Trafficking Crime? (2) was it in relation to a crime of violence?

It is also impossible to determine what subsection of 924(C)(l)(A) his conviction was based on (i) (ii) or (iii). here the lack of a "Special Verdict" "Sheet", and the District Court's erroneous instructions to the jury of "ACTIVE EMPLOYMENT" of a firearm without mentioning the most notable aspect of an "operating factor or nature" during the commission of the predicate offenses was insufficient to "sustain" a conviction for 18 USC 924(C)(1)(A), Count Five as defined in Bailey. (Pro Se Supplemental Brief at 44-45)

10. In addition, Petitioner alleged in his pro se supplemental brief that the Government had knowingly elicited perjured testimony from cooperating witnesses Saquon Jones, Michael Farmer, and Grace Kimbrough, and further argued that the trial suffered from significant prosecutorial misconduct. Although these issues were briefed extensively by Petitioner, and responded to in detail by the Government, the Court of Appeals mentioned them only in passing in it summary order. (A 5) The Court should use this opportunity to address these issues, and if it agrees with Petitioner, ultimately rule that a new trial is required.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
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Respectfully submitted,

/s/Brendan White

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