No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AZIBO AQUART, 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 WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

1. Whether a defendant acts for the "purpose of . . . maintaining or increasing [his] position in an enterprise" within the meaning of 18 U.S.C. § 1959, the Violent Crimes in Aid of Racketeering statute, whenever he acts to protect the enterprise itself.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Azibo Aquart respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming his federal convictions.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-60a) is published at United States v. Aquart, 912 F.3d 1 (2d Cir. 2018).

JURISDICTIONAL STATEMENT

The Court of Appeals issued its opinion and entered judgment on December 20, 2018. Pet. App. 1a. It denied respondent's timely rehearing petition on March 7, 2019. Pet. App. 61a. On May 21, 2019, this Court granted petitioner an extension of time until August 4, 2019, to file this petition. Pet. App. 62a.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, 18 U.S.C. § 3595(a), and 18 U.S.C. § 3742.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life . . . without due process of law.

18 U.S.C. § 1959 provides in relevant part:

> (a) Whoever . . . 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 --

STATEMENT OF THE CASE[1]

A. Proceedings Below

Aquart was charged with orchestrating and participating in the murders of three people, Tina Johnson, James Reid, and Basil Williams, on August 24, 2005. According to the government, from at least the fall of 2004, Aquart led a crack-selling business run from an apartment at 215 Charles Street in Bridgeport,

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[1] The facts set forth below are drawn from the Court of Appeals' decision in this case. Additional record citations are designated as follows: The prefixes "T." and "P." refer, respectively, to transcript citations for the guilt/innocence trial (which started April 20, 2011) and the sentencing hearing (which began May 31, 2011, on p. 4386); since the transcripts for each phase were not separately numbered, the prefixes will identify the source proceeding; "DE" refers to documents filed electronically and listed on the District Court's docket sheet; "GX" and "DX" refer to government and defense trial exhibits, respectively, and "GX-P" and "DX-P" refer to sentencing-hearing exhibits.

Connecticut. The victims lived in another apartment in the same building. The government theorized that Aquart planned the murders because Tina Johnson had started to sell small quantities of crack on her own and would not stop. The government charged that he enlisted three people to help break into Ms. Johnson's apartment: his brother, Azikiwe; an acquaintance, Efrain Johnson; and John Taylor, a man he had only recently met.

All of the men were eventually indicted, Aquart in 2005, Azikiwe Aquart in 2006, and Efrain Johnson in 2007, with superceding indictments for murder and other offenses. Taylor was separately indicted in 2010. A notice of intent to seek the death penalty was filed against Azibo and Azkiwe Aquart in 2009, and a final notice was filed in August, 2010. Efrain Johnson's case was severed, as was Azikiwe Aquart's, and Azibo Aquart was tried alone.

The final indictment against Aquart contained six capital counts, two for each victim: murder to maintain or increase Aquart's position in the narcotics racketeering enterprise, 18 U.S.C. § 1959(a)(1), and drug-related murder, 21 U.S.C. §§ 841(b)(1)(A) and 848(e)(1)(A). He was also charged with conspiracy to murder and narcotics conspiracy.

After a jury trial, Aquart was convicted of all these offenses. At a sentencing hearing pursuant to 18 U.S.C. § 3593, the same jury sentenced him to death for

killing Tina Johnson and Basil Williams, but could not agree on a sentence for James Reid's murder. Accordingly, a sentence of life in prison without the possibility of release was imposed on those counts.

A panel of the Second Circuit affirmed Aquart's convictions but vacated his death sentence as a result of prosecutorial misconduct during the sentencing phase of Mr. Aquart's capital trial and remanded to the district court for further proceedings. United States v. Aquart, 912 F.3d 1 (2d Cir. 2018).

B. Statement of Relevant Facts

1. Background: The Government's Case Against Aquart

The government's evidence of the homicides rested almost exclusively on the testimony of John Taylor, who testified pursuant to a cooperation agreement. According to Taylor, early in the morning of August 24, 2005, four men, including Taylor himself, led by Aquart, forced entry into the apartment shared by Tina Johnson, James Reid, and Basil Williams. Taylor testified that the victims were bound with duct tape and that he observed Aquart and his brother Azikiwe beating Tina Johnson and James Reid with baseball bats, at which point, exculpating himself, Taylor told the jurors he fled the apartment (Pet. App. 12a). The victims were discovered the next morning, still bound in duct tape. Medical-

examiner evidence established that they each had died from blunt-force trauma (Id.).[2]

On lengthy cross-examination, Taylor admitted that his story had evolved over the course of numerous interviews with law enforcement, starting with an absolute denial of any involvement to slowly admitting some involvement, but placing primary responsibility on Aquart and his brother (see T.2384-416, 2433-34, 2438-67). In material ways his self-exculpatory testimony could not be squared either with the statements of Efrain Johnson, the alleged fourth participant in the break-in (Pet. App. 15a-16a), or with the physical evidence.[3] Most significantly, Taylor received substantial financial and other benefits from the

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[2] The government also introduced testimony from a number of other cooperators, none of whom witnessed the homicides or any of the events inside the apartment. These additional cooperators testified only to collateral matters such as Aquart's drug enterprise and its operations (Pet. App. 11a); an ongoing dispute between Tina Johnson and members of the Aquart drug enterprise (Pet. App. 11a), described more fully below; and an alleged dry-run to the break-in at the apartment undertaken a few days before the homicides (Pet. App. 12a). The defense challenged the testimony of these witnesses, each of whom obtained significant benefits from the government for their testimony, and each of whom testified inconsistently with prior statements made to law enforcement, with testimony offered by other cooperators, or both.

[3] For example, Taylor claimed that the Aquart brothers taped Tina Johnson while he and Efrain Johnson did nothing (Pet. App. 12a). But Efrain Johnson testified that both he and Taylor bound her with duct tape (Pet. App. 15a), and Efrain's DNA was found on the tape around her hands and Taylor's DNA could not be eliminated (T.3155-74; GX 465).

government — Taylor, who had faced a life sentence on each count, ultimately received a sentence of nine years for his admitted participation in a triple homicide (Pet. App. 20a n.9) — but he incredibly downplayed to the jury the rewards he believed his testimony against Aquart would earn him (Pet. App. 20a).

The government attempted to corroborate its case against Aquart with forensic evidence. In the bedroom where victim Basil Williams was found, investigators collected two plastic bags, stuck together with a small piece of duct tape (T.1029-32; see GX123, GZ23-1, GX455). Although Taylor had testified that all four of the perpetrators wore latex gloves, a government fingerprint expert identified prints belonging to Aquart (one print on the non-adhesive side of the duct tape) and Azikiwe (multiple prints on the bags) on the items (T.2754-68, 2794-96, 2802). But the defense argued there had been significant traffic between the apartment and Aquart's drug enterprise (T.4269), and the government's expert admitted that he could not say when the prints had been deposited (T.2800-01). And investigators eventually conceded that they had moved the items around (T.345, 647-53, 665-66, 1084-87, 1089-90), before photographing and collecting them (compare GX 123, 123-1 (photographs showing the bags taped together), with GX 120-2, 120-3 (photographs showing the bags, as originally observed, not taped together).

The government also introduced evidence of DNA samples, mostly complex mixtures, collected from gloves and glove fragments recovered in the apartment, including fragments recovered from the duct tape used to bind the victims. What appeared to be the cuff of a latex glove was recovered from under a cushion of a couch in the living room of the apartment, and the government emphasized that DNA testing effectively included Azibo Aquart's profile (with 1 in 79 million persons sharing the profile) on a sample taken from the cuff (T.345, 647-53, 665-66, 1084-87, 1089-90; compare GX123, GX123-1, with GX 120-2, 120-3).[4] The government's DNA expert testified that Aquart's profile was included in sample collected from a double vinyl glove (one glove inside another) found on the floor of one of the bedrooms (T.3185-92; GX137, GX465). And the expert said that Aquart could not be eliminated as a potential contributor to a swab taken from one of the latex fragments in the duct tape (T.3155-64).

But it was clear that, despite the government's emphasis of the evidence, neither the latex cuff nor the double vinyl glove were connected to the homicides. The cuff was found under a cushion of a couch far removed from the bedrooms where the victims were found, and it bore no resemblance visibly to the fragments

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[4] James Reid's profile was also included in the sample collected from the cuff (id.).

recovered from the duct tape — a cursory visual comparison showed it to be a different color, soiled, and noticeably older and deteriorated (T.4274; compare GX136, GX447, GX448 (photographs of cuff), with GX419, GX420, GX426, GX425, GX430, GX433, GX435 (photographs of fragments recovered from duct tape). And the government expert admitted that the vinyl gloves appeared not the same material as the latex fragments collected from the duct tape (T.3081). As for the profiles found on the swab collected from the latex fragments in the duct tape, the partial profile would have been shared by one out of 400 African-Americans, vitiating the significance of the "could not be eliminated" finding (T.3186-87).

Significantly, the government's expert also found DNA from an unidentified male under the fingernails of Tina Johnson's right hand — the four defendants, Williams, and Reid were affirmatively eliminated as the source (T.3446-51 re 32-1-Z1). The source of that profile was never identified.

2. The Government Failed to Establish that Aquart Acted in Order to Maintain or Increase His Position in the Enterprise, as Required by the VICAR Statute

Even accepting that the government proved beyond a reasonable doubt that Aquart participated in the homicides, it introduced no evidence that would have permitted the jurors to find he did so "for the purpose of . . . maintaining or increasing position in an enterprise," as required by 18 U.S.C. § 1959(a).

a. In the government's own words, Aquart was the "undisputed leader" of his drug operation. He made the rules and served as his own enforcer, and none of his employees posed any threat to his position.

From the fall of 2004 through August 2005, Azibo Aquart headed a small crack-selling business based in a Bridgeport residential building. $10 bags were sold out of apartment 211 at 215 Charles Street, on a 24-hour, seven days a week basis. Unit 202 was established as a "lookout" apartment. The government presented numerous witnesses who described the operation. Most were employees, many of them addicts, who testified pursuant to cooperation agreements. The defense did not challenge Aquart's guilt of drug conspiracy (see defense summation at T.4267-68).

As the government itself described in its brief to the Second Circuit, the testimony of these witnesses established that Aquart was the "undisputed leader of the organization." See Gov. Br. 82 (filed July 15, 2015). None of these witnesses testified that anyone inside or outside the drug operation posed a threat to Aquart's "undisputed" leadership.

To the contrary, several witnesses testified that Aquart made the rules and served as his own enforcer, when his rules were broken, administering beatings when he thought someone was cutting into his profits. The beatings were brief and

controlled, no one was subdued, and Aquart acted alone and the injuries were relatively minor — the worst was a broken nose (T.695-709, 726-27, 731, 734-35, 741, 841-42, 1110-27, 1134-35, 1145-50, 1469-72, 1208, 1288-96, 1299-1302, 1319-25, 1367-69, 2531-38, 2545, 2549-51, 2553, 2565-69; P.4678, 4685-93; GX245, GX246, GX249, GX-P12A). This evidence was intended to show the means and methods of Aquart's control of the racketeering enterprise and the operation of the drug conspiracy.

b. The government suggested that Aquart (and others) had personal animosity toward Tina Johnson, who sold small quantities of crack from her apartment, but did not prove a motive to kill her — and certainly not a motive to kill her for the purpose of maintaining or increasing his position in his enterprise.

215 Charles Street is a three-story condominium building containing 36 apartments (see GX101A). Basil Williams was the tenant in apartment 101 (T.758, 1152). Living with him the summer of 2005 were Tina Johnson and her boyfriend, James Reid (T.778-80). Johnson and Reid were "regular customers" at apartment 211, where Aquart's employees sold crack (T.716-17); Basil Williams did not use crack (T.759).

According to testimony, Aquart once received an inferior batch of crack, and Johnson got some elsewhere and began to sell it from her apartment. Some of

Aquart's customers started buying from her. His sales slowed but did not cease (T.757-63; 1484-85; T.2579). She bought small quantities of crack, sold some of it, and smoked the rest (T.1149-54). Rodney Womble, who became Aquart's "lieutenant" in the building, oversaw sales at apartment 211; he would get crack from Aquart and supply the workers, and deliver the money back (T.1429-31, 1439-40, 1445-48).

Womble said that Aquart continued to make money during the time Tina sold crack. "[S]he wasn't selling that much drugs. Like I told [Aquart] at one time, she's only selling enough to support her own habit." Given the bad quality of Aquart's drugs at that time, this made sense to Womble (T.1506). Aquart told Tina to stop selling, as did Womble (T.1506). One time Womble brandished a table leg to intimidate her (T.1159-61, 1215-17; T.1487-92). Tina would not back down. On another occasion, she once yelled at Womble in front of a friend of his that if she could not sell, nobody else would (T.1160, 1162-63; T.1490-92). When Womble updated Aquart on Tina's sales, Aquart said, "I'll take care of it" — Womble said "that was just his word for everything, 'I'll take care of it.'" (T.1488, 1492).

The government offered no evidence from which a juror could reasonably infer that Aquart's position as "undisputed leader" of his drug operation was at risk unless he killed Tina Johnson. It did not offer evidence that her small,

personal-use drug sales posed anything like an existential threat to his organization.

To the contrary, it was law-enforcement raids and arrests, which naturally and predictably followed the homicides, that brought about the end of the Aquart enterprise — attention from the police that several witnesses testified Aquart had always insisted that the organization should go to great lengths to avoid (T.1142-43, 1590).

c. The government presented evidence that Aquart assembled a group to break into Tina Johnson's apartment, for the purpose of robbing and moving her out, not killing her.

John Taylor met Aquart that same summer, and began selling marijuana for him. Aquart asked him to sell crack on occasion (T.2234-49). A few weeks before the killings, they took a trip down south with Aquart's girlfriend and his brother, Azikiwe (T.2249-53). Taylor testified that Aquart asked him if he could help him out with something in Connecticut, and Taylor said he would (T.2275). Taylor testified he also overheard Aquart tell his brother that he "had a problem with some people in this [sic] building" (T.2276-77).

According to Taylor, soon after they returned, Aquart asked Taylor to come to Bridgeport. The two of them, with Azikiwe, drove to a diner near the Charles Street building. On the way, they stopped at a Walgreen's, and Aquart made a

purchase — he had said something about duct tape, Taylor testified (T.2279-85). They met Efrain Johnson (T.2286-87; see GX 208). Aquart said he wanted to "move some people out," they "were into his money business" (T.2291-92).

Taylor's account continued: They entered the building, Azikiwe and Efrain carrying bats. Azikiwe gave them masks — with holes for the eyes and nose, effectively concealing their faces — and latex gloves. They all lined up near a door, which a light-skinned woman knocked on. Nobody answered, and Efrain left. The other three went upstairs to apartment 202. That was where Taylor said Aquart had told him he would be would be set up (T.2293-300).

A few days later, Taylor testified, Aquart called and invited him back to Bridgeport; he said Efrain Johnson "got a couple of girls at the diner" (T.2302). Taylor met up with Aquart and Azikiwe, and they drove to the Charles Street building (T.2302-06). Efrain met them there. He had bats, and Azikiwe again handed out gloves and masks. Aquart said he knew "she" was there now, and told Taylor, "Well, you going to help because she got a son and he's a big guy and you going to handle him." Taylor agreed (T.2306-07).

When they got to Tina's apartment, Taylor said, Aquart pulled out a gun. Efrain and Azikiwe had the bats. Taylor thought they were going to "tear the place up" to get people out (T.2372-73); robbery was also on the agenda (T.2464; GX

247, p.9 [stipulated offense conduct]). Taylor did not know anyone would be killed (T.2373).

Consistent with Taylor's belief, it would be an odd precaution to wear masks if Aquart's plan was to kill the occupants. Moreover, robbing other drug dealers was not unprecedented for Aquart's organization. There was evidence that other people sold drugs in the Charles Street building (T.828, 1649-50), including a woman named Velma who sold crack. At the direction of Womble (Aquart's lieutenant), Juanita Hopkins, a crack user who sold drugs for Aquart's organization (T.726-27), once robbed Velma of her stash (T.2607-10). There was also evidence that assault — not murder — was considered a fitting punishment for other dealers: Randi Washington, who worked for Aquart for a short time, claimed that Aquart once asked him to pistol-whip a "Spanish male" who was selling inside the building. Washington could not find the man at the time and that was the end of it (T.1999-2002).

C. The Direct Appeal to the Court of Appeals

In his opening brief to the Second Circuit, Aquart challenged the sufficiency of the evidence on the four VICAR-related counts of conviction against him. Specifically he alleged that the government offered no evidence at all that Aquart, whom the government itself described as the "undisputed leader of the

organization," Gov. Br. 82, participated in the murders for the purpose of maintaining or enhancing his position in his drug operations. See App. Br. 228, 229-30 (filed January 14, 2015).

Petitioner acknowledged, however, that his sufficiency challenge was foreclosed in Second Circuit by that court's controlling case law, United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001), which expansively holds that the VICAR motive element need not relate strictly to the defendant's personal position, but may be satisfied when the purpose is to maintain or increase the position of the enterprise itself. See id. at 671 ("we have affirmed convictions under section 1959(a) for violent crimes committed or sanctioned by high ranking leaders of the enterprise for the purpose of protecting the enterprise's operations and furthering its objectives"). He raised the issue in order to preserve for further review in this Court his challenge that, on its face, section 1959(a) requires the government to prove a motive to maintain or increase one's personal position in the enterprise, as opposed to a desire to benefit the enterprise's position.

In response, the government agreed that the Dhinsa-line of cases in the Second Circuit controlled. It urged not that Aquart's personal position in the enterprise was in any jeopardy, but that he acted, instead, only against a threat to the enterprise:

> Viewing the evidence in the light most favorable to the government, a jury could reasonably conclude that Aquart murdered Tina, James, and Basil to protect the operations of his enterprise, and to set an example for his other associates, who, fearing the same fate, would avoid committing similar transgressions in the future.

Gov. Br. 83. And it specifically embraced the expansive holding of Dhinsa as the legal support for finding the evidence of VICAR motive to be sufficient:

> According to Aquart, the Dhinsa standard is insufficient because it allows conviction of a defendant who committed a crime to maintain or enhance the position of the enterprise itself, and not the defendant's position in the enterprise. But as Dhinsa and this Court's cases recognize, when the leader of an enterprise acts to maintain the enterprise, he acts to maintain his role in that enterprise.

Id.

The Second Circuit agreed with the government. Quoting Dhinsa, the Second Circuit rejected Aquart's sufficiency challenge:

> [W]e have affirmed VICAR convictions where violent crimes are "committed or sanctioned by leaders of enterprises for the purpose of protecting the enterprise's operations and furthering its objectives." That is this case.

Pet. App. 18a (quoting Dhinsa, 243 F.3d at 671). In describing the government's motive case, the panel noted evidence Aquart's personal animosity toward Tina Johnson and her own small-quantity drug sales, but nothing showing a threat to Aquart's position as leader of the enterprise. Pet. App. 18a-19a. The panel agreed that Dhinsa defeated Aquart's sufficiency claim, observing that it was bound by

the opinion and "not inclined, in any event, to depart from it." Pet. App. 19a (internal citation omitted).

Finally, in the alternative, in a concluding paragraph, the panel observed that even under Aquart's narrower reading of the statute, requiring a motive to protect one's personal position in the enterprise, it would hold that the government had proven the element. Pet. App. 19a. Given Aquart's position as leader of the enterprise, the panel noted, a reasonable jury could infer that he "'was expected to act based on the threat posed to the enterprise,' by Tina Johnson's drug sales" and that "'failure to do so would have undermined *his position* within that enterprise.'" id. (quoting Dhinsa, 243 F.3d at 671) (emphasis in original)). Again, however, according to the government's own witnesses, Johnson sold only small quantities of drugs, to cover her own use, during a brief period when Aquart had acquired a bad batch. She therefore posed no existential threat to the organization. And the government itself has described Aquart as the "undisputed leader" of his organization — a small drug-selling operation, employing a few individuals, who were mostly addicts themselves, where Aquart himself made and enforced the rules. The panel offers no hint (and the government never argued) who, precisely, it believes might have entertained expectations of Aquart, such that he would have felt obliged, at risk of his leadership position, to act in accordance with those

expectations. Absent such facts, the panel's alternative conclusion is simply a re-statement of Dhinsa's expansive interpretation of the statute.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to consider an important question of statutory construction that arises under the VICAR statute.

In 1984, Congress enacted the "Violent Crimes in Aid of Racketeering Activity" statute, P.L. 98-473, commonly known as "VICAR." That law makes it a federal offense to commit certain enumerated violent crimes, including murder, kidnapping, maiming, and serious assault, as well as attempts, conspiracies, or threats to commit those crimes, when done either for 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 such an enterprise. This case presents an important and vexing question concerning the proper construction of the statute's "maintaining or increasing position" clause. 18 U.S.C. § 1959(a).

In Petitioner's case, the Court of Appeals held that the leader of a racketeering enterprise acts for the purpose of maintaining or increasing his position when "violent crimes are 'committed for the purpose of protecting the enterprise's operations and furthering its objectives.'" (Pet. App. 18a) (quoting Dhinsa, 243 F.3d. at 671). "That is this case." (Id.)

Petitioner submits that that construction, even if it were plausible given the language of the statute, is not the correct construction of the statute. This Court should grant review as "[i]t is the responsibility of the Supreme Court to say what statutes mean." Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312 (1994). Petitioner submits that the legislative language is clear, and that it does not permit the reading ascribed to it by the Second Circuit. The statute does not proscribe conduct undertaken for the purpose of maintaining or increasing an enterprise, but rather for the purpose of maintaining or increasing one's personal position in an enterprise.

The legislative history of the statute is scant, but that history establishes that the purpose of the law was to further the federal government's interest in suppressing the activities of organized criminal enterprises. See S. Rep. No. 225, 98th Cong.; 1st Sess. 304-07 (1983) reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3483-86. But rather than criminalizing all organized criminal activity, to the extent permissible under the Commerce Clause, Congress enacted a statute that reaches only certain conduct undertaken by those who participate in criminal enterprises. Congress further limited the reach of the statute by criminalizing such acts only when undertaken for enumerated purposes, specifically for payment from an enterprise or to gain admittance to, or to maintain or increase one's position in,

an enterprise. Why the line was drawn there is not apparent from the statute itself or the legislative history. But a line was drawn, and it cannot be ignored.

The Second Circuit's reading, even if logically plausible, eliminates the limitation, and renders the critical term, "position," superfluous, in violation of the well-established principle that judges should not construe criminal statutes as to render words describing an element of an offense to be surplusage. See Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994).

Moreover, the Second Circuit's untenable reading of the position-related motivation requirement presages further unjustifiable expansion of this criminal statute.[5] Any crime an enterprise leader commits in connection with the enterprise could be said to have been done because it was expected of him and, thus, because failure to do it could undermine his leadership role. Non-leaders are in jeopardy too. If the leader of an enterprise acts to maintain his position in the enterprise by acting to thwart a threat to the enterprise itself, so, by the same logic, would any

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[5] The Second Circuit's expansive reading of the scope of section 1959(a) is exacerbated by its related holding in United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992), that the government need not prove that maintaining or increasing his position in the enterprise was the defendant's "sole or principle motive." Id. at 381. Concepcion so held despite the plain language section 1959(a), which prohibits certain conduct when engaged in "for *the* purpose of . . . maintaining or increasing position" (emphasis added) — using the definite article "the," as opposed to the indefinite article "a."

underling in the enterprise act to maintain his position by engaging in such conduct; it is not only the enterprise's leader, but all of its personnel, whose positions in the enterprise are jeopardized when the existence of the enterprise is at risk. Similarly, if conduct undertaken to address a threat to the enterprise itself is sufficient to establish VICAR liability, then conduct undertaken to make the enterprise thrive or grow should likewise be sufficient. As victims of corporate downsizing know, everyone's position in an enterprise is at risk if the enterprise fails to thrive. It is hard to imagine any violent crime committed in furtherance of the enterprise's goals or mission that would not be related to the enterprise's continued existence or its growth.

Yet, it seems clear that criminal liability under § 1959 requires more than that the crime be in furtherance of the organization's criminal affairs for if it had been Congress's purpose to criminalize violent acts committed in furtherance of an enterprise's goals, purposes, or criminal activities, there are much more straightforward ways for Congress to have said that. If that is indeed what Congress meant to do, then it should say so with plainer language than this VICAR statute contains.

The Second Circuit's decision in this case takes VICAR well beyond anything heretofore endorsed by any court. Because most of the reported cases

involving prosecutions under VICAR come from the Second Circuit, its jurisprudence on the subject is likely to be followed by other courts. In addition, the Second Circuit's decision in this case almost certainly portends further expansion of the statute in the Second Circuit and elsewhere. The history of prosecutions under RICO establishes federal prosecutors' willingness constantly to test the boundaries of the statute, and to push its reach as far as the courts will permit them to go. There is reason to believe that the same willingness to push the envelope will attend criminal statutes — like the VICAR statute — which build upon RICO and, in effect, extend RICO's reach.

Petitioner therefore asks this Court to grant certiorari and to review the Second Circuit's flawed construction of this important criminal statute.

II. The Second Circuit's expansive interpretation of the VICAR statute runs afoul of this Court's instruction that legislative history directing that a statute be interpreted liberally cannot be used to expand an otherwise unambiguous statute.

The Second Circuit's interpretation, derived originally from Concepcion, 983 F.2d 369, rests on its understanding that Congress directed that the statute be construed "liberally." In Concepcion, the court, referencing the legislative history of § 1959, noted that the statutory phrase "for the purpose of . . . maintaining or increasing his position in" the enterprise was included as a means of proscribing

violent crimes committed "as an integral aspect of membership" in such enterprise. Id. at 381 (citing S. Rep. No. 225, 98th Cong. 1st Sess. 304-07, 304 (1983) ("S. Rep. No. 225"), reprinted in 1984 U.S. Code Cong. & Admin. News ("USSCAN") at 3483). The court, noting that "Congress intended RICO, which § 1959 complements, to be 'liberally construed to effectuate its remedial purposes,'" id. (citing Pub. L. 91-452, § 904(a), 84 Stat. 947), concluded 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." Id.

Concepcion continues to be the controlling construction of § 1959's motivation requirement in the Second Circuit. See, e.g., United States v. Pimentel, 346 F.3d 285, 296 (2d Cir. 2003); Dhinsa, 243 F.3d at 671. In addition, at least four other circuits follow Concepcion. See United States v. Tse, 135 F.3d 200, 206 (1st Cir. 1998); United States v. Fiel, 35 F.3d 997, 1004 (4th Cir. 1994); United States v. Fernandez, 388 F.3d 1199, 1233 (9th Cir. 2004); United States v. Smith, 413 F.3d 1253, 1277-78 (10th Cir. 2005), overruled on other grounds by United States v. Hutchinson, 573 F.3d 1011 (10th Cir. 2009).

However, in Reves v. Ernst & Young, 507 U.S. 170 (1993), subsequent to the Concepcion decision, this Court reined in the clause, "liberally construed to effectuate its remedial purposes," which the Concepcion court borrowed from the legislative history of the RICO statute, 18 U.S.C. § 1961 et seq., to justify its expansive construction of § 1959. The Reves Court stated:

> This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause "'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.'"

Id. at 183-84 (citation omitted).

Thus, contrary to the court of appeals' expansive view, the statutory phrase "for the purpose of . . . maintaining or increasing his position in" a racketeering enterprise should not be interpreted liberally, but according to the plain and unambiguous meaning of its terms, by focusing on the individual defendant's actual "purpose" in committing the violent crime at issue.

This use of legislative history to create an ambiguity and expand the coverage of the statute also runs counter to the rule of lenity, reinforced by this Court last term in, United States v. Davis, 139 S. Ct. 2319 (2019), which requires

that ambiguities in criminal statutes be resolved in favor of the defendant. Id. at 2333 ("Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor."); see also Hughey v. United States, 495 U.S. 411, 422 (1990); Crandon v. United States, 494 U.S. 152, 160 (1990).

III. The Second Circuit's expansive interpretation of the VICAR statute is an outlier among the Courts of Appeals, which have never affirmed a VICAR conviction on a showing of an intent to protect the enterprise only.

Finally, the Second Circuit's application of its expansive enterprise-purpose motive in Aquart's case is an outlier. Other circuits have cited the language from Dhinsa that the VICAR motive element can be established by evidence that a high-ranking leader of an enterprise acted "for the purpose of protecting the enterprise's operations and furthering its objectives," 243 F.3d at 671, but none found by undersigned counsel has, as the panel in Aquart's case did, affirmed solely on the basis of some evidence of enterprise purpose. Instead, courts have relied on additional evidence of a defendant's motive to protect his own personal position within the enterprise: for example, evidence of actual threats to the defendant, see, e.g., United States v. Kamahele, 748 F.3d 984, 1009 (10th Cir. 2014) ("jury could

have inferred that [defendant's] reputation for toughness would have diminished by a failure to retaliate after being punched in the face"); or of rules of conduct or expectations within the enterprise and fear of retaliation, United States v. Gooch, 665 F.3d 1318, 1338 (D.C. Cir. 2012) (defendant statement that "I *had* to kill [victim]" coupled with evidence of social structure of enterprise built on premise that threats to gang were met with violence) (emphasis in original); Smith, 413 F.3d at 1278 (extensive evidence that acts of violence were a common part of the enterprise's culture and that members were expected to retaliate against acts of violence committed against its members).

Such evidence was wholly absent in this case. Tina Johnson's small drug sales, for personal use, during a brief period when Aquart had obtained a bad batch did not represent a threat to the survival of the enterprise. To the contrary, the homicides, and the wholly foreseeable resulting law enforcement raids and arrests, brought the enterprise to an end. And Aquart was, in the government's own words, shown by the evidence at trial to be the "undisputed leader" of his drug-sale operation. The enterprise was small and most of its employees were themselves drug addicts, who posed no threat to his leadership. The government offered absolutely no evidence that anyone inside or outside the operation expected anything of Aquart. To the contrary, the government went to great

lengths to establish that he was the organization's sole rule maker and the enforcer of his own rules.

Absent any evidence of expectations, or even of persons who could hold expectations, or threats, inside or outside the organization, the panel's opinion affirming Aquart's conviction stands alone.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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