No.

In the

Supreme Court

of the

United States

CLIFFORD L. ROBINSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

The VCAR statute, 18 U.S.C. § 1959(a)(1), contains two "motive" elements, only one of which applies to Petitioner's case. To prove this element, Respondent was required to show Petitioner committed the murder in aid of racketeering offense as "consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from" the indicted RICO enterprise. At Petitioner's trial, Respondent elicited neither direct evidence nor circumstantial evidence from which an inference could be drawn, to prove this motivational element.

On appeal, the Sixth Circuit applied the "enterprise profits" theory of pecuniary-gain motivation to conclude Respondent shouldered its burden. This theory satisfies the motive element by focusing on whether some of the individuals involved in the VCAR offense were RICO enterprise members, as opposed to whether Petitioner's paymaster was an enterprise member.

Does the application of the "enterprise profits" theory stretch the application of the VCAR statute far beyond what Congress intended and federalize a state murder case?

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Petitioner Clifford L. Robinson respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on July 3, 2019.

OPINIONS BELOW

The Sixth Circuit's opinion was published at *United States v. Ledbetter, et. al.*, 929 F.3d 338 (6th Cir. 2019) and is attached hereto in Appendix 1. The district court's order denying Petitioner's Rule 29 motion was published at *United States v. Ledbetter, et. al.*, 2016 WL 3180872 (S.D. OH June 8, 2016) and is attached in Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on July 3, 2019 as well as his petition for rehearing *en banc* on July 26, 2019 (Appendix 3), making this petition for a writ of *certiorari* timely. This Court's jurisdiction is invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 18 U.S.C. § 1959(a) (VCAR) provides in part:

> 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—

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The panel succinctly summarized the facts, as they relate to Petitioner's VCAR conviction, in the following manner:

> [t]he evidence showed that in August 2007 Rastaman Wilson, David Hurst (sic), Robinson, and Homicide Squad members Harris and R.J. Wilson conducted an armed home invasion at Greg Cunningham's house, which doubled as a strip club and event space. Harris broke down the door, and the others began the assault. As Robinson charged through the battered door, he saw Donathan Moon, a guest of Cunningham's, bolt into a bedroom and shut the door behind him. Robinson followed and fired three rounds from an AK-47 assault rifle through the door. Once Robinson's shots were fired, R.J. Wilson entered the bedroom and shot Moon to death with a handgun. Robinson, Harris, and the others searched the house for the cash they were hoping to find, but found none and left.

United States v. Ledbetter, 929 F.3d 338, 359 (6th Cir. 2019).

Of the five individuals who participated in this VCAR offense, three were not members of the indicted enterprise--Rastaman Wilson, David Hurt, and Petitioner Clifford Robinson. The other two, Christopher Harris and R.J. Wilson, were members.

Respondent offered no direct evidence as to how and why Harris and R.J. Wilson became involved in the Cunningham robbery. David Hurt testified he became involved after Rastaman Wilson offered to pay him several thousand dollars if he acted as the getaway driver. Of the fourteen witnesses who testified about the aborted robbery resulting in the murder of Donathan Moon on August 19, 2007, this was the only direct evidence of an offer of pecuniary value to any of the participants. However, this offer was made by a non-enterprise member to another non-enterprise member.

There were two divergent explanations Respondent offered to explain Petitioner's motive for becoming involved. First, Petitioner was collecting a debt he was owed by Cunningham. Second, an unnamed individual told Petitioner that Cunningham was in possession of a large sum of money and wanted him robbed. Although these were the competing motivations offered to explain Petitioner's participation, at no time was any direct evidence offered to show an enterprise member induced him with anything of pecuniary value.

At the close of Respondent's case, Petitioner moved for a judgment of acquittal, which the district court took under advisement. Later, the district court denied Petitioner's motion. (Appendix 2). The jury convicted Petitioner of the VCAR offense as well as the companion murder through the use of a firearm during and in relation to a crime of violence offense, in violation of 18 U.S.C. § 924(j). Petitioner was sentenced to serve consecutive life sentences.

Petitioner appealed his convictions to the United States Court of Appeals for the Sixth Circuit, raising the following issues:

I. WHETHER THE DISTRICT COURT ERRED BY DENYING ROBINSON'S RULE 29 MOTION ON COUNT FIVE?

II. WHETHER THE DISTRICT COURT ERRED BY DENYING ROBINSON'S RULE 29 MOTION ON COUNT SIX?

III. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING § 924(c)(3)(B)'s CRIME OF VIOLENCE DEFINITION WAS NOT VAGUE?

IV. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING THERE WAS SUFFICIENT EVIDENCE TO SHOW THAT ROBINSON WAS THE TINK INVOLVED IN THE MOON HOMICIDE?

V. WHETHER THE DISTRICT COURT ERRED BY DENYING ROBINSON'S MOTION FOR SEVERANCE?

In light of this Court's decision in *United States v. Davis*, ___U.S.___, 139 S. Ct. 2319 (2019), the Sixth Circuit sustained Petitioner's third assignment of error thereby reversing and vacating his conviction on the § 924(j) offense. However, Petitioner's other four assignments were rejected. The only issue Petitioner advances in this petition is the first, which challenges the sufficiency of the evidence to satisfy VCAR's motive element.

In rejecting Petitioner's first assignment of error, the Sixth Circuit found Petitioner's jury:

> was entitled to infer that Harris and Robinson participated in the robbery for pecuniary gain—to split the cash they were expecting Cunningham to have kept at his dual home/business venue. The jury could also infer that, since this was a bread-and-butter Homicide Squad robbery, any cash they stole amounted to enterprise profits, a cut of which they hoped to receive—from the enterprise. This is a proper application of the "enterprise profits" theory of pecuniary gain. As this court held in connection with an earlier Short North Posse appeal, "[h]aving concluded that this was a Short North Posse robbery, a rational jury could also conclude that [defendants] participated in the robbery to gain something of pecuniary value from the gang." *See Holt*, 751 F. App'x at 827.

Ledbetter, 929 F.3d at 360.

The Sixth Circuit's resolution of this legal issue blazed a different trail as the district court did not rely on the "enterprise profits" theory in denying Petitioner's Rule 29 motion. Additionally, Respondent did not advance this argument in the district court. Importantly, the facts making this theory applicable in *Holt* were clearly absent in Petitioner's case.

REASONS FOR GRANTING THE WRIT

VCAR's applicable motive element required Respondent to prove Petitioner was induced to commit the VCAR offense by an offer of pecuniary gain by a member of the indicted RICO enterprise. Respondent adduced no direct evidence to demonstrate Petitioner was offered anything from the enterprise. Moreover, there were no facts from which this inference could be reasonably drawn.

The Sixth Circuit found Respondent shouldered this burden by applying the ethereal "enterprise profits" theory, focusing on the enterprise membership of a minority of the defendants charged in the VCAR offense and further assuming there was an agreement to split the proceeds with the enterprise without any facts to which this assumption could be reasonably tethered.

The Panel's conclusion was divined by stacking inference upon inference and relying on a theory, unsupported by facts, to blur the distinction between what is truly national and what is truly local. In effect, the Sixth Circuit's opinion dramatically expanded the application of VCAR, diluted the proof needed to establish the pecuniary gain motive, and federalized a state court murder case.

A. The plain language of 18 U.S.C. § 1959(a)(1).

"In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Artis v. District of Columbia,* __ U.S.___, 138 S. Ct. 594, 603 (2018). "[O]ur inquiry into the meaning of the statute's text ceases when 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "When a term [in a statute] is undefined, we give it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008).

Title 18 U.S.C. § 1959(a)(1) required Respondent to establish Petitioner was induced to commit the VCAR offense because he was offered "anything of pecuniary value **from** an enterprise engaged in racketeering activity." The key word in the clause is "from," demonstrating that in order for federal jurisdiction to be triggered the pecuniary motivation to induce participation of non-enterprise members must come from the enterprise. The proof of this connection was clearly absent in Petitioner's case.

B. Insufficient Evidence to Prove VCAR's Motive Prong.

This Court, in *Jackson v. Virginia*, 443 U.S. 307 (1979), found the Due Process Clause guarantees that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Id.* at 316. This doctrine requires more than simply a trial ritual. Instead, this Court

found that the doctrine must also require that the factfinder will rationally apply that standard to the facts in evidence. *Id.* Additionally, this Court recognized in *Jackson* that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." *Id.*

As noted, Respondent offered no direct evidence on the motive element and did not advance the "enterprise profits" theory argument in the district court. In relying on this theory, the Sixth Circuit pointed to *United States v. Holt*, 751 Fed Appx 820 (6th Cir. 2018), *cert. denied*, ___U.S.___, 139 S.Ct. 1281 (2019), which appears to be the genesis for this theory. Holt was indicted along with Petitioner but was charged in a different substantive VCAR offense. Like Petitioner, Holt was not an enterprise member but Holt's case was severed and he was tried four months after Petitioner's trial concluded.

Importantly there were significant factual differences in Petitioner's and Holt's cases. When those factual differences are taken into account, it is clear the "enterprise theory" may have been properly applied in *Holt* whereas Petitioner's factual record made it inapplicable.

First, Holt conceded an enterprise member planned the VCAR robbery in which he participated. *Holt*, 751 Fed. Appx. at 826. In contrast, there was no evidence an enterprise member planned the Cunningham robbery. Instead, the only evidence offered supported an inference that either Petitioner or Rastaman Wilson, neither of

whom were enterprise members, planned the robbery.

There was evidence in *Holt* that an enterprise member "organized robberies and would often recruit non-gang members to assist in executing them." *Id.* at 827. In contrast, in Petitioner's case, the record was devoid of any evidence that either R.J. Wilson or Christopher Harris, both of whom were enterprise members indicted in Cunningham robbery, recruited non-gang members to execute robberies.

Jonathan Holt participated in multiple robberies with an enterprise member whereas Petitioner was involved in only the Cunningham robbery. *Id.* Finally, a witness testified at Holt's trial the VCAR robbery he committed with Holt was committed on behalf of the enterprise, whereas the record in Petitioner's case was devoid of this evidence. *Id.*

In sum, the facts in *Holt* supported the application of the "enterprise profits" theory. From these facts, a jury could infer Holt was induced by an offer of pecuniary gain from the enterprise. Consequently, the panel in *Holt* was justified in concluding that "[a] rational jury could consider the evidence that Holt had previously engaged in robberies led by Reynolds (an enterprise member) in which the participants had split the proceeds and conclude that such was the arrangement when Holt agreed to Reynolds' plan to rob Battle." *Id.* In contrast, the evidence upon which these inferences could be drawn was missing in Petitioner's case.

In the absence of a record rich with facts, like that found in *Holt*, the panel, in Petitioner's case, relied on enterprise membership of two of the five participants to assume there was a plan to split the proceeds between non-enterprise members and the enterprise. This reasoning ignores the plain language in § 1959(a)(1) requiring Respondent to prove the offer of pecuniary gain to the non-enterprise member came **from** the enterprise. Literally applied, the Panel's logic and use of the "enterprise theory," without the requisite factual support, will always support proof of the pecuniary gain motivational prong when non-enterprise members are joined by at least one enterprise member in the commission of a VCAR offense.

The Panel's decision changes the quantum of Respondent's proof and, as a result, federalizes a state murder case by diluting, if not altogether ignoring, the need to establish the source of the inducement. After the panel's decision, establishing the membership of the wrongdoers, as opposed to the identity and membership of the offeror of the inducement, satisfies the offer of pecuniary value motivational prong. Such a decision is inconsistent with the clear language of the statute requiring Respondent to prove the offer of pecuniary gain came **from** the enterprise.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court refused to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. In short, in deciding *Lopez*, the Court respected the distinction "between what is truly national and what is truly local." *Id.* at 567–68.

In this case, the record was devoid of any facts from which reasonable inferences could be drawn to determine if the enterprise offered an inducement of pecuniary gain to Petitioner. By piling inference on top of inference, the panel stretched the application of VCAR far beyond what Congress intended and federalized a state murder case. By doing so, the Panel also failed to respect the distinction between what is truly national and what is truly local. On this basis, *certiorari* should issue.

C. The Sixth Circuit's erroneous interpretation and application of 18 U.S.C. § 1959(a)(1) matters in this and other cases.

Finally, *certiorari* should issue to not only vacate a conviction entered based on insufficient evidence and a misapplication of a statute but also to prevent this erroneous interpretation of the statute that could be utilized by the United States in the future.

CONCLUSION

Petitioner Clifford L. Robinson requests that this Court grant *certiorari* and reverse his VCAR conviction.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEAL'S DECISION—July 3, 2019
2. DISTRICT COURT'S DECISION—June 8, 2016
3. COURT OF APPEAL'S *EN BANC* ORDER—July 26, 2019