No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2019

_____

CHRISTOPHER HARRIS, Petitioner

v

UNITED STATES OF AMERICA, Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Should a Writ of Certiorari Issue Because the Sixth Circuit Ignored the Uncontroverted Evidence and its own Analysis of the VCAR Motives to Conclude that the Murder of Donathan Moon Was in Furtherance of the Short North Posse RICO Enterprise?

II. Should a Writ of Certiorari Issue Because the Sixth Circuit's Application of the Enterprise Profits Theory of Pecuniary Gain Ignores the Plain Language of 18 USC §1959 and Converts Every State Law Violent Crime Committed By a Gang Member Into a VCAR Offense?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Christopher Harris is an individual and has no corporate affiliations.

Respondent

United States of America.

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APPENDIX

TABLE OF CITED AUTHORITIES

Petitioner Christopher Harris respectfully prays that a Writ of Certiorari issue to review the Opinion and Order of the US Court of Appeals for the Sixth Circuit entered on July 3, 2019.

JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1) and Rule 10(a) of the Supreme Court. The instant Petition is timely filed within 90 days of July 3, 2019, the date of the US Court of Appeals for the Sixth Circuit's Opinion and Order.

OPINIONS BELOW

The Sixth Circuit's Opinion and Order is found at 929 F3d 338 (6th Cir, 2019). A copy of the Opinion and Order and Judgment is attached as Exhibit A (Appendix 001-036).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

> 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.

18 USC §1959(a)
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—

STATEMENT OF FACTS RELEVANT TO PETITION

After trial in the district court for the Southern District of Ohio Eastern Division on two consolidated cases, Petitioner was convicted of RICO conspiracy, four counts of murder in aid of racketeering, including Count V raised here, and four related counts of discharge of a firearm in relation to a crime of violence.

In both cases, the RICO enterprise was alleged to be a gang called the Short North Posse (SNP), so called because of its geographical location in Columbus, Ohio, and the SNP subgroups known as Homicide Squad or Homicide or Cut Throat or Cut Throat Committee. The RICO enterprise was alleged to have engaged in federal crimes of drug trafficking, robbery, extortion and witness tampering or retaliation and State of Ohio crimes of murder, robbery and burglary.

Petitioner was sentenced to five concurrent sentences of life without parole and 4 consecutive but concurrent life sentences for the firearm convictions.

TRIAL TESTIMONY ON COUNTS V AND VI

Count V charged Petitioner and four co-defendants (Robert "RJ" Wilson, Rastaman Wilson (deceased before trial), Clifford Robinson and Earl Williams) with the murder of Donathan Moon during and while aiding and abetting a robbery or attempted robbery of Gregory Cunningham. Count VI charged Defendant and the others with discharging and aiding and abetting the discharge of a firearm during the robbery, resulting in the death of Donathan Moon.

As to Counts V and VI, government witness David Hurt testified co-defendant Rastaman Wilson asked Hurt to drive Rastaman and some other people

to Pataskala, Ohio to rob a businessman who Rastaman believed possessed large amounts of cash. Hurt and Rastaman each drove a car to the home of the businessman. Hurt drove "Tink" and two other men he later learned were "O" and RJ Wilson. Hurt knew Rastaman and "Tink" but not "O" or RJ Wilson. "O" was later identified as Petitioner. Some of Hurt's passengers had guns. Hurt stayed in his car as his passengers and Rastaman's left the cars and approached the businessman's house. Hurt heard the door kicked in and then gunshots. The passengers ran back to the two cars and all fled the scene. Tink and RJ Wilson told Hurt they had shot Donathan Moon. Rastaman Wilson later told Hurt that Moon had died. Troy Patterson testified Petitioner told Patterson about the attempted robbery of Gregory Cunningham and that RJ Wilson had shot Donathan Moon.

Government witnesses Jada Wilson and Ashley Ward, the mother and ex-girlfriend of Rastaman Wilson, were the only witnesses who testified regarding any motive for the robbery of Gregory Cunningham. Jada Wilson learned about the Donathan Moon murder in the news and Rastaman told her about it about a week after it occurred. Rastaman told her he, Tink (Clifford Robinson), "Dave" and some other people went to a house to rob it because Tink said "some other man" said there was money "out there." According to Rastaman, the "other man" didn't want any of the money, he just wanted the homeowner robbed. Rastaman did not tell Jada any other details but said "they" didn't get any money.

Ashley Ward testified that Rastaman came home the night of Moon's homicide "excited." Rastaman told Ward that he, "Dave," "Tink," "some kid whose

last name was Wilson," and a big guy named "O" (Petitioner) went to Pataskala in two cars. Rastaman told Ward the homeowner in Pataskala "owed Tink and someone else money and "they" were going to get it." Rastaman told Ward "O" was a "big guy" who was "brought in to kick down the door."

Rule 29 Motions

Defendant moved for acquittal on all of his charges at the close of the Government's evidence. Defendant again moved for acquittal at the close of all of the evidence. Both motions were denied.

On appeal to the Sixth Circuit, Defendant raised these issues:

I. Defendant Harris' Due Process Right to Be Convicted Only by a Unanimous Jury Was Violated When the Jury Found Defendant Guilty of Murder in Aid of Racketeering on Counts 5, 7, 9 and Joined Count 1 Because the Verdict Forms and Verdicts Were Ambiguous as to Which "Motive" for Racketeering Murder the Jurors Agreed Upon.

II. Defendant's Conviction on Count 5, Murder in Aid of Racketeering, 18 USC §1959(a)(1) and 2; Should Be Reversed for Insufficient Evidence That the Murder Was in Furtherance of the Short North Posse Enterprise.

III. Defendant's Conviction on Count 6 Should Be Vacated Because the District Court Erred in Concluding a Hobbs Act Conspiracy Was Not Vague After Johnson v. United States.

IV. The District Court Erred by Denying Harris' Rule 29 Motion on Count 6 Because the Evidence of the Necessary Impact on Interstate Commerce is Insufficient.

V. The District Court Erred When it Permitted the Government to Introduce Opinion Testimony of Unqualified Witnesses Whose Opinions Were Irrelevant to Whether SNP Was a Gang and Were Substantially Prejudicial.

The Sixth Circuit set aside Defendant's conviction on Count VI in light of United States v. Davis, __ US __; 139 S Ct 2319,. The panel did not address the merits of Defendant's Issue IV and rejected Petitioner's arguments as to Issues I, II and V. United States v. Ledbetter, 929 F3d 338, 348-351,359-360, 364-365, and fn.1.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE SIXTH CIRCUIT IGNORED THE UNCONTROVERTED EVIDENCE AND ITS OWN ANALYSIS OF THE VCAR MOTIVES TO CONCLUDE THAT THE MURDER OF DONATHAN MOON WAS IN FURTHERANCE OF THE SHORT NORTH POSSE RICO ENTERPRISE.

Defendant only seeks certiorari regarding the panel's decision affirming his conviction on Count V, the VCAR murder of Donathan Moon. As relevant to Count V, the panel held:

> Harris and [co-defendant Clifford] Robinson were each convicted of murder in aid of racketeering, 18 USC §1959(a)(1), for the murder of Donathan Moon. Each argues that there was not sufficient evidence that he committed the murder for one of the two possible statutory purposes – for pecuniary gain from the Short North Posse, or to increase their position within the gant. §1959(a). But the jury was entitled to infer that Harrison 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 Fed Appx at 827.

Ledbetter, 929 F3d at 348.

Petitioner's appeal was consolidated with the appeals of his four co-defendants. United States v. Ledbetter, et. al., 929 F3d 338 (6th Cir, 2019). In Ledbetter, the Sixth Circuit reversed co-defendant Deounte Ussury's conviction for the VCAR murder of Dante Hill, holding there was no evidence that the murder was committed for either of 18 USC 1951(a)'s motives: (1) pecuniary gain/enterprise profits or (2) positional motivation. 929 F3d at 359. In analyzing co-defendant Ussury's claim, the panel stated:

> Although this evidence—most pointedly, Ussury's admissions—showed that Ussury murdered Hill, it did not show beyond a reasonable doubt that Ussury did so for one of §1959(a)'s statutory purposes.
>
> Pecuniary Gain. . . . §1959(a) requires consideration of pecuniary value "from the enterprise," not from the victim. . . the Government relies on an "enterprise profits"theory of the pecuniary- gain motivation. The Government reads §1959(a) to cover a violent crime committed in the course of enterprise-related work so long as the person expects to profit from the overall affairs of the enterprise. . .
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> * * *
>
> The "enterprise profits" theory of pecuniary gain is a sound one, but it does not fit the facts of this case. There is no evidence that Ussury intended to split whatever he got from Hill with others in the Short North Posse. Nor is there any evidence that he robbed (and killed) Hill in the course of his Short North Posse work— . . . this one was conducted alone, without assistance or direction from any of Ussury's fellow members, . . . Ussury's one-off robbery and murder of Hill did not contribute to the purpose of the group and thus is not attributable to the enterprise. *Cf.* Thus, this is not an appropriate case for the "enterprise profits" theory of pecuniary gain.

* * *

. . . what is missing here: that the robbery was undertaken on behalf of the Short North Posse, such that the ill-gotten fruits of that labor might be attributed to the enterprise. Without evidence linking Ussury's actions to the Short North Posse' affairs, a rational juror could not conclude beyond a reasonable doubt that Ussury robbed and killed Hill in consideration for something of pecuniary value from the enterprise.

Positional Motivation. The Government relies in the alternative on the second statutory purpose, arguing that Ussury was motivated to rob and kill Hill in order to maintain or increase his position in the Short North Posse. A jury can reasonably infer that motive where the evidence shows that a defendant committed the 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." See United States v. Concepcion, 983 F2d 369, 381 (2nd Cir. 1992). But the evidence did not show that here. While there was plenty of evidence that Short North Posse members were expected to be violent and take part in sanctioned robberies and murders, there was no evidence that members were expected or encouraged to unilaterally rob and murder low level drug users who otherwise supported the gang by purchasing its drugs.

It is not enough that Ussury committed a violent crime while a member of a violent gang. The violent-crimes-in-aid-of-racketeering statute does not extend to every "violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang." United States v. Hackett, 762 F3d 493, 500 (6th Cir. 2014). . . This would be a different case entirely if the Short North Posse directed Ussury to rob and murder Hill, or if Hill was somehow a target of the gang. . . But unlike in those hypotheticals or in any of the Government' cited cases, one is left to guess why Ussury acted as he did here alone and with no apparent connection to the gang. Guesswork is not reasonable inference.

Id, at 356-58.

This same analysis should have been applied by the panel to Petitioner's conviction for the VCAR murder of Donathan Moon. The panel summarized the facts as they relate to Petitioner's VCAR conviction for the murder of Donathan Moon as follows:

> [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 F3d 338, 359 (6th Cir, 2019). The panel did not mention the testimony from Jada Wilson and Ashley Ward relating to possible motives for the robbery.

Of the five individuals who participated in this VCAR robbery/murder, three were not members of the SNP – Rastaman Wilson, David Hurt, and Clifford Robinson. Petitioner and R.J. Wilson were SNP members.

The Government offered no evidence as to how and why Petitioner became involved in the attempt to rob Cunningham. Non-SNP member David Hurt testified he became involved after non-SNP member Rastaman Wilson offered to pay him

several thousand dollars if Hurt acted as the getaway driver. Of the fourteen witnesses who testified regarding the unsuccessful robbery of Cunningham's house and the murder of Donathan Moon at the house, this was the only evidence of an offer of pecuniary value to any of the participants. However, this offer was made by a non-enterprise member (Rastaman Wilson), to another non-enterprise member (David Hurt).

The evidence at trial provided two distinct explanations for the robbery. First, co-defendant Clifford Robinson, who was not a SNP member, was collecting a debt he was owed by the homeowner, Cunningham. Alternatively, an unnamed individual told non-SNP member Robinson that Cunningham kept a large sum of money. The unnamed individual wanted Cunningham robbed and would pay Robinson to do the robbery. Petitioner was brought in to "kick down the door" because he was "a big guy." There was no evidence that Petitioner was recruited because he was a member of the SNP.

This is not evidence that the murder of Donathan Moon was in furtherance of the SNP enterprise. This testimony established two possible motives for the robbery which resulted in Moon's death. One was that "Tink," co-defendant Clifford Robinson, was owed money by the Pataskala homeowner, Gregory Cunningham, and Tink had found helpers to help him get his money. The second was that "some other [unidentified] man" said "there was money out there" and Rastaman Wilson decided to help Robinson get it.

There was no evidence that as part of the SNP enterprise, SNP members

jobbed themselves out to participate in non-members' personal vendettas. There was no evidence that as part of the SNP enterprise, SNP members were expected to participate in violent crimes unsanctioned by Ledbetter. That Petitioner was a member of the SNP did not make his every violent crime an act in furtherance of the RICO enterprise. Ledbetter, 929 F3d at 358. There was no evidence this crime was in furtherance of the RICO enterprise or conspiracy. Defendant's conviction on Count V should have been reversed by the Sixth Circuit because the evidence of motive was insufficient.

II. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE SIXTH CIRCUIT'S APPLICATION OF THE ENTERPRISE PROFITS THEORY OF PECUNIARY GAIN IGNORES THE PLAIN LANGUAGE OF 18 USC §1959 AND CONVERTS EVERY STATE LAW VIOLENT CRIME COMMITTED BY A GANG MEMBER INTO A VCAR OFFENSE.

VCAR's motive element required proof that Petitioner was induced to commit this VCAR robbery resulting in murder by an offer of pecuniary gain from the SNP enterprise or to enhance his position within SNP. 18 USC §1959(a). The Government adduced no direct evidence to demonstrate Petitioner was offered anything from the enterprise or was, by helping Robinson, a non-SNP member, enhancing his position in the SNP. There were no facts from which either inference could be reasonably drawn.

The Sixth Circuit found the Government satisfied its burden by applying an "enterprise profits" theory of pecuniary gain which focused on Petitioner's SNP membership and an assumption there was an agreement among the participants to split the proceeds of the robbery among all of the participants, including Petitioner

and an assumption that payments to the SNP members equated to SNP activity. There were no facts to which any of these assumptions could be reasonably tethered.

A. The Plain Language of 18 USC § 1959(a)(l) Requires the Pecuniary Value to Come "From" the Enterprise.

"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, __ US _, 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 US 438, 450 (2002). "When a term [in a statute] is undefined, we give it its ordinary meaning." United States v. Santos, 553 US 507, 511 (2008).

Title 18 USC §1959(a) required the Government to establish Petitioner was induced to commit the VCAR robbery because he was offered "anything of pecuniary value from an enterprise engaged in racketeering activity." The key word in that clause is "from." It demonstrates that federal jurisdiction is triggered under §1959 when the pecuniary motivation to induce participation in the VCAR offense comes "from" the enterprise. There was no proof that SNP offered Petitioner any pecuniary gain from his involvement in the attempted robbery of Cunningham or the resulting murder of Donathan Moon.

B. Due Process Requires Sufficient Evidence to Prove VCAR's Motive Prong.

In Jackson v. Virginia, 443 US 307 (1979), this Court stated the Due Process

Clause guarantees that no person shall be convicted of a crime except upon sufficient proof. The Jackson court defined sufficient proof as the amount of 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 the ritual of a trial and a jury finding. Due Process also requires that the fact-finder will rationally apply that standard of proof to the facts in evidence. Id. This Court recognized 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.

The Government offered no direct evidence on either element of VCAR motive and did not advance the "enterprise profits" theory argument of pecuniary gain in the district court. In relying on this new theory on appeal, the Sixth Circuit relied on its holding in United States v. Holt, 751 Fed Appx 820 (6th Cir. 2018), cert. denied, _U.S._, 139 S Ct 1281 (2019), apparently the genesis for this theory. Holt was indicted with Petitioner. Holt was not a SNP member. Holt's case was severed and he was tried four months after Petitioner's trial concluded.

There were important and significant factual differences between Petitioner's case and Holt's case. When those factual differences are taken into account, it is clear the "enterprise theory" may have been properly applied in Holt but could not be applied to Petitioner's facts.

First, Holt conceded a SNP enterprise member planned the VCAR robbery in which Holt participated. Holt, 751 Fed Appx at 826. In contrast, there was no

evidence a SNP enterprise member planned the Cunningham robbery. The evidence offered at Petitioner's trial supported a finding that either Clifford Robinson or Rastaman Wilson, neither of whom were SNP enterprise members, planned the robbery.

Second, there was evidence in Holt that SNP member (and lead defendant in Ledbetter) Robert Ledbetter "organized robberies and would often recruit non-gang members to assist in executing them." Id. at 827. In Petitioner's case, there was no evidence that Ledbetter or any other SNP member or organized or planned or recruited the participants in the Cunningham robbery.

Third, Holt participated in multiple robberies with a SNP enterprise member. Petitioner participated in multiple robberies and other violent crimes as a SNP member. But that is not evidence that the Cunningham robbery was committed on behalf of the SNP enterprise.

The facts in Holt supported the application of the "enterprise profits" theory because Holt's jury could infer Holt was induced by an offer of pecuniary gain <u>from</u> the SNP enterprise to participate in an enterprise directed crime. In contrast, no inferences of VCAR motive could reasonably be drawn in Petitioner's case.

The panel in Petitioner's case relied on Petitioner's enterprise membership in SNP to infer there was a plan to split the proceeds between the organizing people and the SNP enterprise. This reasoning ignores the plain language in §1959(a) which requires the Government to prove the alleged offer of pecuniary gain to the non-enterprise member came from the enterprise. Literally applied, the panel's

logic and its use of the "enterprise theory" will always support proof of a pecuniary gain motive when a non-enterprise member is joined by at least one enterprise member in the commission of a one-off violent offense.

The panel's decision reduces the quantum of the Government's required proof and federalizes a state murder case by minimizing, if not ignoring, the Government's requirement to establish the source of the alleged pecuniary inducement as "from" the enterprise. After the panel's decision, proof that one of the wrongdoers is a member of the enterprise, instead of the identity and membership of the offer of the inducement, satisfies the offer of pecuniary value motivational prong. The panel decision violates the clear language of §1959(a).

In United States v. Lopez, 514 US 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 deciding Lopez, the Court respected the distinction "between what is truly national and what is truly local." Id. at 567-68.

In Petitioner's case, the trial record lacked any facts from which reasonable inferences could be made to conclude that the SNP enterprise offered an inducement of pecuniary gain to Petitioner to commit the attempted robbery of Cunningham which led to the murder of Donathan Moon. But by piling shaky inference atop shaky inference untethered to facts, the panel stretched the application of VCAR far beyond what Congress intended in §1959(a) and federalized a state murder case. By doing so, the panel failed to respect the distinction between

what crime is truly national and what crime is truly local. On this basis, certiorari should issue.

C. The Sixth Circuit's Erroneous Interpretation and Application of 18 USC §1959(a) Threatens Other Cases.

Certiorari should issue to vacate Petitioner's conviction on Count V because of insufficient evidence and the misapplication of §1959(a), but also to prevent the panel's erroneous interpretation of the VCAR statute being utilized by the Government in the future.

CONCLUSION

Petitioner Christopher Harris requests that this Court grant certiorari and reverse his Count V VCAR murder conviction.

Respectfully submitted,

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