NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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UNITED STATES OF AMERICA,

Respondent-Appellee,

vs.

ROBERT BANKS III,

Petitioner-Appellant.

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

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QUESTIONS PRESENTED FOR REVIEW

1. Should *Whren v. United States*, 517 U.S. 806 (1996), be overruled for permitting unconstitutional detentions of Black Americans and people-of-color for no reason, pre-textual reasons or fabricated reasons and thereby facilitating racial profiling and discrimination in violation of the Fourth Amendment's promise to protect all against unreasonable searches and seizures?

2. Did the Ninth Circuit's opinion, which upheld the frisk, arrest and prolonged detention of Petitioner Banks absent reasonable suspicion or probable cause, violate this Court's precedent in *Rodriguez v. United States,* 575 U.S. 348 (2015), and *Knowles v. Iowa,* 525 U.S. 113 (1998)?

3. Should this Court revisit *Salinas v. United States*, 522 U.S. 52 (1997), which reduced the quantum of evidence necessary to prove a conspiracy to commit crimes through a pattern of racketeering, rendering Title 18 U.S.C. §1962(d) overbroad, vague and therefore susceptible to arbitrary enforcement as evidenced by the discriminatory application of RICO to people of color?

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

Petitioner-Appellant, Robert Banks III, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals in *United States v. Banks*, U.S.C.A. No. 17-50103, affirming Petitioner's conviction and denying a petition for rehearing on April 7, 2020. (Appendix B). [1/]

OPINION BELOW

On January 15, 2020, the Ninth Circuit filed an unpublished memorandum opinion affirming the conviction in this case, a copy of which is attached as Appendix A. On April 7, 2020, the Ninth Circuit rejected Petitioner's request for rehearing and suggestion for rehearing *en banc.* See, Appendix B.

In the memorandum opinion, the Ninth Circuit affirmed Petitioner Banks's conviction for Conspiracy to Conduct Enterprise Affairs through a Pattern Of Racketeering Activity (RICO) in violation 18 U.S.C. § 1962(d) [count one]; Transportation of a Minor to Engage in Criminal Activity in violation of 18 U.S.C. § 2423(a) [count two]; and three courts of Sex Trafficking of Minors in violation of 18 U.S.C. §1591(a) and (b) [counts three, four and five].

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[1] Under Supreme Court Rule 13.1 a petition for certiorari is due 90 days after the denial of any petition for rehearing. On March 19, 2020, the Court extended the deadline another 60 days, for a total of 150 days, from the denial of a petition for rehearing.

While Banks raised eight separate issues and joined six of co-appellant Brown's issues on appeal, here he seeks certiorari only of the Ninth Circuit's decision upholding the pre-textual traffic stop, arrest and prolonged detention of four African-Americans, Banks and three women, in accordance with this Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), and the lower court's interpretation of this Court's precedent to uphold the conviction for conspiracy to commit a RICO when the "enterprise" was a construct of white law enforcement imposed on a group of young Black men who were friends.

In the opinion below, the Ninth Circuit noted that "the most significant [issues] for the purposes of our decision are the sufficiency of the evidence supporting the RICO enterprise conviction and whether various videos . . . were unduly prejudicial." (App. A, at 2-3). However, the lower court upheld the conviction of the RICO conspiracy, stating:

> The record contains a great deal of evidence that connects members of Black Mob with members of Skanless. It also contains evidence describing and illustrating the defendants' conduct as gang members, including advertising their relationships with other Black Mob Skanless members, promoting and entrenching the enterprise's hold over pimping activity within its territory, and attending events with other Black Mob Skanless members celebrating their pimping prowess. From this evidence, the jury could rationally infer the existence of a pimping enterprise and activities undertaken by Brown and Banks, with others, in support of that enterprise for their mutual benefit.

(App. A, p. 3).

The Ninth Circuit also rejected Banks's argument that the crime of conspiracy to

commit a racketeering offense under §1962(d), as interpreted by this Court in *Salinas v. United States*, 522 U.S. 52 (1997), is unconstitutionally overbroad and vague because it punishes membership in a group without proof of sufficient action, knowledge or specific intent to aid the enterprise. The lower court concluded, "RICO association-in-fact charges do not raise the due process concerns that the defendants identify." (App. A, p. 8).

Finally, the Ninth Circuit upheld the district court's denial of Petitioner Banks's motion to suppress evidence obtained from a pre-textual traffic stop in Los Angeles in 2001:

> When the investigating officers pulled him over, Banks was driving without a license, an offense under California law. The officers therefore had probable cause to detain him. *Edgerly v. City and County of San Francisco*, 599 F.3d 946, 956 (9th Cir. 2010). And because after a driver is detained, police officers may impound vehicles that 'jeopardize public safety and the efficient movement of vehicular traffic,' *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005), the 30-minute seizure of Banks that occurred while the police officers figured out what to do with his vehicle was not unreasonable.

(App. A, pp. 7-8).

JURISDICTION

This Court has Jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

U.S. Const. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . without due process of law . . . .

U.S. Const. Amend. XIV (section 1):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

FEDERAL STATUTES INVOLVED IN THIS CASE

Title 18 U.S.C. §1962(d): Conspiracy to Conduct Enterprise Affairs through a Pattern Of Racketeering Activity (RICO):

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section [which prohibit racketeering activities].

REASONS FOR GRANTING THE WRIT

During this time of national reflection upon a long history of racial discrimination against our Black citizens, it is incumbent upon the judiciary to reflect upon the extent to which our court system has perpetuated the disparate enforcement of our laws. This case

presents two situations wherein this Court's precedent have facilitated and enabled racial profiling and disparate enforcement of the laws against people of color: 1) pre-textual traffic stops permitted by *Whren v. United States*, 517 U.S. 806 (1996); and, 2) the vague and overbroad definitions of a conspiracy to commit a racketeering offense under RICO announced in *Salinas v. United States*, 522 U.S. 52 (1997), which invite discriminatory enforcement.

I. The Time Is Right To Overrule *Whren* And Restore The Fourth Amendment's Protection To People of Color.

In *Whren*, this Court held that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred," regardless of the subjective intentions or prejudices of the arresting officer and despite the fact that the officers are not traffic cops. *Id.,* at 810, 813 & 818. As many commentators and scholars have observed, this decision has unleashed racial profiling and pre-textual stops of Blacks throughout the states. In short, "*Whren* is at the heart of the phenomenon known as 'driving while black.' So long as the officer doesn't report that he was targeting someone for racial reasons–indeed, the officer may not even be conscious of the bias that led him to believe the driver was 'suspicions' and should be followed–any minor traffic violation will suffice."[2] Even worse, a lie will suffice if a traffic violation was not

[2] Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case Western Law Rev. 931 (2016) ("What happens next [after the stop]

observed. The word of a criminal defendant is rarely, if ever, credited over the word of a police officer. The lie will stand 99% of the time, meaning officers have carte blanche to stop Black individuals whenever they want.

The legacy of *Whren* has been to deny people of color the critical protections of the Fourth Amendment. This is especially troubling since, as noted by Prof. Anthony Thompson, "one of the primary concerns of the framers was that the state should not exercise its search powers against those who are not members of the established majority." [3/] The Fourth "[A]mendment operated as a structural protection against unregulated police power" against those groups who were held in disfavor by the majority and those in political power. [4/] Today's disfavored groups include people of color, who, in particular, need the protection of a vibrant and strong Fourth Amendment.[5/] However, in *Whren,* the fact that white law enforcement officers, assigned to "vice" not "traffic

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in many instances makes a bad situation worse." What follows are disproportionate searches and unjustified violence against Black citizens which has led to a crisis in this country); available at: https://scholarlycommons.law.case.edu/caselrev/vol66/iss4/5/

[3] Anthony C. Thompson, *Stopping the Usual Subjects: Race and the Fourth Amendment*, 74 N.Y.U. Law Review 956, p. 991 (October, 1999); available at https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-74-4-Thompson.pdf

[4] *Id.*, pp. 997-998 (quoting, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, p. 97 (Harvard University Press, 1981).

[5] *Id.*

control", detained defendant Whren, who was Black, on an admittedly pre-textual claim that he had violated a minor traffic law was deemed irrelevant. *Whren*, at 808-811. While the Court recognized that "the Constitution prohibits selective enforcement of the law based on considerations such as race," it failed to enforce this principle in the context of a pre-textual traffic stop, preferring to rely on "objective" justifications for racially motivated stops. Thus, *Whren* gave law enforcement the tools and permission to detain people based on race and justify it afterwards by citation to a traffic violation (real or not). *Whren* even facilitates and perpetuates implicit or unconscious bias by allowing law enforcement to act, unreflectively, upon racially motivated hunches. As one commentator bluntly stated: "the Supreme Court effectively legalized racial profiling of drivers by police in *Whren v. United States*."[6/]

"[S]tudies support what advocates and scholars have been saying for years: The police target people of color, particularly African American, for stops and frisks."[7/] The data from the steady stream of studies reveal that "the Court has underestimated the extent to which racial factors affect an individual officer's perceptions, memory, and

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[6] Jonathan Blanks, *Twenty Years Ago the Supreme Court Effectively Legalized Racial Profiling*, Cato Institute (June 10, 2016); available at: https://www.cato.org/publications/commentary/twenty-years-ago-supreme-court-effectively-legalized-racial-profiling

[7] Thompson, *Stopping The Usual Suspects*, p. 957.

reporting, transforming what may be innocent behavior into indicia of criminality and the basis for a search or seizure."[8] These studies date back to Prof. David Harris's studies in 1995 and 1996, establishing that Black drivers are stopped and ticketed far more than their White counterparts.[9] Despite White and Black drivers exhibiting no statistically significant differences in overall driving behavior,[10] 72.9% of searches conducted on I-95 were of Black drivers, and 80.3% of searches were conducted on identifiably minority drivers.[11] "Only 19.7% of those searched in this corridor were white."[12] Additionally, while "find" rates of contraband in this study again held firm when comparing Black and White motorists, Black motorists were still disproportionately searched – at nearly 73% of all searches.[13]

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[8] *Id.,* p. 991.

[9] David A. Harris, *The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters*, 84 Minnesota Law Review 265, pp. 265-326 (1999); available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=2132&context=mlr

[10] *Id*., pp. 278-79.

[11] John Lamberth, Ph.D., *Report of John Lamberth, Ph.D.*, The American Civil Liberties Union (1996); available at: http://homepage.divms.uiowa.edu/~gwoodwor/statsoc/lectures/w2/lamberth.html, 1996.

[12] *Id.*

[13] *Id*.

Unfortunately, the data has not changed over the decades. [14/] A statistical, empirical analysis of 218,364 traffic stops in 2005-2007 concluded, "Black and Hispanic drivers, when stopped, are more than twice as likely as White drivers to be searched, regardless of officer race...."[15] Recent studies in Los Angeles and San Diego expose similar discrimination. In Los Angeles, where Banks was stopped in 2001, a study found the stop rate was "3,400 stops higher per 10,000 residents for blacks than for whites, and 350 stops higher for Hispanics than for whites, even after controlling for variables such as the rate of violent and property crimes."[16] An analysis of traffic stop data generated by the San Diego Police Department from 2014 to 2015 shows that "despite being subject to higher rates of discretionary and non-discretionary searches, Black drivers were less

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[14] John Wilkens, *The politics of traffic stops: Are they good policing or racial profiling,* San Diego Union Tribune (June 14, 2020); available at: https://www.sandiegouniontribune.com/news/public-safety/story/2020-06-14/traffic-stops-racial-profiling.

[15]Jeffrey A. Fagan and Amanda Geller, *Profiling and Consent: Stops, Searches, and Seizures after* Soto, Virginia Journal of Social Policy & the Law, forthcoming; Columbia Public Law Research Paper No. 16-656 (2020); available at: https://scholarship.law.columbia.edu/faculty_scholarship/2657?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F2657&utm_medium=PDF&utm_campaign=PDFCoverPages

[16] Ian Ayers, *Racial Profiling and the LAPD: A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (2008); available at: https://www.aclusocal.org/en/racial-profiling-lapd-study-racially-disparate-outcomes-los-angeles-police-department

likely to be found with contraband than matched Whites and were more than twice as likely to be subject to a field interview where no citation is issued or arrest made" and three times as likely to be searched. [17/]

Even where the traffic violation was literally true, when an officer, as in this case, orders the driver out of the car and conducts a factually and legally unsupported frisk for weapons, the general law enforcement – rather than traffic enforcement – becomes clear:

> If the stop was about enforcement of traffic laws [or perhaps the lack of a driver's license], there would be no need for any search. Thus, for an officer to tell a driver that he [has] been stopped for a traffic offense when the officer's real interest is in [general crime control] is a lie – a legally sanctioned [lie].[18]

It was the holding in *Whren* which gave license to law enforcement to lie and use traffic stops as cover for racial profiling and generalized criminal investigations. And it is *Whren* which prohibits the lower courts from unveiling the lies and falsehoods proffered as cover for racial profiling. Dr. Harris' words in 1999 unfortunately still ring true today: "[A]s long as the officer or police department does not come straight out and say that race was the reason for a stop, the stop can always be accomplished based on some other

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[17] Joshua Chanin, Megan Welsh, and Dana Nurge, *Traffic Enforcement Through the Lens of Race: A Sequential Analysis of Post-Stop Outcomes in San Diego, California*, 29 Criminal Justice Policy Review 6-7, pp. 561-583 (2018); available at: https://journals.sagepub.com/doi/abs/10.1177/0887403417740188

[18] Harris, *Driving While Black*, p. 299.

reason – a pretext. Police are therefore free to use blackness as a surrogate indicator or proxy for criminal propensity."[19]

The instant case is part of *Whren's* legacy. The white officers who executed the "traffic" stop of Banks, a young black man, for making an "unsafe lane change" were not traffic officers but SWAT and vice officers. When Banks complied and pulled into a nearby Denny's parking lot, he was ordered out of the car, immediately patted down "for weapons" and arrested. No ticket was issued for the purported traffic violation, but additional investigation was conducted through interrogation of the other occupants. And, all four occupants were taken to the police station for interrogation.

Not only was the detention in this case an example of racial profiling, it was a clear violation of this Court's precedent requiring articulable suspicion of danger or potential violence before frisking an individual. *Terry v. Ohio*, 392 U.S. 1 (1968) and *Knowles v. Iowa*, 525 U.S. 113 (1998). The officers here had no basis to believe that Banks was violent or possessed a weapon, yet they immediately patted him down, handcuffed him and placed him in the back seat of the police vehicle. Then, they prolonged the "traffic stop," in violation of *Rodriguez v. United States*, 575 U.S. 348 (2015), to interrogate and investigate the women in the car.

Especially now, as we exhort our police departments and public officials to

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[19] Harris, *Driving While Black,* p. 291.

examine and reform racially discriminatory police practices, we must correct case law that results in the continued oppression of our communities of color in violation of the Constitution. Certiorari should be granted to overrule *Whren* and correct the lower court's mis-application of *Rodriguez, Knowles* and *Terry*.

II. This Court Should Review Its Cases Defining A Conspiracy To Commit RICO To Prevent The Use Of This Statute As An Instrument of Racial Discrimination.

This case also lays bare how the overbroad and vague definitions of RICO are used to round-up and prosecute people of color for crimes allegedly committed as an "enterprise". RICO has evolved alongside the politics of being "tough on crime" and tough on "sophisticated urban street gangs" to target and prosecute "gangs" comprising people of color.[20] "Conflating gang activity with racial minorities allows the government to rely upon denigrating racial stereotypes in order to engage in racial profiling and sweeping arrests of minorities under RICO,"[21] all while empirical research demonstrates that law enforcement underestimates and often ignores White involvement in "gang activity". "Surveys of young Americans have shown that 40% identifying as gang members are white, but police tend to undercount them at 10% to 14% and over count

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[20] Matthew H. Blumenstein, *RICO Overreach: How the Federal Government's Escalating Offensive Against Gangs Has Run Afoul of the Constitution*, 62 Vanderbilt Law Review 211 (2019); available at: https://scholarship.law.vanderbilt.edu/vlr/vol62/iss1/5

[21] *Id*., p. 307.

Black and Hispanic members."[22] White gangs are less heavily policed and less likely to be classified as "street gangs," which generally garner the harshest sentences. For example, 86% of the RICO prosecutions between 2001 and 2011 were of Black or Latino gangs.[23] Similarly, an analysis of 120 cases charged by the U.S. Attorney's Office of the Southern District of New York found that 106 of the 120 defendants (88%) charged with RICO were Black.[24]

The problematic classification of just who is a "gang member" and the "extreme racial disparity of who is added to gang databases and thus targeted for gang policing and prosecutions" has continued to be exposed as a system born out of and perpetuating our country's racist legacy.[25] Nationwide, over ninety percent of people added to gang databases are Black or Latino, even though "studies suggest that at least twenty-five

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[22] Donna Ladd, *Dangerous, growing, yet unnoticed: The rise of America's white gangs*, The Guardian (April 5, 2018); available at: https://www.theguardian.com/society/2018/apr/05/white-gangs-rise-simon-city-royals-mississippi-chicago

[23] Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 Michigan Journal of Race & Law 303 (2012); available at: https://repository.law.umich.edu/mjrl/vol17/iss2/3/

[24] Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 Cardozo L. Rev. 2 (2020); available at: http://cardozolawreview.com/conspiracy-contemporary-gang-policing-and-prosecutions/

[25] Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. Times (Aug. 11, 2016); available at: https://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html

percent of gang members are white [members of] openly violent white supremacist gangs."[26] Yet, these violent white gang members avoid intense policing.

In California, 85% of those included in the state-funded gang database are Black or Latino, "including forty-two people added when they were one year old or younger." [27] Of those 42 pre-verbal infants, 28 were entered for "admitting to being gang members."[28] In Los Angeles specifically, "a full forty-seven percent of Black men between the ages of twenty-one and twenty-four were in the LAPD's gang database."[29] LAPD officers have just this year come under investigation for falsifying information gathered during stops to boost statistics.[30] LAPD body camera footage has also confirmed that officers falsely

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[26] Stephan, *Contemporary Gang Policing*, p. 13 (*citing* A.C. Thompson, Ali Winston & Darwin Bond Graham, *Racist, Violent, Unpunished: A White Hate Group's Campaign of Menace*, ProPublica (Oct. 19, 2017); available at: https://www.propublica.org/article/white-hate-group-campaign-of-menace-rise-above-movement

[27] Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, Los Angeles Times (Aug. 11, 2016); available at: https://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html

[28] *Id*.

[29] Greg Howard, *A Lamentation for a Life Cut Short*, New York Times (Oct. 13, 2017); available at: https://www.nytimes.com/2017/10/13/books/review/cuz-danielle-allen-michael-biography.html

[30] Richard Winton and Mark Puente, *Officers falsely portrayed people as gang members, falsified records, LAPD says*, Los Angeles Times (Jan. 6, 2020); available at: https://www.latimes.com/california/story/2020-01-06/dozens-of-lapd-officers-accused-of

label people as gang members by falsifying field interview cards from traffic stops.[31]

It has often been said that a group of white people is a "club" while a group of minorities, especially a group of Black men, is a "gang," with all the connotations of crime and violence that accompany that term. If a group of Black friends gather and some have committed or continue to commit crimes, they become an "enterprise" for purposes of RICO. Any social media post showing that friendship becomes an "act" "promoting the enterprise".

Here, we have a "gang" that never existed except in the minds of white law enforcement. We have a group of Black male friends, many of whom engaged in a variety of crimes for their own personal enrichment – not the enrichment of the alleged "enterprise". And we have gigabytes of social media posts, photos, rap videos and other videos that were deemed evidence of the enterprise and the conduct allegedly committed to further the enterprise, i.e., "promoting" the enterprise. Armed with broad interpretations of this Court's precedent and RICO, the Ninth Circuit upheld the prosecution, conviction and incarceration of 20 Black men for conspiracy to commit a

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-portrayed-innocent-people-as-gang-members-falsifying-records

[31] Mark Puente, Richard Winton, Matthew Ormseth, *Body cams contradict LAPD's gang designation,* Los Angeles Times (Jan. 16, 2020); available at: https://www.latimes.com/california/story/2020-01-16/how-camera-exposed-lapd-falsification-gang-affiliations-after-decades-of-questions

violation of RICO.

Unfortunately, this case is not an outlier but rather emblematic of RICO's implementation as a tool of racial oppression.[32] It is time for this Court to retract these expansive, vague and overbroad definitions to prevent the continued use of RICO as "an instrument of government persecution of African Americans," in violation of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[33]

STATEMENT OF FACTS RELEVANT TO THIS PETITION

I. PROCEDURAL HISTORY

On December 19, 2013, the government filed the initial indictment charging 23 defendants with one count of Conspiracy to Conduct Enterprise Affairs Through a Pattern of Racketeering Activity (RICO) in violation 18 U.S.C. § 1962(d) . (CR 1).[34] A

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[32] Woods, *Systemic Racial Bias and RICO,* p. 309, 340-342 (detailing other cases in which the government coined a "gang" and then imposed its construct upon a group of minorities and charged them with RICO).

[33] Blumenstein, *Rico Overreach,* at 218, *citing* Julie Kay, *Acosta Launches Federal Fight Against Gangs,* Broward Daily Bus. Rev., p. 1 (Fla., Apr. 16, 2007); and Maureen Sieh Urban, *Rallies Support "Jena 6", Speakers Use Opportunity to Reflect on Black Comunity*, Post Standard, p. B1 (Syracuse, N.Y., Sept. 1, 2007).

[34] "CR refers to the Clerk's Record. Banks and Brown each filed his own brief and Excerpt of Record but the appeals were consolidated and each joined the other's appeal. Banks's Excerpt of Record is designated "BA-ER"; while Brown's Excerpt of Record is designated "BR-ER".

superseding indictment was filed a year later, on November 20, 2014, adding 36 substantive charges. (BA-ER 1-54). In counts two-five, the superseding indictment charged Banks and co-defendant Brown with sex trafficking of minors, in violation of 18 U.S.C. § 2423(a) and 18 U.S.C. §1591(a) and(b), for conduct which occurred ***thirteen years*** before the indictment was filed. (BA-ER 34-60). Banks's defense to the RICO charge was that the "enterprise" charged by the government was a fiction and any pimping activity he committed was for his own personal benefit, not through or for the benefit of the alleged enterprise. Banks also steadfastly maintained that he never trafficked minors, although his friend and co-defendant, Brown, may have.

For more than two years, the defendants attacked the RICO charge as overbroad and vague, moved to dismiss the indictment due to prejudicial delay, moved to exclude testimony due to the destruction of verbatim witness statements and filed a number of motions to suppress evidence under the Fourth Amendment. (CR 420, 458, 557-59, 653). Banks moved to suppress all fruits of his warrantless seizure and search pursuant to a "traffic stop" on March 31, 2001, by Los Angeles police in Hollywood, California. (BA-ER 64, 90-91; BR-ER, 63).[35/] At the end of two and a half years, defendants Banks and

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[35] The evidence from this "traffic stop" was the only evidence to prove overt act four in support of the RICO conspiracy charge in count one and counts three-five of the Superseding Indictment. The evidence from the March, 2001, stop was also used to prove the charges in overt act three and count two.

Brown were the only ones left standing trial. Both were convicted after a jury trial which spanned thirteen days. Banks was sentenced to eighty-five months (almost eight years).

II. THE "TRAFFIC" STOP, ARREST AND PROLONGED DETENTION

Los Angeles Police Officers Scallon and Cottle were working a "crime suppression detail in the Hollywood Division" on March 31, 2001, when they stopped the four door Oldsmobile driven by Banks, claiming the car made an unsafe lane change on Sunset Boulevard. (BA-ER 103-04, 112-13).[36] The officers were in an unmarked police car. (BA-ER 114-115; BR-ER 66). Scallon, who worked in the SWAT (special weapons and tactics) division, admitted that he was unfamiliar with California Vehicle Code section 12801.5(e), which prohibits a custodial arrest for the misdemeanor offense of driving without a license, explaining that he didn't "write a lot of [traffic] citations because that's not my primary duty . . . ." (BA-ER 103; 111-112, 122 & 128). Banks, a young Black man, was never given a traffic ticket or citation for either an unsafe lane change or driving without a license. (BA-ER 122).[37]

When Banks pulled into a Denny's Parking lot, Scallon and Cottle remained by their police car and ordered the driver, Banks, to get out of the car and walk back towards

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[36] Officer Cottle was killed in Afghanistan in 2010 and unable to testify in this case. (BA-ER 114).

[37] At the time of the traffic stop, Banks was 20 years old.

them. (BA-ER 105 & 116). Scallon "made contact with [Banks], patted him down, checked for weapons, checked for ID." (BA-ER 116). Notably, at the point when Banks was patted down and checked for weapons, the officers only suspected him of making an unsafe lane change. At that point, the officers had *no* information that he did not have an ID and *no* information that he was an unlicensed. (BA-ER 124-126). Moreover, the officers had no articulable or reasonable suspicion that Banks was armed, violent or had broken any criminal laws. Even though no contraband was found on Banks during the pat down, he was handcuffed and placed in the back seat of the patrol car. (BA-ER 117-18) After placing Banks in the police car, the officers questioned the three female passengers in the car. (BA-ER 125-126).

The "detention" continued for **thirty** (30) minutes, even though the officers had completed their questioning of Banks within the first five minutes. (BA-ER 123, 129-30).

During this thirty-minute prolonged detention, the officers questioned the women in the car. Scallon claimed the two minor females in the back seat "said they were in Hollywood to be street-walked, prostitutes" so they transported them to the station. (BA-ER 107). However, Scallon's testimony regarding this parking-lot interview conflicted with Cottle's report. (BA-ER 118-19). Cottle was the primary interviewer of the women and wrote the report. (BA-ER 111, 119, 124-25 125). Cottle's report is clear that the only

information gleaned from the parking-lot interrogation of the three women was that none of them were licensed to drive and the two young women in the back seat were under 18. (BR-ER 66-67). Moreover, the reason all were taken to the station was "[d]ue to the juveniles changing stories and the possibility that [the front seat passenger] . . . could possibly be contributing to the delinquency of minors . . . ." (BR-ER 67).

The Ninth Circuit's finding below that Scallon arrested Banks or intended to arrest Banks for being an unlicensed driver is belied by the record. First, Scallon never testified that he arrested Banks for being an unlicensed driver or that he intended to arrest him for being an unlicensed driver. (BA-ER 106-07, 115-118, 122). No traffic citation was ever issued to Banks. (BA-ER 122). Finally, the evidence established that Banks gave the name of a licensed driver, Malik Kelley, during the detention. It is unclear exactly when the officers determined that Banks was not Malik Kelley and not licensed, but it was definitely after they were all taken back to the station house for further interrogation and investigation. (BA-Er 116-17; BR-ER 66-67).

No charges were filed pursuant to the March 31, 2001, stop and investigation in Los Angeles until thirteen years later when the instant RICO charges were filed in San Diego. (BA-ER 918-19).

III. COUNT ONE – THE RICO CHARGE

Count One alleged a conspiracy to conduct enterprise affairs through a pattern of racketeering (RICO), the alleged enterprise being the "'Black MOB/Skanless' ('BMS')" organization. (BA-ER 2, 4). The required "purpose" of the alleged enterprise was to: 1) "[e]nrich[] the members and associates of the Enterprise through, among other things, recruiting and maintaining juvenile and adult females to work as prostitutes; the illegal distribution of narcotics; committing robberies; and conducting other profit-driven illegal activities in San Diego County and elsewhere"; 2) "[m]aintain control over illegal activities occurring in BMS 'territory' within San Diego County, California, including keeping the public-at-large in fear of the Enterprise, and in fear of its members and associates through threats of violence and violence"; and 3) "[p]reserve[], protect[] and expand[] the power of the Enterprise through the use of intimidation, violence, threats of violence, assaults, and other violent crimes as well through rap music and social media." (BA-ER 4-5). The government specifically alleged that "Skanless" and "Black MOB" were "criminal street gangs" which came "together for one common goal, which is to 'make money through criminal acts and to raise their status within the Enterprise'". (BA-ER 5-6). Banks was named in three of the 137 overt acts: overt act 3 which alleged sex trafficking on August 12, 2000, in Las Vegas (which was also alleged as a separate substantive crime in Count 2); overt act 4 which alleged sex trafficking on March 31,

2001, in Los Angeles (which was also alleged in Counts 3-5 as separate, substantive crimes); and overt act 126, which alleged that on June 2, 2013, Banks received $500.00 in proceeds from prostitution from Phoenix, Arizona. (BA-ER 15-17, 32-33).

The issue – hard fought at trial – was whether any criminal conduct was performed through and for the benefit of the alleged "BMS" enterprise and whether "BMS" even existed. Banks also vehemently denied pimping for an alleged enterprise, although he admitted that he was an independent pimp, involved in adult female prostitution for his personal benefit – not the benefit of any "enterprise".

The primary evidence against appellants on the RICO conspiracy was presented through the testimony of White law enforcement officers who opined that "Black Mob/Skanless" or "BMS" was a single enterprise encompassing two African American groups, "Skanless" and "Black Mob". (TT 544, 573, 754, 796-97, 822-24). Unlike most RICO cases, there were no co-conspirators or former "enterprise" members testifying to the existence, membership or purpose of the putative enterprise, "BMS".

Banks was not a documented gang member and the government had no evidence that either Skanless or the fictional "Black Mob Skanless" were documented gangs. (TT 689-90).

To combat the law enforcement testimony, defendants called Reginald Washington, an African-American and former gang member who, after early parole from

a life sentence, became a development specialist for at-risk youth. (TT 1603-04). Mr. Washington was clear and firm in his opinion that Black Mob and Skanless were not "the same gang" nor had they merged into one gang. (TT 1630).

To prove the "enterprise" and the conspiracy to facilitate it, the government presented extensive social medial evidence depicting friendships among the defendants, some of whom affiliated with Skanless and others who were Black Mob, but all of whom grew up in the North Park area of San Diego. The government also submitted a series of prejudicial videos of various defendants rapping about pimping and "open source" videos – videos found on the internet – of large celebrations of pimping.[38]

The government exhibits fall into one of two groups: 1) photos depicting individuals displaying Black Mob and Skanless tattoos, hand signs and colors; and, 2) photos and videos of Banks promoting himself as a pimp. A review of the exhibits shows an absence of convergence between gang affiliation and prostitution activity. Noticeably absent are any photos or videos which depict pimping or prostitution *for the enterprise*, e.g. "Pimpin' for BMS," or "'Hoes for Skanless".

Worse, through the expert testimony, the government relied upon race and racial

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[38] During the oral argument, the Ninth Circuit specifically referred to the videos as "offensive" and "inflammatory," (https://www.ca9.uscourts.gov/media/ ; U.S. v. Tony Brown, 16-50495; Oral Arg., Pasadena, 11-4-2019, at 47:00-49:20). The introduction of such evidence was especially troubling since Banks admitted he had worked as a pimp obviating the need to "prove" he was a pimp.

stereotypes to prove the existence of this fictional enterprise. The government often equated the "African-American lifestyle" with evidence of "gang association" or criminal behavior. Some of the specific indicia of the African-American lifestyle presented by the government encompassed traits, behaviors and characteristics which are not exclusive to gang members, e.g. use of the term "black" as a term of endearment. The "pimping" expert expounded on the criminal behavior of "gorilla" pimps, employing a term laced with a racist history even though it was not relevant to the conduct alleged.[39] Racial denigration infected the case all the way through to the government's closing argument, wherein the government played a racially charged "blaxploitation" film clip (which had not been admitted into evidence). (BR-ER 483).

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO ENFORCE THE EQUAL APPLICATION OF THE FOURTH AMENDMENT TO PEOPLE OF COLOR, TO EXAMINE *WHREN'S* DISCRIMINATORY LEGACY AND TO OVERRULE *WHREN*.

The Ninth Circuit upheld the detention of Banks in 2001, finding, "[w]hen the investigating officers pulled him over, Banks was driving without a license, an offense

[39] Testimony about "gorilla pimps" is especially disturbing given the long and sordid history of the use of the term "gorilla" as a racial slur. See, https://www.nytimes.com/2018/06/17/opinion/roseanne-racism-blacks-apes.html ; https://www.washingtonpost.com/news/grade-point/wp/2016/10/07/slurs-blackface-and-gorilla-masks-the-academic-year-opened-with-racial-ugliness/

under California law." (App. A, p. 7). Thus, this case, with facts that are similar to but worse than those in *Whren*, presents this Court with a timely opportunity to re-examine *Whren* in light its legacy of racially discriminatory traffic stops and end court support of racially motivated pre-textual stops.

Here, Scallon and Cottle were investigating general crime in a "high crime area". One officer was working "vice" and the other was a trained as a Swat Officer who admitted that he had little knowledge of traffic laws. The two officers were in an unmarked car. They saw a car, occupied by four Black individuals and driven by a young Black man, on Sunset Boulevard in Los Angeles. They claimed that the car made an "unsafe lane change," but the only evidence of this is the deceased officer's report and his partner's testimony (thirteen years after the stop). They issued no ticket for any traffic violation. Rather than question the driver about his license and registration, they immediately ordered him to get out of his car and walk back towards the officers, frisked him, handcuffed him and placed him inside the police car. There was *no* evidence that Scallon asked for a driver's license or checked for a license *before* patting down Banks and placing him in handcuffs. (BA-ER 116-17).

Whren allows officers to stop a vehicle when they "have probable cause to believe that a traffic violation has occurred," regardless of the subjective intentions or prejudices of the officer. *Id.* at 810, 813 & 818. Absent a pretextual traffic violation, officers must

have a "reasonable suspicion" that a crime has been or is being committed to detain an individual. *Terry v. Ohio*, 392 U.S. 1 (1968). At the time that the officers detained Banks, i.e., when they activated their lights and pulled him over, they possessed no information – no articulable suspicion – that he was involved in criminal behavior. The officers relied entirely upon the pretext of the "unsafe lane change" to justify the initial seizure under the Fourth Amendment.

The lower court relied upon *Edgerly v. City and County of San Francisco*, 599 F.3d 946 (9th Cir. 2010), to support its claim that the detention was justified by the fact that Banks was unlicensed. In *Edgerly* the Ninth Circuit upheld an arrest which would have been unauthorized under state law (just as Banks's arrest for being an "unlicensed driver" was impermissible under California law). *Id.,* at 956. The *Edgerly* Court relied upon this Court's decision in *Virginia v. Moore,* 553 U.S. 164 (2008), holding that police officers did not violate the Fourth Amendment by arresting a motorist they believed had violated a state traffic law, even though Virginia law only authorized the issuance of a summons – not an arrest. *Moore* explicitly relied upon and *expanded Whren,* holding,

> linking Fourth Amendment protections to state law would cause them to "vary from place to place and from time to time," *Whren,* 517 U.S., at 815, 116 S.Ct. 1769. Even at the same place and time, the Fourth Amendment's protections might vary if federal officers were not subject to the same statutory constraints as state officers. ... It would be strange to construe a constitutional provision that did not apply to the States at all when it was adopted to now restrict state officers more than federal officers, solely because the States have passed search-and-seizure laws that are the

prerogative of independent sovereigns.

Moore, at 176. What is stranger is allowing federal officers, vice officers and SWAT officers to enforce state traffic laws, about which they know little-to-nothing. It is stranger still to allow state officers to violate state law in the name of the equal and consistent application of the Fourth Amendment. Even more ironic is that the *Moore* Court's stated goal of equal and consistent application of the Fourth Amendment across the fifty states results in the unequal (but consistently disproportionate) application of the Fourth Amendment to protect White Americans but to leave exposed to police abuse Black Americans who have already suffered so much. *Moore* demonstrates that *Whren* was not just wrong on the facts of its own case, but it has spawned a devilish progeny which continues to subject Black individuals to routine violations of the Fourth Amendment, as well as the dehumanization and degradation that accompanies this disparate enforcement of "traffic" laws.

While the Ninth Circuit claimed the detention and arrest were legitimate under the Fourth Amendment because Banks was an "unlicensed" driver, this was yet another factually unsupported pretext. Cottle's report established that the officers believed the driver, "Kelly," was licensed – just without his license – at the time of the stop. (BA-ER 117; BR-ER 66-67). Both Cottle's report and Scallon's testimony establish the reason all the occupants were taken to the station was the changing stories of the young women.

Finally, the fact that Banks had no ID on his person did not constitute probable cause to believe that he was an unlicensed driver. Indeed, when asked by Judge Rosenthal, during oral argument, whether officers can arrest a driver anytime the driver does not have a license on her or his person, the government responded, "It doesn't sound good when you put it like that." [40/] For, drivers often forget their license or have their license in a purse or wallet inside the car and not in a pocket. All Scallon knew when he frisked Banks and placed him in handcuffs in the backseat of the patrol car was that he did not have ID on his person.

Stripped of the "traffic" pretexts, the stop and detention here violated the Fourth Amendment requirement of reasonable suspicion under *Terry*. This Court should overrule *Whren* and reverse the lower court's decision upholding the "traffic" stop.

II. THE PAT-DOWN AND PROLONGED DETENTION VIOLATED THIS COURT'S PRECEDENT.

Even if this Court leaves undisturbed the decision in *Whren*, the Ninth Circuit's decision disregarded established law from this Court requiring probable cause or reasonable suspicion that a suspect is armed or dangerous before conducting a pat down and this Court's prohibition of prolonged traffic stops for general criminal investigation.

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[40] https://www.ca9.uscourts.gov/media/ U.S. v. Tony Brown, 16-50495; Oral Arg., 11-4-19, Pasadena, at 32:00 -33:19.

A. THE PAT-DOWN

In *Knowles v. Iowa*, 525 U.S. 113, 118 (1998), this Court held that, in the context of a traffic stop, the pat-down of the driver or any passengers must be based "upon reasonable suspicion that they may be armed and dangerous." *Id.* at 118 (citing *Terry v. Ohio*, 392 U.S. 1 (1968) and *Michigan v. Long*, 463 U.S. 1023 (1983)). In fact, Government counsel conceded, at oral argument, that an officer must have a reason to believe a person poses a danger or is armed before executing a pat down.[41/]

However, in this case, as soon as Banks pulled into the Denny's parking lot (in response to the officers's activating their lights), Scallon ordered him out of the car, ordered him to walk back towards the police vehicle, "patted him down [and] checked for weapons . . . ." (BA-ER 116-17). When Banks was frisked for weapons, the officers had *no* reason to believe he had a weapon, was armed or dangerous and *no* information that he was an unlicensed. Prior to the pat-down, the officers only knew that the driver had made an "unsafe lane change" and was a Black man.

Even if this Court leaves *Whren* and *Moore* in effect, the frisk was impermissible under *Terry* and *Knowles* because the officers had no reasonable suspicion to believe Banks was armed or dangerous. This Court should grant certiorari to correct the

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[41] https://www.ca9.uscourts.gov/media/ U.S. v. Tony Brown, 16-50495; Oral Arg., 11-4-19, Pasadena, at 33:25-34:17.

misapplication of *Knowles* and *Terry* to this case and reverse the lower court's decision upholding the unconstitutional pat down.

B. THE PRO-LONGED DETENTION.

During a routine traffic stop officers may not take "measure[s] aimed at 'detect[ing] evidence of ordinary criminal wrongdoing' because those efforts are not 'fairly characterized as part of the officer's traffic mission.'" *Indianapolis v. Edmond*, 531 U.S. 32, 40-41 (2000). The observation of a traffic infraction provides "[a]uthority for the seizure" of the driver only until the "tasks tied to the traffic infraction are – or reasonably should have been – completed." *Rodriguez*, 575 U.S. at 354 (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

The thirty-minute prolongation of the "traffic stop," upheld by the Ninth Circuit on the grounds that Scallon and Cottle were merely trying to "figure[] out what to do with his vehicle," runs afoul of this Court's decision in *Rodriguez*. (App. A, p. 8; relying upon *Miranda v. City of Cornelius,*429 F.3d 858, 864 (9th Cir. 2005) (explicitly relying upon *Whren* to hold that a traffic stop can be properly prolonged for the police to conduct community caretaking functions such as impounding vehicles)). Banks does not dispute the authority of the police to impound vehicles for the public safety. However, the record here does ***not*** establish that the prolongation of the detention was for the purpose of, or necessary to, impounding the vehicle as the lower court claimed.

Scallon did mention the need to impound the vehicle, but further questioning revealed they did not impound the vehicle but simply asked another officer to drive it back to the station. (BA-ER 123). Moreover, Scallon repeatedly admitted the primary *reason* for the prolongation of the stop was to investigate the women in the vehicle. (BA-ER 107, 122-23).

Here, the lower court invoked another traffic-related pretext to justify the prolonged detention. Even if we credit this post-hoc justification, it does not justify the general criminal investigation conducted by Scallon and Cottle for thirty minutes. This general criminal investigation was conducted after Banks was placed in the police car in handcuffs, i.e. arrested. If this was just a traffic stop, the officers would not have taken Banks and the passengers to the station. They would have given Banks a ticket, impounded the car, and told Banks and the passengers to call a cab. The fact that everyone was carted off to the station house where they were interrogated individually reveals the true purpose of Banks's arrest and the prolonged stop – general criminal investigation.

The prolongation of the detention in *Rodriguez* – which violated the Fourth Amendment – was only seven or eight minutes, far less than the thirty-minute prolongation here. This Court should grant certiorari to correct the mis-application of *Rodriguez* and reverse the Ninth Circuit's holding that the prolonged detention was

constitutional.

III

THE CONVICTION ON THE RICO CHARGE WAS BASED ON OVERBROAD AND VAGUE INTERPRETATIONS OF THE STATUE AND USED TO CONVICT A GROUP OF YOUNG BLACK FRIENDS.

For three years, from the pre-trial motions to the sentencing hearings, Banks vehemently disputed the government's allegation in that two African-American groups residing in North Park, San Diego, "Black Mob" and "Skanless", merged into one criminal enterprise – dubbed "BMS" or "Black Mob Skanless" by law enforcement. (ER 139-75, 235-35). Banks argued that the RICO charge, under §1962(d), was overbroad and void for vagueness, allowing for the arbitrary application of the law to this case. (Id.) Specifically, as interpreted by this Court in *Salinas v. United States,* 522 U.S. 52 (1997), §1962(d) is overbroad and impermissibly punishes mere status or membership in an organization, contrary to due process, as explained by *Scales v. United States,* 367 U.S. 203 (1961). In addition, the statute is unconstitutionally vague under *Johnson v. United States*, 576 U.S. ___ , 135 S.Ct. 2551(2015).

In *Salinas, supra,* this Court addressed the necessary elements of a §1962(d) conspiracy. Applying traditional conspiracy principles, *Salinas* explained that a defendant is guilty of a RICO conspiracy if he and his coconspirators "agree to pursue the same criminal objective." *Id.* at 63-64. But, the defendant needn't "agree to commit or facilitate each and every part of the substantive offense." *Id.* To be guilty of a RICO

conspiracy, the defendant only needs to "further an endeavor which, if completed, would satisfy all the elements of a substantive [RICO] offense." *Id*. at 65.

Furthermore, because § 1962(d) – unlike the general conspiracy statute, 18 U.S.C. §371 – does not require an overt act, a RICO conspiracy does not require proof of any completed act. *Id.* at 63-65. Although §1962(d) requires proof of at least two predicate racketeering acts, to be guilty of a RICO conspiracy, the defendant only need agree that someone else would commit the necessary predicates. In sum, the defendant need only agree to "further an endeavor" that "would satisfy all the elements" of §1962. *Id.* at 65.

Following this Court's lead, the circuits have held that the defendant need only agree that someone else satisfy §1962's remaining elements. For instance, the Second Circuit, in *United States v. Applins*, 637 F.3d 59, 75 (2d Cir. 2011), held that, to prove a RICO conspiracy, the government need not prove that an enterprise exists, or that the defendant agreed to personally form one – it is enough that the defendant agreed someone else would form an enterprise. Likewise, in *United Sates v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004), the Ninth Circuit held that the defendant need not have agreed to personally operate or manage, i.e., direct, an enterprise – the defendant need only agree that someone else will direct an enterprise's affairs.

Such broad interpretations of a RICO conspiracy violates this Court's holding in *Scales*. The *Scales* Court held that a statute violates due process if it punishes

"express[ing] sympathy with [an] alleged criminal enterprise, unaccompanied by any significant action in support or any commitment to undertake such action." *Id.* at 228. *Scales* construed the Smith Act – which punished active membership in subversive organizations – to require proof of knowledge and specific intent as to each defendant to avoid finding that the Act violated due process. *Id.* at 226-28.

In contrast, here, §1962(d) has been construed so broadly as to remove any personal guilt requirement. Under *Salinas*, no particular element must be proven as to each defendant.[42] The result is worse than guilt by association, which is forbidden by *Scales*. *Id.* at 226-28. It is guilt by association with a conspiratorial scheme, which in turn is associated with an enterprise. RICO conspiracy under § 1962(d) has been so watered down that a defendant need only somehow facilitate the conspiratorial scheme, e.g., by expressing sympathy for its goals, without actually furthering the target offense or directing an enterprise's affairs.

Yet, as this Court explained in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), §1962(d)'s purpose is to punish an enterprise's inner circle, i.e. its directors and managers. *Id.* at 183. But §1962(d) extends RICO liability two levels beyond the inner circle. First, liability is extended to conspirators who agree to personally further the

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[42] Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for extending the* Reves *"Operation or Management" Test to RICO Conspiracy*, 97 J. Crim. L. & Criminology 1, p. 43 (2006).

enterprise's directions. Second, *Salinas* extends liability to those who simply agree that someone else will further the enterprise's direction, i.e. to those who agree "to further an endeavor which, if completed, would satisfy all the elements of" a RICO offense under §1962(a) - (c). *See Salinas,*367 U.S. at 228. This outer circle is too attenuated from *Reves's* focus on punishing individuals who commit to undertake significant action towards an enterprise's operation or management. *Scales*, 367 U.S. at 228.

Here the government failed to prove that Banks acted to further the operation or management of an enterprise or intended to further such an enterprise. In fact, Banks disputed that the alleged "enterprise" even existed, much less that he facilitated it. The government constructed and even ***named*** the "enterprise," "Black Mob Skanless" or "BMS". (TT 544, 551, 669, 692-93, 793-94, 814, 822-27, 1580-81). At trial, no exhibit, tattoo or defendant's statement referred to the singular entity, "BMS" or "Black Mob Skanless". The only evidence that a unified enterprise existed was the testimony of the white law enforcement officers who were deemed "experts" on "black criminal gangs". The government did not prove that Banks knew who was operating or managing the enterprise or that he even knew what the "enterprise" was, i.e, its scope and purpose. The government only proved the association of these young Black men.

The court below held that the government submitted evidence that Banks promoted the "enterprise" through bragging and rapping. Banks's bragging and rapping only

promoted himself – not any group and certainly not a group defined and named by law enforcement officers. For example, in none of the government exhibits showing Banks at "Player's Balls," events which celebrated the pimping and prostitution "lifestyle," does Banks "represent" BMS or even Skanless. He did ***not*** wear the brown Skanless colors. He did ***not*** display any tattoos. He did ***not*** thank "all the Black Mob Skanless" members for making his award possible. He did ***not*** throw gang signs. His was an individual endeavor.

There was no evidence that the proceeds of any individual overt act was shared with the group. There were no taxes nor dues. The government presented no evidence of meetings, hierarchy, leadership, taxes, dues or membership requirements. Indeed, the government expert testified that "Black Skanless" had no structure and lacked many of the indicia of criminal street gangs. (ER 459, 463-64). According the government's own experts, the "association in fact" alleged in this indictment was a "fluid" and "loose" association. Yet, under the lower court's interpretation of *Salinas,* this was enough to convict Banks, and other young Black men who were friends, of a §1962(d) conspiracy. Such an interpretation and application of *Salinas* is unconstitutionally overbroad under *Scales*.

In *Johnson v. United States*, 567 U.S. ___ , 135 S.Ct. 2551 (2015), this Court explained that "'[o]ur cases establish that the Government violates this guarantee [of due

process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" *Id.* at ___, 135 S.Ct. at 2556 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). In addition, under *Chapman v. United States*, 500 U.S. 453, 467 (1991), if a statute's vagueness infringes upon a First Amendment right, e.g. free speech or association, it may be attacked on its face; otherwise a vagueness claim must be evaluated as applied to the facts of the case.

Here, as in *Johnson*, §1962(d) contains critical uncertainties that fail to provide adequate notice *and* allow for arbitrary and discriminatory enforcement of this law against people of color. Moreover, because §1962(d)'s vagueness, in this case, infringes upon the First Amendment right to free speech (rap videos and social media statements) and the right of association, it is unconstitutional.

The statute creates uncertainty regarding what a defendant must agree to personally do to violate §1962(d). It could be that expressing sympathy for coconspirators' goals is enough. It is difficult enough for an ordinary person to decipher when a group of people qualifies as an "enterprise". It is more difficult for an ordinary person to determine whether – to be liable for RICO conspiracy – he or she has agreed that someone else will form an enterprise. Because the statute prevents an ordinary person from understanding and knowing whether her or his speech or association with a

group of friends will subject him or her to RICO liability, it impermissibly infringes upon the First Amendment rights.

The other problem that the vagueness doctrine seeks to address is the arbitrary enforcement of vague statutes. *Johnson*, at ___, 135 S.Ct. at 2556. As noted above, RICO has been disproportionately enforced against groups of minorities, people of color and Black people. Here we have a construct of white law enforcement officers imposed on a "loose" and "fluid" group of African-American friends. As in other RICO prosecutions of people of color, race and racial stereotypes become a "surrogate indicator" or "proxy" for evidence of a criminal enterprise. Here, the "experts" made repeated references to the "African-American lifestyle" which the "enterprise" "promoted." The pimping expert expounded upon "gorilla" pimps, invoking a racist term with a long history in this country. The gang expert testified that the term "black" was a "term of endearment used by Black Mob and Skanless members." (ER 428).[43/] He also testified that "Black Skanless" promoted "blackness" and the "African-American lifestyle". (ER 347-48, 368-69, 463, 467-68). This evidence shows how race was used as a surrogate for evidence and criminality in this case and how RICO is used as a tool or racial oppression.

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[43] Berry Gordy and Diana Ross used the term "black" as a term of endearment. See, "Motown: The Musical".

To prevent the use of RICO as a tool of racial discrimination and oppression, this Court should grant certiorari, tightened the definition of a RICO conspiracy and reverse the lower court's decision upholding the conviction in this case.

CONCLUSION

At this moment in time, it is incumbent upon the judiciary to ensure that our criminal justice system does not employ or allow the use racist stereotypes, vestiges of slavery and unconscious assumptions to enforce our laws in a discriminatory fashion. The criminal justice system in the United States is the terminal point of law enforcement – it is the culmination of the policing and prosecution efforts, many of them layered with centuries of racism. If we are not to be a tool of this systemic racism, we must face it head-on and review and revise those decisions which have permitted and fostered the racist and unconstitutional application of the law.

Whren, which has facilitated the discriminatory seizures of Blacks and people of color in this country for decades, must be overruled.

This Court should also take this opportunity to address the vague and overbroad definitions of a conspiracy to commit a violation of RICO which have resulted in the discriminatory enforcement of RICO against Blacks and people of color in violation of the Due Process and Equal Protection clauses.

Respectfully submitted,

S/Martha M. Hall

Date: July 10, 2020

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

UNITED STATES OF AMERICA,

Respondent-Appellee,

vs.

ROBERT BANKS, III,

Petitioner -Appellant.

CERTIFICATE OF COMPLIANCE:

I, the undersigned, say:

I certify that the opening brief is proportionateley spaced, has a typeface of 13 points and is under 40 pages in compliance with Rule 33.2.

I certify under penalty of perjury that the foregoing is true and correct. Executed July 10, 2020, at San Diego, CA.

S/Martha M. Hall

_____

MARTHA M. HALL

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner -Appellant.

PROOF OF SERVICE AND DECLARATION OF COUNSEL

MARTHA M. HALL, being first duly sworn, deposes and says:

Counsel was court appointed, pursuant to Title 18, United States Code Section 3006A (a)(2)(B), on appeal to the Ninth Circuit Court of Appeals;

That on July 10, 2020, the petition for writ of certiorari and motion were deposited in a United States Post Office mailbox located in San Diego, California, with first class postage prepaid, properly addressed to the Honorable William Sutter, Clerk of the Supreme Court of the United States, One First Street, NE, Washington, D.C. 20543, and within the time allowed for filing said petition, in compliance with Order 589 of the U.S. Supreme Court issued on March 19 and April 15, 2020;

That an additional copy of the petition, motion and the affidavit of proof of mailing of the petition was served on counsel for respondent: Noel Francisco, the Solicitor General of the United States, at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001, through the United States mail.

Dated at San Diego, California, this 10th day of July, 2020.

S/ Martha M. Hall
Martha M. Hall

APPENDIX A

Ninth Circuit Memorandum Decision
January 15, 2020

FILED

JAN 15 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TONY BROWN, AKA Lil' Play Doh, Defendant-Appellant.	No. 16-50495 D.C. No. 3:13-cr-04510-JAH-10 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT BANKS III, AKA Pimpsy, Defendant-Appellant.	No. 17-50103 D.C. No. 3:13-cr-04510-JAH-3

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted November 5, 2019
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and ROSENTHAL, [**] Chief District Judge.

Defendants-Appellants Tony Brown and Robert Banks III were associated with the Skanless street gang in San Diego, whose members engaged in pimping and related unlawful activities.[1] In 2014, the government indicted them as part of a large-scale RICO prosecution alleging that Skanless and another gang, Black Mob, together constituted a RICO "association-in-fact" enterprise, Black Mob Skanless, that engaged in sex trafficking and related racketeering acts. Brown and Banks went to trial on the charges. Brown and Banks now appeal their convictions after the jury trial.

While these defendants raise many issues, the most significant for the purposes of our decision are the sufficiency of the evidence supporting the RICO enterprise conviction, and whether various videos, depicting Brown, Banks, and other gang members engaged in braggadocio behavior concerning their pimping achievements and gang affiliations, were unduly prejudicial. We hold that the

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[**] The Honorable Lee H. Rosenthal, Chief United States District Judge for the Southern District of Texas, sitting by designation.

[1] Although the defendants contest whether Skanless in fact constituted a street gang and whether they were members, the jury was entitled to infer that Skanless functioned like a street gang and that the defendants were members of or otherwise affiliated with it.

evidence was sufficient, and that the district court did not abuse its discretion in admitting the videos into evidence; the limited number of videos to which the defendants objected were probative in establishing their involvement, with others, in promoting and entrenching pimping and prostitution activity and were not unduly prejudicial given the unsavory nature of the entire case.

The defendants argue that the evidence was insufficient to establish that Black Mob Skanless constituted a single RICO enterprise and that their acts were undertaken for the benefit of the enterprise. The record contains a great deal of evidence that connects members of Black Mob with members of Skanless. It also contains evidence describing and illustrating the defendants' conduct as gang members, including advertising their relationships with other Black Mob Skanless members, promoting and entrenching the enterprise's hold over pimping activity within its territory, and attending events with other Black Mob Skanless members celebrating their pimping prowess. From this evidence, the jury could rationally infer the existence of a pimping enterprise and activities undertaken by Brown and Banks, with others, in support of that enterprise for their mutual benefit.

The district court admitted videos the government offered that depicted various subjects, including rap music produced by the defendants and others, gang members' pimping celebrations, and individuals bragging about their pimping

successes. Brown and Banks were shown in many of the videos. The videos they challenge on appeal illustrated antisocial behavior associated with pimping. The defendants contend that the district court abused its discretion in admitting the videos because they were unduly prejudicial in featuring acts and words demeaning to women, offensive language, and improper character evidence.

The videos were probative in that they provided evidence that Black Mob Skanless was an enterprise organized for the purpose of entrenching members' pimping activity in North Park, San Diego. The videos conveyed that Black Mob Skanless controlled North Park, highlighted the territorial markers, and conveyed warnings that rival gangs should keep their activities "over there" and not bring them into North Park. The videos celebrated and promoted pimping and prostitution activity and the defendants' success as pimps. Although some of the videos had prejudicial content, their prejudicial impact was largely cumulative of the prejudicial impact of other evidence in the case, including expert testimony, a video introduced by Banks himself, photographic still images, and text messages. Accordingly, it was not an abuse of discretion for the district court to conclude that

the videos' probative value was not substantially outweighed by their prejudicial effect. FED. R. EVID. 403.[2]

The defendants contend the videos were also improper character evidence under Rule 404. Acts falling "within the temporal scope" of a conspiracy that actually comprise the conspiracy are not subject to Rule 404, since they are "inextricably intertwined" with the offense. *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004). The district court did not violate Rule 404 in admitting the videos.

Turning to the other issues raised by the defendants, we conclude that none warrants relief. They argue that the indictments should have been dismissed due to prejudicial preindictment delay because Officer Cottle, who was tasked with investigating their activity in 2001, was killed in overseas combat, and because videotaped statements by sex trafficking victims taken at the time of the investigation were also destroyed. But the defendants do not explain how the lost evidence would have benefitted either or both of them. They merely ask us to

[2]The defendants argue that the district court erred because it failed to view the videos and therefore to engage in the proper balancing analysis. Although the trial record suggests that the district court may have initially ruled on the defendants' motions *in limine* without viewing the videos, the record also reflects that the district court offered to revisit the issue in response to appropriate objections later, and does not indicate that the court failed to review the videos in advance of their formal admission.

assume it would have. To prevail on that claim, however, the defendants must demonstrate "actual, non-speculative prejudice from the delay." *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007). Moreover, the defendants were able to cross-examine Officer Cottle's partner at the time, Officer Scallon, and the three victims of the incident. The district court did not abuse its discretion in denying the defendants' motion to dismiss the indictment. The preindictment delay was not unduly prejudicial.

The defendants further argue that prosecution of Counts 2 to 5, which relate to sex trafficking offenses the defendants were charged with committing in 2000 and 2001, violated both the Jencks Act, 18 U.S.C. § 3500, and *California v. Trombetta*, 467 U.S. 479, 485 (1984), given the loss of the evidence contained in the videotaped statements taken at the time. But the federal government was never in possession of the videotapes, so the routine destruction of those tapes by local officials did not violate the Jencks Act. *See* 18 U.S.C. § 3500(b); *United States v. Higginbotham*, 539 F.2d 17, 21 (9th Cir. 1976). A fortiori, because there is no indication in the record that the federal government acted in bad faith, there is no due process violation. *See Trombetta*, 467 U.S. at 488. The district court therefore correctly denied the motion to dismiss the indictment.

The district court also correctly denied the motion to dismiss Counts 2 to 5 as untimely under the statute of limitations in effect before the 2003 and 2006 amendments extending the statute under which the defendants were charged. Because Congress evinced a clear intent to extend the statute of limitations for these types of crimes in its amendments, and because there is no *ex post facto* problem here, the prosecution was timely. *United States v. Leo Sure Chief*, 438 F.3d 920, 924 (9th Cir. 2006).

Brown argues that the district court erred in denying his motion to dismiss Count 2 because he previously pleaded guilty to the same conduct in state court. A single act that violates the laws of two separate sovereigns, however, can be two separate crimes, and separate prosecutions by each sovereign do not violate the Double Jeopardy Clause. *See United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002). The district court correctly denied the motion.

Banks argues that the district court should have suppressed evidence obtained as a result of a 2001 traffic stop because it was obtained in violation of his Fourth Amendment rights. When the investigating officers pulled him over, Banks was driving without a license, an offense under California law. The officers therefore had probable cause to detain him. *Edgerly v. City and County of San Francisco*, 599 F.3d 946, 956 (9th Cir. 2010). And because after a driver is

detained, police officers may impound vehicles that "jeopardize public safety and the efficient movement of vehicular traffic," *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005), the 30-minute seizure of Banks that occurred while the police officers figured out what to do with his vehicle was not unreasonable. The district court properly denied Banks's motion.

Relying on *Scales v. United States*, 367 U.S. 203 (1961), the defendants assert that 18 U.S.C. § 1962(d), as interpreted by the Supreme Court in *Salinas v. United States*, 522 U.S. 52 (1997), is unconstitutionally overbroad, because it punishes membership in a RICO enterprise without proof of knowledge or specific intent. But *Salinas* itself explained that a RICO enterprise charge requires proof that a RICO conspirator "knew about and agreed to facilitate the scheme." 552 U.S. at 66. RICO association-in-fact charges do not raise the due process concerns that the defendants identify.

Nor did the district court err in instructing the jury on the RICO charge. The jury instructions were adequate as to the need to prove the defendants' participation.

Banks has not identified an error in the admission of the spreadsheet summarizing his text messages. The spreadsheet was properly admitted under Federal Rule of Evidence 1006, because it summarized thousands of Banks's text

messages. The district court also properly found that the text messages were not hearsay under Federal Rule of Evidence 801(d)(2)(e) because the text messages admitted were between Banks and other RICO co-conspirators during the charged conspiracy.

Brown argues it was improper to admit the tax returns under Federal Rule of Evidence 404(b). The trial record contains no evidence the returns were fraudulent, and even if they were, there was no prejudice given that Brown's position is that he filed no returns. There is no question he avoided paying taxes.

The defendants argue that expert testimony about pimping and gang activity was improper under Federal Rule of Evidence 702. "A district court's rulings on the admissibility of expert testimony are reviewed for . . . abuse of discretion," and will be reversed only if they are "manifestly erroneous." *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000). Because the details of pimping are not common knowledge, it was not an abuse of discretion to admit the expert testimony about pimping and prostitution. *See United States v. Taylor*, 239 F.3d 994, 998 (9th Cir. 2001). Nor did the testimony of case agent Detective Johnson contain improper opinion testimony under Rule 701; he gave lay opinions rationally based on his personal knowledge of the case. *United States v. Gadson*, 763 F.3d 1189, 1209–1210 (9th Cir. 2014). And gang expert Detective Resch,

who based his testimony on experience similar to that which we have previously approved as a basis for gang expertise, *see United States v. Hankey*, 203 F.3d 1160, 1168-70 (9th Cir. 2000), did not testify in a dual capacity. His use of such prefatory statements as "in my opinion" or "as far as I could tell" do not indicate otherwise, and his identifications of gang members relied at least in part on his specialized knowledge and on the type of evidence on which such experts typically rely. *See id.* at 1169–70.

Banks also argues that the expert testimony about pimping and prostitution from Detective Drilling was impermissible character evidence admitted in violation of Federal Rule of Evidence 404(a) and unduly prejudicial in violation of Federal Rule of Evidence 403. Because Banks did not object to this testimony on Rule 404 grounds at trial, we review that issue for plain error. *United States v. Rizk*, 660 F.3d 1125, 1132 (9th Cir. 2011).

Experts may offer testimony about general behavioral characteristics of a class of victims to help a jury understand the charged offense. *See United States v. Hadley*, 918 F.2d 848, 852–853 (9th Cir. 1990). It was not plain error for the district court to allow this testimony about pimping and prostitution. The expert testimony here was not unduly prejudicial because we have held that testimony about "the relationships between pimps and prostitutes" helps jurors in assessing

witness credibility. *United States v. Brooks*, 610 F.3d 1186, 1195–96 (9th Cir. 2010). There was no abuse of discretion in admitting this testimony under Rule 403.

The defendants argue that the testimony of Yasenia Armentero was perjured because of prior inconsistent statements. Brown used many of the statements for impeachment purposes; there is no basis for us to conclude Armentero's testimony was perjured. *See Audett v. United States*, 265 F.2d 837, 847 (9th Cir. 1959). The defendants also contend that their Sixth Amendment rights were violated when Armentero refused to answer all of their questions. The witness eventually provided answers to all the questions. There was no error.

The defendants further argue that the district court's admission of testimony from minor victim witness Ariane U. violated due process because of substantial government interference and that the district court improperly limited cross-examination of this witness. "Whether substantial government interference occurred is a factual determination . . . that we review for clear error." *United States v. Vavages*, 151 F.3d 1185, 1188 (9th Cir. 1998). Warning the victim of the consequences of perjury, which is all the district court found occurred here, "does not unduly pressure the witness's choice to testify or violate the defendant's right to due process." *Williams v. Woodford*, 384 F.3d 567, 603 (9th Cir. 2004). The

district court did not err in making that determination, and there was no due process violation in admitting this testimony. Nor was there an abuse of discretion in limiting cross-examination on account of Ariane U.'s privilege to attorney-client communications.

Minor victim Kara M.'s 2001 adopted statement was admissible as a past recollection recorded. Because she had previously signed the document and affirmed its accuracy in her limited testimony, it was not an abuse of discretion for the district court to find that it constituted an adopted statement. *See United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002). Nor did admitting that statement violate the Confrontation Clause, because Rule 803(5) does not require further cross-examination of a witness once a statement is properly admitted as a past recollection recorded. *See United States v. Marshall*, 532 F.2d 1279, 1285–86 (9th Cir. 1976). Banks had a full opportunity to cross-examine Kara M. on her limited recollections about the accuracy of the statement.

Brown charges prosecutorial misconduct on several grounds, but does not identify any resulting prejudice by or indeed any error on the part of the district court.

Cumulative error does not warrant reversal; the defendants have not demonstrated that the district court committed any prejudicial error.

AFFIRMED.

APPENDIX B

Ninth Circuit Denial of Petition for Rehearing April 7, 2020

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TONY BROWN, AKA Lil' Play Doh, Defendant-Appellant.	No. 16-50495 D.C. No. 3:13-cr-04510-JAH-10 Southern District of California, San Diego ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT BANKS III, AKA Pimpsy, Defendant-Appellant.	No. 17-50103 D.C. No. 3:13-cr-04510-JAH-3 Southern District of California, San Diego

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and ROSENTHAL,* District Judge.

The Defendant-Appellant's Motion to File an Oversized Petition for Rehearing is **GRANTED.**

* The Honorable Lee H. Rosenthal, United States Chief District Judge for the Southern District of Texas, sitting by designation.

The panel has voted to deny the petition for panel rehearing. Judge Friedland has voted to deny the petition for rehearing en banc, and Judges Schroeder and Rosenthal have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc are **DENIED.**