NO._____

In The
Supreme Court of the United States

PEDRO GUTIERREZ,
a/k/a Magoo, a/k/a Light, a/k/a Inferno,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jorgelina E. Araneda
ARANEDA LAW FIRM
Suite 200
5400 Glenwood Avenue
Raleigh, NC 27612
919-788-9225
jea@aranedalaw.com
Counsel for Petitioner
Pedro Gutierrez

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

QUESTIONS PRESENTED FOR REVIEW

I. Whether a RICO "Gang" Case Certified as Complex Should Require the Use of a Special Verdict Form Rather Than a General Verdict Form.

II. Whether Gutierrez's Fifth Amendment Rights in a Criminal Case Were Violated When Gutierrez's Motion for a Judgment of Acquittal Was Denied When There Was Not Substantial Evidence to Support Such a Ruling.

DIRECTLY RELATED CASES

United States v. James Baxton, No. 18-4665 (4th Cir. June 26, 2020)

United States v. Cynthia Gilmore, No. 18-4855 (4th Cir. June 26, 2020)

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

ORDERS BELOW

The decision appealed from is located at the CM/ECF Docket of the Fourth Circuit Case No. 18-4656 against Petitioner Pedro Gutierrez (hereafter "Gutierrez"). App. A1. An order denied the petition for rehearing and rehearing en banc of Petitioner Gutierrez on July 24, 2020. App. A46.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is filed after the July 20, 2020 order denying the petition for rehearing and rehearing en banc of Petitioner Gutierrez. App. A46. The rehearing and rehearing en banc petition was based on the June 26, 2020, judgment of the Fourth Circuit Court of Appeals, affirming the district court's judgment in Petitioner Gutierrez's conviction from the United States District Court for the Western District of North Carolina for violation of 18 U.S.C. § 1962(c). App. A1, A39. Accordingly, this Court has jurisdiction over this petition for writ of certiorari matter pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

Messrs. Pedro Gutierrez and James Baxton and Mrs. Cynthia Gilmore were charged with conspiracy to violate 18 U.S.C. § 1962(c), which prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which

affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Conspiracy being subpart (d) of this statute.

On May 16, 2017, a Charlotte, North Carolina, grand jury indicted eighty-three people with sixty-nine offenses, even though Mr. Gutierrez was only named in count one, the conspiracy count. The United Blood Nation (UBN) is an East Coast off-shoot of the California-based criminal street gang commonly known as the "Bloods." Mr. Gutierrez has been accused of being a UBN member and its highest-ranking leader, Chairman of the UBN Council, in addition to holding the rank of "Godfather" of the Nine Trey Gangster (NTG) set, one of ten groups ("Hoods" or "sets") within the UBN.

On October 18, 2017, the government filed a motion to have the case designated as complex. App. A48. On February 15, 2018, the motion was granted.

On March 13, 2018, the Charlotte grand jury returned a superseding indictment, which did not alter the charge against Messrs. Gutierrez and Baxton and Mrs. Gilmore. Pedro Gutierrez, a/k/a Magoo, a/k/a Light, a/k/a Inferno, James Baxton, a/k/a Grown, a/k/a Frank White, Cynthia Gilmore, a/k/a Lady Bynt, a/k/a Cynthia Young, were named in the seventy-two count First Superseding Bill of Indictment along with the other co-defendants. Mr. Gutierrez was charged with Conspiracy to Participate in Racketeering Activity (RICO) in violation of 18 USC § 1962(d) as a member of the gang known as "United Blood Nation." The indictment

contained a Notice of Forfeiture and Finding of Probable Cause pursuant to 18 USC §§ 924, 982, and 1963, 21 USC § 853, and 28 USC § 2461(c).

The government claims that Mr. Gutierrez was involved with the UBN by:

(a) participating in UBN gang meetings from July 2011 until October 2016, while he was an inmate within the New York Department of Corrections;

(b) participating in the collection of UBN gang dues from April 2010 until January 2017, while he was an inmate within the New York Department of Corrections;

(c) promoting other gang members within the UBN ranks, while some gang members were selling drugs to generate money for UBN, when he was an inmate within the New York Department of Corrections; and

(d) participated in racketeering activities in furtherance of the UBN enterprise, including conspiracy to commit murder and drug trafficking from July 2011 until June 2017, while he was an inmate within the New York Department of Corrections.

At trial the government presented forty-one witnesses. The essence of the case was that UBN is comprised of people who make a pledge to uphold a set of rules and to be a member of the UBN one must pay $31 in monthly dues to the UBN leadership. The $31 per month dues are financed by criminal activity of its members that the government alleges is promoted by UBN. The government believes the UBN to be a violent criminal enterprise associated in fact through a pattern of racketeering activity.

A jury found Mr. Gutierrez and his two co-defendants guilty of the RICO charge on May 17, 2018, after a two-week trial. On the same date, the jury also returned a Special Verdict for forfeiture of approximately $6,767.03 in funds seized in May 2017 from an inmate account of Mr. Gutierrez at the New York Department of Corrections.

The Presentence Report (PSR) for Mr. Gutierrez calculated the offense level to be 39. It made a multiple count adjustment by looking at four groups of actions within Count One and assigning level 39 to the Conspiracy or Solicitation to Commit Murder of Pretty Tony gang members. Four points were added due to the multiple counts involving four units and determining that the total offense level was 43. Mr. Gutierrez's criminal history score was calculated to be six with a two level enhancement for having committed the instant offense while under a sentence for a New York murder, Depraved Indifference. His total criminal history score was 8 for a criminal history category of IV.

The statutory sentence is a maximum term of imprisonment of 20 years, pursuant to 18 USC § 1962(d) and 18 USC § 1963(a). The Guideline range was calculated to be life but because the statutorily authorized maximum sentence of 20 years is less than the minimum of the applicable guideline range, the guideline term of imprisonment was calculated to be 240 months.

Mr. Gutierrez was sentenced on September 4, 2018, to 240 months of imprisonment for Count One, to run consecutively with any State or Federal Sentence imposed, in addition to 3 years of supervised release, $100 assessment.

Judgment was issued for same on September 6, 2019. App. A39. On September 7, 2018, the court issued an Order granting the government's Motion for Forfeiture of Property.

Mr. Gutierrez filed a timely appeal on September 12, 2018. The Fourth Circuit Court of Appeals filed a published opinion June 26, 2020, after oral argument was canceled due to the COVID-19 pandemic, affirming the district court's sentence. App. A1.

Mr. Gutierrez filed a petition for rehearing and rehearing en banc on July 6, 2020, which was denied on July 24, 2020. App. A46.

ARGUMENT ONE

I. Whether a RICO "Gang" Case Certified as Complex Should Require the Use of a Special Verdict Form Rather Than a General Verdict Form.

To convict for RICO conspiracy under § 1962(d), it is necessary and also sufficient that the jury unanimously find that a defendant has agreed to the commission of at least two predicate racketeering acts; no finding as to overt acts is required. *See United States v. Cornell*, 780 F.3d 616, 625 (4th Cir.), *cert. denied*, 136 S. Ct. 127 (2015).

The use of special verdict forms for RICO criminal cases is common-place and the First Circuit has explained its use:

> The special verdict form allows juries to specifically identify the predicates for the general verdict. In *United States v. Torres Lopez,* 851 F.2d 520 (1st Cir.1988), we reversed a *substantive* RICO conviction where the jury's responses to interrogatories on a special verdict form

> properly related to the substantive conviction revealed that the government proved only time-barred predicates. The defendants in that case argued that as indicated by the special verdict, the jury found them guilty of only two predicates. When both of those predicates were shown to be outside the statute of limitations, we overturned the substantive RICO conviction. Other circuits have employed the special verdict form similarly. *See United States v. Edwards,* 303 F.3d 606 (5th Cir. 2002) (court used special verdict to uphold RICO conviction as being based on two valid predicates); *United States v. Kramer,* 73 F.3d 1067 (11th Cir. 1996) (money laundering conviction cannot stand where special verdict established defendant involvement in only foreign transactions).

United States v. Cianci, 378 F.3d 71, 91 (1st Cir. 2004).

Although special verdicts are generally disfavored in criminal prosecutions, their use has been endorsed in RICO cases. In *United States v. Console*, 13 F.3d 641, 663-65 (3d Cir. 1993), it was held that the district court did not abuse its discretion in asking the jury to return special verdicts as to some predicate acts but not others. The Third Circuit in *United States v. Pungitore*, 910 F.2d 1084, 1136 (3d Cir. 1990), again approved special verdicts. The Second Circuit in *United States v. Ruggiero*, 726 F.2d 913, 922-23 (2d Cir. 1983), in dictum, stressed to other courts the importance of using special verdicts to specify the racketeering acts found by the jury to avoid unnecessary reversals where some acts were found invalid.

There is great benefit for the use of special verdicts in RICO cases. The viability of a RICO conviction on appeal can depend on being able to determine which specific separate predicate acts support the jury's conviction on the RICO charge. If one or more of the convictions on the predicate offense are reversed on appeal, the RICO conviction may not succeed if the appellate court cannot

determine that each defendant's substantive RICO conviction is supported by at least two valid predicate offenses. *See, e.g., United States v. Bodi*, 568 F.3d 24, 31 (1st Cir. 2009), affirming a RICO conviction although the defendant's drug conviction was vacated because the special verdict form showed the jury found that the defendant was also guilty of three acts of embezzlement, which were sufficient predicate acts. As noted in *Cianci*, "[o]rdinarily, when a jury returns a general verdict of guilty on a *substantive* RICO count and one of the predicate acts is later found to be legally insufficient by a reviewing court, the conviction must be overturned where it is impossible to determine whether two legally sufficient predicate acts support a RICO conviction." *United States v. Cianci,* 378 F.3d at 91-92. The Second Circuit in *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), reversed a RICO conviction even though special verdicts had clearly established the defendant's commission of two mail fraud predicates. The jury, if it had heard the evidence that was improperly excluded, might have concluded that the mail fraud acts were not committed as part of a RICO pattern with a nexus to the affairs of a RICO enterprise. *Id.* at 692-93.

In *United States v. Ruggiero,* 726 F.2d 913, 922-23 (2d Cir. 1984), the court reversed a RICO conspiracy conviction after striking one of the eight acts of racketeering. The court noted that the use of a special verdict would have avoided this result. *See also United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988), where a RICO conviction was vacated because the jury might have relied on invalid mail fraud counts. In *United States v. Mandel*, 672 F. Supp. 864, 877 (D. Md. 1987),

aff'd, 862 F.2d 1067 (4th Cir. 1988), RICO convictions were vacated where in the absence of special verdicts, the court could not determine "with a high degree of probability" whether the jury relied on valid or invalid mail fraud predicates.

The court abused its discretion in not permitting the use of a special verdict form in the Gutierrez case. Almost five months before the superseding indictment was obtained, the government filed a motion to designate this case as complex under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A) and (B)(ii). App. A48. One of the several factors for the motion was due to the "nature of the prosecution, including the volume and complexity of evidence." App. at A51. It argued:

> The evidence in this case, including wiretap and consensual recordings as well as social media is complex and there is a lot of it, including:[footnote omitted]
>
> - 4,400 pertinent Title III wiretap audio recordings, totaling approximately 245 hrs;
> - 16,000 pertinent SMS messages;
> - 14 terabytes of pole camera data;
> - 67 gigabytes of Facebook data;
> - 336 gigabytes of Elsur evidence, including Hawk videos;
> - 771 gigabytes of cellphone data; and
> - 252 gigabytes or 139,000 pages of discovery documents.
>
> Moreover, as trials are prepared for particular defendants, it is expected that discovery will inevitably grow.

App. at A52.

The jury heard from forty-one government witnesses and closing arguments over a period of nine days. At the end of the trial a discussion commenced regarding jury instructions and the type of jury verdict form to be used. It was requested by defense counsel that "the jury find the racketeering act on the verdict form." The government argued against the use of a special verdict form because it was not required by law. The court agreed with the government and stated that using its discretion he would use only a general verdict form because he believed that a special verdict form would be too confusing for the jury and he would instruct the jurors that their decision had to be unanimous regarding the types of racketeering activity that the defendants agreed would be committed during the course of the conspiracy.

The court erred in its assessment that a special verdict form would be too confusing for the jury. In *United States v. Cornell*, a verdict form was used that specified an option for "acts" – while listing specific criminal offenses – which the jury could choose from. On charging the jury on the RICO element of at least two racketeering acts,

> [T]he district court instructed that the "verdict must be unanimous as to which type of racketeering acts you have found by your unanimous verdict were committed or intended to be committed by members of the racketeering conspiracy that the defendant has joined." J.A. 4372. The verdict forms (reproduced below) mirrored this instruction, listing multiple types of crimes that satisfy the definition of racketeering acts and asking the jury to decide whether some member of the conspiracy had committed or intended to commit no act, a single act, or multiple acts of each type:
>
> IMAGE

United States v. Cornell, 780 F.3d at 623. Nothing like that was presented to the jury in this case.

Without a layout of the verdict form like the one used in *Cornell*, the jury was not given any guidance on how to determine in a unanimous manner as which specific racketeering acts were committed within the conspiracy or how to keep track of them. The jury trial in this case was long and complicated, lasting at least two weeks. It was also boring to some of the jurors as juror number 2 even fell asleep.

In the end, the failure to use a special verdict form prejudiced the defendant at sentencing. At the sentencing of co-defendant of Mr. Baxton, held at the same time as the sentencing of Mr. Gutierrez, his counsel was arguing about the foreseeability of the actions of co-conspirators because his client's PSR had calculated an enhancement for fraud committed by a UBN member in Florida. The following colloquy took place,

> THE COURT: When you're talking about someone at the top of the conspiracy, there's a lot more knowledge by that person, and there's a lot more that's reasonably foreseeable. … But I agree with you if you're talking about a soldier or scrap, then you're right. But we're not talking about a soldier or a scrap. We're talking about someone who's really at the Godfather level.
>
> MR. JOSEPH: Your Honor, I'm talking about somebody that's been in jail for over 20 years, and these acts [of fraud] took place in Florida. How does that tie in at all?
>
> THE COURT: Because the evidence was pretty substantial that UBN was an East Coast operation that ran the whole East Coast.

> MR. JOSEPH: But – in terms again – again, this is – the other issue is in terms of these specific crimes – again, we don't know what the jury determined was actually committed, but we don't even know that the crime that this that Lattibeaudiere [in Florida] admitted to had anything to do with Nine Trey.

Without knowing which types of racketeering acts the jury was unanimous about, the defendants were prejudiced.

At the sentencing of Mr. Gutierrez, the PSR broke down the racketeering acts to conspiracy or solicitation to commit murder and drug trafficking. In arguing against defendants Rule 29 motion, the government claimed that Curtis Martino testified that "Defendant Gutierrez instructed him to meet with a fellow Nine Trey to get heroin to get to Mr. Gutierrez so he can sell." That was not true. The actual testimony of Mr. Curtis was as follows on redirect:

> Q. Do you have personal knowledge these two individuals [either Magoo, Frank White, Uno B] would have been surprised those in the gang committing crimes to make money for dues?
>
> A. Of course not. I mean, at one point, Mr. Gutierrez directed me to somebody that was a Nine Trey member to try to get heroin to bring into the prison for him … It was on a visit that - - a couple times we had brung him a marijuana. That's when the lady, that lady - - one of the home girls was a female that's Blood. She came up there with me. She would bring marijuana for him, and he'd take it back for him and Mr. Baxton.
>
> And during one visit he offered - - he asked me to bring some heroin and he - - in New York State all - - you can get a pencil and paper. So all he has to do is write down whatever - - whatever he needs and give it to you, and you can walk right out of the prison with it. He gave me the guy name and number that was also a Nine Trey member and for us - - it was for us to contact him to bring him in some heroin."

There is nothing in the statement indicating that Mr. Gutierrez had asked for drugs to sell. The above description is not evidence of drug trafficking or a sale and, instead, describes a personal use request for drugs.

It also could not be based on fraud via the credit card scam operation from Charlotte. At the October 25, 2017, Status Conference, the government wanted to place defendant number 41, Barrington Lattibeaudiere, in Group 1A. The government's *Motion for Defendant Groupings for Trial* stated "It is axiomatic that the members of the conspiracy that conspired most directly with each other should be tried together, as they share the most evidence." Mr. Gutierrez was never placed in the same group as Barrington Lattibeaudiere. This means there was not shared evidence.

This issue was appealed and the Fourth Circuit opinion in this case discussed that there is a presumption against special verdicts in criminal cases and it is within a district court's discretion whether to use such a verdict form, citing *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008), in support. App. at A24. It held that the district court decision was consistent with precedent that "'for a RICO conspiracy charge the jury need only be unanimous as the types of racketeering acts that the defendants agreed to commit. …. [N]o instruction as to the commission of specific acts was required.' *United States v. Cornell*, 780 F.3d 616, 625 (4th Cir. 2015)." App. at A25. It held that the district court did not abuse its discretion by refusing to issue a special verdict from. *Id.*

The problem is Mr. Gutierrez, one of three convicted, does not know which of the many racketeering acts presented by the government were attributed to him specifically since the evidence did not show he engaged in all the acts presented by the government against his two co-defendants. The jury heard an overwhelming amount of evidence over a nine-day period of time. This was an extremely complicated case[1] and designated as complex. To not require the jury to think about the actions of each of the three defendants in its final decision, as would be presented in a special verdict sheet, is a grave injustice to Mr. Gutierrez and a violation of his due process rights. The district court abused its discretion in not permitting a special verdict.

ARGUMENT TWO

II. Whether Gutierrez's Fifth Amendment Rights in a Criminal Case Were Violated When Gutierrez's Motion for a Judgment of Acquittal Was Denied When There Was Not Substantial Evidence to Support Such a Ruling.

The appellate court held that the "Appellants fail to meet their heavy burden because their argument does not show a clear prosecutorial failure, but mere disagreement with the jury's findings." App. at A23.

Mr. Gutierrez and his two co-defendants were charged with violating 18 U.S.C. § 1962(d), by allegedly conspiring to violate § 1962(c). A violation of Section 1962(c) requires: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

---

[1] The case was selected for oral argument by the appellate court even before the government filed its brief.

The government must show that racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. *H.J., Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239 (1989). Racketeering predicates are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *Id.* at 240. "'It is this factor of *continuity plus relationship* which combines to produce a pattern.'" *Id.* at 239. "Thus, the threat of continuity is sufficiently established where predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 242-43.

To sustain a RICO conspiracy charge, the government must prove that defendants knowingly and intentionally agreed to conduct or participate in the affairs of enterprise, agreed that he/she or some or member of conspiracy would commit at least two racketeering acts, and the enterprise substantially affected interstate commerce. *United States v. Cornell*, 780 F.3d at 621, 623, 630. The government must prove that a defendant conspired to participate and conspired that a member of the enterprise "[P]erform at least two racketeering acts constituting a "pattern of racketeering activity."' *United States v. Pinson*, 860 F.3d 152, 161 (4th Cir. 2017).

In *United States v. Pinson* there were four business ventures which the government claimed formed part of a RICO conspiracy. In its sufficiency of evidence evaluation, the court first examined the RICO conspiracy. It determined

that the defendant and his associates did not conspire to commit the same crimes. "Pinson is the only member common to all four ventures. As a result, we cannot say the government proved a single conspiracy in which each conspirator shared ' same criminal objective.' … [conspirators] must at least have a 'single-mindedness to achieve a particular goal.'" *United States v. Pinson*, 860 F.3d at 162.

The government failed to show that any of the defendants and associates conspired to form a RICO enterprise as an association-in-fact enterprise and conspired to engage in a pattern of racketeering activity. The evidence failed to show beyond a reasonable doubt that UBN existed ***for criminal purposes*** through a long-term association. This is especially clear with the element of relatedness. Many of the members are criminals and they also happen to be UBN members. To say that their criminal acts are related to "affairs of the enterprise" is unproven when the organization does not require its members to commit criminal acts of murder, robbery, identify theft, fraud, or narcotics trafficking. There are criminal acts UBN members have committed but not at the bequest nor on "behalf" of UBN.

An example is the "mansion guys" who were scamming from Charlotte, North Carolina. That group of individuals happened to be UBN members and they refused to share their criminal techniques with other members of UBN. That is direct evidence that the criminal acts did not have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are isolated events.

The government failed to produce sufficient evidence that any of the defendants agreed that UBN members, specifically NTG members would commit two racketeering acts necessary to establish a pattern of racketeering activity. It also failed to prove that there was a "nexus" to the enterprise and racketeering activity.

The defendants were charged with conspiracy in relation to the following predicate RICO acts: acts involving murder under North Carolina General Statute and New York Penal Law Sections; acts involving robbery under North Carolina General Statute; fraud in connection with identification documents, authentication features, and information chargeable under Title 18 U.S.C. § 1028(a)(7); wire fraud under Title 18 U.S.C. § 1343; bank fraud under Title 18 U.S.C. § 1344; obstruction of justice under Title 18 U.S.C. § 1503; tampering with witnesses under Title 18 U.S.C. § 1512(b)(1); interference with interstate commerce by robbery under Title 18 U.S.C. § 1951; conspiracy to possess with intent to distribute certain controlled substances under Title 21 U.S.C. § 846; possession with intent to distribute certain controlled substances under Title 21 U.S.C. § 841(a); and use of a communication facility in order to facilitate a controlled substance offense under Title 21 U.S.C. § 843(b). These specific predicate racketeering acts are addressed as follows.

The government made no effort to connect Mr. Gutierrez with any racketeering act of fraud.

The government did not argue that any racketeering acts of tampering or obstruction were attributable to Mr. Gutierrez.

As for drug dealing, the only argument by the government attributing this racketeering act to Mr. Gutierrez was through testimony by government witness Curtis Martino. Mr. Martino testified that he was currently in prison for racketeering and use of a firearm during a crime of violence and that those convictions were related to his membership in NTG. He testified that he was sentenced to Virginia Department of Corrections for conspiracy to commit larceny and even though he was NTG member, that crime had nothing to do with his NTG affiliation and was not NTG related.

On cross-examination Mr. Martino admitted that there is no requirement that NTG members commit crimes. The fact that Mr. Martino had contacted the government through his family and offered to testify at trial if "whatever steps needs to be taken to assure my financial assistance and immediate release" was also discussed. He admitted that he never spoke with Mr. Gutierrez "directly about drug dealing" on the streets.

Mr. Martino admitted that there is no requirement that NTG members commit crimes. Mr. Martino admitted that he had never ordered anyone to commit a robbery as an NTG member and that he only heard about it. He admitted that he never spoke with Mr. Gutierrez "directly about drug dealing or robbery" on the streets. He stated that he had communicated by letter with Mr. Gutierrez and they wrote about "[n]othing really important." He admitted that he never met him. He also admitted that he had never been involved in any robberies, had never been present at any robbery, and that he never carried a firearm. He admitted that he

had been delayed in the past in sending in money and that no one ever harmed him because of it. He admitted that terms "Peter roll," "plate," "food" are loose terms and do not mean to hurt or kill anyone.

The government argued that racketeering acts of murder were attributable to Mr. Gutierrez, specifically, hits on Pretty Tony, recordings of him discussing the hit on Jarrod Brewer a/k/a Hotz, and recordings and jail mail regarding putting a hit on Daniel Romain a/k/a Polo.

Government witness Mr. Robinson testified that he was convicted for a different conspiracy and discussed a meeting with Pretty Tony. He admitted that he had never met Magoo. He admitted that he commits crimes whether he is a gang member or not. He admitted that many UBN members hold normal jobs. He admitted that no one in UBN is required to commit a crime to pay dues. He admitted that he committed crimes to support himself and pay his bills. He admitted that other NTG members also committed crimes to support themselves.

Government witness Mr. Burrell testified that he never killed anyone and that no one in his line had ever been killed. He admitted that he sold drugs to support himself and that was motivation to sell drugs – not to pay NTG dues. He admitted that NTG dues of $31 was not a large amount of money to pay for dues. He admitted that some NTG members had legitimate jobs and that there was not any requirement that NTG members commit crimes to pay dues.

On December 18, 2015, cooperating informant and government witness Ms. Kellie Starr, a former NTG member, had a meeting with Mr. Gutierrez at a New

York state prison wearing a wire. She testified about a portion of the conversation with Mr. Gutierrez and explained that Mr. Gutierrez had a girlfriend called Baby Red and that she was killed by a man with whom she was involved with at the time. Mr. Gutierrez became very upset talking about Baby Red's murder and said "if I got to kill him, fuck it." He also said "[h]e come up here, I'm fucking with him. That's what up." He also said "I'm saying if he cross my path, he cross my path." This colloquy does not show that a murder was ordered. On cross-examination it came out that this conversation took place about a week and one half after Baby Red had been killed. It also came out that during that conversation they were laughing a lot. There was no direct evidence at trial that Mr. Gutierrez ordered a hit.

On March 21, 2017, Ms. Starr met again with Mr. Gutierrez wearing a wire. There was a conversation about a member called Hotz. While Hotz was at the North Carolina Clinton Correctional facility, he was supposedly stabbed by some Blood members because he was causing trouble for Mr. Gutierrez. The recording indicates that Mr. Gutierrez himself is telling Ms. Starr that he is going to do something against Hotz but there was no direct testimony from anyone that he/she heard Mr. Gutierrez order any retribution against Hotz.

The government alleged in the indictment and argued during trial that the manner and means of this conspiracy was that defendants and or members and associates of UBN agreed to and engaged in acts of violence, narcotics distribution and fraud. The government also alleged that UBN's primary source of income came from illegal activity. However, the evidence in this case did not support that

contention.

Corporal Edwin Santana testified as a government gang expert in this case and acknowledged that not only are there members of NTG without a criminal record but there are members with legitimate jobs who do not commit crimes. Committing crimes and having a criminal record are not required as a member of Nine Trey. In fact, all the cooperating witnesses corroborated this. Furthermore, they all testified that they committed crimes to support themselves, not for UBN.

Government witness Quincy Burell, a former high with NTG who was cooperating in this case, testified that he sold drugs to support himself, not for NTG. He started selling drugs in sixth grade long before he became a member of NTG. Selling drugs was how he paid his bills, bought clothes and supported his family. His motivation for selling drugs was not NTG, it was money for himself.

Government witness Maurice Robinson was a former low with NTG who cooperated and testified in this case. He admitted that members were not required to commit crimes and that some members had normal jobs. He also admitted, like Mr. Burell, that he committed crimes to support himself. He was committing crimes before he became a member of NTG and continued to commit crimes after he was no longer a member.

Government witness Kellie Starr testified that some NTG members had jobs and some did not. They were not required to commit crimes. As with Mr. Robinson and Mr. Burrell, she did it to support herself and her five kids.

Curtis Martino, a former high with NTG, was cooperating and testified that

members have legal jobs and do not commit crimes and they are not required to. He also committed crimes to support himself, to pay bills and take care of his family.

Government witness Myquan Nelson, a former high with NTG, testified that he mostly worked legitimate jobs as a member of NTG but did sell drugs for a brief period and that members weren't required to commit crimes.

Based on the testimony of cooperating witnesses, there is no nexus between the illegal activities of some members and the enterprise. The government argued that money from illegal activity is collected for dues but paying dues is not illegal. It is also clear that dues include money from legal jobs and legal activity. There is no agreement that all members must be involved in criminal activity. Members involved in criminal activity were involved in criminal activity before they became members of UBN or Nine Trey. Committing crimes was the source of their income. It had nothing to do with membership in UBN or NTG.

Contrary to the appellate court's assertion, there was prosecutorial failure to show all the essential elements of the crime. The government failed to prove beyond a reasonable doubt the second element of a RICO conspiracy regarding nexus between enterprise and racketeering activity.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant his petition for writ of certiorari to the Fourth Circuit Court of Appeals, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 10th day of November 2020.

Jorgelina E. Araneda
ARANEDA LAW FIRM
Suite 200
5400 Glenwood Avenue
Raleigh, NC 27612
919-788-9225
jea@aranedalaw.com
Counsel for Petitioner
Pedro Gutierrez