

No. ____-____

IN THE
Supreme Court of the United States

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DOMENICO ANASTASIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit*

PETITION FOR A WRIT OF CERTIORARI

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November 16, 2020

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred by affirming the judgment of conviction and sentence pronounced by the United States District Court for the Southern District of New York on Count One of the Superseding Indictment charging a RICO Conspiracy because it failed to properly apply the standard set by this Court to determine whether there was sufficient evidence to show that a defendant was guilty of RICO Conspiracy.

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The Judgment and Opinion of the United States Court of Appeals for the Second Circuit in *United States v. Jonathan Delgado, Matthew Smith, Ismael Lopez, Domenico Anastasio*, Docket Nos. 15-1453-cr (L), 18-328-cr (Con), 18-369-cr (Con), 18-421-cr (Con), as amended on September 1, 2020, which is published at 972 F.3d 63 (2d Cir. 2020), appears as Appendix A of this petition (A¹-29).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1) and predicated upon the entry of a decision by a United States court of appeals in conflict with the decision of this Court, and Rules 10(a) and 13 of this Court's rules.

The Opinion and Order of the Court of Appeals was entered on September 1, 2020. This petition was filed within ninety days of that date. U.S. Sup. Ct. Rule 13(1) and (3).

¹“A” followed by a number refers to a page in the Appendix to this Petition

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section § 1959

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine [of] under this title, or both.

(b) As used in this section—

(1) “racketeering activity” has the meaning set forth in section 1961 of this title; and

(2) “enterprise” includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

Title 18, United States Code, Section § 1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for 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.

(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.

Title 18, United States Code, Section § 1963(a)

Whoever violates any provision of section 1962 of this chapter [shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both ...

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner Domenico Anastasio respectfully requests that a writ of certiorari issue to review the Order and Judgment dated September 1, 2020 (Appendix A), entered by the United States Court of Appeals for the Second Circuit which affirmed the judgment of conviction entered against him on February 1, 2018, in the United States District Court for the Western District of New York.

This petition for certiorari asks the Court to review the decision of the Second Circuit which improperly expands the elements to RICO conspiracy to criminalize what is at most mere presence and knowledge of the gang's plan but shows no agreement to bring about its ends.

The instant petition results from the judgment entered against Petitioner Anastasio following a jury trial which convicted him of one count of the RICO conspiracy in violation of 18 U.S.C. §§ 1962(d) and 1963(a) and two counts of VICAR murder in violation of 18 U.S.C. §§ 1959(a)(1) and 2. The district court sentenced Petitioner Anastasio to Life on the RICO conspiracy and mandatory Life sentences on the VICAR murders. The Second Circuit reversed the VICAR convictions but affirmed the RICO conspiracy conviction and remanded the case for resentencing.

Petitioner Anastasio's conviction resulted from a five week joint jury trial. He and his co-defendants at trial, Jonathan Delgado, Matthew Smith and Ismael Lopez, were alleged to be members of a RICO enterprise referred to as the "10th Street Gang" in Buffalo, New York.

The indictment charged Petitioner Anastasio with One Count of the RICO conspiracy in violation of 18 U.S.C. §§ 1962(d) and 1963(a) and two VICAR murder offenses in violation of 18 U.S.C. §§ 1959(a)(1) and 2 (A39-50, A58-60). The only overt acts in the RICO conspiracy naming Petitioner Anastasio related to VICAR murder charges which the Second Circuit found were not proven (A43-44). The indictment did NOT charge

Petitioner Anastasio with the substantive RICO violation (A50-58) or with participating in the narcotics conspiracy (A60-61).

The trial record included the testimony from more than 50 witnesses, including ten members of the 10th Street Gang who had earlier pleaded guilty and cooperated with the government (the “Cooperators”).²

Viewing the record, as we must, most favorably to the government, the record showed that Petitioner Anastasio, on occasion, was aware of, but did not participate in, the illegal activities of the 10th Street Gang.

The trial evidence against Petitioner Anastasio focused on his presence at various locations on April 16 and 17, 2006. Prior to that time, Petitioner Anastasio had socialized with members of 10th Street Gang. The gang, which was comprised of adolescents and young adults who lived in the vicinity of 10th Street in the West Side of Buffalo, New York, lacked any formal structure, membership rules or leadership. The members engaged in various criminal activities including dealing in

² The ten Cooperators were: (1) Sam Thurmond, (2) Michael Corchado-Jamieson, (3) Derrick Yancey, (4) Christopher Pabon, (5) Jimmy Sessions, (6) Jimmarlin Sessions, (7) Jairo Hernandez, (8) Kyle Eagan, (9) Douglas Harville, and (10) Nicholas Luciano.

controlled substances including heroin, cocaine, crack cocaine, marijuana, and ecstasy from street corners, houses, and a park located within its territory. The members of the gang protected the gang's territory of the gang from encroachment by rival gangs (A85). The 7th Street Gang, which operated in nearby neighborhoods, was one of the 10th Street Gang's main rivals (A65).

The trial evidence concerning Petitioner Anastasio focused on April 16 and 17, 2006, when tensions between the gangs culminated in the shooting of the brother of a member of the 10th Street Gang and the shooting murders of two individuals near a residence associated with the 7th Street Gang.

On April 16, 2006, while Petitioner Anastasio, who was then 18, was hanging out near a convenience store preparing to go on a picnic in the park, several armed 7th Street members drove by and opened fire on the group, striking co-defendant Delgado's younger brother, Robert Sanabria, in the stomach. (A75-78, A82). While an ambulance transported Mr. Sanabria to a near-by hospital, a crowd, including Petitioner Anastasio, member of the 7th Street Gang and others discussed the shooting, Mr. Sanabria's condition and seeking revenge (A8-9, A86).

Although Petitioner Anastasio was identified as being in this group, there was no testimony that he engaged in any planning regarding ways to seek revenge.

While the group was in the park, members attacked a woman and a man whom some of the group suspected of being a member of the 7th Street Gang. The beating lasted about 90 seconds. The evidence showed that Petitioner Anastasio was present but not that he participated in it. Only one witness, Corchado, testified that Petitioner Anastasio was part of the group which “jumped” the victims. However, since Cooperator Corchado admitted that he could not see what happened, there is no evidence that Petitioner Anastasio participated in the beating (A79-80). Cooperators Thurmond and Harville, who participated in the beating or observed it, did not testify that Petitioner Anastasio was one of the assailants (A68, A86). As a result, there was no evidence to show that Petitioner Anastasio was more than present at the time of this assault.

Following this incident, the group went to a nearby apartment where Thurmond lived with his brother, James Foxworth. There, Delgado told those present (including Anastasio) that they needed to find guns to use to attack the 7th Street Gang (A81). Petitioner Anastasio did not

provide any guns. At most, the evidence showed that he attempted without success to buy back a shotgun which he had sold to a member of an allied gang, known as the Zolo Boys (A9-10).

When co-defendant Smith identified the location of suspected members of the 7th Street Gang, the people with guns drove to the location in two vehicles. Petitioner Anastasio was not present. At the location, gang members fired approximately 50 bullets, killing two innocent bystanders, and injuring four others (A10-11).

The only other specific evidence regarding Petitioner Anastasio's alleged role in the 10th Street Gang was his presence at a memorial service for James Foxworth in which he allegedly displayed a handsign associated with the 10th Street Gang (A67). However, displaying a 10th Street Gang handsign does not show that he was a member of a racketeering enterprise. This is like saying that every fan who purchases a jersey would be a member of the team. Self-identification with a group does not show that a person agreed with that group's illegal activity.

The Second Circuit ruled that Petitioner Anastasio was guilty of conspiracy because other gang members "knew he possessed firearms" (A8). However, none of the cooperating witnesses testified that Petitioner

Anastasio provided them with firearms to use in connection with any crimes.

Other evidence of Petitioner's alleged role in the conspiracy is even more tenuous. For example, while evidence showed that Petitioner Anastasio possessed firearms at several times, there was no evidence that he used them in any crimes or provided them to others for that purpose.

Cooperator Thurmond testified that Petitioner Anastasio had a .25 caliber handgun, but did not testify that Petitioner Anastasio "stashed" it in the park for use by gang members (A66). Similar testimony was provided by Cooperators Corchado and Nicholas Luciano (See A70-73, A87-88). Likewise, while Petitioner Anastasio owned a .20 gauge shotgun which he had brought to the park and later sold to one of the Zolo Boys, there was no evidence that he provided this or any other weapon to anyone else in gang activity.

The other roles that Petitioner Anastasio allegedly played in the gang was similarly amorphous. For example, there was no direct evidence of marijuana sales. The only evidence was Cooperator Sessions'

testimony that he purchased marijuana from Anastasio for his own use on occasion (A84).

Similarly, while Cooperator Corchado testified that Petitioner Anastasio acted as a lookout there was no any indication when or how that occurred. (A69).

The trial judge charged the jury that to find Petitioner Anastasio guilty of the RICO conspiracy, it had to find, *inter alia*, that he knowingly participated in the conspiracy with intent to accomplish the objectives or to assist other conspirators in accomplishing its objectives (A92). The jury was not required to make any specific findings regarding to Petitioner Anastasio other than those related to the VICAR murders (A94).

The jury returned a verdict against Petitioner Anastasio finding him guilty of the RICO Conspiracy and the two VICAR murders (A96, A97-98).

In denying, Petitioner Anastasio's Rule 29 motion, the trial judge cited involved the events at the apartment and his display of the gang signs years later (See A8).

On February 1, 2018, the district judge sentenced Petitioner Anastasio to life on the RICO conspiracy count and mandatory sentences of life without release on each of the VICAR counts (A99).

In *United States v. Delgado*, 972 F.3d 63 (2d Cir. 2020), the Second Circuit reversed the judgment against Petitioner Anastasio on the VICAR murder counts as well as the special findings relating to the murders but let stand his conviction on the RICO Conspiracy Count.

REASON FOR GRANTING THE PETITION

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE INVOLVES AN IMPORTANT MATTER, NAMELY WHETHER PROOF OF RICO CONSPIRACY REQUIRES EVIDENCE THAT THE DEFENDANT PARTICIPATED IN THE CONSPIRACY WITH INTENT TO ACCOMPLISH THE OBJECTIVES OR TO ASSIST OTHER CONSPIRATORS IN ACCOMPLISHING ITS OBJECTIVES, OR WHETHER MERE KNOWLEDGE OF THE PURPOSES OF THE CONSPIRACY IS SUFFICIENT

The standard which the Second Circuit applied to affirm Petitioner Anastasio's conviction for RICO conspiracy unduly expanded the standard set by this Court. Under the Second Circuit's formulation in this case, mere knowledge of the objects of a conspiracy would suffice. We respectfully submit that this case presents an important matter warranting the grant of certiorari. U.S. Sup. Ct. Rule 10.

The Court has held that to convict a defendant of a RICO conspiracy, the Government must prove beyond a reasonable doubt that the conspiracy existed and that the defendant knowingly and willfully participated in the agreement. *Smith v. United States*, 568 U.S. 106, 110 (2013).

Viewing the evidence as we must most favorably to the government, we concede that there was sufficient evidence to show that the conspiracy existed based on the testimony of the Cooperators, but not that Petitioner Anastasio was a member of it, that is, he agreed to participate in the criminal activity.

The Second Circuit reduced that element to mere knowledge. In this case, that court held that “The conspiracy provision of RICO, 18 U.S.C. § 1962(d), proscribes an agreement to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity.” *United States v. Delgado*, 972 F.3d at 79 citing *United States v. Arrington*, 941 F.3d 24, 36 (2d Cir. 2019) (emphasis added.)

Under that standard mere knowledge would suffice to prove membership in a conspiracy. The Second Circuit itself, in other cases, has held that to prove a RICO conspiracy, the evidence must show the

defendant's knowing engagement in the scheme with the intent that its overall goals be effectuated. See *United States v. Zemlyansky*, 908 F.3d 1, 11 (2d Cir. 2018) cited at *United States v. Delgado*, 972 F.3d at 81. However, in this case it applied a mere knowledge test.

In the instant case, there is insufficient evidence that Petitioner Anastasio participated in the RICO conspiracy. There was no direct evidence that Petitioner Anastasio sold marijuana as part of the RICO conspiracy. While Cooperator Sessions testified that he purchased marijuana for his own personal use from Petitioner on one occasion (A84), there was no evidence that such a sale was a part of the criminal enterprise. Notably, Cooperator Sessions said that the sale occurred at the apartment which Petitioner Anastasio shared with his family and not in the park or other gang territory (*Id.*). Likewise, while Cooperator Corchado testified that Petitioner Anastasio acted as a look out, he did not indicate when or how that occurred (A69). Corchado also claimed that Petitioner Anastasio “stashed” firearms at the park and at another location, i.e., an abandoned house on 10th Street, but there was no indication that he did so for protection of the gang during drug deals there (A70-74).

Finally, the Second Circuit also applied the knowledge standard to find that Petitioner Anastasio's actions at the Caroline Street apartment prior to and following the murders evinced his membership in the RICO conspiracy. The Court of Appeals stated that:

Although Anastasio's actions at the apartment where the murders were planned did not render him an accomplice to the murders, his conduct there certainly provides a reasonable basis for inferring that Anastasio knew about, and agreed to, "the general criminal objective" of the 10th Street Gang.

(A26 citing *Arrington*, 941 F.3d at 36-37). However, the Second Circuit found that Petitioner Anastasio did nothing to further the VICAR murders or contribute toward their success:

Although Anastasio was present while members of the 10th Street Gang discussed and formulated its scheme for revenge, nothing in the record suggests that Anastasio spoke during—much less contributed to—this planning process. Nor has the government offered evidence that Anastasio's mere presence at Thurmond's apartment, encouraged or otherwise influenced the Gang to commit the murders. Indeed, as far as we can tell from the record, Anastasio played no "role" in the execution of the retaliatory shooting "beyond that of a companion" to the shooters, and even that he did at a distance from the shooting ... He did not, for example, supply any of the firearms used during the shooting; provide any information on the location of the 7th Street Gang; serve as a look-out during the shooting; transport any of the shooters to or from 155 Pennsylvania Street; or, after the crime, help shield the shooters from police investigation.

(A21-22). While the Second Circuit held that his actions were not sufficient to prove that Petitioner Anastasio aided and abetted in the VICAR murders, it held that his mere knowledge of the plan was a sufficient basis from which the jury could infer that he was a member of the RICO conspiracy. In doing so, the Second Circuit improperly expanded the holdings of this Court that the evidence must show agreement.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, WE RESPECTFULLY URGE THIS COURT TO GRANT A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING PETITIONER'S CONVICTION

Dated: Garden City, New York
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