NO._____

In The
Supreme Court of the United States

JAMES BAXTON,
a/k/a Grown, a/k/a Frank White,

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

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QUESTIONS PRESENTED

I. Whether the Government produced sufficient evidence to prove beyond a reasonable doubt that the Petitioner's actions were part of a Rico Conspiracy.

II. Whether the District Court erred at the sentencing hearing in its interpretation of the sentencing guidelines which resulting in an unreasonable sentence of the Petitioner.

LIST OF PARTIES TO PROCEEDING

United States of America (Respondent)

James Frankie Baxton (Petitioner)

DIRECTLY RELATED CASES

United States v. Pedro Gutierrez, No. 18-4656 (4th Cir. June 26, 2020)

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

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PETITION FOR WRIT OF CERTIORARI
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in his case on June 26, 2020.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, for which review is sought, is *United States v. Pedro Gutierrez,* No. 18-4656 (L) (4th Cir., June 26, 2020) (per curium) (unpublished). The Fourth Circuit opinion is reproduced in the Appendix.

JURISDICTIONAL GROUNDS

Judgment was rendered in the United States Court of Appeals for the Fourth Circuit on June 26, 2020. The jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

STATUTORY 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

The Petitioner, James Frankie Baxton, along with 82 other co-defendants 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."

The government claims that Mr. Baxton was involved with the United Bloods Nation (hereinafter UBN) by:

> (a) being a high-ranking member of UBN, he held leadership position over UBN members from New York to North Carolina as well as other states on the East Coast. (JA 4966).
>
> (b) participating in UBN gang meetings in the New York Department of Corrections on September 13, 2014, May 21, 2015 and March 11, 2016 with Bianca Harrison. (JA 481, 485, 492).

(c) wrote letter to Barrington Lattibeaudiere dated August 17, 2010 discussing gang business. (JA 471).

(d) wrote letter on February 2, 2016 and March 11, 2016 to Pedro Gutierrez discussing gang business. (JA 490, 492).

(e) participating in the collection of UBN gang dues by receiving a total of $212 from Lattibeaudiere on different occasions from 2010 thru 2012 and receiving to total of $290 from David Watson on different occasions in 2010 and in 2015 in his prison commissary account. The government also alleges that gang dues were also paid to Baxton's girlfriend and UBN associate, Rosalyn Pettway, during the course of the conspiracy. (JA 471-73, 476-77, 4968).

(f) knowingly and intentionally agreed that he or other members of the UBN enterprise would commit at least two (2) racketeering acts including robbery and wire fraud, and personally participated in racketeering acts in furtherance of the UBN enterprise including narcotics trafficking, obstruction of justice, and wire fraud. (JA 4969).

The Petitioner entered pleas of not guilty and proceeded to a jury trial along with Co-defendants Cynthia Gilmore and Pedro Gutierrez. The essence of the case is 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 government alleges that the UBN promotes its members to engage in criminal activity in order to finance the UBN. The government believes the UBN to be a violent criminal enterprise associated in fact, through a pattern of racketeering activity.

During the trial, the government introduced testimony of several cooperating witnesses. One of the witnesses that testified against the Petitioner was Michael

Bennett, a member of Nine Trey Gangters (hereinafter NTG), who is a "set" under the UBN. (JA 3122). He was not associated with this case but previously pled guilty to an unrelated Hobbs Act Robbery and was hoping to get his sentence reduced pursuant to his testimony in this case. (JA 3135, 3142). He was in United States Penitentiary Atlanta (hereinafter USP Atlanta) from June 2017 to February 2018. He testified that the Petitioner arrived at USP Atlanta after him in July 2017 awaiting transfer to Charlotte in order to be served with the Federal Indictment in this case. Mr. Burnett testified that Petitioner was at USP Atlanta for a month and they shared a cell for approximately two (2) weeks. Mr. Burnett further testified that he wrote a letter to the FBI after the Petitioner was transferred to Charlotte informing them that he was aware of the 83-person indictment, had information on the Petitioner and was "ready willing and able to cooperate with the government." (JA 3134, 3136). The letter was dated June 22, 2017; even though, he said the Petitioner didn't arrive until July and the letter was written after he left. (JA 3137).

The government also introduced the testimony of Kellie Starr. Ms Starr was a former gang member in NTG and G Shine sets under the UBN. (JA 2653). She is from Cherryville, North Carolina. (JA 2649). She worked as a paid confidential human source for the FBI from March 2012 to May 2017. (JA 2665). At the direction of the FBI, Ms. Starr arranged a meeting with the Petitioner on October 5, 2015 in the New York Department of Corrections. (JA 2823). Ms. Starr was equipped with a recording device that recorded their conversation. (JA 2710). Prior

to that date, Ms. Starr had never communicated with the Petitioner. (JA 2823). At that time, the FBI wanted to know what the Petitioner's role with NTG was after the "Godfather," Garland Tyree AKA "S.I." was killed in 2015. (JA 2831). During trial, the government played about seven (7) excerpts from their recorded conversation that lasted approximately one (1) minute. Ms. Starr's visit with the Petitioner lasted at least four (4) hours. (JA 2840).

A jury found the Petitioner, Mr. Gutierrez and Ms. Gilmore guilty of the RICO conspiracy charge on May 17, 2018, after a two-(2) week trial. (JA 3683). The jury also returned a Special Verdict for forfeiture of approximately $9,268.15 in funds seized in May 2017 from an inmate account of the Petitioner at the New York Department of Corrections. (JA 3703).

The Presentence Report (hereinafter PSR) for the Petitioner held him responsible for drug amounts attributable to UBN member Montraya Atkinson. Mr. Atkinson was a high-ranking member of NTG under the UBN that resided in Wilson, North Carolina. He was arrested on May 18, 2017 pursuant to a federal warrant for RICO conspiracy and is amongst 83 co-defendants charged in this case. After his arrest, Mr. Atkinson was transported to the FBI office in Raleigh, North Carolina. (JA 3980). Mr. Atkinson gave a statement to special agents, Eric Nye and Maria Joycs. During the interview, Mr. Atkinson admitted to being a member of NTG and collecting dues to send to incarcerated members to help them with their canteen. (JA 3981). Mr. Atkinson also admitted to selling drugs but not for NTG. Mr. Atkinson was clear that he did not sell drugs for NTG. He said he did it to pay

bills. He also said that most of the blood gang members did not know that he sold drugs. (JA 3991-92). Mr. Atkinson's supplier, "Little John," was not NTG or UBN. "Little John" resided in High Point, North Carolina for the past two (2) years. Mr. Atkinson believed he got twelve ounces a month for the past two (2) years from "Little John." (JA 3986).

The PSR for the Petitioner grouped two (2) specific crimes. Group one was for narcotics trafficking which held the Petitioner responsible for at least 1,600 kilograms of marijuana based on the drug amounts attributable to Montraya Atkinson which resulted in an offense level of 30. (JA 4972-73). Group two was for wire fraud based mostly on UBN member Barrington Lattibeaudiere's fraud schemes. The offense level for that group was 21. (JA 4974). The Petitioner also received a two-point enhancement for distribution of a controlled substance in prison, a four-point leadership enhancement and a two-point enhancement for obstruction of justice which resulted in an adjusted offense level of 38. (JA 4973). The Petitioner's total criminal history score was 11 resulting in a category of V. (JA 4979). The statutory sentence is a maximum term of imprisonment of 20 years, pursuant to 18 U.S.C. § 1962(d) and 18 U.S.C. § 1963(a). The guideline range was calculated to be 360 months to life but because the 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. (JA 4982).

Mr. Baxton was sentenced on September 4, 2018, to the maximum of 240 months of imprisonment for Count One, to run consecutively with any State or

Federal Sentence imposed, in addition to three (3) years of supervised release and $100 assessment. (JA 4106, 4259-65) The Judgment was issued on September 10, 2018. An Amended Judgment was issued on September 26, 2018.

REASONS FOR GRANTING THE WRIT

I. GOVERNMENT FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT DEFENDANT'S ACTIONS WERE PART OF A RICO CONSPIRACY.

The Petitioner was 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). An "enterprise" is defined as including any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 USC § 1961(4). "Pattern of racketeering activity" requires at least two acts of racketeering activity committed within ten years of each or. 18 USC § 1961(5). 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). 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 member of conspiracy would commit at least two racketeering acts, and the enterprise substantially affected interstate commerce. *United States v. Cornell*, 780

F.3d 616, 621, 623, 630 (4th Cir. 2015). The Government must prove that a defendant conspired to participate and conspired that a member of the enterprise "perform 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, supra*, there were four business ventures which government claimed formed part of a RICO conspiracy. In its sufficiency of evidence evaluation, the court first examined RICO conspiracy. It determined that 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 government failed to produce sufficient evidence that any defendant 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 evidence failed to show beyond a reasonable doubt that UBN existed for criminal purposes through a long-term association. Many of the UBN 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. That group of individuals happened to be UBN members and they refused to share their criminal techniques with other members of UBN. (JA:3315-16). 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 Petitioner was 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). (JA:1254-55, 3535-45). These specific predicate racketeering acts are addressed as follows.

FRAUD

The government alleged during the trial that there was a connection between the Petitioner and Barrington Lattibeaudiere, who was a co-defendant in this case and a member of NTG, since he sent the Petitioner money on several occasions between 2010 and 2012 that totaled $212. (JA:1661). Mr. Lattibeaudiere admitted to committing various fraud schemes throughout the southeast between November 13, 2015 and November 22, 2016. The government alleged that money sent to the Petitioner from Mr. Lattibeaudiere was gang dues although there was no proof. During this trial, their witnesses testified that gang dues were supposed to be paid every month. The money Mr. Lattibeaudiere sent to the Petitioner was sporadic and for a very short period. The Government's cooperating witness, Quincy Burrell, a former "high" with NTG, testified that UBN members sent other UBN members in prison money that wasn't gang dues but was just to help them out or show support. In fact, he admitted that Co-defendant Cynthia Gilmore sent him $93 dollars in 2013 when he was incarcerated which wasn't gang dues but rather a show of support. (JA:2451). He also testified that he sent other UBN members money in prison to help them out. (JA:2467-68). There is no evidence that money sent to the Petitioner was sent through or for illegal activity.

Detective Sardelis testified during the trial that the FBI gathered evidence during their investigation of Mr. Lattibeaudiere including wiretaps and a search on March 1, 2017 at his residence in Miami, Florida. (JA:2251). They seized his laptop and eventually "conducted a forensic exam of a laptop." (JA:2254). FBI also seized a

duffel bag full of jail mail and western union receipts. One of the jail letters was from the Petitioner addressed to Mr. Lattibeaudiere. The letter was dated November 19, 2010. (JA:2256). There was no evidence that any other letters or western union receipts found in the duffel bag were associated in any way with the Petitioner or other defendants in this case. Myquan Nelson testified in this case about fraud scams that Mr. Lattibeaudiere was involved with because he had firsthand knowledge of it. He never implicated the Petitioner as being involved or even being aware that it was going on. (JA:3333-34).

The government also argued the Petitioner committed wire fraud while in custody in New York State Prison by calling inmates family members, Laurie Cummings and Helen Prouty, concerning money. There was nothing illegal, fraudulent or misleading about either call. Both women had family members in prison and both calls dealt with money issues involving those family members. Neither women were threatened and in both, cases their phone numbers were provided by their family member. (JA:3268). The calls were irrelevant to this case as there was no evidence at all that this had anything to do with the UBN or NTG. The Petitioner was never investigated or charged with any crime related to these calls. (JA:3101). The Petitioner made up to 20 calls per day, on a daily basis, from prison. The government reviewed all his calls made from the prison for several years. (JA:3099). If there was some type of wire fraud scheme being operated, there would have been some evidence besides two legitimate calls made during the 20 plus years he had been in prison. The Petitioner contends the government

introduced this evidence for the sole purpose of assassinating his character and making him look bad in front of the jury which affected his right to a fair trial. There was no nexus with these calls to this case. This evidence is simply insufficient to prove wire/bank fraud as one of the predicate RICO crimes that the Petitioner committed or was aware and agreed that other NTG members committed.

OBSTRUCTION OF JUSTICE/TAMPERING WITH WITNESSES

The government argued that the Petitioner committed obstruction of justice by threatening Co-defendant Myquan Nelson in an attempt to dissuade him from cooperating with law enforcement against other members of the UBN. Mr. Nelson testified that at some point after he pled guilty and agreed to cooperate, him and the Petitioner were both being held at Caldwell County Jail in Lenoir, North Carolina. (JA:3317) Mr. Nelson testified that sometime in February 2018, the Petitioner whom he had never met previously came up to him after taking a shower in his pod, greeted him with an NTG hand signal and then spoke to him. Mr. Nelson said that the Petitioner told him that the case was weak and that they needed to go over his factual basis to make sure he let them know that money sent to Magoo wasn't gang dues. (JA:3319-20). Mr. Nelson also stated that the Petitioner told him that "people were looking out for me," which he said worried him that it meant people were watching him to see if he was cooperating. (JA:3317). Mr. Nelson acknowledged that the statement "could also mean that people would take care of [him]...not as far as doing any harm...but in a good way..." (JA:3325).

He acknowledged that the Petitioner "never said he was going to do anything to me." When asked if the Petitioner would have greeted him with an NTG hand signal if he knew he was cooperating, Mr. Nelson indicated that he wouldn't. (JA:3345). This shows that the Petitioner did not know that Mr. Nelson was cooperating.

The government further alleged that the Petitioner committed obstruction of justice by calling his girlfriend, Rosalynn Pettway, to have her contact David Watson (a co-defendant) on Facebook to obtain an affidavit from him saying the Petitioner "never instructed him or directed him to do any of these crimes or involved in any crimes." (JA:3132). This information came from testimony of Michael Burnett. The Petitioner contends that he in fact was not involved with any crimes with David Watson and was asking him for a truthful affidavit. His intentions were not to impede or obstruct this case in anyway. Furthermore, there was nothing about his actions that was corrupt as required by statute.

On tampering, the government had to prove beyond a reasonable doubt that:

> an individual used intimidation, threatened, or corruptly persuaded, or engaged in misleading conduct toward, another person...[and] did so with intent to influence, delay, or prevent testimony of any person in an official proceeding, and individual did so knowingly, that is, that individual knew or had notice of official proceeding, and that he or she intended or knew that his or her actions were likely to affect official proceeding. (JA:3542)

Based upon the instructions, it is clear that the Petitioner did not commit the charge of tampering with a witness. There was no evidence that he intimidated, threatened, misled or corruptly persuaded any witness. More importantly, there was

no evidence of him having any contact with any witness that was providing testimony in this case particularly at a time when he was aware that the person would be testifying.

DRUG OFFENSES

There was insufficient evidence to prove beyond a reasonable doubt that the Petitioner committed drug offenses or agreed that others would commit drug offenses. Mr. Burnett testified that the Petitioner told him that he had his girlfriend, Rosalyn Pettway, bring drugs into the New York State Prison so that he could make money. Mr. Burnett also testified that the Petitioner "stated that he was making...close to $10,000." (JA:3127). The Petitioner contends that Mr. Burnett's testimony is not credible. There is no corroboration of his testimony when such corroboration would exist. The Petitioner was never found to be in possession of any drugs in New York State Prison. Mr. Burnett's testimony was very general and basic and did not provide any details as to a specific time period. His testimony was also very inconsistent. He alleged that the Petitioner made close to $10,000 selling drugs in prison; however, on cross examination, Mr. Burnett admitted that he didn't know how much money the Petitioner made. (JA:3145). Mr. Burnett alleged that he arrived at USP Atlanta in June 2017 and the Petitioner arrived in July 2017. (JA:3132-33). Mr. Burnett testified that he knew the Petitioner for about a month from their interactions at USP Atlanta. (JA:3125). He wrote a letter to the FBI to inform them that he had information on the Petitioner and "was ready willing and able to cooperate." (JA:3134) That letter was dated June 20, 2017 after

the Petitioner left Atlanta which shows the Petitioner could not have arrived in July 2017. (JA:3137). Mr. Burnett later changed his testimony and said that the Petitioner arrived at USP Atlanta in June 2017. (JA:3139) Regardless, he could not have been at the facility much more than two weeks based on the date of the letter, despite Mr. Burnett's contention that he knew him for a month. He also admitted that he was aware of the indictment in this case. (JA:3137) The government did not produce anyone with firsthand knowledge or information to corroborate or even supplement Mr. Burnett's testimony.

The government presented an October 5, 2015 recorded conversation with Kelli Starr in New York Department of Corrections. (JA:2710). The Petitioner mentions the word "dogfood" which the government argued in this context meant heroin. (JA:2719). During trial, the following from exhibit 31A (interpreted by the government) was played:

> JB: "Hey, I got [UI] right now [UI]. I got fucking, 20, 25 grams dogfood. [UI] But that shit is for like [UI] spot you know what I mean?
> KS: Mm-hm.
> JB: You know?
> KS: Really. [UI]
> JB: It was alright up re.
> KS: Really?
> JB: [UI] shit is good, [UI] see I'm on keeplock right now and the shit is good, [UI] but I wish I could send that shit down South with y'all [UI]. That shit [UI], flip that shit [UI]. [UI]
> KS: [UI] You have to – yeah, you got to know.
> JB: Yeah. [UI]
> KS: Basically, down re y really like pills that's what everybody was doing. [UI] Down south is whatever come out is what they want to try. [UI] Heroin.
> JB: I told my [UI] over m let my people get some shit you

> go open up a spot… H town. I mean damn. [UI] I be [UI]. (JA:3712N)

Nowhere in this conversation did the Petitioner ever say or insinuate that he was selling drugs in prison. In fact, there is no evidence that the Petitioner actual had heroin or access to it in prison. Ms. Starr admitted they were both laughing during that conversation and the Petitioner never showed her drugs nor did she see any drugs. (JA:2840-41) She did not take drugs to him or sell drugs for him. (JA:2835) She also testified that she did not know the Petitioner nor did she speak to him prior to her visit on October 5, 2015. Other than that part of conversation, that mentioned "dogfood," there was no mention of drugs during the four-hour visit. FBI and prison officials would have taken necessary measures to determine if the Petitioner possessed, sold or had access to heroin inside New York State Prison. However, other than this recorded conversation and testimony from Mr. Burnett as to what the Petitioner told him, the government produced no other evidence to support their contention that he was selling drugs in prison or that he did so for NTG.

The government alleged the Petitioner knew other members of NTG were selling drugs and conspired with them to traffic drugs. There was not one cooperating government witness with first-hand knowledge that testified they knew or believed the Petitioner knew what type of crimes other members on the streets were involved in. The government alleged that based on conversations via Facebook between Montraya Atkinson and another co-defendant, David Watson,

from October 2016 to December 2016 proved dues were funneled through the Petitioner's girlfriend, Rosalyn Pettway, to him. (JA:4028). Although, the government argued Rosalynn Pettway was funneling dues to the Petitioner, they provided no evidence to support this claim. These messages only showed that the Petitioner likely received $200 that was sent via western union to Rosalyn Pettway on or about December 27, 2016 for what Mr. Atkinson stated was "legal fees" to help. (JA:4034) There was no evidence this money was related to drug trafficking between Mr. Petitioner and Mr. Atkinson. Mr. Atkinson said he pays dues every month and he clearly said he sends his dues to Bandana aka Barrington Lattibeaudiere not to the Petitioner. (JA:4026) Also, there was no evidence Mr. Atkinson sent the Petitioner money on any other occasion. Mr. Atkinson never visited the Petitioner in New York State Prison and never sent him money via his prison commissary account. (JA:3105) Detective Sardelis went through Watson and Atkinson's Facebook account from 2012 to 2017 and the only mention of the Petitioner occurred from October 2016 to December 2016. There was no evidence Mr. Atkinson sent Rosalyn Pettway any money before or after December 27, 2016.

There was no evidence the Petitioner agreed to traffic drugs at any point. The Petitioner has been in prison since at least 1995. He has never been a member of NTG while on the streets. As the government's expert witness, Corporal Edwin Santana testified, there is a difference between the street gang and the prison gang. (JA:2010) When the Petitioner became a NTG member, the goals and objectives were different. The government argued that by the Petitioner being a high-ranking

member of NTG, somehow, he is responsible for criminal activity other members on the street are involved with but they failed to prove he had an agreement with Mr. Atkinson or any other member to traffic drugs. They failed to prove he was aware of Mr. Atkinson or any other member dealing drugs or that he agreed they would sell drugs for the benefit of NTG or himself.

ROBBERY/MURDER

There was no evidence presented that the Petitioner was involved in any way with robbery or murder. There was no evidence presented that he agreed that he or another member of NTG would commit acts of robbery or murder

NEXUS

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. (JA:469) 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 that don't commit crimes. (JA:2017) Committing crimes and having a criminal record are not required as a member of NTG. In fact, all the cooperating witnesses corroborated this. Furthermore, they all testified that they committed crimes to support themselves, not for UBN. Quincy Burell, a former "high" with NTG that 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. (JA:2449) 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. (JA:2409) Maurice Robinson was a former "low" with NTG that cooperated and testified in this case. He admitted that members were not required to commit crimes and that some members had normal jobs. (JA:2148) 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. (JA:2166-67, 2133) Kellie Starr, another former NTG member that was cooperating, testified that some NTG members had jobs and some didn't. They were not required to commit crimes. As with Mr. Robinson and Mr. Burrell, she did it to support herself and her five kids. (JA:2829) Curtis Martino, a former high with NTG, was cooperating and testified in this case that members have legal jobs and don't commit crimes and they aren't required to. He also committed crimes to support himself, to pay bills and take care of his family. (JA:3203) 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. (JA:3332, 34) Based on testimony of cooperating witnesses, there is no nexus between 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 NTG. Committing crimes was the source of their income. It had nothing to do with membership in UBN or NTG. The government failed to prove beyond a reasonable doubt the second element of RICO conspiracy regarding nexus between enterprise and racketeering activity.

II. THE SENTENCE WAS UNREASONABLE

Drug Amount

The determination whether a defendant's sentence is reasonable has both procedural and substantive components. The reviewing court first ensures that court did not commit a significant procedural error, "such as failing to calculate (or improperly calculating) Guidelines range, treating Guidelines as mandatory, failing to consider § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007). The guidelines for RICO are found in § 2E1.1 and provides a basic offense level of 19 and a cross reference for underlying racketeering acts and grouping of racketeering acts, but no additional grouping points. For the Petitioner, cross reference and grouping procedures were followed resulting in guideline ranges at the top of the statutory range. The main point of contention is the disparity between the general verdict and cross reference to more serious racketeering acts,

which were not found by special verdict of the jury because the government and district court opposed the constraint of a special verdict. Had the jury found by special verdict that defendants were not guilty of predicate racketeering acts of murder or robbery or drug dealing, then sentences would have reflected the much lower offense level of 19.

The Petitioner's offense level of 38 was based on 30 for drug dealing plus two (2) for doing it in prison plus two (2) for obstruction of justice plus four (4) for leadership role of UBN with membership of 7,000 to 15,000. (JA:4069) The offense level of 30 was based on 6.3 kilograms of cocaine, which was less than the eight (8) kilograms in the PSR. As to the 2-point enhancement for selling in prison, Mr. Burnett's testimony was insufficient to prove that Petitioner sold drugs inside New York State Prison. This is explained earlier in the section challenging the sufficiency of evidence. The court also said that the Petitioner was recorded saying he "was selling [drugs] inside the New York Department of Corrections." (JA:4037) The Petitioner never mentioned selling drugs in prison. There is nothing in this conversation that suggests he was selling drugs in prison. (JA:3712N) This is discussed earlier in the section in which the Petitioner challenges the sufficiency of the evidence.

With regard to the 6.3 kilograms of cocaine attributed to the Petitioner, "[w]hen the amount of drugs for which a defendant is to be held responsible is disputed, the district court must make an independent resolution of the factual issue at sentencing. The Government bears the burden of proving by a

preponderance of evidence quantity of drugs for which a defendant should be held accountable at sentencing." *U.S. v. Gilliam*, 987 F.2d 1009 (4th Cir. 1993). The government argued that drug amount attributable to Co-defendant Montraya Atkinson should also be attributable to the Petitioner. The government failed to prove that there was any connection with drug trafficking between the Petitioner and Mr. Atkinson to establish an agreement. The government's main argument during sentencing surrounded Facebook messages between David Watson and Montraya Atkinson. This is discussed in detail earlier in the challenge to sufficiency of evidence and those messages do not establish a connection between the Petitioner and Mr. Atkinson's drug dealing.

According to U.S.S.G. § 1B1.3(a)(1)(B), relevant conduct includes "all acts and omissions of others that were- (i) within scope of jointly undertaken criminal activity (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity." Under U.S.S.G. § 1B1.3. cmt. n.3, "[i]n order to determine defendant's accountability for conduct of others under subsection (a)(1)(B), court must first determine scope of criminal activity particular defendant agreed to jointly undertake (i.e., scope of specific conduct and objectives embraced by defendant's agreement." Court in *U.S. v. Flores-Alvarado*, 779 F.3d 250 (4th Cir. 2015) said, "as to this issue, we require sentencing courts to 'make particularized findings with respect to both scope of defendant's agreement and foreseeability of [conduct at issue]'" quoting, *United States v. Bolden*, 325 F.3d 471, 499 (4th Cir. 2003). The court failed to follow this process when considering information about

Mr. Atkinson. The court in this case never addressed Mr. Atkinson's drug trafficking being independent from his membership in NTG. The Petitioner argued that "Montraya's Atkinson's statement was that members, his own members, did not know he was selling drugs." His supplier was "not a blood member" and, his drug trafficking "had nothing to do with United Blood Nation or Nine Trey." The court's response was "I agree there's conflicting evidence." (JA:4036) There was no conflicting evidence on this issue. The Petitioner contends that consistent with other co-defendants in this case that were associated with him, the offense level for underlying crime of trafficking should be less than offense level of 19 for RICO conspiracy conviction under §2E1.1. Therefore, the Petitioner contends his base offense level should have been 19. The Petitioner contends that based on error of the court on this issue, this case should be remanded for resentencing.

Credit Card Fraud

The PSR alleged that the Petitioner received gang dues from Barrington Audley Lattibeaudiere who pled guilty in this RICO conspiracy and "admitted to obtaining funding for UBN in part by engaging in a scheme along with or UBN members to acquire and use stolen credit card numbers and or personal information from unsuspecting bank customers without their consent." (JA:4969) As detailed above in the challenge to sufficiency of evidence, the Petitioner had absolutely no involvement in credit card scheme that Mr. Lattibeaudiere was involved in. The court said, "it has to be relevant conduct that's reasonably foreseeable to him. He doesn't have to specifically know it. It has to be reasonably foreseeable." (JA:4060)

Counsel for the Petitioner stated to the court that "if you look at language that's *United States v. Flores Alvarado*, it says that foreseeability is not enough. The act of others may be attributed to defendant only if these acts were foreseeable to defendant and were within scope of defendant's agreement to jointly undertake criminal activity." *Id.* In response to this, the court said, "if you're talking about a scrap or someone at bottom of conspiracy, you're absolutely right...[but] someone at top of conspiracy, there's a lot more knowledge by that person, and there's a lot more that's reasonably foreseeable...We're talking about someone who's really at Godfather level." (JA:4061) Counsel for the Petitioner pointed out to the court that he was "somebody that's been in jail for over 20 years [in New York], and these acts took place in Florida. How does that tie in at all?" *Id.* The court replied, "[b]ecause the evidence was pretty substantial that UBN was an East Coast operation that ran the whole East Coast." *Id.* The court however never explained how the Petitioner specifically agreed to jointly undertake criminal activity involving Mr. Lattibeaudiere. It was clearly error by the court to determine that Mr. Lattibeaudiere's fraud scheme was relevant conduct that was attributable to the Petitioner. The base offense level of seven (7) for wire fraud plus a 14-point enhancement under U.S.S.G. §2B1.1 should not have been applied to this case. Therefore, this case should be remanded for resentencing on this issue.

Obstruction of Justice

The PSR states that "Baxton admitted to his cellmate that he instructed Rosalyn Pettway to call (79) David Earl Watson on Baxton's behalf to instruct

Watson to submit an affidavit stating that Baxton never ordered Watson to participate in any illegal activities" and that this was ordered by Mr. Baxton to "influence proceedings." (JA:4971) The Petitioner contends that the term "ordered" as used in the PSR is misleading. He never ordered anything. This is discussed in detail above in the challenge to sufficiency of evidence of obstruction of justice. Regarding David Watson, counsel for the Petitioner told the court at the sentencing hearing, that the Petitioner "never tried to get David Watson to say something that was not true. What he wanted was to tell the truth about that they haven't had any illegal dealings. You heard testimony about David Watson at trial. He held a legal job. He doesn't have a criminal record. James Baxton doesn't know him for being involved in any type of crime...he was asking him...simply to tell the truth, not to lie...this has been misconstrued to mean something negative." The PSR also alleges that the Petitioner obstructed justice on or about February 10, 2018, when he "approached Myquan Lamar Nelson while two were housed in same jail...displayed a UBN hand signal at Nelson and instructed Nelson to change factual basis to Nelson's guilty plea in this case to falsely state that gang dues payments were not actually gang dues." The PSR also stated that the Petitioner "told Nelson that people would be looking out for him" which Nelson believed "or gang members would harm Nelson if he did not do what Baxton instructed and that Baxton was threatening Nelson in order to prevent Nelson from cooperating with law enforcement." (J.A. Vol. XI, p. 4971) These allegations made in PSR are false. This is discussed above in detail in the challenge to sufficiency of evidence of obstruction

of justice. The court still sustained the PSR on the issue of obstruction of justice and overruled Mr. Baxton's objection to the two-point enhancement under U.S.S.G. § 3C1.1. The court said, "I understand what you're saying, you can take it either way. But you have to -- this Court is taking it away that doesn't favor your client because of -all the rest of the evidence supports the Government's interpretation of these acts so -- and the probation office's interpretation of se acts." (JA:4047). The court went on to say, "in the context of all the evidence in this trial, there is just overwhelming evidence that UBN retaliates against cooperating people...I agree with you, Mr. Joseph, that you could take these statements either way. You could take them as you're aware of brotherhood, that we're sticking together, and we're all supporting each or. Or we can take it the other way, that, hey, Mr. Baxton is intimidating people." (JA:4047). In reaching its conclusion regarding obstruction of justice, the court clearly punished the Petitioner based upon the overall perception and reputation of UBN and NTG. The court completely ignored specific facts of this case as it related to the Petitioner. It is unfair and unjust to punish him based upon actions of members in the past. The evidence clearly shows that he did not commit obstruction of justice as defined under U.S.S.G. § 3C1.1, and that it was clear error by the court to find that he did.

Leadership Role

The presentence report states that Mr. Baxton was an organizer or leader of criminal activity that involved five (5) or more participants or was otherwise extensive. (JA:4966) The Petitioner is not the leader or "godfather" of NTG. He is

not on the "UBN council." Quincy Burrell who held the same rank as Mr. Baxton but got his rank on the streets testified that the Petitioner didn't have control over what goes on with members out on the street. (JA:2399) The court said, "that was one of the fascinating things about this trial. A lot of witnesses testified about how they had contact with Mr. Baxton and Gutierrez even though they were in prison." (JA:4054) However, the term "a lot of witnesses" as it related to the Petitioner was one witness. Of the cooperating witnesses, Curtis Martino was the only one who spoke to the Petitioner prior to 2015 and it was only a few times. Kelli Starr only had contact with him because federal agents had her initiate contact with him. She testified that in 2015 the FBI had no idea what his role in the organization was and they wanted her to find out. (JA:2833) More importantly, when it came to crime, specifically the predicate RICO offenses, there was no evidence that the Petitioner organized or was the leader of criminal activity. The overwhelming theme throughout this case from cooperating witnesses was that they committed crimes to support themselves not to support NTG. Not all members were criminals. Since the Petitioner was in prison, he certainly wasn't out on the streets committing crimes. The government failed to prove that there was a connection between him and members that committed the crimes. If they couldn't prove that he was involved, there is no way he can be a leader or organizer of that criminal activity.

Unreasonable Sentence

Because of the District Courts misinterpretation of the sentencing guidelines, the Petitioner's guideline range went from a level 21 to a level 38. With a total

criminal history score of 11 that resulted in a category of V. (JA 4979) The statutory sentence is a maximum term of imprisonment of 20 years, pursuant to 18 U.S.C. § 1962(d) and 18 U.S.C. § 1963(a). The Guideline range was calculated to be 360 months to life but because the 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. (JA 4982) But for the misinterpretation of the District Court, the Petitioners guideline range would have been 70-87 months, not 360 months to life. Even with a sentence of 240 months, the District Court created a huge disparity between the Petitioners sentence and the sentence of majority of the co-defendants in this case that actually committed the crimes. Many of those co-defendants received sentences significantly lower than the Petitioners sentence. One of the factors listed in 18 U.S.C. § 3553(a)(6) is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The Petitioners sentence was unwarranted and greater than necessary. The District Court punished the Petitioner solely because of his alleged position in NTG and not based upon the actual evidence presented at trial. The Petitioners sentence in this case was unjust and unfair and should be set aside.

CONCLUSION

For the foregoing reasons, the United States Supreme Court should grant this Writ of Certiorari.

This the 21st day of December, 2020.

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