NO. _____

In The
Supreme Court of the United States

JUAN CARLOS GUADRON-RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Vernida R. Chaney
Counsel of Record
CHANEY LAW FIRM PLLC
4120 Leonard Drive
Fairfax, Virginia 22030
(703) 879-6650
vchaney@chaneylawfirm.com

Counsel for Petitioner

Dated: December 31, 2020

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

Petitioner played a relatively minor role in the extortion of $550 from a third party, acting as the "delivery boy" of the funds on behalf of known MS-13 gang members who Petitioner feared would injure or kill him or those he loved if he did not comply. Coordination of the pick-up and delivery of the extorted funds was arranged between the parties on cellular phones, all within the state of Virginia. Subsequently, after Petitioner had cut all contact with the gang members, fled Virginia, and moved across the country to avoid further involvement with them, certain of the same MS-13 gang members and others conspired to and did kidnap and violently murder a suspected member of a rival gang.

Despite Petitioner moving the trial court to have the case severed prior to trial, the indictments and trials for the two disparate offenses were joined, thereby exposing the jury that convicted Petitioner of conspiracy to extort and extortion to testimony and evidence of the unrelated gruesome stabbing of the rival gang member.

Petitioner was also convicted of violation of 18 U.S.C. §§1952(a)(2) and (a)(3) of the Travel Act, which makes it a federal offense to use "interstate facilities" in aid of specified unlawful activity, in this case, extortion in violation of Va. Code Ann.§ 18.2-59. Petitioners' conviction was based upon the theory that a party uses an "interstate facility" when he or she uses a cellular phone to contact another person within the same state with regard to criminal activity that did or will take place entirely within that same state.

The following questions are presented:

1. Do federal joinder laws permit the expansive joinder of two unrelated cases with no factual commonality apart from one defendant's involvement in both instances, where the facts of one of the crimes of so extreme and abhorrent as to inherently cause "spillover" prejudice to defendants only charged with the lesser crime?

2. Does a cellular phone constitute an "interstate facility" to the extent that the mere intrastate use of a cell phone automatically converts any crime identified in § 1952(a) into a federal offense?

PARTIES TO THE PROCEEDING

Petitioner is Juan Carlos Guadron-Rodriguez, who was the petitioner/appellant below.

Respondent is the United States of America, which was the respondent/appellee below.

STATEMENT OF RELATED CASES

- *United States v. Guadron-Rodriguez*, No. 18-4496, United States Court of Appeals for the Fourth Circuit, judgment entered May 28, 2020; *Petition For Rehearing and Rehearing En Banc* denied on August 3, 2020.
- *United States v. Guadron-Rodriguez*, No. 1:16-cr-00209-LO, United States District Court for the Eastern District of Virginia, Alexandria Division, judgment entered March 5, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mr. Juan Carlos Guadron-Rodriguez, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit ("Fourth Circuit Opinion," Pet. App. at 1a) was unpublished but can be found at *U.S. v. Juan Carlos Guadron-Rodriguez*, No. 18-4496, Dkt. No 75 (4th Cir., May 28, 2020).[1] The judgment of the United States District Court for the Eastern District of Virginia ("District Court Judgment," Pet. App. at 39a) can be found at *U.S. v. Juan Carlos Guadron-Rodriguez*, No. 1:16-cr-00209-LO, Dkt. No 471 (E.D. Va., July 6, 2018). The District Court for the Eastern District of Virginia did not file a corresponding written opinion.

JURISDICTION

The judgment of the Court of Appeals confirming conviction and sentencing was entered on May 28, 2020. Mr. Guadron-Rodriguez timely filed a petition for rehearing and rehearing en banc, which was denied on August 2, 2020. After being granted an extension due to the COVID-19 pandemic, Order 589 U.S., this petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction over the judgment of this matter under 28 U.S.C. § 1254(1).

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[1] The lead case in the consolidated action was *U.S. v. Dublas Aristides Lado*, No. 1:16-cr-00209 (E.D. Va.).

STATUTORY PROVISIONS INVOLVED

The first issue before the Court involves the scope of Federal Rules of Criminal Procedure 8 and 14, permitting the joinder of parties and cases under certain circumstances where sufficient commonality exists, and requiring severance of claims or parties under prejudicial circumstances, respectively.

The second issue before the Court involves the scope of 18 U.S.C. § 1952(a), referred to as the "Travel Act," and specifically inquires as to whether this code provision encompasses the use of a cellular phone exclusively within the confines of a single state constitutes the use of a "facility in interstate commerce."

STATEMENT OF THE CASE

I. Introduction

Mr. Guadron-Rodriguez is a Salvadorian immigrant who fled his native country to avoid being killed by the MS-13 gang. (4th Cir. Aplt. Br., Dkt. 57, at 21.) After settling in Virginia, local members of MS-13 began targeting Mr. Guadron-Rodriguez. (*Id.*) Fearing for his life, Mr. Guadron-Rodriguez once again uprooted himself and fled to California, but not before MS-13 gang members coerced him through implicit threat of violence or death to participate in several "pick-ups" of extorted monetary "rent" payments totaling $550. (*See id.*, generally.)

Separately, after Mr. Guadron-Rodriguez had fled Virginia and moved to California, several MS-13 gang members and associates, including two of the gang members who had coerced Mr. Guadron-Rodriguez to collect extorted funds on their behalf, kidnapped and gruesomely murdered a suspected member of a rival gang. (*See*

id., generally.) The gang members took their victim to an isolated rural location, violently attacked him, and then took turns holding him down and stabbing him in the chest. Mr. Guadron-Rodriguez played no part in the murder. (*Id.* at 15-18.)

Despite the grisly murder taking place after and being completely distinct from the extortion case and involving two separate, unrelated victims, the Government joined the two indictments into a single case for trial. (Pet. App. at 5a.) The District Court denied Mr. Guadron-Rodriguez's motion to sever the cases, thereby exposing the jury to prejudicial "bad character" evidence of the other defendants, causing prejudice to Mr. Guadron-Rodriguez. (*Id.*)

The Government also brought charges against Mr. Guadron-Rodriguez for violation of the Travel Act, 18 U.S.C. § 1952(a), alleging that when Mr. Guadron-Rodriguez, in Virginia, communicated with others also located in Virginia about the pick-up and delivery of monies in Virginia, he committed a federal offense by using a cell phone to do so, which the Government labeled an "interstate facility." (*Id.* at 16a.)

The jury convicted all defendants in the case of all charges levied against them. Mr. Guadron-Rodriguez was sentenced to 78 months of incarceration. (*Id.* at 4a.) The entirety of the District Court's decisions was upheld upon challenge before the Court of Appeals for the Fourth Circuit. (*Id.* at 5a.)

II. Facts Relative to the Extortion Charges

Mr. Guadron-Rodriguez, who has at no time ever been a member of the MS-13 gang, fled his native El Salvador and moved to Virginia to escape from being killed by the gang. (4th Cir. Aplt. Br. at 21.) It is no secret that recently arrived young people

from Central America are particularly vulnerable to MS-13 recruitment: they are culturally and socially adrift; live in fringe communities; are frequently unaccompanied by competent adult supervision; have difficulty with the language; have an inherent distrust of the police; and are often here illegally or without status. (*Id.* at 6.) They are, in a real sense, isolated from the mainstream community and particularly susceptible to gang recruitment and domination. (*Id.*)

Miguel "Smiley" Zelaya-Gomez, an active MS-13 member aspiring to rise to the level of "Homeboy," lived in the same Virginia apartment complex as Mr. Guadron-Rodriguez. (*Id.* at 4, 21.) Once in Virginia, Mr. Guadron-Rodriguez concealed his identity and place of origin to maintain his safety and avoid conflict with the local MS-13 gang (of which he was never a part), including Smiley, as well as Wilmer "Humilde" Viera-Gonzalez, a high-ranking MS-13 member responsible for managing gang activity in seven states, including Virginia. (*Id.* at 4, 21.) Smiley, however, who assisted with MS-13 recruitment, pursued contact with Mr. Guadron-Rodriguez. (*Id.* at 21.)

Smiley was a known marijuana dealer. (*Id.* at 22.) One of his clients was "Johnny" Reyes de Palma, who lived in the neighborhood. (*Id.* at 21-22.) Smiley eventually introduced Mr. Guadron-Rodriguez to Johnny. (*Id.* at 21.)

On December 24, 2015, Johnny promised Smiley that he would lend Humilde money to buy marijuana. (*Id.* at 22.) One day, a few weeks after Johnny had promised to lend Humilde money, Smiley, Johnny, Mr. Guadron-Rodriguez and others were hanging out in a car near a local Walmart when Humilde unexpectedly jumped into

the car. (*Id.*) Humilde asked Johnny about the money he had promised to lend him, and Johnny reaffirmed his intention to lend the money. (*Id.*) Humilde then pulled out a gun and threatened to kill Johnny, prompting Johnny to pay Humilde on the spot. (*Id.*)

Three months later, Smiley asked Mr. Guadron-Rodriguez to come with him to meet Johnny at a restaurant. (*Id.*) Unbeknownst to Smiley, Johnny had begun working with the FBI, who surveilled this meeting. (*Id.*) While at the restaurant, Johnny gave money to Smiley. (*Id.*)

On two subsequent dates, even though Mr. Guadron-Rodriguez was not affiliated with the MS-13 gang, Smiley requested that Mr. Guadron-Rodriguez meet with Johnny on Smiley's behalf to collect additional sums of money. (*Id.*) All three men were located in Virginia at all relevant times. (*Id.* at 22-23) Smiley, Johnny, and Mr. Guadron-Rodriguez communicated via cell phone text messages and the WhatsApp messaging application, all within the state of Virginia. (*Id.*) Although Mr. Guadron-Rodriguez did not want to play any part in the collections, he felt compelled to follow Smiley and Humilde's orders. (*Id.* at 23.)

Johnny, who continued working with the FBI to surveil these meetings, selected the Virginia location and time for each meeting. (*Id.* at 22.) As Mr. Guadron-Rodriguez was reticent to participate, he was more than an hour late to both meetings. (*Id.* at 23.) All told, Mr. Guadron-Rodriguez collected $550 from Johnny on Smiley's behalf and derived no personal benefit from his involvement. (*Id.* at 64.)

By April of 2016, Mr. Guadron-Rodriguez's identity had been discovered by the local MS-13 gang, endangering his life. (*Id.* at 23.) MS-13 gang members followed Mr. Guadron-Rodriguez, waited for him at his job at an IHOP restaurant, and were actively hunting him in order to kill him. (*Id.*) Mr. Guadron-Rodriguez ceased all communication with Humilde, Smiley, and Johnny and fled to California, where his sister lived. (*Id.* at 24.)

In June 2016, FBI agents contacted Mr. Guadron-Rodriguez's uncle in Virginia regarding the money exchanges with Johnny. (*Id.*) Mr. Guadron-Rodriguez immediately went to a local California police station and fully cooperated with the FBI's investigation. (*Id.*)

III. Facts Relative to the Kidnapping and Murder Charges

On May 16, 2016, after Mr. Guadron-Rodriguez had fled to California to avoid further interaction with the MS-13 gang, several members and recruits of MS-13 in Virginia, including Smiley Zelaya-Gomez and Humilde Viera-Gonzalez, kidnapped and murdered Mr. Oscar Otero-Henriquez, a suspected member of the rival "18th Street Gang" as part of an initiation ritual. (*Id.* at 15-19.) On Humilde's orders, Mr. Otero-Henriquez was collected in a van full of MS-13 members and associates and was driven to a rural side road in West Virginia. (*Id.* at 15.) Once there, Otero-Henriquez was knocked down and Humilde repeatedly stomped on his head. (*Id.* at 17) Smiley and others then took turns holding Mr. Otero-Henriquez down and stabbing him in the chest, a total of 51 times. (Pet. App. at 5a.) They then dumped his mutilated body into a ravine. (*Id.*)

Mr. Guadron-Rodriguez played no role in the gruesome kidnapping and murder, had no knowledge of the events until well after they had occurred, and was in another state on the other side of the country when the events were carried out. (4th Cir. Aplt. Br. at 67.) He never communicated with Smiley, Humilde, or anyone else about the kidnapping or murder. (*Id.*)

IV. The District Court Proceedings

Mr. Guadron-Rodriguez was charged in Counts One through Five of a third superseding indictment. (*Id.* at 64.) Count One charged conspiracy in violation of 18 U.S.C. § 371 and Counts Two through Five charged the use of interstate facilities in aid of specified unlawful activity, in this case extortion, in violation of 18 U.S.C. §§ 1952(a)(3) & 2. (*Id.*) The indictment alleged that Guadron-Rodriguez conspired and extorted a total of $550 from Johnny between March 3, 2016 and April 14, 2016. (*Id.*) Guadron- Rodriguez was not charged in the remaining counts in the indictment, all relevant to the kidnapping and murder of Mr. Otero-Hernandez, a separate victim: conspiracy to commit kidnapping in violation of 18 U.S.C. § 1201(c); kidnapping resulting in death in violation of 18 U.S.C. §§ 1201(a)(1) & 2; accessory after the fact in violation of 18 U.S.C. § 3; and illegal re-entry after deportation in violation of 18 U.S.C. § 1326(a). (*Id.*)

Humilde was also charged with conspiracy and extortion charges, as well as charges related to the kidnapping and murder of Mr. Otero-Henriquez. (*Id.* at 66.) None of the other defendants were charged with any counts related to the extortion of Johnny. (*Id.*)

Prior to trial, Mr. Guadron-Rodriguez moved the District Court to sever the extortion counts from the kidnapping and murder counts because the two events had no logical relationship to one another. (*Id.* at 69.) Despite noting that Mr. Guadron-Rodriguez's charges "stand out the most as being prejudiced by the testimony of the homicide," the District Court refused to sever the claims. (*Id.* at 66; E.D. Va. Hrg. Tr., Dkt 534, at 19.)

A jury trial began on February 5, 2018. (4th Cir. Aplt. Br. at 1.) At the trial, the jury heard testimony and was presented with evidence regarding the violent murder of Mr. Otero-Henriquez by Smiley, Humilde, and others. (*Id.* at 68-69.) The jury also heard testimony regarding extensive drug dealing activity and related gang activity by certain of the other defendants, of which Mr. Guadron-Rodriguez played no part. (*Id.*) On March 5, 2018, after deliberating 5 days, the jury returned guilty verdicts for all defendants on all counts. (*Id.* at 28.) The District Court then sentenced Guadron-Rodriguez to 78 months of imprisonment. (*Id.* at 1.)

V. The Appeal to the Court of Appeals for the Fourth Circuit

Guadron-Rodriguez timely noted his appeal of the District Court's judgment and sentencing to the Court of Appeals for the Fourth Circuit. (Pet. App. at 1a.) The Fourth Circuit affirmed the District Court's rulings in their entirety. (*Id.* at 5a.)

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Decision Impermissibly Expands Federal Joinder Rules to Encompass Any Charges Brought Against Any Two Members of The Same Gang or Syndicate, Regardless of How Distinct Those Claims May Otherwise Be

A. The Fourth Circuit Interpreted Federal Rule of Criminal Procedure 8 Overbroadly

Federal Rule of Criminal Procedure 8(a) permits joinder of separate offenses as follows:

> JOINDER OF OFFENSES. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Similarly, Federal Rule of Criminal Procedure 8(b) permits joinder of defenses as follows:

> JOINDER OF DEFENDANTS. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

However, Rule 8(b) prohibits joinder of defendants when the charged offenses merely share the same or similar characteristics; instead, there must be a logical relationship between the joined offenses. Joinder is improper, therefore, when there is "not a sufficient logical relationship" between the counts and there is no substantial overlap in evidence. *Mackins*, 315 F.3d at 413.

In the instant case, the extortion allegations are completely unrelated to the kidnapping related offenses. On its face, the extortion of one victim and the

kidnapping and murder of another unrelated victim committed by two different sets of defendants cannot constitute the same or similar character, act or transaction. Similarly, the charging of two separate conspiracy counts, Count One for the extortion and Count Six for the kidnapping and murder, demonstrates that the offenses lack a sufficiently common scheme or plan that would permit joinder under Rule 8(a). *See United States v. Mackins*, 315 F.3d 399 (4th Cir. 2003) (improper joinder of counterfeit and drug conspiracy charges).

Humilde, the MS-13 leader and government cooperating witnesses, was the only other defendant charged with the same counts as Guadron-Rodriguez. Humilde, however, was also charged in the kidnapping and murder counts, Counts Six and Seven. Joinder is not proper when the only connection between the counts is a defendant. *Hawkins*, 776 F.3d at 209 (citing *United States v. Cardwell*, 433 F.3d 378, 387 (4th Cir. 2005)); *Mackins*, 315 F.3d at 412–413. There must be limits because the "joinder of unrelated charges' create[s] the possibility that a defendant will be convicted based on considerations other than the facts of the charged offense.'" *Hawkins*, 776 F.3d at 206 (quoting *Cardwell*, 433 F.3d at 384– 85). In *United States v. Whitehead*, the Fourth Circuit held that "[w]here the only nexus between two defendants joined for trial is their participation in similar offenses, on different dates, with a common third defendant, the 'same transaction' or 'series of transactions' test of Rule 8(b) is not satisfied and joinder is impermissible." 539 F.2d 1023, 1026 (4th Cir. 1976).

The alleged conspiracy in Count One had terminated on April 14, 2016 with the last extortion payment. Guadron-Rodriguez did not even pick that payment up. Guadron-Rodriguez was threatened and felt his life was in danger. Shortly after, he left Virginia and reunited with his sister in California. He no longer had contact with Humilde or Smiley. The evidence established that Guadron-Rodriguez effectively withdrew from the conspiracy prior to any conspiracy to commit the kidnapping and murder of Otero-Henriquez and therefore, Guadron-Rodriguez was not charged in Counts Six, Seven, and Eight. The extortion related offenses involved different participants and victims and are, therefore, wholly separate transactions independent from the kidnapping and murder offenses. *See Ingram v. United States*, 272 F.2d 567 (4th Cir. 1959) (joinder not proper two different group of individuals commit similar transactions on different dates). Because the extortion-related offenses were not part of the same act or transaction or series of acts or transactions as the kidnapping and murder offenses the defendants were improperly joined. Both the District and the Circuit Courts improperly interpreted Rule 8 in holding otherwise.

The precedent set by the lower courts has impermissibly broadened the scope of Rule 8 to allow joinder of distinct claims and parties in any instance, so long as there is at least one common defendant in each claim. Because such an overbroad interpretation of the Rule flies in the face of both its intent and plain language, intervention and correction by this Court is necessary to prevent miscarriage of justice both in this case, and in future matters.

B. The Fourth Circuit Interpreted Federal Rule of Criminal Procedure 14 Too Narrowly

Rule 14(a) of the Federal Rules of Criminal Procedure enables the Court to sever a joint trial as follows:

> RELIEF. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Courts should grant severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." *Zafiro v. United States*, 506 U.S. 534, 539 (1993); See *also United States v. Becker*, 585 F.2d 703, 706 (4th Cir. 1978) (noting that a district court abuses its discretion by denying severance when doing so "deprives the defendants of a fair trial and results in a miscarriage of justice."). The jury may have concluded that the other defendants were guilty of their crimes and then find Guadron-Rodriguez guilty because of their criminal disposition. *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976).

The District Court denied Guadron-Rodriguez's motion for severance under FRCP 14(a) even though the government submitted a substantial amount of FRE § 404(b) evidence concerning his co-defendants' gang-related activity and drug distribution. The substantially prejudicial spillover effect of the admission of Rule 404(b) evidence against his co-defendants should have weighed in favor of a severance of trials. *See United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980); *United States v. Kelly*, 349 F.2d 720, 759 (1965), *cert. denied*, 384 U.S. 947 (1966); *see also United*

States v. Lujan, 529 F. Supp. 2d 1315, 1326-27 (D. N.M. 2007); *United States v. Basciano*, No. 05-CR-060 (NGG), 2007 WL 3124622 at *3–4 (E.D.N.Y., Oct. 23, 2007).

Crucially, other Circuits have come to the opposite conclusion of the Fourth Circuit, creating a Circuit split that requires Supreme Court resolution. In *Sampol*, *supra*, for example, the D.C. Circuit held that the district court erred in denying a motion for severance and conducting a joint trial of all of the defendants on charges arising from the same underlying event, an assassination, but premised upon entirely disparate allegations of culpability. The Court held that this foreshadowed the confusion of evidence and prejudiced the defendant who was charged only with false declarations to a grand jury and the concealment of a felony from the prosecuting authorities. 632 F.2d at 642-48. The court in *Sampol* explained:

> To speak in terms of 'transference' or 'rubbing off' of guilt, classic expressions used to explain why severance is justified in a particular case, would be to downplay the prejudice that Ignacio was subjected to in a joint trial alongside two men on trial for the bombing murder of two people. Alvin Ross and Guillermo Novo … were accused of participating in an intentional and extremely violent assassination scheme, the gory details of which were described with extreme accuracy to the jury. … Ignacio Novo … was not charged with the conspiracy or murders, but still he was required to sit in court while the emotion-charged testimony was unveiled to the jury and to hear his name bandied around the fringes of those offenses as one of the 'leaders' and council members of an admittedly participating organization-the CNM. The amount and provocative nature of the evidence required to prove the charges against his co-defendants so exceeded and varied from that which was necessary or relevant to the charges against Ignacio that it was unfair to him, and unrealistic to expect a jury not to be influenced by such extraneous testimony in its assessment of his guilt upon the lesser charges for which he was tried.

Id. at 646-47 (emphasis added).

The Fifth Circuit has also determined that such cases require severance to avoid unfair "spill-over" prejudice. In *United States v. Cortinas*, 142 F.3d 242 (5th Cir., 1998), the Fifth Circuit determined that certain former members of a marijuana distribution conspiracy, Rodriguez and Mata, should not have been tried alongside certain "Bandido" motorcycle gang members who had "shot up" a house during a marijuana deal gone bad, resulting in the murder of a 14-year-old boy. Rodriguez and Mata had assisted the head of the distribution enterprise, Nieto, in acquiring marijuana and laundering money, but had withdrawn from the enterprise before Nieto had begun working with the Bandido gang, and before the murder. *Id.* at 248. The *Cortinas* Court held that the "highly inflammatory evidence" of the shooting gave rise to the need to sever the cases, and the prejudice the defendants had incurred could not be cured by limiting jury instructions. *Id.* In vacating Rodriquez and Mata's convictions, the Court stated:

> Although 'persons jointly indicted in a conspiracy case should generally be tried together,' we must conclude that Rodriguez' and Mata's motions for severance should have been granted. Neither Rodriguez nor Mata was associated with the Bandidos. In fact, the record reflects that their charged involvement with Nieto ended in 1989, prior to the Bandido's joining the conspiracy. … Limiting instructions given by the trial judge were inadequate to mitigate the prejudicial effect of the overwhelming testimony regarding the violent, criminal activities of the Bandidos.

Id. The Fifth Circuit reiterated this position in *United States v. McRea*, 702 F.3d 806 (5th Cir, 2012); s*ee also United States v. Erwin*, 793 F.2d 656 (5th Cir, 1986).

The Court in *Lujan*, *supra*, used similar reasoning to order the severance of trials where the potential admission of FRE 404(b) evidence would unduly prejudice the defendants:

> Mr. Lamunyon and Mr. Medina both contend that evidence that Mr. Lujan committed two other brutal murders in the Las Cruces area will prejudice them if admitted in a joint trial. I agree that the introduction of the double murder allegedly committed by Mr. Lujan increases the likelihood of prejudice against Mr. Lamunyon and Mr. Medina, because such evidence would not be admissible against them in a separate trial. The possibility exists that a jury might infer Mr. Medina's and Mr. Lamunyon's guilt because of the enhanced likelihood of Mr. Lujan's guilt. Cf. *Basciano*, 2007 WL 3124622 at *5–6 (finding severance warranted because introduction of co-defendant's prior conviction for same charge that defendants were facing likely would spillover to defendants). Although the United States has not yet filed its Rule 404(b) notice seeking the introduction of evidence of the double murder, it has stated in its briefs and in open court that it intends to file the notice and wishes to introduce the evidence. The additional potential prejudice this evidence poses is another factor weighing in favor of severance.

529 F. Supp. 2d at 1326 (emphasis added).

Likewise, in the present case, the government conceded, and the District Court agreed, that Guadron-Rodriguez was not involved in the murder of Otero-Henriquez and that he was not a leader of the MS-13 affiliate. The government also presented large amounts of evidence of the defendants' gang-related activity and drug distribution. This "bad character" evidence admissible under FRE 404(b) was not relevant or probative regarding the unrelated extortion charges against Guadron-Rodriguez, and the joint trial was unduly and unfairly prejudicial against him.

This was a complex case wherein six defendants went to trial; however, it is plainly clear that there were disparate levels of alleged culpability among them. The "spillover prejudice" created by the disparity of evidence between Guadron-Rodriguez and the other defendants created a "guilty by association" trial atmosphere to the determent of Guadron-Rodriguez. The majority of the evidence and trial was devoted to the kidnapping/murder offenses. When there are multiple defendants and differing

levels culpability, the risk of unfair prejudice is elevated. *Zafiro* at 439. Trying Guadron-Rodriguez with other defendants whose participation and culpability were substantial prejudiced the jury into imputing evidence to Guadron-Rodriguez and resulted in an unfair deliberation as to his guilt or innocence. Supreme Court guidance is necessary to clarify the limits of Fed. R. Crim. P. 14(a) and prevent overreaching and prejudicial joinder both in this case, and in future matters.

II. The Courts Need Guidance as to Whether Federal Jurisdiction under the Travel Act Exists Through the Use of Cellular Phones Exclusively Within One State

A. The Travel Act Must be Construed Narrowly to Achieve Its Purpose, and Thus Cannot Reach Intrastate Cellular Communication to Establish Federal Jurisdiction Over State Crimes

The District Court convicted Guadron-Rodriguez of a violation of 18 U.S.C. §§ 1952(a)(2) and (a)(3) of the Travel Act in the use of an interstate facility in the aid of an unlawful activity (in this case the Virginia state felony of extortion, codified at Va. Code Ann. § 18.2-59). 18 U.S.C. § 1952(a) provides that the following persons shall be guilty of interstate travel or transportation in aid of a racketeering enterprise as follows:

> (a) Whoever travels in interstate or foreign commerce or **uses the mail or any facility in interstate or foreign commerce**, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

(emphasis added). The basis for this charge and conviction is evidence that Guadron-Rodriguez used a cellphone in Virginia to contact the alleged extortion victim who was also in Virginia. There is no evidence that Guadron-Rodriguez made an interstate phone call or used interstate facilities in his alleged criminal endeavors, as his phone conversations with the alleged victim were all intrastate correspondence.

The Travel Act "was intended to make interstate travel or transportation in aid of racketeering enterprises a crime." *United States v. Hawthorne*, 356 F.2d 740, 742 (4th Cir. 1966). This Court has repeatedly noted that the purpose of the Travel Act, as the name itself implies, is to address an interstate problem. See, e.g., *Perrin v. United States*, 444 U.S. 37, 41 (1979) (explaining the Travel Act was designed to address "the increasingly complex and interstate nature of large-scale, multiparty crime"); *Erlenbaugh v. United States*, 409 U.S. 239, 247 n.21 (1972) (Section "1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating, or managing illegal activities located in another.") (quoting *Rewis v. United States*, 401 U.S. 808, 811 (1971)); *United States v. Nardello*, 393 U.S. 286, 292 (1969) (explaining the Travel Act was "primarily designed" to address criminal activities "which cross State lines"). The Act "was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *see also Erlenbaugh v. United States*, 409 U.S. 239, 246-47 (1972). Accordingly, the Supreme Court has construed the jurisdictional nexus required narrowly to serve this purpose.

In *Rewis*, this Court looked to the rule of lenity and the canon of construing a federal statute narrowly to avoid disrupting the federal-state balance to construe the Travel Act narrowly. 401 U.S. at 811-12. *Rewis* involved an intrastate illegal gambling establishment in Florida that operated near the Georgia state line, and which attracted and encouraged out-of-state bettors. The Court refused to find that the interstate travel by customers was sufficient to satisfy the jurisdictional element as to the gambling establishment owners, even though interstate patronage was foreseeable and even encouraged. *Id.* at 813. There was no need to construe the Travel Act more broadly because it focuses upon "persons who reside in one State while operating or managing illegal activities located in another," which was not the case before it. *Id.* at 811.

The Supreme Court feared extending the scope of the Travel Act too far. The Court recognized that, given the ease of travel and numerous multi-state metropolitan areas, there would be a great deal of criminal activity "patronized by out-of-state customers." *Rewis*, 401 U.S. at 812. The Court explained: "Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." *Id.* Given Congress' silence on wanting to extend the Travel Act so far, coupled with the rule of lenity, this Court has construed the Travel Act narrowly. *Id.*; accord *Perrin*, 444 U.S. at 50 (distinguishing the need to construe other elements of the Travel Act

narrowly, explaining that in *Rewis*, "[o]ur concern there was with the tenuous interstate commerce element. Looking at congressional intent in that light, we held that Congress did not intend that the Travel Act should apply to criminal activity within one State solely because that activity was sometimes patronized by persons from another State.").

The same principles warranting a narrow construction of the Travel Act in *Rewis* apply even more so here. As in *Rewis*, the alleged criminal activity in this case is allegedly purely intrastate, so the Travel Act's focus upon "persons who reside in one State while operating or managing illegal activities located in another" is not implicated. *Id.* at 811. Worse yet, the construction the Fourth Circuit has adopted is far broader than *in Rewis* and implicates situations where even the interstate nexus in *Rewis* is absent. Every aspect of this case concerns an intrastate matter. The Supreme Court's concern in *Rewis* was with criminal enterprises in one state attracting customers from another, as such travel could be done with "ease" and would therefore reach "substantial amounts of criminal activity." *Id.* at 812. The *Rewis* Court rejected a proposed "reasonable foreseeability of interstate patronage" test or a "mere seeking of interstate customers" test because "for practical purposes" these constructions were "almost as expansive" as the overly broad interpretations the Court had rejected. *Id.* at 813.

The Fourth Circuit's construction here is far more expansive than that which this Court rejected in *Rewis*. Cell phone use is easier than the interstate travel noted in *Rewis*, and even more likely to be involved in an even-more substantial amount of

criminal activity – indeed, in almost every case. In today's day and age, cell phone use is ubiquitous. Virtually everyone carries with them at all times a cellular phone. Purely intrastate offenses will likely involve the use of intrastate phone calls or messaging, as so much of our daily communications (legitimate or otherwise) take place by phone. Thus, the Fourth Circuit's construction has the consequence of federalizing the vast majority of purely intrastate offenses. Such a position tramples principles of federalism and states' rights, in that cases that should rightfully be heard in state courts are instead improperly granted federal jurisdiction simply because a cell phone was used.

In the years since *Rewis* was decided, this Court has repeatedly adhered to its principles. The Supreme Court has repeatedly invoked the rule of lenity as well to prevent the words of a statute from being stretched farther than Congress intended. *See, e.g.*, *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *United States v. Bass*, 404 U.S. 336, 347 (1971). This case offers the Court an opportunity to continue this tradition by restricting the interpretation of the Travel Act to incorporate intrastate cell phone usage to be considered an "interstate facility." Considering the widespread use of cellular phones, such guidance by this Court is sorely needed to ensure that every local crime is not transmuted into a federal offense.

B. The 2004 Amendments to 18 U.S.C. § 1958 Confirm the Limitation on 18 U.S.C. § 1952(a) with Regard to Cellular Communication

Prior to 2004, the federal "murder-for-hire" statute, 18 U.S.C. § 1958, which originally contained the same language as the Travel Act, was interpreted differently

by different circuits to hold that intrastate telephone calls alone would, or would not, be sufficient to confer federal jurisdiction. *Compare United States v. Marek*, 238 F.3d 310, 316 (5th Cir. 2001) *with United States v. Weathers*, 169 F.3d 336 (6th Cir. 1999).

Critical to the analysis of these courts was the use of the words "facility ***in*** interstate commerce," as opposed to "facility ***of*** interstate commerce." The Sixth Circuit, in interpreting the murder-for-hire statute, found that "the distinction between 'in' and 'of' interstate commerce, … when used in two different statutes, is critical," and that "a statute that speaks in terms of an instrumentality *in* interstate commerce rather than an instrumentality *of* interstate commerce is intended to apply to interstate activities only." *Weathers*, 169 F.3d at 341 (6th Cir. 1999) (emphasis in original) (quoting *United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989), which interpreted the Travel Act in the same way). The Sixth Circuit reasoned that "the two phrases, 'facility in interstate commerce' and 'facility of interstate commerce,' encompass different categories of activity, both of which Congress intended to regulate." *Id.*

Such an interpretation of the statutory language is bolstered by the concern that, should the statute be interpreted otherwise, there is risk of a serious federal encroachment on state police powers. As the Eleventh Circuit noted, because the crimes contemplated in §§ 1952 and 1958 are "traditionally considered within the States' fundamental police powers," such statutes "generate federalism concerns" in their interpretation. *United States v. Drury*, 344 F.3d 1089, 1101 (11th Cir. 2003) ("*Drury* I"); *see also* Michael P. Murphy, "Of" as a Loaded Word: Congress Tests the

Boundaries of Its Commerce Power with an Amendment to the Federal Murder-for-Hire Statute, 13 Wm. & Mary Bill of Rts. J. 1375, 1399 (2005) ("Permitting the mere use of an interstate commerce facility, even purely intra-state, to trigger federal jurisdiction opens wide the door of opportunity for federal prosecution of essentially local crime…"). As a result, courts should only interpret such statutes in a manner that disrupts the delicate balance between state and federal power when Congress' intent for such an interpretation is plain. *Drury* I, 344 F.3d at 1101 ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" The *Drury* I court concluded that the original language of the murder-for-hire act, which mirrors the present-day language of the Travel Act, must be interpreted such that "the facility in question must actually be used in interstate commerce." *Id.* (emphasis in original).

Confronted with the circuit split regarding its interpretation, in 2004, Congress amended the statute to confirm its intrastate reach. Congress did so by amending Section 1958(a), changing the "facility ***in*** interstate commerce" language to "facility ***of*** interstate commerce," thereby making "unmistakably clear" Congress' intent to cast a federal jurisdictional net over murder-for-hire cases that used an instrumentality *of* interstate commerce, albeit solely in an intrastate manner. *United States v. Drury*, 396 F.3d 1303, 1311 (11th Cir. 2005) ("*Drury* II") (addressing Intelligence Reform and Terrorism Prevention Act of 2004, § 6704, Pub. L. No. 108-458, 118 Stat. 3638).

Prior to the amendment of § 1958(a), though, Congress was presumed to be aware of the many courts' interpretation of § 1952(a) to require interstate activity. Accordingly, Congress in amending § 1958(a) demonstrated it knew how to "clarify" the basis for interstate jurisdiction under the Travel Act, yet Congress did not amend § 1952(a). "Every circuit that has decided whether entirely intrastate use of an interstate facility can satisfy the murder-for-hire statute since the 2004 amendment has held that it does." Andrew Wiktor, You Sat Intrastate, I Say Interstate: Why We Should Call the Whole Thing Off, 87 Fordham L. Rev. 1323, 1351 (2018).

"It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute." *McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009); *cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[when] Congress includes particular language in one section of a statute but omits it in another . . . this Court "presume[s] that Congress intended a difference in meaning"); *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (same). Likewise, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (finding negative implication in Congress' amendment to Title VII while not expanding the scope of the ADEA through a similar amendment); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249 (1991) (finding negative implication in Congress amending the ADEA to apply to employees overseas to overcome contrary judicial decisions, but not making similar amendment to Title VII).

That is the situation here. Congress deliberately amended Section 1958 to reach intrastate murder-for-hire offenses, but chose not to amend the same language in Section 1952(a) to expand the federal reach under that statute to a host of local crimes. Consequently, the Fourth Circuit's decision, which runs contrary to Congress' intent, should not stand.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Fourth Circuit's judgment affirming the conviction of Juan Carlos Guadron-Rodriguez, summarily reverse the decision below and vacate the conviction, and grant such other relief as justice requires.

Respectfully submitted,

/s/ Vernida R. Chaney
Vernida R. Chaney
Counsel of Record
CHANEY LAW FIRM PLLC
4120 Leonard Drive
Fairfax, Virginia 22030
(703) 879-6650
vchaney@chaneylawfirm.com

Counsel for Petitioner