No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY W. GREEN, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether sufficient evidence exists to sustain a RICO conspiracy conviction when the Government charges specific predicate acts in the indictment, the jury finds the defendant guilty of only one of those charged predicate acts, and the jury makes no finding that the defendant agreed to an objective of the conspiracy?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and Appellant in the lower court, Jerry W. Green, Jr., and the Respondent and Appellee in the lower court, the United States of America. Co-appellants in the lower court were Charlie L. Green, Corey Deonta Harris, Nathaniel Harris, Napoleon Harris, and Deonte Jamal Martin

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OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court in a published opinion, *United States v. Green, et. al.*, 981 F.3d 945, 113 Fed. R. Evid. Serv. 2405, 28 Fla. L. Weekly Fed. C 2205, No. 17-10346 (11th Cir. November 25, 2020), which is attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its panel opinion on November 25, 2020. *See* Appendix A. On January 25, 2021, the Eleventh Circuit entered an order denying motions for rehearing and motions for rehearing en banc. On February 2, 2021, the Eleventh Circuit entered its mandate. Petitioner now, thereby, seeks the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) through the filing of the instant petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor 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. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 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.

STATEMENT OF THE CASE

Petitioner Jerry W. Green, Jr. was indicted in the United States District Court for the Middle District of Florida, Tampa Division, in a second superseding indictment alongside five co-defendants. (Doc. 82.) The indictment charged all of the co-defendants with one count of conspiracy to commit racketeering pursuant to 18 U.S.C. §§ 1962(d). (Doc. 82.) Concerning the RICO conspiracy charge, the indictment also alleged several special sentencing acts that were attributed to certain co-defendants specifically. (Doc. 82.) As to Mr. Green, the indictment specially alleged against him four purported acts: the April 8, 2007 murder of Christopher W. Jenkins pursuant to Florida Statutes § 782.04(1)(a); the July 3, 2012 murder of Ceola Lazier pursuant to Florida Statutes §§ 782.04(1)(a) and 777.011 (also alleged against co-defendant Charlie Green); the April 1, 2013 conspiracy to murder Carlos Jurado pursuant to Florida Statutes §§ 782.04(1)(a) and 777.04(3) (also alleged against co-defendant Napoleon Harris); and the April 1, 2013 murder of Carlos Jurado pursuant to Florida Statutes §§ 782.04(1)(a) and 777.011 (also alleged against co-defendant Napoleon Harris). (Doc. 82.)

In addition, the superseding indictment charged all of the defendants with conspiracy to distribute and to possess with intent to distribute one kilogram of more of heroin, MDMA, and oxycodone; 100 kilograms or more of marijuana; five kilograms or more of cocaine; and 280 grams or more of cocaine base pursuant to 21 U.S.C. §§ 841(a)(1); 841(b)(1)(A), (B), and (C); and 846. (Doc. 82.) It also charged Mr. Green with three counts of knowingly using carrying, or discharging a firearm during and

in relation to crimes of violence and, in doing so, causing the deaths of Christopher Jenkins [Count 3], Carlos Jurado [Count 18], and Ceola Lazier [Count 19]. (Doc. 82.) Those charges were brought pursuant to 18 U.S.C. §§ 2, 924(c), 924(c)(1)(A)(iii), and 924(j)(1). (Doc. 82.) Those counts corresponded to the allegations as set forth in the special sentencing allegations charged against Mr. Green. (Doc. 82.)

The case proceeded to jury trial beginning on June 6, 2016. (Doc. 869.) On September 8, 2016, the jury found Mr. Green guilty of the Count One conspiracy to commit racketeering charge, but found him guilty of only one of the special sentencing allegations – the alleged murder of Carlos Jurado. (Doc. 1185.) The jury further found Mr. Green not guilty of the section 924 count pertaining to Christopher Jenkins, but found him guilty as to the section 924 counts that pertained to Ceola Lazier and Carlos Jurado, despite the fact that it found him not guilty of the special sentencing allegation that alleged the murder of Lazier. (Doc. 1185.) As to the count two drug conspiracy charge, the jury found Mr. Green guilty of conspiracy to distribute and to possess with intent to distribute five or more kilograms of cocaine and less than 28 grams of cocaine base. (Doc. 1185.)

The court went on to impose concurrent sentences of life imprisonment on Counts 1 and 2. (Doc. 1438:34.) On Counts 18 and 19, the court-imposed sentences of life imprisonment to run consecutive to one another and consecutive to the sentences imposed on Counts 1 and 2. (Doc. 1438: 34.)

(ii) Statement of the Facts

Jerry Green was, during the events at issue, an aspiring rap artist living in, and having been raised in, Manatee County, Florida. (Doc. 1422:90-169.)

The Ceola Lazier Allegations

Concerning the Ceola Lazier allegations, the jury would ultimately find Mr. Green not guilty of the special sentencing allegation of Lazier's murder. (Doc. 1185.) It, nonetheless, found him guilty of the corresponding Count 18 charge of discharging a firearm during and in relation to a crime of violence and causing the death of Lazier in the course thereof. (Doc. 1185.)

The Government alleged at trial several different theories as to why Ceola Lazier had been murdered. (Doc. 1431:18-19.) On one hand, it alleged that the Lazier homicide was connected to the failure on the part of Gerrell Houston to make full payment to Nathaniel Harris for the alleged contract murder of Demetrius Cunningham. (Doc. 1431:18-19.) It further alleged that Lazier was killed as a preemptive strike because he was jealous of the members of that alleged group and purportedly wanted to kill them. (Doc. 1431:18-19.)

The Government alleged that Charlie Green recruited his half-sister Delexsia Harris to coax Ceola Lazier to Delexsia's father's house, where he was purportedly to be attacked. (Doc. 1420:89-253.) On July 2, 2012, Harris and Lazier drove to that house. (Doc. 1420:89-253.) Prior to reaching the house, Harris allegedly texted Charlie Green to say that they would be arriving. (Doc. 1420:89-253.) The Government purported that, upon arriving at the house, Harris allegedly walked

away while Charlie Green and Jerry Green purportedly shot into the car with rifles. (Doc. 1420:89-253.) Lazier died as a result of gunshot wounds he sustained during that shooting. (Doc. 1420:89-253.)

Cortney Callaway testified as a defense witness at trial. (Doc. 1423:204-25.) Callaway, who had no criminal history, testified that Mr. Green and his three year-old son had been living with her during the summer of 2012. (Doc. 1423:204-25.) She presented documentation that she worked between 6:36 P.M. and10:52 P.M. on July 2, 2012. She went on to testify that she returned home within approximately 15 minutes after getting off of work. (Doc. 1423:204-25.) Upon doing so, she saw Mr. Green at home. (Doc. 1423:204-25.) Because Calloway had the next day off, she stayed up with Mr. Green listening to music until they both went to sleep late that night. (Doc. 1423:204-25.) In the morning, she woke, checked her phone, and saw news that Lazier had been murdered. (Doc. 1423:204-25.) She further recounted that Mr. Green was still at home when she woke up and that she and Mr. Green discussed the news of the Lazier homicide that morning. (Doc. 1423:204-25.)

The Carlos Jurado Allegations

Concerning the Carlos Jurado homicide, the Government would allege that Jurado had been a source of cocaine for the alleged group. (Doc. 1420:30-252.) In the spring of 2013, rumors had purportedly spread that Jurado believed he was being investigated by law enforcement and had intended to provide information regarding his dealings with the group if he were to be arrested. (Doc. 1420:30-252.) The Government alleged at trial that Jurado was shot and killed by Mr. Green on a

sidewalk outside of an apartment complex in Bradenton, Florida after being lured out of the apartment. (Doc. 1431:77-84.) The Government also alleged that Mr. Green took cocaine from Jurado after the shooting. (Doc. 1431:77-84.) Jurado's car was later found abandoned in neighboring Hillsborough County. (Doc. 1431:77-84.)

Witness Tiffany White testified that she had been in the apartment complex getting eyelashes put on and left around 6:20 P.M. (Doc. 1412:74-98.) When she was leaving, she claimed to have seen Jerry Green with black T-shirt on his head. (Doc. 1412:74-98.) She later heard gun shots and went back to the apartment complex. (Doc. 1412:74-98.) Upon doing so, she saw Carlos Jurado, deceased. (Doc. 1412:74-98.) She did not, however, see Mr. Green. (Doc. 1412:74-98.)

The Government would present cell phone tower records that purported to show that phone numbers associated with Jerry Green, Napoleon Harris, and Deontae Martin were in contact with one another during the day of the homicide. (Doc. 1418:17-204.) After 6:25 P.M. around the approximate time of the homicide, cell tower records allegedly placed the phone associated with Mr. Green in the sector that encompassed the general vicinity of the homicide at the time it occurred. (Doc. 1418:17-204.)

Mr. Green called as a witness, Xavier Henry, a record producer who had a contract with Atlantic Records and who had worked with Mr. Green in the music business. (Doc. 1423:142-92.) Henry testified that he had been at his parents' home in Sarasota on April 1, 2013 to work on upcoming records. (Doc. 1423:142-92.) Henry recalled Mr. Green having come to the home at the Sarasota residence during the late

afternoon, still-daylight hours. (Doc. 1423:142-92.) He testified that they worked until after dark and that Mr. Green and his girlfriend remained at the residence throughout that time. (Doc. 1423:142-92.) He further testified that Mr. Green had worked continuously and had not been on his phone during that time. (Doc. 1423:142-92.)

The Homicide of Christopher Jenkins

As discussed above, the jury found Mr. Green not guilty of the special sentencing allegation and the Count 3 charge that stemmed from the homicide of Christopher Jenkins. (Doc. 1185.) The Jenkins homicide occurred on April 8th, 2007 in a Denny's restaurant parking lot near a large crowd of people. (Doc. 1398:111-33; 1399:16-172.) Jenkins had allegedly gotten into an altercation with Mr. Green earlier at the club. (Doc. 1398:111-33; 1399:16-172.) The Government called four witnesses to testify to their accounts of that homicide. (Doc. 1398:111-33; 1399:16-172.) They testified that a lone gunman, alleged to have been Mr. Green, shot Jenkins with a handgun in the crowded parking lot after the nearby club had closed for the night. (Doc. 1398:111-33; 1399:16-172.)

The defense called as a witness Cleara Lovett, who was friends with Christopher Jenkins and was acquainted with Mr. Green from the music industry. (Doc. 1423:47-70.) She recalled having been at the club with Jenkins on the night of his murder. (Doc. 1423:47-70.) She further recalled Jenkins having gotten into an altercation with a group of men at the club that night. (Doc. 1423:47-70.) She

testified, however, that Mr. Green had not been at the club that night. (Doc. 1423:47-70.)

The Controlled Substances Allegations

Concerning the controlled substances conspiracy charge, the Government purported at trial that the individuals who allegedly comprised the enterprise had been dealing various controlled substances since at least January 2006. (PSR ¶80, 86.) The Government alleged that Mr. Green was involved in the purported conspiracy during the period from January 2006 through May 2013. (PSR ¶80, 86.) However, during that 96-month span, Mr. Green was incarcerated for approximately 58 months. (PSR ¶80, 86.)

The Government would present various witnesses at trial concerning the alleged controlled substances activity. The Government presented evidence that a deputy was given a business card by a largely unknown individual named Princeo Altidor on July 6, 2006. (1399:183-93.) Mr. Green was 19 years-old at that time. (1399:183-93.) The business card advertised 24 hour service and "2-4-1 Wednesdays" and listed a phone number. (1399:183-93.) The deputy was told that if a person called that number, he or she could arrange for a purchase of crack cocaine. (1399:183-93.) The deputy allegedly purchased $40 worth of crack cocaine, approximately 1.9 grams, by dialing that number. (1399:183-93.) Mr. Green was alleged to have been the person who delivered that cocaine. (1399:183-93.) Mr. Green pled no contest to a state offense arising from that incident in 2007. (1399:183-93.)

Montrina Lazier, the relative of Brenton Coleman and Ceola Lazier who testified with regard to the Jenkins shooting, claimed to have witnessed Mr. Green make a hand-to-hand crack cocaine deal in her presence. (Doc. 1399:57-110.) Jessica Johnson testified that Mr. Green had registered phones in her name and that she had witnessed him sell crack cocaine with Joshua Smith. (Doc. 1410:210-20.) Calli Higgins, Juan Hernandez, Lashawn White alleged Mr. Green to have been involved in cocaine, crack cocaine, and marijuana. (Doc. 1401:82-187; 1420:30-252.)

In June 2012, the Bradenton Police Department conducted a traffic stop of a car being driven by William Caldwell in which Mr. Green was a passenger. (Doc. 1431:58-59.) The vehicle contained marijuana of which Caldwell and Mr. Green were allegedly in joint possession of. (Doc. 1431:58-59.) Ernest Zinnermon alleged to have met with Mr. Green on an occasion in April, 2013, during which Mr. Green allegedly had a large amount of cocaine and had bragged about robbing cocaine dealers. (Doc. 1412:99-150.)

Mr. Green argued in closing that, while Mr. Green had admittedly been known to use and possess marijuana, the Government had not shown him to have been involved in distribution or to have entered into an agreement that would support the conspiracy charge. (Doc. 1433.) Mr. Green further argued that his alibi evidence went unrebutted and largely unchallenged by the Government. (Doc. 1433.) The Government, likewise, did not impeach any of Mr. Green's fact witnesses, Cleara Lovett, Xavier Murray or Cortney Callaway. (Doc. 1433.)

Following trial, Mr. Green filed a renewed motion for judgment of acquittal and a motion for new trial. (Doc. 1216; 1217.) The district court entered orders denying both of those motions. (Doc. 1249; 1250.) It went on to sentence Mr. Green to terms of life imprisonment on all counts, as set forth above. (Doc. 1299.)

The Direct Appel to the Eleventh Circuit

The defendants then appealed the convictions and sentences to the United States Court of Appeals for the Eleventh Circuit. The defendants raised various grounds, including the sufficiency of the evidence to support the various convictions and the question of whether RICO conspiracy qualifies as a violent felony so as to support the 18 U.S.C. 924 charges alleged in the indictment.

On August 11, 2020, the Eleventh Circuit issued a panel opinion affirming in part, vacating in part, and remanding the case for resentencing. One of the co-defendants subsequently filed a motion for panel rehearing, while another co-defendant filed a motion for rehearing en banc. The Government additionally filed a motion for rehearing en banc.

On November 25, 2020, the Eleventh Circuit withdrew its August 11, 2020 panel opinion and substituted it with a panel opinion again vacating the defendants' section 924(c) convictions and remanding the cases for resentencing. The Eleventh Circuit affirmed as to the remaining issues raised by Mr. Green.

Concerning the section 924 issue, the Eleventh Circuit held that RICO conspiracy does not qualify as a violent felony under section 924(c). *Id.* at 950. In

reaching that holding, the court analyzed RICO conspiracy under the elements clause and reasoned:

> RICO conspiracy is virtually indistinguishable from a conspiracy to commit Hobbs Act robbery. "To establish a RICO conspiracy violation under 18 U.S.C. § 1962(d), the government must prove that the defendants objectively manifested, through words or actions, *an agreement* to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes." *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995) (per curiam) (emphasis added) (internal quotation mark omitted). RICO conspiracy requires neither proof of the commission of an overt act nor proof of an agreement to commit individual predicate acts. *Id.*; *see United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984). A RICO conspiracy thus differs from a regular conspiracy because it "may encompass a greater variety of conduct." *Pepe*, 747 F.2d at 659. So as with a conspiracy to commit Hobbs Act robbery, the elements of a RICO conspiracy focus on the *agreement* to commit a crime, which does not "necessitate[ ] the existence of a threat or attempt to use force." *Brown*, 942 F.3d at 1075. Therefore, RICO conspiracy does not qualify as a crime of violence under § 924(c)(3).

Green, 981 F.3d at 952.

Concerning Mr. Green's challenges to the sufficiency of the evidence supporting his remaining convictions, the court held:

> Having reviewed the parties' briefs and the record, we affirm the remaining convictions and findings as they are supported by more-than-sufficient evidence. To the extent the appellants' arguments challenge the credibility of various witnesses, credibility determinations are exclusively within the province of the jury. *See United States v. Hernandez*, 743 F.3d 812, 814 (11th Cir. 2014) (per curiam). We may not revisit such determinations unless a witness's testimony is incredible as a matter of law, *United States v. Thompson*, 422 F.3d 1285, 1291–92 (11th Cir. 2005), and we have found no such testimony here.

Id. at 960.

The court went on to address issues of inconsistent verdicts and reasoned as follows:

> We review de novo whether inconsistent verdicts render a conviction improper. *United States v. Mitchell*, 146 F.3d 1338, 1342 (11th Cir. 1998). That being said, inconsistent jury verdicts are generally insulated from review because "a jury may reach conflicting verdicts through mistake, compromise, or lenity," but "it is impossible to determine whose ox has been gored." *See United States v. Powell*, 469 U.S. 57, 68–69, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984); *United States v. Mitchell*, 146 F.3d 1338, 1344 (11th Cir. 1998) (internal quotation marks omitted). Thus, "as long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an inconsistent verdict on another count." *Mitchell*, 146 F.3d at 1345.
>
> Jerry and Napoleon's challenges to their § 924(c) convictions are moot given the vacatur of those convictions. But even assuming the other challenged guilty verdicts are inconsistent, they must stand because—having reviewed the parties' briefs and the record—we determine that sufficient evidence supports them.

Id. at 960-61.

On December 7, 2020, the Government again filed a petition for rehearing en banc. The Eleventh Circuit issued an order denying the motions for rehearing and motions for rehearing en banc on January 25, 2021. It then issued its mandate on February 2, 2021.

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE QUESTION OF WHETHER SUFFICIENT EVIDENCE EXISTS TO SUSTAIN A CONVICTION FOR RICO CONSPIRACY WHEN THE JURY FINDS THE DEFENDANT GUILTY OF ONLY ONE SPECIALLY CHARGED PREDICATE ACT, ACQUITS THE DEFENDANT OF ALL OTHER PREDICATE ACTS CHARGED IN THE INDICTMENT, AND MAKES NO FINDING THAT THE DEFENDANT AGREED TO AN OVERALL OBJECTIVE OF THE CONSPIRACY.

As set forth above, the charges alleged against Mr. Green stemmed from three alleged acts: the now vacated section 924 charges and the special sentencing allegations of the RICO conspiracy charge that collectively sprung from those acts. In addition, the corresponding section 924 charges and RICO special sentencing allegations were interlocked as to the respective counts that pertained to each of the three alleged acts. While the Eleventh Circuit has vacated the section 924 convictions, it affirmed the RICO conspiracy conviction that arose from the same alleged conduct as the section 924 charges.

As to the RICO conspiracy count, the jury found that Mr. Green committed only one of the four specially charged acts set forth in the indictment. As Mr. Green set out in the Eleventh Circuit, the Government failed to present any competent evidence to permit a finding that he agreed to participate in the alleged enterprise's

affairs knowing that other members of the conspiracy would commit at least two other acts of racketeering. The Eleventh Circuit has held that, when, as occurred in this case, the Government fails to prove that a defendant such as Mr. Green agreed to personally commit two RICO predicate acts in furtherance of the RICO conspiracy, the Government must prove an agreement to an objective of the conspiracy. The jury was not, however, asked to make a finding that Mr. Green agreed to any overall objective of the conspiracy. The verdict form did, on the other hand, ask the jury to make findings as to the four specifically alleged predicate acts attributed to Mr. Green. The jury ultimately rejecte three of those four specific predicate acts. As to the one predicate act that it did find Mr. Green guilty of, the purported murder of Carlos Jurado, the jury specifically found that Mr. Green was not guilty of conspiracy to commit murder of Jurado, thereby, suggesting that the jury believed the alleged murder of Jurado was an independent act separate from the conspiracy. In any event, because the jury found that Mr. Green committed only one of the four alleged predicate acts and the jury made no finding that Mr. Green agreed to an overall objective of the conspiracy, the Government failed to present sufficient evidence to sustain the conviction for RICO conspiracy.

Mr. Green now asks this Court to grant the Petition to address the question presented herein. Given the frequency by which the Government charges RICO offenses, the issue presented in the instant case is likely to arise in many other future cases. Moreover, the grant of certiorari to address the question presented herein

would answer a question of great important and would ensure uniformity among the lower Circuits.

A. The Proof Necessary to Establish the Elements of a RICO Conspiracy Charge

The substantive RICO statute provides that "[i]t 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." 18 U.S.C. § 1962(c). The Eleventh Circuit has held that, in order to establish a RICO conspiracy, the government must prove: "(1) that an enterprise existed; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; (4) that the defendants participated, either directly or indirectly, in the conduct of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity." *United States v. Browne*, 505 F.3d 1229, 1257 (11th Cir. 2007). This Court has more clearly provided that "[t]he elements predominant in a subsection (c) violation are: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas v. United States*, 522 U.S. 52, 62, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) *citing Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985).

"'Pattern of racketeering activity' is a defined term and requires at least two acts of 'racketeering activity,' the so-called predicate acts central to the question

presented herein. *Id. citing* 18 U.S.C. § 1961(5). 18 U.S.C. § 1961, defines racketeering activity, in relevant part, as:

> "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year...[1]

18 U.S.C. § 1961.

This Court has held that to prove the pattern of activity in the context of the RICO statute, the Government must prove "that the predicate acts are related to each other and have continuity." *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995) *citing Sedima,* 473 U.S. at 496 n. 14. As a result, pursuant to the continuity requirement of RICO, the Government was required in the instant case to prove more than the fact that Mr. Green or other members of the purported enterprise committed the alleged predicate acts charged against the enterprise. *United States v. To*, 144 F.3d 737, 746-47 (11th Cir. 1998). The alleged predicate acts must also have been continuous in time and so interrelated as to form a pattern of racketeering activity. *See id.*

As to conspiracy to commit RICO, as opposed to the substantive RICO offense, the Eleventh Circuit has held that the government must prove that the defendant "objectively manifested" an agreement to participate in the affairs of the enterprise through the commission of two or more predicate crimes. *Starrett*, 55 F.3d at 1543

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[1] The statute goes on to provide for several other specific acts that are indictable under various enumerated federal statutes. 18 U.S.C. §1961(1).

citing United States v. Russo, 796 F.2d 1443, 1455 (11th Cir. 1986). The government may only prove such an agreement by showing either "1) an agreement on an overall objective or 2) that a defendant agreed personally to commit two predicate acts and therefore to participate in a 'single objective conspiracy'." *Id.* at 1544, *quoting United States v. Church*, 955 F.2d 688, 694 (11th Cir. 1992).

This Court has found that RICO conspiracy, unlike the general conspiracy offense proscribed in 18 U.S.C. § 371, does not require proof of the commission of an overt act or of any specifically alleged act. *Salinas*, *supra*, 522 U.S. at 63. When the Court reached that holding in *Salinas v. United States*, it reasoned that "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Id. citing United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 253–254, 60 S.Ct. 811, 858–859, 84 L.Ed. 1129 (1940). However, "[t]he partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. *Id.* at 63-64 *citing Pinkerton v. United States,* 328 U.S. 640, 646, 66 S.Ct. 1180, 1183–1184, 90 L.Ed. 1489 (1946). The Court went on to hold that, in RICO conspiracy cases, the Government does not need to prove that "each conspirator agreed that he would be the one to commit two predicate acts." *Id.* at 64. The Court, nonetheless, further held that a RICO conspiracy conviction requires that the defendant agree to "the goal of furthering or facilitating the criminal endeavor":

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to

undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself. See *Callanan v. United States,* 364 U.S. 587, 594, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961).

It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense. True, though an "enterprise" under § 1962(c) can exist with only one actor to conduct it, in most instances it will be conducted by more than one person or entity; and this in turn may make it somewhat difficult to determine just where the enterprise ends and the conspiracy begins, or, on the other hand, whether the two crimes are coincident in their factual circumstances. In some cases the connection the defendant had to the alleged enterprise or to the conspiracy to further it may be tenuous enough so that his own commission of two predicate acts may become an important part of the Government's case. Perhaps these were the considerations leading some of the Circuits to require in conspiracy cases that each conspirator himself commit or agree to commit two or more predicate acts. Nevertheless, that proposition cannot be sustained as a definition of the conspiracy offense, for it is contrary to the principles we have discussed.

In the case before us, even if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to violate subsection (c). The evidence showed that Marmolejo committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under § 1962(d).

B. <u>The Insufficiency of the Evidence and the Jury's Findings in the Instant Case</u>

The Government's evidence against Mr. Green failed to show that, at the time Mr. Green allegedly joined in the agreement, he 1) agreed to personally commit two RICO predicate acts in furtherance of the RICO conspiracy, or 2) agreed to participate in the enterprise's affairs knowing that other members of the conspiracy would

commit at least two other acts of racketeering and that he intended to help the enterprise as part of the pattern of racketeering activity.

With respect to any agreement to commit two predicate acts, the Government clearly failed to prove that Mr. Green agreed to personally commit two predicate acts related to the alleged RICO conspiracy. Specifically, the jury rejected three of the four predicate acts charged in the indictment.

With respect to an agreement to an objective of the conspiracy, the Government failed to show that Mr. Green agreed to participate in or further the enterprise's affairs. There was no competent proof from which to infer Mr. Green's agreement with any co-conspirators on a single overall objective for the RICO conspiracy. The Government simply did not and could not prove that Mr. Green agreed with others to participate and assist in the enterprise's affairs with the knowledge that other conspirators would commit at least two predicate RICO acts. The fact that the jury found Mr. Green responsible for the substantive offense involving Carlos Jurado, but acquitted him of the conspiracy to commit the offense involving Carlos Jurado, illustrates that point. The Government may have presented evidence of Mr. Green's involvement in various criminal activities, but it did not prove that these acts were sufficiently connected to the RICO conspiracy. More troubling, the Government did not request the jury to make a finding that Mr. Green agreed to any overall objective of the conspiracy, but instead, relied only on the special predicate acts charged in the indictment.

The Government alleged in the second superseding indictment that the pattern of racketeering activity through which the conspirators agreed to conduct and participate in the conduct of the affairs of the enterprise included the act of murder. (Doc. 1125-1 at 6.) It further alleged in the second superseding indictment that Mr. Green and co-defendant Napoleon Harris conspired with each other and others to murder Jurado and committed the murder of Jurado together. Thus, the conspiracy to murder Jurado, as well as the murder of Jurado itself, were alleged to be part of the pattern of racketeering activity. While the jury found Mr. Green guilty of the murder of Jurado, it found co-defendant Harris not guilty of the murder. And both Mr. Green and Harris were acquitted of conspiring to murder Jurado. Given that the jury acquitted Mr. Green of conspiring to commit the murder, and acquitted Harris of both conspiring to murder Jurado and committing the murder, those findings indicate that the jury did not find that the murder was itself connected to the RICO conspiracy.

In the end, Government failed to present sufficient evidence that the murder of Jurado constituted a part of a pattern of racketeering activity. The acquittal on the conspiracy charge, along with Harris' acquittals, fatally undermined the Government's contention that the crime was a predicate act related to the enterprise. And if the murder of Jurado was not a predicate act, then the Government had not proven that Mr. Green committed sufficient predicate acts to be convicted of RICO conspiracy.

Because the Government neither proved that Mr. Green agreed to personally commit two RICO predicate acts in furtherance of the RICO conspiracy, or that he agreed to participate in the enterprise's affairs knowing that other members of the conspiracy would commit at least two other acts of racketeering, the evidence was insufficient as a matter of law to sustain Mr. Green's conviction on the RICO conspiracy charge.

For the reasons set forth above, Mr. Green was wrongfully convicted in the absence of sufficient evidence to sustain the RICO conspiracy charge. He, thereby, did not receive due process or a fair trial in this case. If certiorari is not granted to address the question presented herein, the error that the District Court committed in the instant case is likely to arise in other future prosecutions that charge RICO conspiracy offenses. For that reason, Petitioner Green respectfully submits that the instant question is one of great importance and one which will arise frequently in the lower courts in the future. SUP. CT. R. 10(c).

CONCLUSION

Based on the foregoing, the Petitioner respectfully request that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted on this 26th day of April 2021,

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