

NO. _____

In The
Supreme Court of the United States

MALEK LASSITER,

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

Paul G. Beers
Counsel of Record
GLENN, FELDMANN, DARBY & GOODLATTE
37 Campbell Avenue, S.W.
Post Office Box 2887
Roanoke, Virginia 24001-2887
(540) 224-8000 (Telephone)
(540) 224-8050 (Facsimile)
pbeers@glenfeldmann.com

Counsel for Petitioner

Dated: October 26, 2021

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S DENIAL OF LASSITER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE RICO CONSPIRACY CHARGED IN COUNT ONE?

STATEMENT OF RELATED CASES

United States v. Mitchell, No. 2:16-cr-130, U.S. District Court for the Eastern District of Virginia. Judgment entered April 12, 2019.

United States v. Mitchell, No. 18-4876 and 19-4269, U.S. Court of Appeals for the Fourth Circuit. Judgment entered May 28, 2021.

United States v. Simmons, No. 2:16-cr-130, U.S. District Court for the Eastern District of Virginia. Judgment entered May 10, 2019.

United States v. Simmons, No. 18-4875 and 19-4345, U.S. Court of Appeals for the Fourth Circuit. Judgment entered May 28, 2021.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement of Related Cases	ii
Table of Contents	iii
Table of Authorities	v
Citation to Opinion Below	1
Jurisdictional Statement	1
Rules, Statutes and Constitutional Provisions Involved in the Case	2
Statement of the Case	2
Proceedings in the District Court	2
Proceedings in the Court of Appeals	2
Statement of Material Facts	3
Argument	5
THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S DENIAL OF LASSITER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE RICO CONSPIRACY CHARGED IN COUNT ONE	5
Conclusion	9
Appendix:	
Amended Published Opinion of the United States Court of Appeals For the Fourth Circuit entered August 23, 2021	1a

Memorandum Opinion and Order of the United States District Court For the Eastern District of Virginia entered November 16, 2018	70a
Order of the United States Court of Appeals For the Fourth Circuit Re: Granting Limited Panel Rehearing entered August 23, 2021	100a
Judgment of the United States Court of Appeals For the Fourth Circuit entered May 28, 2021	101a
Judgment of the United States District Court For the Eastern District of Virginia entered April 24, 2019	104a

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<u>United States v. Barnett,</u> 660 Fed. Appx. 235 (4th Cir. 2016).....	6, 7, 9
<u>United States v. Mouzone,</u> 687 F.3d 207 (4th Cir. 2012).....	6, 7
<u>United States v. Pinson,</u> 860 F.3d 152 (4th Cir. 2017).....	6
<u>United States v. Simmons, et al.,</u> 9 F.4th 947, 2021 U.S. App. LEXIS 25206 (4th Cir. 2021).....	1
<u>Statutes</u>	
18 U.S.C. § 1961.....	6, 8
18 U.S.C. § 1962.....	2, 3, 8, 9
18 U.S.C. § 3231.....	1
28 U.S.C. § 1291.....	1

CITATION TO OPINION BELOW

Filed with this Petition is the published, amended Opinion of the United States Court of Appeals for the Fourth Circuit dated August 23, 2021 (“Opinion”) (Pet. App., 1a-69a) and the Order entered by same panel. (Pet. App. 100a.) United States v. Simmons, et al., 9 F.4th 947, 2021 U.S. App. LEXIS 25206 (4th Cir. 2021).

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Virginia assumed subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered a Final Judgment on April 24, 2019. (Pet. App., 104a-109a.)

Lassiter filed a timely Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. The appellate court had jurisdiction to hear Lassiter’s appeal pursuant to 28 U.S.C. § 1291.

On May 28, 2021, the United States Court of Appeals for the Fourth Circuit affirmed Lassiter’s conviction. (Pet. App. 101a-103a.) The United States then petitioned for a limited panel rehearing on a ground that did not pertain to Lassiter. The court of appeals granted the United States’ petition for rehearing and issued an amended Opinion on August 23, 2021 (“Opinion”). The Opinion took effect August 31, 2021, when the court of appeals issued its Mandate. (Fourth Circuit Document 142.)

**RULES, STATUTES AND CONSTITUTIONAL PROVISIONS
INVOLVED IN THE CASE**

18 U.S.C. § 1962(d)

(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

Malek Lassiter (“Lassiter”) petitions for certiorari review by the United States Supreme Court of the court of appeals’ published Opinion, as amended, affirming his conviction and sentence.

Proceedings in the District Court

Lassiter and others were named defendants in a 38-count Second Superseding Indictment. Lassiter was charged in Count One with conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(d). Following a seven week trial, jurors found Lassiter guilty of participating in the conspiracy charged in Count One, along with several other counts. The district court upheld the jury’s verdict on Count One and sentenced him to 35 years in federal prison. (Pet. App. 70a-99a.)

Proceedings in the Court of Appeals

Among the issues Lassiter raised on appeal was whether the district court had misapplied 18 U.S.C. § 1962(d) when it upheld the jury’s verdict on Count One of the Second Superseding Indictment. Rejecting Lassiter’s challenge to his conviction on Count One, the United States Court of Appeals for the Fourth Circuit affirmed the

district court in a published Opinion filed on May 28, 2021. (Fourth Circuit Document 132.)

STATEMENT OF MATERIAL FACTS

The focus of this Petition to the United States Supreme Court is Lassiter's conviction on Count One of the Second Superseding Indictment.

Along with Antonio Simmons ("Simmons") and Nathaniel Mitchell ("Mitchell"), Lassiter was charged in Count One with participating in a racketeering conspiracy through an "enterprise" in violation of 18 U.S.C. § 1962(d). The "enterprise" was a Hampton, Virginia branch of the Nine Trey Gangsters ("NTG"), which is a set of The Bloods Nation. With respect to Lassiter, relevant events occurred on December 27, 2015, at the end of the charged conspiracy.

Simmons, who held an upper level management position within NTG, ran one of the gang's "lines." Anthony Foye ("Foye") was a "three-star general" in Simmons's line, while Mitchell held the rank of "one-star general." Lassiter was not a member of any line of NTG, although the court of appeals accepted the prosecution's theory that he joined Simmons' line on December 27, 2015.

The events which climaxed on December 27, 2015, at approximately 8:45 p.m. were rooted in Simmons' dispute with a rival member of NTG named "Skino." Enraged at Skino for showing him "disrespect," Simmons in the days leading up to December 27 actively recruited members of his antagonist's line.

Simmons summoned Mitchell, Foye, and another subordinate, Alvaughn Davis (“Davis”) to his home in Norfolk on December 27, 2015. Lassiter traveled with Foye, Mitchell, and Davis to this meeting. When they arrived, Simmons questioned them about Lassiter’s presence. Because Lassiter was not a NTG member, Simmons had never met or heard about him. Foye, who was Lassiter’s cousin, informed Simmons that Lassiter was “about to make his way home.” (J.A. 4152-53.)

The subject of this meeting was Simmons’ dispute with Skino. Simmons essentially declared war on Skino’s line and ordered his men to “mash the gas on” Skino’s subordinates, or “scraps,” who refused to defect to Simmons’ line. (J.A. 4153.) Two of Skino’s generals Simmons, explained, “got a vest on” because he was under the impression they were poised to “jump line” and join forces with Simmons. (J.A. 4153-54.)

Mitchell, Foye, and Davis, along with the neophyte Lassiter, departed Simmons’ Norfolk residence on December 27, 2015, in search of Skino’s generals. They first tried to rouse one of those generals, Nino, at his home. Nino did not answer their knock on his door. Nino, however, called Mitchell’s cellphone a few minutes later when Mitchell, Foye, and Lassiter was once again traveling in a vehicle driven by Davis. Nino told Mitchell that Nino’s colleague, Blacko, had told him that their leader, Skino, wanted his scraps to “get [their] guns up” in anticipation of a war with Simmons’ line. (J.A. 4159.) After Mitchell hung up with Nino, Foye (who had been

listening in the car through Mitchell's speaker device) declared, “[M]an, f__k that vest, f__k Blacko and that vest.” (J.A. 4160.)

Later that evening, Davis, at Foye's direction, drove the men to a Portsmouth area house where Foye thought Blacko resided. Mitchell and Foye walked up to the front door of a residence on Reid Street, while Lassiter stood on the sidewalk. Davis waited for them in the car down the same street. (J.A. 4165.)

When the men knocked at 8:45 p.m., a woman named Sparkle Morris answered the door. Ms. Morris was a friend of Blacko's. Mitchell shot her at close range in her doorway. As Mitchell and Foye ran back to the waiting car driven by Davis, Foye fired his weapon in the air several times to frighten off bystanders. Lassiter discharged a pistol in the general direction of an apartment complex on Reid Street for the same purpose.

ARGUMENT

THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S DENIAL OF LASSITER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE RICO CONSPIRACY CHARGED IN COUNT ONE.

The United States Court of Appeals for the Fourth Circuit erred by declining to reverse Lassiter's conviction on the RICO conspiracy charged in Count One. The government failed to prove beyond a reasonable doubt that he participated in the “enterprise” alleged in the Second Superseding Indictment. Lassiter was not a member of the charged enterprise when his co-defendants allegedly engaged in racketeering activity.

To convict Lassiter of the RICO conspiracy charged in Count One under 18 U.S.C. 1962(c)-(d), the government had to prove (1) an “enterprise” existed in which he conspired to participate and (2) Lassiter agreed that either he or another member of the enterprise would perform at least two racketeering acts which taken together formed a pattern of racketeering activity. United States v. Pinson, 860 F.3d 152, 161 (4th Cir. 2017).

A “pattern of racketeering activity,” must involve at least two “racketeering acts.” Qualifying racketeering acts include several offenses under state law, such as acts “involving murder,” as well as a litany of federal crimes. 18 U.S.C. § 1961(1).

While Lassiter need not have played a managerial role in the enterprise for conspiracy liability to attach, at a minimum he must have been a *participant* in the enterprise. Merely associating with the enterprise is insufficient to support a defendant’s conviction for RICO conspiracy. United States v. Mouzone, 687 F.3d 207, 218 (4th Cir. 2012) (“We caution that the RICO conspiracy statute does not criminalize mere association with the enterprise.”) [internal quotations omitted]; United States v. Barnett, 660 Fed. Appx. 235, 249 (4th Cir. 2016).

Lassiter’s RICO conspiracy conviction rests only on evidence he associated with NTG. In paragraphs 1-3 of the Second Superseding Indictment, the grand jury charged Lassiter with joining Mitchell, Simmons, and others in committing several racketeering acts on December 27, 2015. (J.A. 169-70.) But these alleged racketeering acts occurred *before* Lassiter became a member of NTG, if he ever joined

the gang. The government presented evidence of Lassiter's association with gang members as they drove to and from Simmons's residence in Virginia Beach that day. Mere association with the enterprise, however, does not render Lassiter guilty of RICO conspiracy. Mouzone, 687 F.3d at 218; Barnett, 660 Fed. Appx. at 249.

Government witnesses testified that a person may become a member of NTG through either of two initiation rites: a person may be "beaten" into NTG or "blessed" into the gang. (J.A. 1790-91; 1925; 1934-35.) No evidence exists Lassiter was beaten or blessed into NTG. Indeed, Simmons, the ranking NTG leader in the area, had neither seen nor heard of Lassiter until December 27, 2015, when Foye introduced him as a cousin who was "about to make his way home" to the gang. (J.A. 4152-53.)

The only witness to suggest Lassiter *ever* became a member of NTG was Davis, who testified for the prosecution. According to Davis, a person who has neither been beaten into NTG nor blessed into the gang can become a member by "putting in work," i.e., committing often violent acts which benefit the gang. (J.A. 4003-04.) Lassiter "made his way home" to NTG on December 27, 2015, by "putting in work" on Reid Street in Portsmouth near the home of Sparkle Morris, Davis testified. (J.A. 4306.)

Davis was very precise in his testimony concerning the date, time, and place Lassiter became an NTG member by "putting in work" so as to "make his way home." At the moment Lassiter discharged a firearm on December 27, 2015, Davis testified, Lassiter became a member of NTG. Foye and Mitchell on December 27, 2015, shot Ms. Morris at her front door in Portsmouth. As Foye and Mitchell ran back to the car

driven by Davis, Lassiter allegedly fired a .38 caliber handgun toward an apartment complex at 1 Reid Street. When he fired that weapon, Lassiter became a member of NTG.

Davis. On the night that they shot Sparkle, yeah, [Lassiter] made his way home that night.

Q. It's your testimony that made him a gang member?

Davis. Yeah. That a [sic] made him a gang member. . . . So as soon as he fired that gun off, that made him a member.

Q. So that happened on December 27th of 2015.

Davis. Yes.

(J.A. 4306-07.)

If, as Davis testified, Lassiter became a member of NTG when he discharged a firearm on Reid Street on December 27, 2015, he cannot be guilty of the RICO conspiracy charged in Count One. Discharging a firearm in the direction of an apartment house is not a racketeering act defined in 18 U.S.C. § 1961(1). But even if this reckless use of a firearm qualified as a racketeering act, Lassiter would nonetheless not be guilty of RICO conspiracy under 18 U.S.C. § 1962(d). Lassiter is not charged with any racketeering acts *following* his alleged use of a firearm on Reid Street on December 27, 2015. No evidence exists Lassiter agreed that either he or another NTG member would commit a *subsequent* racketeering act. Because a person's agreement that either he or a fellow member of the enterprise would commit at least two racketeering acts is an essential element of RICO conspiracy under 18

U.S.C. § 1962(d), the Court should reverse Lassiter's conviction on Count One. United States v. Barnett, 660 Fed. Appx. 235, 249 (4th Cir. 2016).

CONCLUSION

For the foregoing reasons, the Supreme Court should grant Malek Lassiter's Petition for Writ of Certiorari.



Paul G. Beers
Counsel for the Petitioner

Paul G. Beers (VSB # 26725)
Counsel of Record
Glenn, Feldmann, Darby & Goodlatte
37 Campbell Avenue, S.W.
P. O. Box 2887
Roanoke, Virginia 24001-2887
Telephone: (540) 224-8000
Facsimile: (540) 224-8050
E-mail: pbeers@glenfeldmann.com