NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

MICHAEL KENNETH RICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

1. If a RICO enterprise exists for legitimate associational as well as illegitimate purposes, does it violate due process and the obligation to individualize a sentence to hold every member responsible for every single act committed by every other member during the period of membership?

2. Is the split panel decision approving the future tense instruction for a RICO conspiracy contrary to the guarantee of due process of law?

RELATED CASES

Unites States of America

v.

Jeff Garvin Smith (18-2364/2365)
Paul Anthony Darrah (18-2407/2408)
Carey Dale VanDiver (18-2323/2324)
Vincent John Witort (18-2410)
Patrick Michael McKeoun (18-2342)
Victor Carlos Castano (19-1028/1029)
David Randy Drozdowski (18-2401)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

United States Sentencing Guidelines

Rules

OPINIONS BELOW

(Published and Unpublished Appendix)

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit entered its Opinion affirming the judgment on September 13, 2021. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13(1) of the Supreme Court allows for ninety days within which to file a Petition for a Writ of Certiorari after entry of the November 16, 2021 order of the Court of Appeals. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Andrew Goetz, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office for the Eastern District of Michigan, a federal office which is authorized by law to appear before this Court on its own behalf.

Petitioner Michael Kenneth Rich respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fifth Amendment, United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

18 United States Code § 3553 – Imposition of a sentence

> **(a) Factors to be Considered in Imposing a Sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider
>
> > **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > **(2)** the need for the sentence imposed—
> >
> > > **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > >
> > > **(B)** to afford adequate deterrence to criminal conduct;
> > >
> > > **(C)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> >
> > **(3)** the kinds of sentences available;
> >
> > **(4)** the kinds of sentence and the sentencing range established for—
> >
> > > **(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
> > >
> > > **(ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

STATEMENT OF THE CASE AND FACTS

Petitioner, Michael Kenneth Rich, was one of eleven persons charged in a sealed indictment on February 9, 2011, 11-cr-20066 Indictment, R. 3, Page ID# 7 et seq. with violations of 18 U.S.C. §§ 2, 371, 876, 1503, 1513, 1622 (conspiracy to suborn perjury and obstruction of justice, subornation of perjury, obstruction of justice) and violation of 21 U.S.C. §§ 846, 841(a)(1) (conspiracy to distribute marijuana). Petitioner was one of a larger number of persons charged July 13, 2012 with alleged violations of 18 U.S.C. § 1962(d) (Racketeer Influenced Corrupt Organization – conspiracy) 11-cr-20129 Indictment, R. 72, Page ID# 590 *et seq*. The alleged enterprise was a motorcycle club, the Devils Diciples.

The cases were consolidated. There were two trials with Petitioner in Trial 2 beginning September 30, 2015. He was convicted of the RICO conspiracy, obstruction and perjury counts. He was found Not Guilty on the conspiracy to distribute marijuana. Jury Verdict Form, R. 1939, Page ID## 29449-29452.

Following his conviction and remand in December 2015 Petitioner, adhering to the district court's directed format, filed objections with the Probation Department totaling 114 pages. First Presentence Report and Addendum. Subsequently the process stopped. A conference with counsel for defendants from both trials, all Probation Officers and supervisors and the government was conducted in June 2016 (there is no Record number). Defendants collectively were required to make common objections jointly. Order Resolving General Sentencing Issues For Trial Defendants R. 2127, Page ID## 30765-30774, October 16, 2017. On November 9, 2017 the government filed a sealed Memorandum Specifying Racketeering Activities of 321

pages R. 2142, Page ID# 30828 *et seq*. The pleading later referred to by the government as its "treatise," is in spite of length, easily distilled to the notion that accountability for diverse acts all over the country often perpetrated for individual motive and purpose is reduced to chronology of membership. R. 2142, Page ID# 30828 *et seq*. In other words, if a defendant was a member of the club at the time of the act he is automatically responsible. A sincere application of the requirements of knowledge or reasonable foreseeability was unnecessary. The law that mere membership is not evidence of guilt was a nullity.

The district judge accepted, with no serious question, the government's suggestion on August 17, 2018. Order, R. 2268, Page ID## 31867-31883. That Order trivialized the doctrines of reasonable foreseeability and jointly undertaken activity with regard to the subjects of methamphetamine, the so-called Box Canyon event and two homicides which drove a "life" guidelines calculation as well as other diverse personal acts. Petitioner's guidelines of "life" were grossly miscalculated, and this was procedurally unreasonable.

On October 26, 2018 the district court sentenced Petitioner to 30 years on the RICO conspiracy (11-cr-20129) Judgment R. 2325 concurrent with the terms of imprisonment in 11-cr-20066, 60 months on Counts 1 and 2 (conspiracy and perjury) and 120 months on Count 3 (obstruction of justice) all to be served concurrently and concurrent with that in 11-cr-20129. Petitioner had not objected to the guideline calculation for the offenses in the case involving obstruction of justice, perjury and conspiracy. (11-cr-20066)

Notices of Appeal were filed, Notice, R. 395 (11-cr-20066) and Notice, R. 2325 (11-cr-20129) on October 28, 2018.

REASONS FOR GRANTING THE WRIT

In *Gall v. United States*, 128 S. Ct. 586 (2007) this Court emphasized that "all" sentencing proceedings should begin with a correct calculation of guidelines. There is no RICO exception to guideline calculation and to hold any member of the enterprise criminally responsible for each and every act committed by all other members is procedurally unreasonable. The Court in *Gall* had reemphasized the importance of looking at each convicted person as an individual. Those principles were disregarded here and a procedurally unreasonable process was wrongly legitimized by the Sixth Circuit.

Separately, the RICO conspiracy jury instruction approved by the Sixth Circuit violates due process because the insertion of future tense language relieves the government of its burden of proof. The panel dissent notes the existing conflict in the Circuits which this Court may and should resolve.[1]

ARGUMENT

I. WHERE A RICO ENTERPRISE EXISTS FOR LEGITIMATE ASSOCIATIONAL AS WELL AS ILLEGITIMATE PURPOSES IT VIOLATES DUE PROCESS AND THE OBLIGATION TO INDIVIDUALIZE A SENTENCE TO HOLD EVERY MEMBER RESPONSIBLE FOR EVERY SINGLE ACT COMMITTED BY EVERY OTHER MEMBER DURING THE PERIOD OF MEMBERSHIP.

The enterprise was a motorcycle club with chapters in Michigan, Alabama, California, and elsewhere. The district judge recognized and acknowledged that the

[1] As noted elsewhere herein this issue was raised in the Sixth Circuit by a defendant in the first trial, Jeff Garvin Smith, and all defendants joined in the issue. Smith, with retained counsel will be submitting a Petition making a full presentation of the issue as he did in the Circuit.

club existed "to achieve both legitimate associational and illegitimate criminal purposes." (Transcript, R. 2422, Page ID# 35322) (Emphasis supplied)

A considerable number of the government's own witnesses who were club members testified that some crimes were committed for individual purposes and benefits. For example, Ronald Roberts testified about some motorcycle theft in Alabama:

> "It's not like it was the club that did it. It was more of a personal thing. We as people did it." (Transcript, R. 1619, Page ID# 20963)
>
> * * *
>
> "So, therefore we shouldn't be dragging the chapter into our personal business in that aspect." (Transcript, R. 1619, Page ID# 20963) (Emphasis supplied)

The record evidence in general showed a disparate collection of individuals often animated, sometimes spontaneously, by purely individual agendas, purposes, motives and goals.

Petitioner spent the vast majority of the time of his membership in Anniston, Alabama far from the national headquarters in Michigan. As the district judge himself recognized at a co-defendant's sentencing, Petitioner was

> hidden out down in the woods in Alabama, had one foot either out the door or in the grave. I am not sure which, maybe both analogies would be appropriate, and was less active as years went on . . . . (Transcript, R. 2429, Page ID# 36153, 36154)[2]

[2] This was six weeks after Petitioner's sentence and in Petitioner's view a more candid, accurate and nonpartisan assessment.

A member, Vern Rich (no relation to Petitioner) had in trial explained more succinctly when questioned by a prosecutor on direct examination:

> Q. All right. And do you have an understanding of what he was doing in Alabama?
>
> A. Absolutely nothing.
>
> * * *
>
> Q. All right. Do you know why he was there?
>
> A. I guess no other place – you know, what better place to go hang out if he was going to do nothing.

(Transcript, R. 1625, Page ID# 21941) (Emphasis supplied)

Nevertheless, Petitioner was held responsible for every single act committed by any other club member anywhere in the country in the absence of reasonable foreseeability or jointly undertaken activity. In many instances there was no evidence that Petitioner even knew the other members or knew anything about the crime. Mere membership in the club caused multiple "life" guideline calculations with respect to the four separate subjects of methamphetamine quantities, the severe beatings of five members in Arizona and two homicides. No connection to Petitioner was shown with respect to most of this activity. In reality the district judge's sentencing was an adverse reaction to a culture.

The "Box Canyon" incident took place approximately 1,734 miles from Anniston, Alabama. The testimony of actual participants testifying for the government proved the activity was not jointly undertaken with Petitioner or reasonably foreseeable by him. U.S.S.G. § 1B1.3(a)(1)(B).

Club member, John Altman, described the five members who were assaulted because of their role and alleged torture of a woman as "a special clique." (Transcript, R. 1622, Page ID# 21364) They were a bunch of bums without a lot of organization at all. (*Id.* at Page ID# 21405) There was no plan before the event. *Id.* at Page ID# 21417. Altman's understanding, as a member of what was supposed to happen, was far different from what actually occurred. (*Id.* at Page ID# 21373) He was shocked by the unexpected escalation. *Id.* at Page ID# 21381. His expectation as a member was that the five were to have their colors and patches taken and they might be beaten a little bit. His expectation was based on his own experience in the club. When another member was "run down the road" (expelled from the club) they might get a black eye. (*Id.* at Page ID# 21420, 21421)

Altman's testimony was in perfect sync with the other club member, Doug Smith. He figured they might go to Tucson, hear a bunch of denials

> "So, there is good chance we would have went down there for nothing."
>
> * * *
>
> "It wasn't like go down there, and, beat these guys to pulps and take their patches off." (R. 1622, Page ID# 21471)

The bottom line was no one set out "to kill anyone" or rob anyone. Simply to "peel" several patches off. (*Id.* at Page ID# 21596, 21597)

In the district court, and in the Sixth Circuit, Petitioner had cited *United States v. Mulder*, 273 F.3d 91 (2nd Cir. 2001); *United States v. Johnson*, 378 F.3d 230 (2nd Cir. 2004) in support of the principles that even mere knowledge of another

conspirator's criminal acts or the scope of the overall operation does not automatically make a defendant responsible.

The district judge dismissed the carefully articulated Second Circuit opinions with the most flimsy distinction i.e., those cases were not RICO cases. The Sixth Circuit placed its imprimatur on this procedural error. (*Id.* at Page ID# 31876) Respectfully, there is no RICO exception in the guidelines, in the statute or this Court's precedents. Neither a RICO substantive charge or conspiracy license the lack of refined, individualized sentences.

Recognizing the preponderance standard. "generally" satisfies due process, a higher standard may be necessary, as here, where the "tail" of relevant conduct "wags the dog of the substantive offense." See generally *United States v. Watts*, 519 U.S. 148, 156 and fn.2 (1997).

The district judge's attempt to distinguish *Mulder* and *Johnson* because they were "not RICO conspiracy cases" was superficial and deliberately ignored that the Second Circuit correctly set forth critical legal principles about foreseeability, accountability, and jointly undertaken activity. There is no special exception for RICO to evade those legal principles, the Constitution or the provisions of the sentence guidelines. The district judge's reliance on "culture" and club rules inconsistently applied or ignored did not justify the assorted calculations here. The district judge's bad thinking is encapsulated in the chart of entry dates to the club at page 13. Order, R. 2268, Page ID# 31879.

The district judge, contrary to U.S.S.G. § 1B1.3, even extended the miscalculations to assorted acts in 2014 and 2015 (post-indictment). Petitioner had been arraigned and was living peacefully in Alabama on bond with not a hint of any communication with co-defendants, many of whom he did not even know.[3] These included supposed threats in jails like witness Anthony Clark's alleged "shiv" testimony which was contradicted by a sworn affidavit by a non-club member incarcerated in the same jail. See e.g., *United States v. Melton*, 131 F.3d 1400 (10th Cir. 1997); *United States v. Collado*, 975 F.2d 985 (3rd Cir. 1992).

The government demonstrating its penchant for going in opposite directions at the same time earlier withdrew the assertion that Petitioner was accountable for a different post indictment threat allegedly made by Victor Castano to member Darren Sloan or witness Melissa Gordon. R. 2268, Page ID# 31883. At his sentencing Petitioner observed that the government had given no reason for withdrawing it and asked the Court to inquire. The government's response was:

> MR. STRAUS: I think there's a mixed reason there. I don't think it adds anything to the analysis, <u>but there's most definitely a personal aspect to</u> – R. 2422, Page ID# 35352). (Emphasis supplied.)

There were "personal aspects" to most of the other various acts Michael Rich was held responsible for. Just a single good example was the incident involving Jeff Smith and Jeffrey Young (Jethro) in Michigan. A shooting was precipitated by jealousy and the desire of each to be with some woman named "Christine." Addendum to Presentence Report A32. An argument punctuated by a shooting was

[3] Petitioner was the only trial defendant who was not detained.

simply personal. Personal aspect however, was ignored, and the incident swept under the generalized category of "endemic" violence. R. 2422, Page ID# 35354.

Similar erroneous thinking was used to inflate Petitioner's guideline range to "life" with regard to methamphetamine and drug quantity.

There had been good reason why Petitioner was never charged in the separate methamphetamine conspiracy count.[4] Nevertheless, the district judge and the Sixth Circuit panel held him responsible for every distribution, possession with intent to distribute, act of manufacturing or aiding and abetting such. The panel decision ignored U.S.S.G. § 1B1.3(a)(1)(B), established precedent in the Circuit and elsewhere. See *United States v. Campbell*, 279 F.3d 392 (6th Cir. 2002); *United States v. McReynolds*, 964 F.3d 555 (6th Cir. 2020) (Judge Griffin dissenting).

Petitioner challenged the blanket attribution of drug quantity based on his mere membership. He similarly challenged the jury verdict involving the lesser quantity.

The district judge and the Sixth Circuit also failed to recognize the sharp distinction between drug offenses of commercial nature and illicit personal use. See *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977). Petitioner's point and *Swiderski* had been recognized when the Circuit vacated a drug conspiracy count in *United States v. Layne*, 192 F.3d 556, 569 (6th Cir. 1999). *Layne* recognized the critical distinction between conspiring to distribute and an agreement to possess

[4] He was not implicated in any fashion by the major distributors: Vern Rich (no relation), Michael Mastromatteo, Karen Casey or John Riede.

drugs for personal use. The latter does not fall within the requisite chain of distribution.

By using the procedural device of mere membership to make Petitioner responsible no precise method of allocating a quantity of drugs to him was necessary. No effort was needed, or made, to reflect his personal, relative culpability. This is a long way from the Circuit's longstanding admonition to take caution in determining drug quantities. *United States v. Walton*, 908 F.2d 1289 (6th Cir. 1990).

There simply was no individualized assessment as required by this Court. *Gall v. United States*, 552 U.S. 38, 50 (2007). See also *United States v. Perez-Rodriguez*, 960 F.3d 748, 756 (6th Cir. 2020). Again, there is no RICO exception in the guidelines and relevant sentencing laws. There is no motorcycle club exception either.

II. THE SPLIT PANEL DECISION APPROVING THE FUTURE TENSE INSTRUCTION FOR A RICO CONSPIRACY IS CONTRARY TO THE GUARANTEE OF DUE PROCESS OF LAW FOR REASONS STATED IN THE DISSENT AND OTHER CIRCUITS.

Petitioner was the first to file his brief. When all other briefs were filed Petitioner made a motion to join in selected, (not all), issues raised by other defendants. This included that issue raised by Jeff Garvin Smith regarding jury instructions. Doc. 123. The motion was granted. Doc. 126. Rich continues his request to join in this issue of first impression in the Sixth Circuit raised by Smith.[5] Petitioner believes, as stated in the dissent, that the jury instruction in question impermissibly lowered the government's burden of proof. Further, that it is "a grave

[5] Jeff Garvin Smith's petition by retained counsel is forthcoming.

error that cannot be remedied other than by reversing each of the defendants' convictions and sentences and remanding for a new trial." Doc. 168-2, Page 16. The Eighth and Eleventh Circuit model jury instructions avoid this error.

The government must always prove that the defendant objectively manifested an agreement to participate in the affairs of the enterprise. *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995). The Eighth Circuit's model instruction comports with that obligation.

The term "enterprise" embraces both legitimate and illegitimate organizations. *United States v. Turkette*, 452 U.S. 576 (1981). A motorcycle club is not an illegitimate organization per se.[6] If the contrary were true there would not have been the instruction by the Court that mere simple membership alone is not sufficient to prove guilt. Nor does the longevity of the club constitute the requirement of structure with necessary features of common purpose and relationship.

The district court, at the insistence of the government, inserted future tense language in its jury instruction on the RICO conspiracy charge. Thus, the jury could convict if "an enterprise would exist," that the enterprise "would be" engaged in activities affecting interstate commerce that a conspirator "would" participate in those affairs and "would" commit at least two acts. In other words, none of the elements of the RICO conspiracy had to exist at any time.

[6] This is so even if some members use drugs, are misogynist or as individuals sometimes act in a criminal, bad or illicit manner.

The government had looked for a way to avoid its burden of proof. Perhaps this was a reflection of the recognition by the government that there was serious question about whether the motorcycle club acted as a "continuing unit."

The government's witness Keith McFadden testified that not every member of the Devils Diciples Motorcycle Club (DDMC) had engaged in criminal acts. R. 1628, Page ID# 22660. That was a certainty. *Id.*

Anthony Clark, a member of a different club, the Highwayman, referred to his club as an "elite" group but Devil Diciples were less so because their motorcycles were "raggedy." R. 1636, Page ID# 24522, 24523. His pejorative "bug eaters," in Petitioner's view, extended beyond motorcycles. R. 1636, Page ID# 24522. It went to the lack of a cohesive functioning organization. Many criminal acts were done for individual, not club, purposes.

Admittedly, any group of individuals associated in fact has a wide reach. See e.g., *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831 (2008). Nevertheless, there was an essential additional requirement, i.e., that members, actually functioned or agreed to function with others as a continuing unit to achieve a common purpose over the span of the conspiracy. Here, there was no continuing unit acting to achieve a common purpose. Rather, it was a disparate collection of individuals with individual acts, agendas, goals and purposes. The club members were clearly a dysfunctional group.

There was a lack of meaningful evidence of "leaders" directing other members to engage in illegal acts. Each DDMC chapter had distinct ways of doing things,

separate and apart from other chapters. For instance, there was no consistency in application of punishments. Jeffrey Armstrong testified that the Port Huron chapter did not utilize the "black eye" policy. R. 1615, Page ID# 19828. Clearly different chapters functioned independently and differently. John Riede testified "Alabama" (without even differentiating the three separate chapters) had a different set of rules than any other place in the country. R. 1618, Page ID# 20725. Former member, Jeffrey Arnold, like Jeffrey Young, also testified that the club was in no way a fraternal organization. There was:

> A. No brotherhood, like a bunch of wolves snapping at a carcass all the time.

R. 1615, Page ID# 19960. (Emphasis supplied.) Mr. Arnold was testifying about having his motorcycle taken by some club members who were physically opposed in a scuffle by "Magoo" (Patrick McKeoun) and another member (Transcript R. 1075, Page ID# 6561, 6565).[7]

Most circuits require proof of the existence of an enterprise. The Eighth Circuit Model Jury Instructions is illustrative.

6.18.1962B RICO—CONSPIRACY (18 U.S.C. § 1962(d))

> The crime of conspiracy to [invest or use income derived from racketeering activity] [acquire or maintain an interest in or control of an enterprise] [participate, directly or indirectly, in the affairs of an enterprise] through a pattern of racketeering activity as charged in [Count -- --] of the Indictment has five elements, which are:

[7] Another example which could be added to Issue I, *supra*. When McKeoun's counsel asked that the Presentence Report be corrected to comport with the testimony the district judge directed it to read: "McKeoun was present." (Transcript, Sentencing R. 2427, Page ID# 35750-54, 35796-97.

> *One*, an enterprise existed as alleged in the Indictment;
>
> *Two*, the enterprise [was engaged in] [had some effect on] interstate commerce;
>
> *Three*, the defendant was [associated with] [employed by] an enterprise;
>
> *Four*, that on or about [insert date] two [or more] persons reached an agreement or came to an understanding [to invest or use income derived from racketeering activity] [to acquire or maintain an interest in or control of an enterprise] [to conduct or participate in the affairs of an enterprise, directly or indirectly,] through a pattern of racketeering activity; and
>
> *Five*, that the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in existence, and at the time the defendant joined in the agreement or understanding [he] [she] specifically intended to otherwise participate in the affairs of the enterprise.

See also Judicial Council of the United States, Eleventh Judicial Circuit, 2019, O75.2 RICO – Conspiracy Offense 18 U.S.C. § 1962(d); *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir. 1986).

Petitioner, as others in forthcoming petitions will contend, submits that all defendants are entitled to a new trial.

CONCLUSION

In consideration of the foregoing, Petitioner Michael Kenneth Rich urges the Court to grant certiorari review to resolve the questions presented herein to vacate the judgment of the Sixth Circuit Court of Appeals and remand for further proceedings consistent with the Court's decision.

Respectfully submitted,

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Dated: February 4, 2022