NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October, 2022 Term

COREY BAILEY,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of RICO Conspiracy, 18 U.S.C. §1962(d), and multiple counts of Murder and Attempted Murder in Aid of Racketeering, 18 U.S.C. §1959(a). The Sixth Circuit affirmed the convictions and sentences.

The questions presented are:

I. A. Did the government prove beyond a reasonable doubt the existence of a racketeering enterprise, a necessary element for all of the charges, when there was no evidence of any structure of membership, common purpose for an entity or organization or continuing unit?

B. Could Petitioner be convicted of aiding and abetting the VICAR convictions when there was no evidence that Petitioner committed any act that furthered the commission of the crime?

II. Should the jury have been allowed to convict Petition on the hypothetical existence of the predicate federal and state crimes?

III. Was Petitioner denied his right to confrontation and a fair trial by admission of a hearsay statement, which was the basis for the VICAR convictions?

IV. Was Petitioner entitled to text messages between the agent in charge and the cooperating witnesses under *Jencks* and *Brady*?

V. Can the good-faith exception to the warrant requirement under this Court's decision in *United States v. Carpenter*, 138 S. Ct. 2206, 2221 (2018), allow for the illegally seized information to be admitted at trial?

VI. Was Petitioner deprived of his right to an impartial jury and evidentiary hearing having established a colorable claim of extraneous influence and bias of jurors?

VII. Can the trial judge impose multiple life sentences by considering Petitioner's refusal to admit his guilt after trial?

PARTIES TO THE PROCEEDINGS

Corey Bailey is the Petitioner in this cause, as he was a defendant in the District Court for the Eastern District of Michigan, Southern Division, wherein the Respondent was the United States of America. On appeal to the Sixth Circuit Court of Appeals, Bailey was an appellant and the United States was the appellee.

RELATED CASES

*United States of America v. Arlandis Shy, II (*19-2281*); Robert Brown* (19-2354); United States Court of Appeals for the Sixth Circuit, dated July 5, 2022.

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The Petitioner, COREY BAILEY, by and through court-appointed counsel, CRAIG A. DALY, P.C., requests this Court to grant a Writ of Certiorari to review the Opinion and Judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit entered on July 5, 2022.

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Sixth Circuit Court issued its Opinion and Judgment affirming the convictions and sentences on appeal from the United States District Court for the Eastern District of Michigan, Southern Division on July 5, 2022 and is reproduced in the Appendix, pages 1-49.

STATEMENT OF JURISDICTION

The Sixth Circuit filed its Opinion and Judgment on July 5, 2022. This Court has jurisdiction to review the Opinion and Judgment under 28 U.S.C. §1254(1) and Rule 13.1 and 2 of the Supreme Court which allows ninety days within to file a Petition for Writ of Certiorari after the entry of the Opinion and Judgment. Accordingly, the Petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions: U.S. Const. Amend. IV, V, VI, the right "to be confronted with the witnesses against him", the right to be tried by an "impartial jury", and the right to a trial by a jury.

Statutory provisions: 18 U.S.C. §1962(d), 18 U.S.C. §1962(c), 18 U.S.C. §1959.

INTRODUCTION AND STATEMENT OF THE CASE

The government alleged that a group of men who grew up together in northeast Detroit, and identified themselves as the Seven Mile Bloods (SMB) had committed a series of violent and drug crimes that constituted a RICO Conspiracy. The government alleged that Petitioner was a member of the SMB and that he had aided and abetted in a murder and assault with intent to murder rival gang members. After a two month jury trial, Petitioner was convicted of the RICO Conspiracy and VICAR counts and received multiple life sentences.

The issues presented in this case address whether the Sixth Circuit Court of Appeals allowed for Petitioner's conviction and sentence to be affirmed, when the proofs failed to establish, beyond a reasonable doubt, the existence of a racketeering enterprise under 18 U.S.C. §1962(d), a necessary element for all of the Petitioner's convictions. Alternatively, the Sixth Circuit affirmed the VICAR convictions under 18 U.S.C. §1959(a) without any evidence that Petitioner aided and abetted in the commission of the state predicate felonies. In addition, the Sixth Circuit affirmed the District Court's erroneous jury instruction, by including the future tense language of "would exist" into the elements of the predicate federal and state offenses. The VICAR counts were affirmed by the admission of inadmissible hearsay statements,

that violated Petitioner's right of confrontation. The VICAR counts were affirmed when the government obtained historical cell tower information in violation of this Court's decision in *United States v. Carpenter*, 138 S. Ct. 2206 (2018) under the erroneous belief that the evidence was admissible under the good-faith exception of the Fourth Amendment. Post-conviction affidavits of jurors formed the basis of a required hearing based on extraneous influence and juror bias. Yet the Sixth Circuit refused to remand for the required evidentiary hearing. Finally, the District Court deprived Petitioner his constitutional right to a trial by jury, and not to be punished for exercising that right, by refusing to admit guilt after his convictions.

REASONS FOR GRANTING THE WRIT

I. A. THERE WAS NO RACKETEERING ENTERPRISE.

A group of men, who grew up together and lived in the same neighborhood in northeast Detroit, called themselves the Seven Mile Bloods (SMB). These men were loosely associated by familiarity, geographic location and a desire to profit from selling drugs. Those who identified with the SMB and their associates had their own suppliers, customers, drug houses and stash houses and operated independently from one another. Whatever they made, they kept for themselves. When drugs were sold, they did not advance the SMB, any organization or enterprise. The SMB had none of the trappings of a criminal enterprise - a common purpose with some form of structure that established a relationship among those associated with the enterprise. *Boyle v. United States*, 556 U.S. 938, 946 (2009). Instead, the government sought to prove the existence of the enterprise through a pattern of racketeering activity. *United States v. Turkette*, 952 U.S. 576, 583 (1981) ("[T]he existence of a racketeering enterprise is an element distinct from a pattern of activity."). The fact that the SMB was a "distinct, identifiable group" did not make it a continuing unit with longevity sufficient for the group to pursue any purported purpose. *Boyle*, 556 U.S. at 948. Anyone could come or go within the group by either declaring association or simply walking away. There were no obligations, duties, directions, or leadership.

There was no tithing to the church or union dues. Isolated instances of violent acts by individuals who were associated did not make the SMB an enterprise. Even in a light most favorable to the government, the evidence at trial fell well short of the legal requirements of a criminal enterprise. Therefore, all of the verdicts must be vacated. At best the government showed a simple drug conspiracy that never reached the height of a racketeering enterprise.

B. THE VICAR CONVICTIONS WERE UNSUPPORTED BY THE EVIDENCE.

In July of 2014, a sole individual shot into a car occupied by three individuals in revenge for two of the occupants putting him in prison years before. That personal vendetta left one man dead and another injured. There were no eyewitnesses to the shooting and none of the victims testified at trial. The shooter had a previous confrontation with the victims, over this personal vendetta, where he threatened to kill them and then shot at them outside of a lounge. The shooter was described as being "out of control" and "getting high off of shooting people". The shooter took complete responsibility for the shooting and never implicated Petitioner at all. Nothing linked Petitioner to the incident until December of 2014. According to one of the cooperating defendants, he was *told* that *after* the shooting, the shooter pulled off in his vehicle, and Petitioner was described as a "dumb ass" who waived a red

bandana out the window. Even if believed, under both Michigan law and federal law, one can be an aider and abettor *only* if he aids and abets the principal *before* or *during* the commission of the crime, not after. *Rosemond v. United States*, 572 U.S. 657 (2014); *People v. Carines*, 460 Mich 750, 758 (1999) ("[M]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor."). Further, Petitioner's alleged act could not have been for the purpose of maintaining or increasing his position in the SMB. Petitioner's alleged conduct was *concealed* for months. Only the shooter bragged that he, alone, was responsible, never mentioning Petitioner. Being a "dumb ass" hardly increases Petitioner's position. This Court should grant the writ.

II. THE JURY WAS ALLOWED TO CONVICT PETITIONER ON THE HYPOTHETICAL EXISTENCE OF THE FEDERAL AND STATE PREDICATE RACKETEERING CRIMES.

The district court instructed the jury that the racketeering acts under both federal and state law were committed if the Petitioner "or a conspirator" committed those crimes. The basis of the erroneous instruction was that Petitioner was charged with a RICO conspiracy, not the substantive offense. Section 1962(d) makes it "unlawful for any person to conspire to violate" 18 U.S.C. §1962(c). The statute

compels the government to prove a conspiracy to violate a RICO violation, that is, the substantive offense. *Smith v. United States*, 568 U.S. 106, 110 (2013); *United States v. Turkette*, 452 U.S. 576, 583 (1981). Here, the erroneous instruction changed the elements for every substantive federal or state crime, crimes which were not cognizable under federal or state law. In short, for there to be a RICO conspiracy conviction, the government had to prove that Petitioner intended to further "an endeavor which, if completed, *would satisfy all of the elements of a substantive criminal offense*." *Salinas v. United States*, 522 U.S. 62, 63, 65 (1997). The erroneous instruction violated Petitioner's due process rights under the Fifth Amendment, *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *In Re Winship*, 397 U.S. 358, 364 (1970). In the present case, the alternative theories of guilt instructed, one which is legally invalid, constitutes a constitutional error. *Skillings v. United States*, 561 U.S. 358, 414 (2010).

III. THE VICAR CONVICTIONS WERE BASED ON A HEARSAY STATEMENT IN VIOLATION OF PETITIONER'S RIGHT OF CONFRONTATION.

As previously noted in Argument I(B) *infra*, the VICAR convictions were grounded in a hearsay statement. The district court admitted it under the co-conspirator exception under Federal Rules of Evidence 810(d)(2)(E). The Sixth Circuit ruled that the admission of the statement was "a close call". It was not. The

Sixth Circuit's adoption of the district court's conclusion is purely theoretical, rather than based on reality. It was a theory with no evidence. To suggest that the statement put Kennedy who testified to hearing the statement, that as a an associate *he* could be targeted for revenge, and *he* could be targeted anytime he was with Petitioner or the shooter, belies the obvious. Kennedy was a close friend of the shooter, and was with the shooter when he threatened to kill the victims earlier. It was well known that Kennedy and the shooter were associates who hung together on a regular basis and the shooter had previously told Kennedy that he did the shooting. And Kennedy and Petitioner did not associate with one another at all. The theoretical basis for the admission was simply pulled out of thin air. The statement was nothing more than conversation about a past event that had no basis for furthering the conspiracy.

IV. THE GOVERNMENT SUPPRESSED TEXT MESSAGES BETWEEN THE AGENT IN CHARGE AND THE COOPERATING DEFENDANTS IN VIOLATION OF *JENCKS*[1] AND *BRADY*[2].

Neither the government or the lower courts disagreed that the multitude of text messages between the case agent and the two cooperating government witnesses were suppressed and exculpatory. This information, according to the Sixth Circuit Court of

[1]18 U.S.C. 3500.

[2]*Brady v. Maryland*, 373 U.S. 83 (1963)

Appeals did not create a reasonable probability of a different verdict because the witnesses were already impeached at trial. At trial, the witnesses *only* presented themselves as witnesses providing *historical* information and that their rewards were limited to that information. That was simply not true. The text messages clearly showed they were actively involved in real-time, not only gathering information of alleged on-going criminal activity, but willing to *set up* a number of individuals for drug dealing in large amount and violence, even against family members, including a murder. In short, the jury never knew that the witnesses were career informants, willing to set up their victims to help themselves. There was nothing cumulative or immaterial about this critical evidence.

V. THE GOVERNMENT USED ILLEGALLY SEIZED EVIDENCE UNDER THIS COURT'S HOLDING IN *UNITED STATES v. CARPENTER*, 138 S. CT. 2206, 2221 (2018), AND THE GOVERNMENT CANNOT CLAIM A GOOD-FAITH EXCEPTION.

Again, the government and lower court agreed that the warrantless seizure of cell-cite location information was illegally seized in violation of the Fourth Amendment. However, the information was not obtained by law enforcement officers, but rather government lawyers, who decided to short-cut the Fourth Amendment. This is not a case of an uneducated police officer on what the law was and could be. The reason for not seeking a warrant was because the government lawyers did not have

probable cause, as the statutory application by government lawyers under §2703(d) of the Stored Communications Act (SCA) revealed. The good-faith exception does not apply to the facts and circumstances of this case.

VI. PETITIONER WAS DEPRIVED OF AN IMPARTIAL JURY WHEN THE DISTRICT COURT REFUSED TO CONDUCT A *REMMER*[3] HEARING ONCE THE COURT WAS PRESENTED WITH EVIDENCE OF JUROR BIAS AND OUTSIDE INFLUENCE.

Two jurors signed affidavits stating a jury injected extraneous influence and bias into the deliberation, and set forth in detail what occurred, including a Detroit News article about the SMB. Strangely, the Sixth Circuit Court of Appeals ruled that the evidence was not admissible under Rule 606(b), which provides, in part:

> (2) *Exceptions*. A juror may testify about whether:
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
> (B) an outside influence was improperly brought to bear on any juror.

This Court in *Mattox v. United States*, 146 U.S. 140 (1892) recognized a juror was competent to testify to the use of a prejudicial newspaper account into the jury room. See also, *Parker v. Gladden*, 385 U.S. 363 (1966). Falling squarely within the rule and this Court's ruling, a *Remmer* hearing was required.

[3] *Remmer v. United States*, 347 U.S. 227, 230 (1954).

Additionally, a marshal improperly interfered with deliberations by informing them to lower their voices, giving jurors his cell phone number in case they received threats (presumably from individuals connected with the defendants) and questioning a juror about her report that there was a "conspiracy" among jurors in their deliberations.

This evidence was more than sufficient to conduct a hearing, as opposed to simply turning a blind eye to the problem.

VII. THE DISTRICT JUDGE IMPOSED ATRIAL PENALTY OF LIFE WHEN PETITIONER REFUSED TO ADMIT GUILT AFTER HIS CONVICTION.

At sentencing, Petitioner clearly expressed his continued innocence, stating, "All the accusations, they not true. I ain't committed no RICO." In response, the district court first noted other defendant's had pled guilty and accepted responsibility, but not Petitioner. Then the district court said he was hoping to hear that Petitioner would have accepted responsibility for his criminal activity. Petitioner did not. This was a clear statement of a penalty for Petitioner exercising his right to a jury trial and his refusal to accept responsibility, regardless of his claim of innocence. What followed was life sentences. Neither the 18 U.S.C. §3553(a) factors to be considered for imposing a sentence or the Constitution allow for such a penalty. Splitting hairs between "accepting responsibility" and penalizing a defendant for exercising his right

to trial, is a semantic game of avoidance. A trial court cannot penalize a defendant for exercising his constitutional right to plead not guilty and go to trial and that choice has no bearing on a sentence to be imposed. U.S. Const. Am. VI; *United States v. Jackson*, 390 U.S. 570, 581 (1968); *North Carolina v. Pearce*, 395 U.S. 711, 738 (1969) ; *United States v. Derrick*, 519 F.3d 1, 3 (6th Cir. 1975); *Barker v. United States*, 412 F.2d 1069 (5th Cir. 1969); *United States v. Marzette*, 485 F.2d 207 (8th Cir. 1973).

CONCLUSION

WHEREFORE, for all the foregoing reasons, this Court should reverse the Sixth Circuit and remand for relief consistent with this Court's opinion.

Respectfully submitted,

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