No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

JAMAL LAURENT

Petitioner,

against

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

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ISSUES PRESENTED FOR REVIEW

1. Whether RICO is a crime of violence under 18 U.S.C. §924(c)?

2. Whether the district court erred when it admitted Merritt's statements or alternatively whether it erred when it did not sever the joint trials?

3. Whether the district court erred in denying Laurent's motion to introduce unavailable witness statements, or alternatively whether it erred in denying the requested missing witness instruction?

4. Whether there was insufficient evidence to support the convictions?

5. Whether the district court erred when it did not suppress the warrantless seizure of the handgun from Laurent's bedroom?

PARTIES TO PROCEEDINGS

The Petitioner in this Court is Jamal Laurent. The Respondent is the United States of America.

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Petitioner,

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Appellee- Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Petitioner, Jamal Laurent, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, wherein the Second Circuit held that (1) RICO is not a crime of violence under 18 U.S.C. §924(c); (2) the district court did not err when it admitted Merritt's statements and did not err when it did not sever the joint trials; (3) the district court did not err in denying Laurent's

motion to introduce unavailable witness statements, and did not err in denying the requested missing witness instruction; (4) there was sufficient evidence to support the convictions; and (5) the district court did not err when it did not suppress the warrantless seizure of the handgun from Laurent's bedroom.

OPINION BELOW

A copy of the Opinion of the United States Court of Appeals for the Second Circuit, dated April 26, 2022, has been published at *United States v. Laurent*, 33 F.4th 63 (2d Cir. 2022). The Opinion is reproduced in Appendix A, *infra*.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit as set forth in the Opinion in *United States v. Laurent*, 33 F.3d 63 (2d Cir. 2022) is dated and was entered on April 26, 2022. Laurent's petition for rehearing and/or rehearing *en banc* was denied on July 14, 2022. The Second Circuit had jurisdiction under 28 U.S.C. § 1254(1). The United States District Court for the Eastern District of New York had jurisdiction under 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in part, the construction of the Fifth and Sixth Amendments of the United States Constitution. This case also involves the interpretation of 18 U.S.C. §§ 924(c) and 1962. The pertinent texts of the Constitution and Statutes are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

Among other things, Laurent was convicted for three violations of §924(c): (1) Count Three charging that he (and Ashburn and Merritt) used or carried firearms "in relation to one or more crimes of violence, to wit: the crimes charged in Counts One and Two" (RICO and RICO conspiracy); (2) Count Seven charging that Laurent used or carried a firearm in relation to an assault with a dangerous weapon in-aid-of racketeering, and (3) Count Ten charging that Laurent used or carried a firearm in relation to a Hobbs Act robbery conspiracy. The jury found Laurent guilty of the foregoing counts. He received consecutive life sentences for each of the §924(c) convictions. On appeal, Laurent challenged his §924(c) convictions based on *Davis*.

On appeal, the United States Court of Appeals for the Second Circuit held that substantive RICO is not a crime of violence under 18 U.S.C. §924(c). The Second Circuit reasoned that courts are required to find under *Davis* that the predicate offenses for the §924(c) convictions are "crimes of violence" under the elements clause of §924(c). (Appendix A, 44-46)

As to Count Three, the predicate offenses were substantive RICO and RICO conspiracy. *Id*. at 47. The Second Circuit agreed with the Defendants that RICO conspiracy is not a crime of violence in that the crime is complete upon "mere reaching agreement." *Id*. at 48, *see United States v. Capers*, 20 F.4th 105, 117-18 (2d Cir. 2021). The court observed that the district court did not instruct the jury to

specify whether its finding of guilt for Count Three was based on the substantive RICO, the RICO conspiracy, or both. *Id*. at 47-48. Nor did the Defendants object to the court's instructions. *Id*. As such, the Second Circuit was "unable to determine whether the jury's finding of a crime of violence was predicated on the substantive RICO offense, the RICO conspiracy, or both." *Id*. Based on *Yates v. United States*, 354 U.S. 298 (1957), this Court held that "the entries of the guilty verdicts on Count Three were legal error." *Id*. at 48-49.

Given that the Defendants had failed to object to the jury instruction, the Second Circuit applied plain error analysis. *Id*. at 49-55. The court found (1) there was error and (2) the error was clear. *Id*. at 49-50. But when determining whether the error had affected the Defendants' substantial rights, the court held that under its decision in *Ivezaj* it was not error "in instructing the jury that a substantive RICO violation can be a crime of violence for the purpose of §924(c)." *Id*. at 51-52.

The Opinion acknowledges that *Ivezaj* stated that it applied the "categorical approach" to determine whether substantive RICO is a crime of violence. But the Opinion states that the analysis in *Ivezaj* was "much closer to the *modified* categorical approach, insofar as the court held that determining whether a substantive RICO conviction is a 'crime of violence' requires looking at the particular predicate racketeering acts underlying the conviction." *Id*. at 52. (emphasis in original).

The Second Circuit states in the Opinion that it saw "nothing in *Davis* that suggests, much less compels, a rejection of our *Ivezaj* analysis." *Id*. at 52. The court also suggested that RICO is a divisible statute, and therefore courts may "deem[ ] it a crime of violence when the defendant is charged under a predicate that is a crime of violence but not a crime of violence when the RICO charge is based on non-violent predicates." *Id*. at 53. The court further held that it did "not read *Ivezaj* precedent as requiring two violent predicates." *Id*. Finally, the Opinion states that its "conclusion is compatible" with the Second Circuit decision in *Martinez* where the court discussed *Ivezaj* in the context of the voluntariness of a guilty plea. *Id*. at 53-54.

As to Count Seven, the Second Circuit held that attempted assault under New York State law was categorically a crime of violence. *Id*. at 60-61. As to Count Ten, the court reversed Laurant's §924(c) conviction alleging that the firearm was used and carried in relation to a Hobbs Act robbery conspiracy because conspiracy is merely an agreement. *Id*. at 62.

REASONS FOR GRANTING THE WRIT

Laurent contends that substantive RICO is a "crime of violence" under 18 U.S.C. §924(c). Among other things, the Second Circuit's decision on this issue conflicts with this Court's decisions in *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019); *Griffin v. United States*, 502 U.S. 46 (1991); *Yates v. United States*, 354 U.S. 298 (1957); and *Stromberg v. California*, 282 U.S. 359 (1931). The decision is also inconsistent with the Second Circuit's prior decisions in *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009) and *United States v. Martinez*, 991 F.3d 347 (2d Cir. 2021). The main issue raised in this petition is also of great importance. RICO is a highly significant federal criminal statute. The ramifications of the Second Circuit's decision in *Laurent* are far reaching.

Based on *Davis*, Laurent contends the Second Circuit misapplied the categorical approach to the question of whether substantive RICO is a crime of violence under §924(c). The elements of substantive RICO are extremely broad. Substantive RICO is not written as a divisible statute. Section 1963(c) of Title 18 of the United States Code makes it unlawful "for any person employed by or associated with any enterprise…to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. §1962(c). The term "enterprise" encompasses both legitimate and illegitimate enterprises. *United States v. Turkette*, 452 U.S. 576 (1981). A RICO

enterprise is broadly defined as "a group of persons associated together for a common purpose of engaging in a course of conduct," proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id*. at 583.

An individual charged with RICO must conduct or participate in the conduct of an "enterprise's affairs through a pattern of racketeering activity." See *United States v. Payne*, 591 F. 3d 46, 64 (2d Cir. 2010). To show that a series of acts constitutes a "pattern" of racketeering activity, the government must prove that (1) the defendant committed at least two predicate acts of racketeering within 10 years of one another; (2) that the racketeering predicates are "related"; and (3) that the predicates amount to or pose a threat of continued racketeering activity. *H. J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 236-39 (1989).

18 U.S.C. §1961(1) generically defines the element "racketeering activity" as encompassing both violent and non-violent conduct. Among the non-violent conduct, "racketeering activities" include gambling, bribery, dealing in obscene matter, counterfeiting, embezzlement from pension and welfare funds, extortionate credit transactions, various forms of fraud including mail and wire fraud, obstruction of justice, theft of trade secrets, money laundering, criminal infringement of a copyright, and trafficking in contraband cigarettes. See 18 U.S.C. §1961(1).

Based on the generic definition of "racketeering acts," the minimum criminal conduct necessary to commit RICO does not require "the use, attempted use, or threatened use of physical force against the person or property of another." See 18 U.S.C. §924(c)(3)(A). *See, e.g.*, *Napoli v. United States*, 45 F.3d 680, 2d Cir. (1995) (private investigators guilty of RICO when assisting attorneys by providing false witnesses, fabricated evidence and counterfeit claims); *United States v. LeRoy*, 687 F.2d 610 (2d Cir. 1982) (accepted unearned wages from contractors while union vice-president and used position as business manager to obtain payments from union treasury for expenses not properly incurred violated RICO); *Jacobson v. Cooper*, 882 F.2d 717 (2d Cir. 1989) (scheme to appropriate real estate enterprise); *United States v. Boylan*, 620 F.2d 359 (2d Cir.1980) (business manager of union local was convicted of conducting affairs of local through pattern of racketeering activity, receiving illegal payments, income tax evasion, and filing false tax returns); *Empire Merchants, LLC v. Reliable Churchill, LLLP*, 902 F.3d 132 (2d Cir. 2018) (scheme to defraud involving liquor smuggling). Therefore, substantive RICO is categorically not a crime of violence under the elements clause of §924(c)(3)(A).

Davis is consistent with this analysis. While *Davis* primarily concerned the interpretation of the residual clause in §924(c)(3)(B), it also discussed the elements clause of §924(c)(3)(A). A critical part of the *Davis* opinion concerned the statutory interpretation of the word "offense" in the prefatory clause of §924(c)(3). The word

modifies both the elements clause in §924(c)(3)(A) and the residual clause in §924(c)(3)(B). The Court first interpreted the word "offense" as applied to the elements clause, and then analyzed whether the residual clause should have the same meaning. (The Court concluded it did.)

Davis made clear that a court must examine the "generic" crime to determine whether a predicate offense is a crime of violence under either clause. In considering the word "offense" (which also modifies the elements clause), this Court said that in ordinary speech the word can have at least two meanings: (1) it can refer to the "generic crime" or (2) it can refer to "the specific acts in which an offender engaged on a specific occasion." 139 S.Ct. at 2328. With respect to the elements clause, this Court concluded that the term "offense" carries the first, 'generic' meaning." *Id*. This Court rejected the "conduct-specific" approach to determining its meaning because it was inconsistent with the generic meaning of the term "offense."

In *Davis*, this Court determined the generic meaning by solely examining the language of the statute. When examining the language of §924(c)(3)(B), the generic meaning was unconstitutionally vague under the categorical approach and the Court declared it a nullity. Therefore, to determine whether a predicate offense qualifies as a crime of violence under the elements clause of §924(c)(3)(A), a court must apply this same categorical approach. It must look to the statute of the charged crime to examine its "elements." It may not consider the "specific conduct" underlying the

charged offense. When solely examining the language of RICO, the minimum conduct necessary to commit the crime is non-violent.

The Second Circuit's decision also conflicts with this Court's decisions in *Griffin v. United States*, 502 U.S. 46 (1991); *Yates v. United States*, 354 U.S. 298 (1957); and *Stromberg v. California*, 282 U.S. 359 (1931). The Second Circuit held that Count One (RICO) is a crime of violence but Count Two (RICO conspiracy) is not a crime of violence. Therefore, Laurent's conviction under Count Three should have be vacated because it is not possible to ascertain whether the jury's verdict on Count Three rested on legal error.

In the district court's charge to the jury on Count Three, the court instructed "that the racketeering offenses charged in Count One and Two constitute crimes of violence within the meaning of section 924(c)." (T. 3033-3034) The court explained to the jury "[t]his means that you may consider the firearms charge in Count Three against a defendant only if you find the defendant guilty of racketeering as charged in Count One *or* racketeering conspiracy as charged in Count Two, or both." (emphasis added). The court further instructed that the appellants could be convicted of Count Three if they "used or carried a firearm during and in relation to one or more of the racketeering crimes charged in Count One *or* Two, or possessed a firearm in furtherance of the commission *of one* of those crimes, or aided and abetted another person in doing so." *Id.* (emphasis added).

In light on *Davis*, the district court erred when it charged the jury on Count Three that it could consider the RICO conspiracy charged in Count Two as a "crime of violence" under §924(c). Because a RICO conspiracy is not a crime of violence under the elements clause of §924(c)(3)(A), the jury's verdict could have rested on legal error. *See Griffin v. United States*, 502 U.S. 46, 56-59 (1991).

In *Yates v. United States*, 354 U.S. 298 (1957), this Court held that a general verdict must be set aside if it is "supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id*. at 312. *See also Stromberg v. United States*, 354 U.S. 359, 368 (1931). In *Yates*, the general verdict was based on a twin object conspiracy, where one of the objects was unsupportable. *Id*. at 304-11.

Later, *Griffin* held that *Yates* applied only to circumstances in which there is legal error in one of the bases of conviction. *Griffin*, 502 U.S. at 56. This Court stated in *Griffin* that a conviction must be affirmed on the basis of legal sufficiency if there is sufficient evidence "with respect to any one of the acts charged." *Id*. at 56-58. But a court must reverse a conviction if one of the grounds considered by the jury was "a mistake concerning the law" and it is not possible to determine the ground selected by the jury. *Id*. In the case at bar, the jury was permitted to find Laurent guilty of Count Three based on the legal error that RICO conspiracy was a crime of violence. Therefore, Laurent's conviction for Count Three should be reversed.

In addition, the error was not harmless. First, a racketeering conspiracy is not a "crime of violence" under the elements cause of §924(c). Second, the verdict sheet did not require the jury to indicate whether its finding of guilt on Count Three was based either on substantive RICO or RICO conspiracy, or both. Third, the verdict sheet does not indicate whether the jury relied on the elements clause or the residual clause of §924(c)(3) to find Laurent guilty of Count Three.

The Second Circuit's decision is also inconsistent with its decision in *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009). *Ivezaj* states that it applied the "categorical approach" to determine the issue of whether a substantive RICO offense was a crime of violence under §924(c). *Ivezaj* said that "[w]hen determining whether an offense is a 'crime of violence' under the statute, we employ the 'categorical approach,' in which 'we focus on the intrinsic nature of the offense rather than on the circumstances of a particular crime." *Ivezaj*, 568 F.3d at 95. *Ivezaj* said it "[a]ppl[ied] this categorical approach." *Id*.

Arguably, *Ivezaj* also held there must be two predicate crimes of violence to uphold a §924(c). *Ivezaj* stated that "where the government proves (1) the commission of at least two acts of racketeering and (2) *at least two of those acts qualify as 'crime[s] of violence'* under §924(c), a §1962 conviction serves as a predicate for a conviction under §924(c)." *Id*. at 96. Linguistically, this holding was

not case specific. Rather, it was a general holding applying to all cases in which a §1962 conviction serves as the predicate for a conviction under §924(c).

It is true that *Ivezaj* also said that "[b]ecause racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged." *Id*. But *Ivezaj* was decided before *Davis*. Among other things, *Davis* rejected the case-specific approach and instead applied the categorical approach. Predicate acts are case specific. *Davis* instructs courts to exclusively consider the "generic" terms of a crime as stated in the criminal statute, not the specific facts of the case. If a court exclusively considers the generic terms of the RICO statute, RICO is not a crime of violence because the minimal conduct necessary to violate the statute includes non-violent conduct.

The Second Circuit's decision is also inconsistent with its decision in *United States v. Martinez*, 991 F.3d 347 (2d Cir. 2021). In *Martinez*, this Court acknowledged that the "continued viability" of *Ivezaj* after *Davis* "is debatable." *Martinez*, 991 F.3d at 356. *Davis* and other recent precedents "have certainly called into question, if not the premises directly underlying *Ivezaj*, many of the principles and precedents that formed the legal background against which the case was decided." *Id*. *Martinez* recognized that substantive RICO "is not as neatly divisible" as a statute that "subdivides cleanly into specific subsections defining different

conduct. *Id*. at 357. Nor is RICO analogous to a statute that "uses very broad language to define an offense in terms of a conceptual category that could apply to both forcible and non-forceable conduct." *Id*. Rather, "RICO requires that the specific crimes that constitute the 'pattern' be identified in the charging instrument, and that the specific elements of those crimes be alleged and proved beyond a reasonable doubt." *Id*.

While *Martinez* discussed the complex nature of the issue, it did not decide whether substantive RICO was a crime of violence under §924(c). The court in *Martinez* said it "need only decide whether the district court plainly erred by accepting [the defendant's] guilty plea to a violation of §924(c) predicated on an admitted pattern of racketeering that includes a predicate act that is a violent crime." *Id*. at 359. As such, the court left undecided whether *Ivezaj* is "a correct application of the *categorical* approach," a question that is "certainly 'subject to reasonable dispute'…under recent Supreme Court precedent refining that approach." *Id*. at 358 (emphasis in original). The court further stated in *Martinez* that "there is even less authority addressing whether the *Ivenaj* holding can be upheld as a correct application of the modified *categorical* offense, that is, whether substantive RICO is a divisible statute." *Id*. (emphasis in original). "Which of these analyses is correct is a complex and vexing question." *Id*.

Laurent's conviction under Count Seven should also be reversed. Count Seven relies on New York Penal Law §120.05(2) as alleged in Count Six as the predicate "crime of violence" to support Laurent's conviction under Count Seven. While Count Six alleges that Laurent used a firearm as a dangerous weapon to commit the assault, *Davis* prohibits consideration of "case-specific" conduct to determine whether the predicate offense is a crime of violence under the elements clause of §924(c)(3)(A). Rather, a court must examine the generic elements of the statute to determine whether the "minimum conduct" necessary to commit the crime "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

New York Penal Law §120.05(2) states that "[a] person is guilty of assault in the second degree when: (2) With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon *or a dangerous instrument*." (emphasis added). New York Penal Law §10(13) defines "dangerous instrument" as "any instrument, article or substance…, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury."

Based the definition in New York Penal Law §10(13), not all "dangerous instruments" involve "the use, attempted use, or threatened use of physical force

against the person or property of another" as required by §924(c)(3)(A). *See People v. Molineaux*, 168 N.Y. 264 (1901); *People v. Harris*, 162 A.D.3d 1240 (3d Dep't. 2018) (drinking antifreeze).

The definition of "dangerous instrument" in New York Penal Law §10(13) "makes no attempt to give an absolute definition of the term or to provide a list of items which can be considered dangerous instruments." *People v. Carter*, 53 N.Y.2d 113, 116 (1981) Rather, "the statute states plainly that any 'instrument, article or substance', no matter how innocuous it may appear to be when used for its legitimate purpose, *becomes* a dangerous instrument when it is *used* in a manner which renders it readily capable of causing serious physical injury." *Id*. (emphasis in original).

CONCLUSION

In sum, substantive RICO is not a crime of violence under §924(c) because the statute generically includes non-violent forms of conduct. There is no need to employ the modified categorical approach. The generic terms of the RICO statute supply the complete answer. *Davis* compels a court to confine its inquiry to the generic terms of the RICO statute. In addition, the government must prove that at least two racketeering acts were crimes of violence under §924(c).

For the foregoing reasons, Laurent asks this Court to grant his petition for a writ of certiorari.

DATED: September 27, 2022

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