No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

MONZELL HARDING, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

MARY E. POUGIALES
548 Madison Street
Denver, CO 80206
(415) 847-6379

Counsel of record for
Petitioner Monzell Harding

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

MONZELL HARDING, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF *CERTIORARI*

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOTION TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Title 18, United States Code § 3006A(d)(7) and Rule 39 of this Court, Petitioner Monzell Harding asks leave to file the attached Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit without prepayment of fees and costs and to proceed *in forma pauperis*. Petitioner was represented by counsel pursuant to Title 18, United States Code, §3006A(b), (d)(7) on appeal to the Ninth Circuit Court of Appeals.

Dated: November 17, 2022

s/ Mary E. Pougiales
MARY E. POUGIALES
548 Madison Street
Denver, CO 80206

Counsel of record for
Petitioner Monzell Harding

QUESTION PRESENTED

Was the district court required by *IHuddleston v. United States*, 485 U.S. 681 (1988) and Rule 404(b) to cure the reversible trial error that resulted from its admission against petitioner of highly prejudicial extrinsic evidence of 15 uncharged, armed street robberies once it had concluded that the Government had failed to prove that the robberies were "inextricably linked" to the charged RICO conspiracy?

Was the district court required to grant petitioner's motion for a new trial because its finding that the Government had failed to prove a link between the uncharged crimes and the enterprise was reached only after the jury's verdict was returned, and no other curative action remained?

LIST OF PARTIES

The United States of America and petitioner Monzell Harding are the parties to the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Monzell Harding respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit that affirmed his conviction for conspiracy to conduct a racketeering enterprise. He has completed his 12-year federal prison sentence and is on Supervised Release.

OPINIONS BELOW

(Included in Appendix to this Petition, filed separately)

Ninth Circuit Memorandum filed July 1, 2022

The Ninth Circuit briefly addressed appellant's claim that the so-called "Silver Van Robberies" (hereinafter SVR) were wrongly admitted as evidence against him, and only by reference to general principles of conspiracy law. It disregarded the post-trial factual findings of the district court that the Government had failed to offer proof that the SVR were linked to the RICO enterprise.

> The district court did not abuse its discretion by admitting evidence of the so-called silver van robberies. "In conspiracy prosecutions, the government has considerable leeway in offering evidence of other offenses" not charged in the indictment. *United States v. Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972) (evidence of prior illegal acts "admissible to show some material facts relating to the conspiracy charged"). This evidence was relevant to prove the existence of the CDP enterprise and to connect Harding to both the enterprise and to concerted criminal conduct with co-defendant and CDP affiliate Gordon. See *United States v. Rizk*, 660 F.3d 1125, 1131–32 (9thCir. 2011) ("[U]ncharged acts may be admissible as direct evidence of the conspiracy itself." (quoting *United States v. Thai*, 29 F.3d 785, 812 (2d Cir. 1994))).

Appendix at pp. 6-7

District Court Excerpts from Order on Post-Trial Motions for Acuittal and New Trial (Rules 29 and 33), filed June 6, 2018, Case No. 3:13-CR-0076

The district court denied petitioner's motion for a new trial based on insufficiency of the evidence referencing other admissible evidence but within that ruling found as to the SVR that:

> Even though the jury was never asked to determine whether Harding participated in the "Silver Van" robberies, it could have used that evidence to tie Harding to concerted criminal conduct with co-defendant Gordon. But, as with the text messages above, the government offered no direct evidence that the "Silver Van" robberies were perpetrated in furtherance of the charged enterprise.
>
> Appendix at p. 24.

District Courder Oral Ruling Denying Motion *in Limine* to Exclude Silver Van Robbery Evidence, Excerpts from Reporter's Transcript of hearing held September 8, 2017

> THE COURT: So I'm going to not exclude it, and you can make appropriate objections at the time of trial.
>
> Appendix at p. 40.

District Court Excerpts from Omnibus Order on Motions *in Limine*, filed September 28, 2017, Case No. 3:13-CR-0076

> The government has set forth a sufficient basis inextricably tying the Silver Van Robberies to the broader conspiracy; they are not subject to Rule 404(b). Further, the probative value of the evidence is not substantially outweighed by the Rule 403 dangers. The defendants' motions are DENIED.
>
> Appendix at p. 34.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit

denied petitioner's request for rehearing and rehearing *en banc* on October 18, 2022. Appendix at pp. 41-43.

CONSTITUTIONAL and STATUTORY PROVISIONS

> No person shall be . . . deprived of life, liberty, or property, without due process of law[.] United States Constitution, Am. 5.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.] United States Constitution, Am. 6.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. United States Constitution, Am. 14.

> Other Crimes, Wrongs, or Acts. (1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) Permitted Uses**.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. (3) Notice in a Criminal Case. In a criminal case, the prosecutor must: (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and (C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.
>
> Federal Rules of Evidence, Rule 404(b)

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> Federal Rules or Evidence, Rule 104(b)

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Petitioner was charged in only Count One of the 22-count Second Superseding Indictment filed August 14, 2014, with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C.§1962(d). The indictment described the enterprise, known as the Central Divisadero Players (hereinafter CDP) as a violent street gang operating since the mid-1990's in the Western Addition neighborhood of San Francisco, whose members engaged in murder, attempted murder, narcotics distribution, assault, robbery, extortion, interstate transportation in aid of racketeering, pimping, pimping of minors, illegal firearms possession, and obstruction of justice.

Th jury convicted petitioner on Count One on March 5, 2018. Petitioner thereafter filed motions for acquittal and for a new trial pursuant to Fed.R.Crim.P. Rules 29 and 33. The district court denied both motions. Appendix at pp. 10-11, 17. Petitioner was sentenced on June 29, 2018, to 144-months imprisonment and has completed that sentence. He is now on Supervised Release.

The Ninth Circuit panel issued a Memorandum decision affirming his conviction on July 11, 2022, and denied his Petition for Rehearing and Rehearing *en Banc* on October 18, 2022. Appendix at pp. 1-20, 41-43.

OFFENSE CONDUCT

The Government relied heavily on voluminous Other Act evidence of 15 armed street robberies in San Francisco in the Fall of 2011 that it had proffered were inextricably linked to the RICO enterprise, and were committed by petitioner for the benefit of the enterprise. The Government called these the Silver Van Robberies (hereinafter "SVR"), even though none involved a silver van, and five involved no vehicle at all. In two incidents, cell site evidence showed that petitioner's cell phone had used cell towers located near the time and location of a street robbery. In one incident, petitioner attempted to obtain a refund at Nordstrom's for a pair of sunglasses stolen from one victim. A single victim picked out petitioner's photo from a photo lineup, not identifying him as the robber, only noting that he had a similar hairstyle to the robber. No other evidence was offered to link petitioner to the SVR, and, as the district court unambiguously found post-trial, there was no direct evidence that the SVR were perpetrated for the benefit of the enterprise. Appendix at p. 11.

The jury heard highly emotional testimony from eight of the robbery victims about the trauma they suffered. They also heard hearsay and lay opinion testimony about seven more unsolved robberies from the retired investigating police sergeant.

As to the RICO conspiracy charged against petitioner, the jury also heard the following evidence:

Some two years earlier, petitioner (unarmed) intimidated a fellow passenger on a city bus into relinquishing his iPod.

After an interrupted daytime auto burglary in August, 2011, police stopped a car registered to Adrian Gordon, who was in the front passenger seat and found the stolen purse in the rear seating area between the two passengers, petitioner and Baxter Bradley.

Two years later, in August, 2013, petitioner was found in a car that contained property stolen in a recent residential burglary The victim identified only Adrian Gordon as the perpetrator. Petitioner pled guilty in state court to possession of stolen property.

Years before either of these incidents, in October, 2009, petitioner and several other neighborhood men were solicited by codefendant Charles Heard's attorney to appear at his preliminary hearing and silently demonstrate by standing up in unison when a witness was asked in open court to identify the perpetrator of the murder she witnessed. Heard's attorney had orchestrated the incident in response to the state trial court's denial of his motion for Heard to be dressed in plain clothes and seated in the gallery.

The jury also heard from Johnnie Brown, the Government's star witness and only informant, whose testimony the district court found would alone support the jury's verdict. Appendix at p. 10. Brown, an admitted RICO conspirator in this

prosecution, had a long and unbroken history of criminal behavior from the age of 13, including gambling, drug dealing, gun possession, attempted murders of rival gang members, auto burglaries, and street robberies (not the SVR).

But Brown had almost nothing to say about petitioner. Brown knew little about him, nothing about his family, had never been to his house, and did not even know his last name; he only knew that petitioner grew up in the neighborhood What Brown did say was uncorroborated. The two had attended middle school together. Petitioner was not at CDP "business" meetings, nor did anyone mention him or discuss his activities. In a single, conclusory sentence, Brown agreed that apetitioner was a member of the CDP, but also estified that everyone from the neighborhood is automatically CDP; that there is no "joining" CDP, you are born into it.

On a few occasions, petitioner was present when others committed crimes, but Brown never testified to petitioner committing any RICO predicate act, and never identified ptitioner as a perpetrator of the SVR, or that the SVR were committed to benefit the enterprise or was part of its pattern of racketeering activity. Brown at first included petitioner in a list of four of "my group, the younger generation," but later he dropped petitioner from that list. Brown never saw petitioner with a gun or shooting at anyone. Petitioner was twice present but

not participate in an incident where Brown and Adrian Gordon shot at rival gang members.

REASONS FOR GRANTING PETITION

The Ninth Circuit Court of Appeals in this case has decided an important question of federal law that affects all similarly-situated defendants in racketeering prosecutions, that has either not been, but should be, settled by this Court, or that the Ninth Circuit decided in a way that conflicts with this Court's decision in *IHuddleston v. United States*, 485 U.S. 681 (1988). Supreme Court Rules, Rule 10(c).

Huddleston allowed the Government to introduce evidence of uncharged crimes on the theory that such crimes are not subject to Federal Rules of Evidence, Rule 404(b), because they are intrinsic – "inextricably intertwined" – to the RICO conspiracy. That theory allowed the jury in this case to hear detailed and highly emotional testimony of 15 armed street robberies that the Government attributed to petitioner and CDP but that, in the end, it failed to link to either. The case went to the jury with all of that evidence still in the record, and they convicted.

Review by this Court is necessary to maintain uniformity in the admission of uncharged criminal conduct in RICO prosecutions, and in delineating the necessary curative actions to be taken when the statutory guardrails mentioned in *Huddleston* prove to be ineffective, resulting in prejudicial trial error. *Huddleston* did not

address that risk, one that came to fruition in this case. This Court can and should do so now.

Petitioner, therefore, would urge this Court to mandate that, in the absence of any other curative action, the district court be directed to grant a new trial where a jury verdict might improperly rest on severely prejudicial, ultimately inadmissible extrinsic evidence. In this case, petitioner sought that relief, but the district court denied it. Fundamental fairness demands that this manifest injustice be addressed, and prevented from happening again in the future.

ARGUMENT

The district court's explicit post-trial, post-verdict conclusion that the Government had failed to prove the required "inextricable link" between the 15 uncharged armed street robberies admitted into evidence against petitioner and the charged RICO conspiracy required it to take the only curative action remaining: to grant petitioner a new trial free of the tainted evidence.

Arguing that the SVR were "inextricably linked" to the RICO enterprise, the Government persuaded the district court that it could prove that petitioner, by committing the SVR, had "joined the conspiracy," even while declining to provide any evidentiary details. "but it's there." Appendix at pp. 39-40.[1] In its opening

[1] "FBI did their work on the cell phone records, and it's going to be very compelling evidence. . . . . It's not 404(b). This is enterprise evidence. It's showing that he joined the conspiracy. It's showing a pattern. And this is a string of robberies over a very short period of time, every other night, sometimes back-to-back nights. . . . It's plainly relevant. Appendix at pp. 39-40.

statement, the prosecutor mentioned petitioner almost entirely as the alleged perpetrator of the SVR. Appendix at pp. 76-79. In closing, the prosecutor urged the jury to use the SVR as proof that petitioner had the requisite RICO mental states and intent: "How did these defendants know that [racketeering was] what CDP was about? Because they committed these very crimes. [because] Monzell Harding participated in a series of armed robberies with other CDP members, including Adrian Gordon." Appendix at p. 54.

However, post-trial and, unfortunately, post-verdict, the district court made an explicit finding to the contrary: that ***"the government offered no direct evidence that the 'Silver Van robberies' were perpetrated in furtherance of the charged enterprise."*** Appendix at p. 11. (Emphasis added.). The trial record bears that conclusion out. (See "Offense Conduct" *supra*.).

No motive for the robberies was shown, other than the common one of putting money into the perpetrator's pocket. There was no evidence whatsoever suggesting that the proceeds of the robberies were shared with anyone else. They did not happen in CDP or rival gang territory. The perpetrators did not claim CDP territory or exhibit gang affiliation or in any way identify themselves as acting on behalf of CDP, to enhance their own or CDP's status, or to build up fear in the community to increase CDP's standing or power. Their victims were random; none were gang members; the crimes occurred at varying times of day in

neighborhoods throughout the City and were entirely unrelated to gang territory or rivalries. They were run-of-the-mill street robberies with market-variety features common to such a crime: using a gun, demanding property, sneaking up on the victim, and hiding one's identity in darkness and with clothing.

The Government presented no substantive proof that petitioner committed the SVR at all, nonetheless that he did so to further the goals of a RICO enterprise or to advance his standing in it. One could only reach that conclusion through speculation and innuendo, which is prohibited by Rule 404(b) and *Huddleston*: "[T]he Government may [not] parade past the jury a litany of potentially prejudicial acts that have been established or connected to the defendant only by unsubstantiated innuendo." *Huddleston*, 485 U.S. at 689.

Before the Ninth Circuit below, the Government no longer claimed it had "compelling" evidence of the nature or extent of petitioner's involvement; it said only – and vaguely – that petitioner was "involved" or "tied . . . to at least some of the silver van robberies." Appellee Brief at pp. 194-195. Even that, however, is not accurate, as the district court so explicitly found post-trial.

This Court addressed such a potential scenario (where the proof of a link to the enterprise and to the defendant, falls short) in *Huddleston:*

> Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite

> finding. If the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence.
>
> *Id.*

Such evidence must be relevant:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> Federal Rules of Evidence, Rule 104(b).

The challenged extrinsic evidence "is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston, supra* at p. 689. This is a standard broadly applied following *Huddleston,* including in the Ninth Circuit:

> Evidence of prior criminal conduct may be admitted if: (1) the evidence tends to prove a material point; (2) the prior act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; ***and*** (4) [in certain cases] the act is similar to the offense charged. Id. at 1013[.]
>
> *Vizcarra-Martinez, supra* at 1013. (Emphasis added.)

See also United States v. Palacios, 677 F.3d 234 (4th Cir. 2012) (MS-13 RICO defendant proven to have committed uncharged robberies); *United States v. Bergrin*, 682 F.3d 261 (3d Cir. 2012) (proof that act committed and RICO defendant did it, citing *Huddleston*). *But see* Second Circuit holdings, relied on by the district court in petitioner's case, that RICO prosecutions are categorically exempt from Rule

404(b). *United States v. Coppola*, 671 F.3d 220 (2d Cir. 2012); *United States v. Basciano*, 599 F.3d 184, 207 (2d Cir., 2010).

Analyzed under this Court's precedents, the SVR could only be relevant if they were committed by petitioner and committed to benefit the racketeering enterprise. The district court explicitly and unambiguously found, post-trial and post-verdict, that these conditional facts were not proven, that ***"the government offered no direct evidence that the 'Silver Van robberies' were perpetrated in furtherance of the charged enterprise."*** Appendix at p. 11. (Emphasis added.)

The question petitioner raises here, then, is how to effectively prevent or, if it is too late to prevent – as it was here by the trial court's belated conclusion that the conditional facts had not been proved – how to effectively cure the reversible trial error that arises from wrongful admission of such severely prejudicial evidence. The *Huddleson* court suggested that there were four preventive measures: first, Rule 404(b)'s requirement that the evidence be offered for a proper purpose; second, Rule 402 and 104(b)'s requirement that the evidence be relevant; third, Rule 403's requirement that the probative value of the evidence substantially outweighs its potential for unfair prejudice; and fourth, the option to instruct the jurythat the evidence be considered only for the proper purpose for which it was admitted. *Id.* None of this offers protection, however, when, as here, the district

court does not conduct its assessment and make its findings until after the verdicts are returned and the jury is discharged.

This error cannot rationally be seen as harmless. Admission of the SVR evidence, without curative action once the failure of proof was identified, created reversible trial error. The jury heard live and highly emotional testimony from eight still traumatized robbery victims, not one of whom identified petitioner as a perpetrator, not one of whom saw a silver van. The jury heard highly speculative lay opinion from a police officer who opined that an additional seven or eight robberies, details provided solely through hearsay police reports, were attributable to the same robber or robbers. All of this in the face of at best meager evidence that petitioner was more than a passive bystander to the evolution of the neighborhood gang into which he was born into aviolent racketeering enterprise. The Government pounded away on the SVR in its closing argument because of the paucity of any substantial evidence that petitier had joined the charged enterprise, relying heavily on its powerful impact to successfully persuade the jury to convict petitioner. Appendix at pp. 51-71.

CONCLUSION

For these reasons, Monzell Harding respectfully requests that this Court grant *certiorari* to review the merits of his claim that he was wrongly denied his

Fifth, Sixth, and Fourteenth Amendment rights to be tried only on evidence of the crime charged and not upon irrelevant, speculative evidence of uncharged crimes.

Dated: November 17, 2022

Respectfully submitted,

/s/. Mary E. Pougiales
MARY E. POUGIALES
Counsel for Petitioner
Monzell Harding