

NO. _____

***IN THE SUPREME COURT OF
THE UNITED STATES***

OCTOBER TERM, 2022

MANGWIRO SADIKI-YISRAEL,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES SUPREME COURT
TO THE
THE ELEVENTH CIRCUIT COURT OF APPEALS**

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QUESTIONS PRESENTED

- I) Whether in a RICO conspiracy case the government is required to prove a defendant's mens rea and knowledge of *first-degree* murder to establish the statutory max and base offense level of Life under USSG §2E1.1, in accordance with *Rehaif v. United States* ?
- II) Whether Defendant's admission during his guilty plea that the RICO conspiracy involved "murder," where the indictment defined murder to include attempted murder and lesser degrees of murder, was a stipulation to *first-degree* murder generating a Base Offense Level of 43 and a sentencing range of Life ?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
INDEX TO APPENDIX	iii
TABLE OF AUTHORITIES	v
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATUTORY PROVISIONS INVOLVED	2
SENTENCING GUIDELINE PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	5
A. Introduction	5
B. Procedural History	6
C. Statement of Facts	8
REASONS FOR GRANTING THE WRIT	15

I)	IN THIS RICO CONSPIRACY CASE THE GOVERNMENT WAS REQUIRED TO PROVE DEFENDANT'S MENS REA AND KNOWLEDGE OF <i>FIRST-DEGREE</i> MURDER TO ESTABLISH THE STATUTORY MAX AND BASE OFFENSE LEVEL OF LIFE UNDER USSG §2E1.1, IN ACCORDANCE WITH <i>REHAIF V. UNITED STATES</i>	15
II)	DEFENDANT'S ADMISSION DURING HIS GUILTY PLEA THAT THE RICO CONSPIRACY INVOLVED "MURDER," WHERE THE INDICTMENT DEFINED MURDER TO INCLUDE ATTEMPTED MURDER AND LESSER DEGREES OF MURDER, WAS NOT A STIPULATION TO <i>FIRST-DEGREE</i> MURDER GENERATING A BASE OFFENSE LEVEL OF 43 AND A SENTENCING RANGE OF LIFE	18
	CONCLUSION	24
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	

INDEX TO APPENDIX

APPENDIX A: Opinion of the United States Court of Appeals for the Eleventh Circuit *United States v. Sadiki-Yisrael*, USCA11 Case: 21-13001, 2022 U.S. App. LEXIS 19443, 2022 WL 2751571 (Unpublished), issued July 14, 2022.

APPENDIX B: Order from the Eleventh Circuit denying Defendant's petitions for rehearing and rehearing en banc, issued September 8, 2022.

INDEX TO APPENDIX (con.)

APPENDIX C: Statutory Excerpts from Title 18 §§ 1962 and 1963,
And Official Code of Georgia Annotated §16-5-1.

TABLE OF AUTHORITIES

	Page
Supreme Court Cases:	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	10
<i>Connally v. Gen. Const. Co.</i> , 269 U.S. 385 (1926)	17
<i>Flores-Figueroa v. United States</i> , 556 U.S. 646 (2009)	16
<i>Rehaif v. United States</i> , 588 U. S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019)	i,15,16,17
<i>Staples v. United States</i> , 511 U.S. 600, 114 S. Ct. 1793 (1994)	16,17
<i>United States v. United States Gypsum Co.</i> , 438 U.S. 422 (1978)	16
<i>United States v. X-Citement Video, Inc.</i> , 513 U.S. 64 (1994)	16
<i>Xiulu Ruan v. United States</i> , 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022)	15

Circuit Court Cases:

United States v. Collazo, 984 F.3d 1308

(9th Cir. 2020)(en banc) 17

United States v. Farese, 248 F.3d 1056

(11th Cir. 2001) 22

United States v. Ross, 131 F.3d 970

(11th Cir. 1997) 15,22

United States v. Sadiki-Yisrael, 2022 U.S. App. LEXIS 19443,

2022 WL 2751571 (Unpublished) 1,7,14,20

United States v. Vallejo, 297 F.3d 1154

(11th Cir. 2002) 22

District Court Cases:

United States v. Colbert, 2013 U.S. Dist. LEXIS 102774

(M.D. Fla. July 23, 2013) 23

Miscellaneous:

<i>United States v. Antarious Caldwell, et al.,</i>	
USCA 11 Case No. 19-15024, codefendants	
of Sadiki-Yisrael, <i>pending</i> , to be	
argued before the Eleventh Circuit in the	
Winter of 2023.	8

Constitutional and Statutory Provisions:

Fifth Amendment.	1,5
Sixth Amendment	2,5
18 U.S.C. §1029	6
18 U.S.C. §1343	6
18 U.S.C. §1344	6
18 U.S.C. §1961(1) and (5).....	6
18 U.S.C. §1962	5

Constitutional and Statutory Provisions (con.):

18 U.S.C. §1962(d)	6,9
18 U.S.C. §1963	5
18 U.S.C. §1963(a)	6
18 U.S.C. §3006A	(Motion for IFP, p.1)

Official Code of Georgia Annotated

OCGA §16-4-1.....	6,20
OCGA §16-4-8.....	6,20
OCGA §16-5-1.....	6,7,12,18,20,21

Supreme Court Rules:

Rule 33.1(g)	(Certif of Compliance, p.2)
Rule 33.1(h)	(Certif of Compliance, p.2)
Rule 33.2(b)	(Certif of Compliance, p.2)
Rule 39	(Motion for IFP, p.1)

Sentencing Guidelines:

USSG §1B1.2	22
USSG §1B1.2(d)	22
USSG § 2A1.1.....	3,9,10,13,21
USSG § 2A1.1(a)	20
USSG § 2A1.2.....	3,13
USSG § 2A1.3.....	3,13
USSG § 2A1.4.....	3,13
USSG § 2A1.5.....	4,13
USSG § 2E1.1.....	i,3,5,9
USSG § 2E1.1(a)(2)	9,14

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit can be found at *United States v. Sadiki-Yisrael*, 2022 U.S. App. LEXIS 19443, 2022 WL 2751571 (Unpublished); USCA11 Case: 21-13001, and appears as *Appendix A* to the petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 8, 2022, with denial of the Defendant's petitions for rehearing and rehearing en banc. *See Appendix B*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS INVOLVED

See Appendix C.

SENTENCING GUIDELINE PROVISIONS INVOLVED

USSG § 2E1.1. Unlawful Conduct Relating to Racketeer

Influenced and Corrupt Organizations

(a) Base Offense Level (Apply the greater):

(1) 19; or

(2) the offense level applicable to the underlying racketeering activity.

USSG § 2A1.1. First Degree Murder

(a) Base Offense Level: 43.

USSG § 2A1.2. Second Degree Murder

(a) Base Offense Level: 38

USSG § 2A1.3. Voluntary Manslaughter

(a) Base Offense Level: 29.

USSG § 2A1.4 Involuntary Manslaughter

(a) Base Offense Level:

(1) 12, if the offense involved criminally negligent conduct; or

(2) (Apply the greater):

(A) 18, if the offense involved reckless conduct; or

(B) 22, if the offense involved the reckless operation of a means of

SENTENCING GUIDELINE PROVISIONS INVOLVED (con.)

transportation.

(b) Special Instruction:

(1) If the offense involved the involuntary manslaughter of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the involuntary manslaughter of each person had been contained in a separate count of conviction.

USSG § 2A1.5. Conspiracy or Solicitation to Commit Murder

(a) Base Offense Level: 33

(b) Specific Offense Characteristic

(1) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.

(c) Cross References

(1) If the offense resulted in the death of a victim, apply § 2A1.1 (First Degree Murder).

(2) If the offense resulted in an attempted murder or assault with intent to commit murder, apply § 2A2.1 (Assault With Intent to Commit Murder; Attempted Murder).

STATEMENT OF THE CASE

A. Introduction.

This case involves the recurring and important question of whether due process, Title 18 USC §§ 1962 and 1963, and the Sentencing Guidelines require the government to prove a defendant's mens rea and knowledge of *first-degree* murder in calculating the base offense level under USSG §2El.1, when seeking to subject him to a LIFE sentence based upon the acts of others charged in a RICO conspiracy. Here, the Defendant admitted during his guilty plea that he remained in a gang after learning others were involved in murders, but he did not admit knowledge of *first-degree* murders and the indictment defined murder to include attempted murder and lesser degrees of murder. This was insufficient to prove Defendant's knowledge, intent or mens rea to join *first-degree* murder. He should not have been subjected to a statutory maximum of Life, a Base Offense Level of 43, or a sentencing range of Life. This Court should grant review and hold the sentence imposed here violated due process, the notice requirements and burdens of proof required under the Fifth and Sixth Amendments.

B. Procedural History

A grand jury in the Northern District of Georgia returned an indictment charging members of the Gangster Disciples (“GD’s”), including MANGWIRO SADIKI-YISRAEL, with racketeering conspiracy, alleging that they did agree to participate in the conduct of the affairs of said enterprise through a pattern of racketeering activity, as defined by 18 USC §1961(1) and (5), which consisted of multiple threats and acts involving:

- a. Murder, in violation of Official Code of Georgia (OCGA) §16-5-1; §16-4-1 and §16-4-8;
-
- f. Title 18 USC §1343 (wire fraud);
- g. Title 18 USC §1344 (financial institution fraud);
- h. Title 18 USC § 1029 (fraud and related activity in connection with access devices);

All in violation of 18 USC §§1962(d) and 1963(a).

Count One charged 32 defendants in the RICO conspiracy, and 18 of these defendants, including Sadiki-Yisrael, were named in an

enhanced sentencing provision alleging that they joined and remained in the conspiracy, knowing and agreeing that members of the enterprise engaged in acts involving murder, in violation of OCGA §16-5-1.

Defendant entered a non-negotiated guilty plea to Count One. At sentencing, the district court sentenced him to 240 months in custody, followed by 3 years supervised release. Timely notice of appeal was filed. On July 14, 2022, a panel of the Eleventh Circuit Court of Appeals issued an unpublished opinion affirming the sentence on all grounds. (*United States v. Sadiki-Yisrael*, panel opinion attached as “Exhibit A.”) Defendant timely petitioned for rehearing and rehearing en banc. On September 8, 2022, the Eleventh Circuit denied Defendant’s petitions for rehearing and rehearing en banc. (See *Appendix B.*) The Defendant remains in federal custody serving his sentence from this case.

[Note: several codefendants, including KEVIN CLAYTON and ALONZO WALTON, were convicted at trial and sentenced via the same sentencing enhancement as Defendant. These codefendants have

appealed application of the sentencing enhancement, and their direct appeal remains pending in the circuit court. On July 26, 2022, the Eleventh Circuit granted oral argument in *United States v. Antarious Caldwell, et al.*, USCA 11 Case No. 19-15024, to be scheduled and argued before the Eleventh Circuit in the Winter of 2023.]

C. Statement of Facts.

In 2010, Georgia police began investigating the Gangster Disciples. Defendant came to agents' attention for his involvement with a fraud ring. The majority of Defendant's criminal activities related to fraud schemes. At no time - in the 24 count indictment (with 142 overt acts listed in Count One), during two lengthy jury trials of codefendants, in the PSR, or during the sentencing hearings - did the government or any witness assert that Defendant personally committed murder, participated in a murder, conspired, ordered or directed others to commit a murder.

The Guilty Plea.

Defendant entered a non-negotiated guilty plea to Count One and the enhanced sentencing provisions. During the plea colloquy, he made

it clear he did not personally commit any murders which would trigger a Life sentence, and he did not conspire or direct others to do so, or aid or abet these activities. The only legal or factual premise for the enhanced penalty was that Sadiki-Yisrael remained in the organization after learning others gang members killed or murdered people. During the plea, Sadiki-Yisrael never admitted or stipulated that the gang-related killings of which he was aware were *first-degree* murders, as opposed to lesser degrees or lesser included offenses of murder.

The PSR and Objections.

Level 43 for First-Degree Murder.

A probation officer calculated Defendant's sentencing guidelines and noted that the primary focus of his criminal conduct was fraud, and that he did not personally participate in any acts involving murder, but awarded Sadiki-Yisrael a base offense level of 43 (LIFE), applying the guidelines for first-degree murder and writing the following:

Base Offense Level: The guideline for a violation of 18 USC §1962(d) is USSG §2El.1. Pursuant to §2El.1 (a)(2), the guideline most analogous to the underlying racketeering activity is USSG §2Al.1, First Degree Murder. Therefore, pursuant to USSG §2Al.1(a), the base offense level is forty-

three (43).

In support of the base offense level of 43, the PSR including the following paragraph:

Although Sadiki-Yisrael was not known to have personally committed any murders in furtherance of the racketeering conspiracy, he held leadership positions overseeing an organizational structure that expressly contemplated and endorsed murder. At various times Sadiki-Yisrael also learned about particular murders committed as part of the GD and failed to withdraw from the conspiracy after learning that the gang had killed.

Defendant objected and asked to be sentenced upon his relevant conduct which involved fraud, not first-degree murder. Defendant objected to the vicarious liability approach of being sentenced for first-degree murder when he did not join, aid, abet, know about or foresee their occurrence. He argued these events were outside the scope of his agreement, and the “remaining in the gang” approach violated the established jurisprudence of relevant conduct and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). He also adopted the similar arguments submitted in sentencing memos by his codefendants Kevin Clayton, Alonzo Walton and other codefendants.

The Guideline Rulings at Sentencing.

The district court overruled Sadiki-Yisrael's objection and found the base offense at Level 43, stating the following:

All right. I have ruled on it before, I think about five or six times now, and I've always said the same thing, which is that RICO is different, and this case is different in that there was an Indictment returned that explicitly identified certain individuals who were subject to the enhanced penalty for being involved in a racketeering organization involving murder, and Mr. Sadiki-Yisrael was one of those named in the Indictment.

(NDGA Case No. 1:16CR145, Doc:3579-6).

Arguments Submitted on Direct Appeal.

Defendant argued to Eleventh Circuit that his guilty plea did not include an admission that the murders he was aware of being committed by fellow gang members were *first-degree* murders. This was important where the indictment defined murder to include lesser crimes such as attempt and conspiracy to commit murder, offenses which did not carry a Life sentence under Georgia law and which did

not trigger Level 43. In his guilty plea, Defendant did not stipulate to facts establishing first-degree or malice murder. The government failed to prove beyond a reasonable doubt the facts or mens rea required to establish sentencing guideline range of Life.

Defendant also argued to Eleventh Circuit in his direct appeal that,

OCGA §16-5-1 prohibits malice murder, felony murder and second-degree murder. *Id.* The notice of enhanced sentencing alleged that Sadiki-Yisrael “joined and remained in the RICO conspiracy charged in Count 1, *knowing and agreeing that members of the enterprise engaged in acts involving murder, in violation of OCGA §16-5-1.*” *Id.* (Emphasis added). Again, OCGA §16-5-1 includes and prohibits murder in the second degree. *See* OCGA §16-5-1.

Sadiki-Yisrael’s guilty plea to Count 1 did not include an admission of facts sufficient to make him accountable for first-degree murder under USSG § 2A1.1. During the plea colloquy, Sadiki-Yisrael only admitted that he remained in the gang after learning others in the gang *killed*

someone. (Doc:2979-29). He never admitted facts establishing first-degree or malice murder, supporting a Level 43 guideline range of Life.

Under the Sentencing Guidelines, second-degree murder carries a base offense level of 38.

Voluntary manslaughter has a base offense level of 29. Involuntary manslaughter has a base offense level no higher than 22. Conspiracy or solicitation of murder carries a base offense level of 33, not Life. *See USSG §§ 2A1.2, 2A1.3, 2A1.4, 2A1.5.*

.... For the factual basis of his guilty plea, Sadiki-Yisrael admitted that he personally committed at least two predicate acts of fraud, and that he knew one person was killed in Alabama, and the essential elements of the indictment were established. However, he never admitted that he knew or agreed that first-degree / malice murders were involved.

(Defendant's Eleventh Circuit Reply Brief, pp. 6-7).

The Eleventh Circuit Opinion.

The panel opinion failed to address these arguments or acknowledge any distinctions between varying degrees and types of

murder. Specifically, the panel opinion ignored the above arguments and denied Sadiki-Yisrael's claim with two brief sentences:

But this argument ignores the fact that Sadiki-Yisrael admitted that he joined and remained in the RICO conspiracy knowing that it involved murder. Thus, the district court correctly calculated his base offense level using “the offense level applicable to the underlying racketeering activity” under the guidelines. *See* USSG §2E1.1(a)(2).

(Exhibit A, *United States v. Sadiki-Yisrael*, USCA11 Case: 21-13001, 2022 U.S. App. LEXIS 19443, 2022 WL 2751571 at *7).

The Eleventh Circuit opinion also failed to address Defendant's lack of mens rea claim. (Exhibit A, 11th Cir. Opinion, at ** 7-9).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I) IN THIS RICO CONSPIRACY CASE THE GOVERNMENT WAS REQUIRED TO PROVE DEFENDANT'S MENS REA AND KNOWLEDGE OF *FIRST-DEGREE* MURDER TO ESTABLISH THE STATUTORY MAX AND BASE OFFENSE LEVEL OF LIFE UNDER USSG §2E1.1, IN ACCORDANCE WITH *REHAIF V. UNITED STATES*.

The government failed to prove beyond a reasonable doubt that Sadiki-Yisrael possessed the mens rea to commit first-degree or malice murder. The law presumes, “that Congress intends to require a defendant to possess a culpable mental state.” *Rehaif v. United States*, 588 U. S. ___, ___, 139 S. Ct. 2191, 2195, 204 L. Ed. 2d 594 (2019) (slip op., at 3). *Xiulu Ruan v. United States*, 142 S. Ct. 2370, 2383, 213 L. Ed. 2d 706, 723 (2022).

“Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.” *United States v. Ross*, 131 F.3d 970, 980-81 (11th Cir. 1997). The government was required to prove Sadiki-Yisrael possessed the mens rea to commit first-degree murder to trigger the statutory max and sentencing guidelines of Life. Simply remaining in the gang after others commit acts of generic “murder,” which was

defined in the indictment to include lesser crimes including second-degree murder, did not establish the mens rea required to subject him to a Life sentence or Level 43 under the Guidelines.

It has long been a rule of criminal law "that determining the mental state required for commission of a federal crime requires construction of the statute and inference of the intent of Congress." *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793 (1994) (internal quotation marks and ellipsis omitted); see *Rehaif*, 139 S. Ct. at 2195 (citing *Staples*).

There is a strong presumption that Congress intends to require a culpable mens rea as to every element of a crime. See, e.g., *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019); *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009).

....
"[T]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (internal quotation marks omitted).

....

[A] person should have fair notice as to the likely consequences of voluntary acts.

....

A severe criminal penalty makes the already strong presumption even stronger, for the severity of the penalty is a “significant consideration” in determining whether Congress intended to require a mens rea. *Staples*, 511 U.S. at 616; see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (pointing to the harsh penalty as a reason to apply the presumption). The presumption is overridden only if Congress makes plain that it intends to forego a mens rea requirement. *Rehaif*, 139 S. Ct. at 2195.

United States v. Collazo, 984 F.3d 1308, 1337-40 (9th Cir. 2020)(en banc)(Fletcher, J., dissenting).

Here, neither the RICO statute nor the Sentencing Guidelines excused the government from proving mens rea, nor created maximum liability simply for Defendant remaining in an organization after learning that members killed people. The Defendant and members of all organizations deserve fair notice about the likely consequences of voluntary acts. Due Process requires that the laws be sufficiently explicit to inform people about what conduct will render them liable to its penalties. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). On one hand, the courts say RICO does not punish mere membership in an organization. In this case, it most certainly did.

II) DEFENDANT'S ADMISSION DURING HIS GUILTY PLEA THAT THE RICO CONSPIRACY INVOLVED "MURDERS," WHERE THE INDICTMENT DEFINED MURDER TO INCLUDE ATTEMPTED MURDER AND LESSER DEGREES OF MURDER, WAS NOT A STIPULATION TO FIRST-DEGREE MURDER GENERATING A BASE OFFENSE LEVEL OF 43 AND A SENTENCING RANGE OF LIFE.

During his plea Sadiki-Yisrael never admitted to first-degree or malice murder, or to knowing about such. Given that the indictment defined murder to include offenses less than first-degree or malice murder, and given that the sentencing enhancement section incorporated OCGA §16-5-1, which also prohibits second-degree murder, Defendant was able to enter a guilty plea without stipulating to knowledge that others committed first-degree murder. For the factual basis, Defendant only admitted that he remained in the gang after being told over the phone that someone in the gang killed someone over in Alabama.

Not all killings are murder, and not all murders are first-degree murders.

The case agent testified at sentencing that street-gangs are constantly in conflict with each other. Sometimes members resolve

their conflicts with words and reason, and no one gets hurt. Sometimes someone pulls a gun and starts shooting. Sometimes people on the other side of the conflict pull their guns and shoot back in self-defense. Defendant was not present at any gang killing. As the agent acknowledged, some gang-related killings turn out to be voluntary manslaughter or involuntary manslaughter, and some are self-defense. Unless one was present and aware of the full context, it is difficult to know whether a shooting was justified or not, or whether the killing legally amounted to a crime less than first-degree or malice murder. If one was not present for a shooting or privy to all the surrounding facts and circumstances, it is impossible to know that a malice or first-degree murder has occurred.

Count One of the indictment charged RICO conspiracy. The sentencing enhancement alleged Defendant and others “joined and remained in the RICO conspiracy charged in Count One, knowing and agreeing that members of the enterprise engaged in acts involving murder, in violation of Official Code of Georgia §16-5-1. Count One defined murder to include attempted murder, conspiracy to commit

murder, and other offenses which do not carry a Life sentence under Georgia law, and which thus did not trigger Level 43 under USSG § 2A1.1(a). Specifically, the indictment defined the racketeering activity of murder to include:

- Murder, in violation of OCGA §16-5-1;
- Attempted Murder in violation of §16-4-1; and
- Conspiracy in violation of §16-4-8.

OCGA §16-5-1 prohibits malice murder, felony murder and second-degree murder. *Id.* The notice of enhanced sentencing alleged Defendant “joined and remained in the RICO conspiracy charged in Count One, *knowing and agreeing that members of the enterprise engaged in acts involving murder, in violation of OCGA §16-5-1.*” *Id.* (Emphasis added). Again, OCGA §16-5-1 includes and prohibits murder in the second-degree. *See* OCGA §16-5-1.

Defendant’s guilty plea to Count One did not include an admission of facts sufficient to make him accountable for first-degree murder under USSG §2A1.1. During the plea colloquy, Defendant only admitted that he remained in the gang after learning others in the gang

killed someone in Alabama. Under the Sentencing Guidelines, second-degree murder carries a base offense level of 38. Voluntary manslaughter has a base offense level of 29. Involuntary manslaughter has a base offense level no higher than 22. Conspiracy or solicitation of murder carries a base offense level of 33, not Life.

The district court and the Eleventh Circuit conflated generic “murder” with first-degree or malice murder. *Sadiki-Yisrael, supra*, Appendix A, panel opinion, p. 7. This was a mistake. For the factual basis of his guilty plea, Defendant only admitted that he personally committed at least two predicate acts of fraud, and that he knew one person was killed by a gang member in Alabama. He never admitted that he knew or intended that *first-degree* or malice murders were committed.

“[W]here a count charges a conspiracy to commit more than one offense, the district court must find beyond a reasonable doubt that the defendant conspired to commit that particular offense conduct in order to apply the corresponding offense level as found in the sentencing guidelines.” *United States v. Vallejo*, 297 F.3d 1154, 1170 (11th Cir.

2002)(quoting USSG §1B1.2 and citing *United States v. Ross*, 131 F.3d 970, 989 (11th Cir. 1997); *see also United States v. Farese*, 248 F.3d 1056, 1060-1061 (11th Cir. 2001) (the district judge should determine which racketeering acts were committed by a defendant utilizing a beyond a reasonable doubt standard).

“Where the conspiracy has multiple criminal objects, the conviction ‘shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.’ USSG §1B1.2(d). Where the verdict does not establish which offenses were the object of the conspiracy, the Sentencing Guidelines caution that ‘subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.’ USSG §1B1.2(d), cmt. n.4. . . . ‘the court must find beyond a reasonable doubt that the defendant conspired to commit the particular object offense.’” *United States v. Colbert*, 2013 U.S. Dist. LEXIS 102774, at *7-8 (M.D. Fla. July 23, 2013).

The government failed to prove, and the guilty plea failed to establish beyond a reasonable doubt that Defendant possessed the mens rea to be found guilty of first-degree murder. The base offense level of 43 and guideline range of Life were the direct result of this due process violation where the government failed to meet its burden to establish Defendant's requisite knowledge, intent or mens rea.

CONCLUSION

For the above enumerated reasons, this Court should grant the Defendant's petition for certiorari, vacate his sentence and remand his case to the Eleventh Circuit.

DATED: This the 7th day of December, 2022.

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