No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAQUAIN YOUNG—PETITIONER

VS.

UNITED STATES OF AMERICA —RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Shortly after the murder of Jelvon Helton, which petitioner was convicted of, witness Tierra Lewis went to the police, circled codefendant Esau Ferdinand's picture on a lineup card, and wrote that she saw Ferdinand shoot Helton. When called as a defense witness by petitioner, she recanted on the stand. Under Federal Rules of Evidence, Rule 801(d)(1)(C), the out-of-court identification was admissible for its truth because Lewis testified and was available for cross-examination.

Did the district court err as a matter of law, thereby violating petitioner's constitutional right to present a complete defense, when, under Federal Rules of Evidence, Rule 403, it would not let the jury consider Lewis's identification of Ferdinand for its truth because it believed the recantation?

2. Regarding the above issue, did the district court err as a matter of law, thereby violating petitioner's constitutional right to present a complete defense, when it would not let the jury consider Lewis's identification of Ferdinand for its truth under FRE 801(d)(1)(C) for the additional reason that it was not *also* admissible for its truth as a prior inconsistent statement under FRE 801(d)(1)(A), having not been made under oath?

3. Regarding the above issue, the district court said it was motivated to rule as it did to protect Ferdinand from prejudice. Nonetheless, it repeatedly refused to sever petitioner's case from Ferdinand. Did the Ninth Circuit err in rejecting petitioner's severance claim when it focused entirely on whether petitioner's and Ferdinand's defenses were mutually exclusive rather than on whether joinder

compromised petitioner's constitutional right to present a complete defense? Relatedly, did the Ninth Circuit err when it held that petitioner's constitutional right to present a complete defense to the charged murder was satisfied because his attorney got to cross-examine witnesses and argue to the jury he was not guilty?

4. May a *Pinkerton* instruction on coconspirator liability be given when the government has not introduced evidence that might prove beyond a reasonable doubt that one or more identified coconspirators, other than the named defendant, committed the charged crime?

5. In holding that no error occurred on the issues of the Tierra Lewis evidence and severance, the Ninth Circuit panel ignored both precedent of this Court and its own binding precedent. It did not distinguish this authority, and it did not ask the *en banc* Court to overrule it. Without saying so, it upheld a legal conclusion by the district court that finds no support in the law. It did not rule against petitioner on alternative grounds of prejudice. It ignored key arguments petitioner made. In denying rehearing and *en banc* review, the full Court countenanced these practices.

Should the case be summarily remanded because the Ninth Circuit "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power?"

6. For RICO conspiracy liability to attach under 18 U.S.C. § 1962(d), must the defendant agree to personally further the enterprise's affairs rather than merely agreeing that someone else will associate with the enterprise and participate in the affairs?

7. In his original briefing, citations of supplemental authority, and court-ordered supplemental briefing, petitioner more than adequately preserved his argument that implied malice murder under California law is not a crime of violence for purposes of 18 U.S.C. § 924(j). The government never argued waiver or forfeiture. It never claimed that it was prejudiced in its ability to address this issue, nor was it. Should this Court set aside the panel's finding of waiver due to prejudice to the government and order it to address the merits of petitioner's claim?

LIST OF PARTIES

All parties to these issues appear in the caption of the case on the cover page. Petitioner was jointly tried with Esau Ferdinand, Monzell Harding, Adrian Gordon, and Charles Heard. The Ninth Circuit consolidated each defendant's appeal. The only common charge and count of conviction was count one, RICO conspiracy in violation of 18 U.S.C. § 1962(d).

This Court has denied Harding's cert. petition in case 22-6135. Petitioner is informed and believes that Ferdinand, Gordon, and Heard will be filing cert. petitions.

LIST OF PRIOR PROCEEDINGS

- *United States v. Jaquain Young, et al*, Northern District of California No. 13-cr-764-WHO. Original trial and conviction of petitioner and codefendants. Judgment entered June 14, 2018;
- *United States v. Jaquain Young*, 9th Circuit No. 18-10228. Direct appeal. Consolidated with *United States v. Charles Heard*, 9th Cir. No. 18-10218, *United States v. Esau Ferdinand*, 9th Cir. No. 18-10239, *United States v. Monzell Harding*, 9th Cir. No. 18-10248, and *United States v. Adrian Gordon*, 9th Cir. No. 18-10258. Memorandum decision issued July 11, 2022. Rehearing and *en banc* review denied on October 18, 2022.

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The memorandum decision of the Ninth Circuit and its order denying rehearing and *en banc* review are unpublished. App. 1, 21.

JURISDICTION

On July 11, 2022, a panel of the U.S. Court of the Appeals for the Ninth Circuit, with one minor modification, affirmed petitioner's convictions and sentence on direct appeal. App. 1, 20. On July 12, 2022, the panel extended the deadline for all defendants to file a petition for rehearing and *en banc* review to September 23, 2022. App. 50. Petitioner filed his rehearing petition on September 23, 2022. App. 24. On October 18, 2022, the Ninth Circuit denied the petition. App. 21.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction of the case pursuant to 18 U.S.C. § 3231. The Ninth Circuit had jurisdiction of petitioner's appeal pursuant to 28 U.S.C. § 1291. This petition is timely under Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Fifth Amendment

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

U.S. Constitution, Sixth Amendment

"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."

Federal Rules of Evidence, Rule 403

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Federal Rules of Evidence, Rule 801

"(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier . . . ."

Federal Rules of Criminal Procedure, Rule 14(a)

"If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires."

18 U.S.C. § 1962

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

18 U.S.C. § 924

"(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life . . ."

(c)(1)(A) provides enhanced punishment for anyone who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . .."

(c)(3) "For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . .."

STATEMENT OF THE CASE

A jury convicted petitioner and his four codefendants of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(d). It found that an object of the conspiracy included murder. It also convicted petitioner of VICAR murder, 18 U.S.C. § 1959(a)(1), using a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A), using a firearm during a crime of violence to commit murder, 18 U.S.C. § 924(j)(1), and two counts of pimping. 18 U.S.C. § 2422 (a), (b). Petitioner received four concurrent life terms, a concurrent 20-year term on one of the pimping counts, and a consecutive ten-year term on the section 924(c) count. App. 51.

On appeal, the Ninth Circuit panel struck the section 924(c) conviction and sentence as violating Double Jeopardy because section 924(c) is a lesser included offense to section 924(j). App. 20. It rejected petitioner's other claims. Petitioner's request for panel rehearing and *en banc* review were denied. App. 21.

STATEMENT OF FACTS[1]

I. Statement of Facts from Trial

A. The Murder of Jelvon Helton

1. The Crime Scene

Around midnight on November 1, 2010, someone shot Jelvon Helton at the Gravity Bar in San Francisco. No eyewitness identified petitioner as the shooter. The gun was not found. No DNA evidence incriminated him.

Four black men ran from the bar and sped away in a metallic burgundy Chrysler 300. A responding officer followed but lost a silver Acura near the area speeding and weaving through traffic. There were four or five black men in the car. The last two numbers of its license plate were 59.

2. The Tierra Lewis Evidence

On November 17, 2010, Inspector Cunningham of SFPD met with Tierra Lewis. Helton's family asked her to come forward.

Lewis told Cunningham that on the night of the murder, the shooter called her friend, Tiffany, asking to be picked up at different places. They drove Lewis's brother's Acura. Eventually, the shooter said they should meet at the Gravity Bar. Cunningham agreed Lewis's brother owned a silver Acura.

At the bar, Lewis saw Helton, whom she knew as Pooh Bear. The shooter walked up and shot him. There were ten shots. The shooter left Lewis and her

[1] This summary is derived from petitioner's rehearing petition. App. 33-39.

friend because they were slow leaving. Lewis identified the shooter in a photo lineup. He killed Helton because his friend, Julius Hughes, had died.

The shooter called Tiffany and asked to be picked up in Emeryville. The women drove there. The shooter drove up in a BMW with Nut Cake. They had driven across the Golden Gate Bridge. Lewis and Tiffany took the shooter to the Oaks Card Club. Nut Cake left in the BMW. Then, Lewis and Tiffany drove the shooter to San Francisco so he could get a Bay Bridge receipt. The shooter wanted to say he was with them if investigated. Lewis objected to that.

Lewis had grown up with the shooter and dated him. Tiffany texted with him repeatedly. Tiffany told Lewis before her interview that the shooter wanted to know if they were talking. Lewis told Cunningham she did not want to testify. She received threatening texts after the interview.

Lewis testified under immunity. She knew Ferdinand. His nickname was Sauce. She only knew Helton as Pooh Bear. She had grown up with Ferdinand.

Lewis acknowledged telling Cunningham Ferdinand shot Helton. She had identified Ferdinand in a photo lineup as "E. Sauce," who "pulled out his gun" and killed Pooh Bear." She admitted providing substantial detail about the crime scene.

Helton's family insisted she go to the police with this story. They were convinced Ferdinand had committed the murder and needed an eye-witness.

After receiving threats, Lewis contacted SFPD and said she had lied. She insisted the threats and a beating she got after talking to Cunningham related to her cousin's case, not petitioner's. Lewis had recanted in her cousin's murder case,

lying on the stand that he had not asked her to hide a gun after having told the police he had.

The initial call from Ferdinand never happened. Tiffany was a name she made up for her cousin Tanisha, whom she was with. They later got a call from Ferdinand who wanted to be picked up in the East Bay. They met him at the Emeryville card club. Ferdinand was with petitioner in a white car. She could not say if it was a BMW. Ferdinand got in the car with them. They drove back to San Francisco. Lewis was dropped off at home. She was never at the Gravity Bar.

3. Other Evidence

The Acura with the plate ending in 59 belonged to petitioner's girlfriend, Taylor Norry. He borrowed it to go to the funeral of his murdered friend, Julius Hughes, where it was photographed by law enforcement. Petitioner also borrowed it on November 1, 2010. Later, petitioner asked Norry to clean it inside and out. He said nothing had happened. The car was seized by SFPD in 2010 and by the FBI in 2014. Norry knew Ferdinand as petitioner's "cousin."

Jailhouse informant Bruce Lee Marshall was a self-taught software engineer. Lacking credentials, he created the identity, Francois Delacroix, who had prestigious degrees. He maintained this deception in his personal life. Marshall had a history of fraud, convictions, and supervised release violations.

In 2013, while awaiting trial on mail fraud charges, Marshall was housed with petitioner, who asked him to look at a motion in his pimping case. The pimping

complaint said petitioner was a member of the gang, CDP, and a RICO target. Marshall wrote down the case number and the U.S. Attorney's name.

Marshall wrote the government offering information about a murder for benefits in his case. It was agreed Marshall would record conversations with petitioner. Marshall tried unsuccessfully to do this several times.

Marshall testified petitioner had told him about his friend being murdered. Petitioner and his cousin were at a bar when his cousin pointed out the killer. Petitioner said, "I'm going to go get him." He simulated to Marshall how he pulled the trigger about four times from point blank range while backing up.

Petitioner and his cousin ran to his girlfriend's Acura, sped off, and eluded the police. Petitioner later cleaned the car with lye. The police interviewed his girlfriend, showing her pictures of his cousin. She had lied at petitioner's request.

Petitioner said he was part of a clique or gang. People did different things. He was a pimp. Most everybody "had a body."

A later successful recording and notes Marshall made of their talks were introduced. Topics included the girlfriend's loyalty, the government's ongoing interest in her car, him seeing no need for her to dump it, not yielding to the police because he was drunk and high while on probation, the foolish behavior of young criminals, petitioner's dissociation from problematic people, and whether he was snitching. Petitioner never admitted killing Helton. He said a RICO prosecution premised on local criminals sharing proceeds of their crimes was ridiculous.

A text from Ferdinand to petitioner on November 2, 2010 read "wipe em down he's gone."

B. Petitioner and the Alleged Criminal Enterprise

Cooperating witness Johnnie Brown identified most defendants, including petitioner, as Central Divisadero Playas ("CDP") members. He identified photos of petitioner and others throwing hand signs. Brown agreed some of these were taken with local rappers who rapped about the neighborhood. In his cooperation interview in May 2010, six months before the Helton murder, Brown did not mention petitioner until two hours in and only at police prompting. He said CDP no longer dealt with petitioner.

II. Relevant Procedural History

A. Tierra Lewis's Identification of Esau Ferdinand as the Killer of Jelvon Helton.

The district court ruled petitioner could only elicit through Cunningham that Lewis identified someone else. If Lewis testified, it would be "a different story." App. 57. During immunity talks, petitioner's counsel said he would introduce her identification for its truth. App. 58.

During closing argument, the court addressed Lewis's identifications. Petitioner argued for admissibility under FRE 801(d)(1)(C). Credibility was a jury question. App. 255-258, 262-265, 267-268, 273-274. The government argued that under FRE 403, the recanted identification had no probative value and that

Ferdinand had to be protected. It asked for a limiting instruction. Ferdinand joined that request. App. 258-262, 265-267.

The court gave the instruction because Lewis's identification would "be prejudicial . . . to Mr. Ferdinand. . .. [T]here was very clear testimony from Ms. Lewis that she was lying at the time." App. 269. Petitioner could only argue that exhibit 779 showed Lewis knew who Ferdinand was. App. 271-273.

Prior to defense arguments, the court instructed, "During the trial, you heard evidence that Tierra Lewis made prior inconsistent statements. Those statements cannot be considered as substantive evidence for the truth of the matters asserted in those statements, although the jury may properly consider any inconsistencies when evaluating her credibility." App. 276-277.

In denying petitioner's motion for new trial, the court agreed the identification was a non-hearsay prior identification under FRE 801(d)(1)(C), though not a non-hearsay prior inconsistent statement under FRE 801(d)(1)(A). App. 194. The limiting instruction had been "an attempt to draw a difficult line between the convergence of two rules of evidence . . .. To the extent that this delicate balance reflected any error, it did not rise to the level in which the interests of justice requires a new trial." App. 194. The instruction was also grounded in FRE 403 due to the potential for misleading and confusing the jury. App. 194, fn. 17.

B. Petitioner's Efforts to Sever his Case from Ferdinand's.

Petitioner first unsuccessfully moved to sever his case from Ferdinand's on the theory their defenses were antagonistic given Lewis's identification. The court ruled the defenses were not mutually exclusive because other people could have shot Helton. App. 70-72, 92-93.

Subsequent motions focused on prejudice to petitioner's defense from restrictions placed on the Lewis evidence to protect Ferdinand. App. 72-73, 93-94. Petitioner sought a new trial on this ground. App. 197-204. It was denied because the defenses were not mutually exclusive and because a jury believing Ferdinand shot Helton would have convicted petitioner under *Pinkerton*. App. 191-193.

C. The Government's Request for a *Pinkerton* Instruction.

Discussions about a *Pinkerton* instruction focused on *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal 2011) and whether the government would prove or had proved alternative scenarios justifying the instruction. App. 76-77. The government argued that acquitting petitioner as a direct perpetrator based on the Lewis identification would require convicting under *Pinkerton*. It expected to "tie up" its *Pinkerton* case "in very specific ways" at trial. App. 77. However, entitlement to the instruction turned only on general foreseeability. App. 78.

At the instructions conference, petitioner argued the government had presented no alternative scenario. The court replied, "[J]ust because the theory wasn't particularly expressed in the way that the Government may end up arguing

it in closing, I think that is not grounds for saying that they can't have the instruction." App. 78-79. It gave it. App. 210-211.

The government argued petitioner killed Helton. Guilt under *Pinkerton* assumed some unnamed CDP member foreseeably killed Helton. Addressing the idea Ferdinand killed Helton, the government said if so, petitioner was guilty under *Pinkerton*. It cited no prosecution evidence proving Ferdinand's guilt. It never "tied up" its *Pinkerton* case as it promised to do. App. 79-80, 210.

D. The RICO Conspiracy Instruction

The district court instructed the jury on RICO conspiracy that 1) the charged enterprise—which is CDP—was or would be established; 2) the enterprise or its activities would affect interstate or foreign commerce; 3) the defendant knowingly agreed "that either the defendant or another person would be associated with the enterprise;" and 4) the defendant knowingly agreed that "either he or another person" would conduct or participate, directly, or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity." App. 143.

The district court denied the parties' motion for new trial, which relied on disapproval of a similar instruction in *United States v. Young*, 720 Fed. Appx. 846 (9th Cir. 2017). App. 188-190.

E. Section 924(j) and Whether There was an Underlying Crime of Violence.

Petitioner did not raise this argument in the district court.

F. Proceedings in the Ninth Circuit.

Addressing Lewis's out-of-court identification of Ferdinand, petitioner argued that under circuit precedent, the district court had no discretion to exclude it for its truth because it believed her recantation. App. 51-55. Under the plain language of Rule 801(d)(1), the district court lacked discretion to condition admission of a prior identification under Rule 801(d)(1)(C) on its also being admissible as a prior inconsistent statement under Rule 801(d)(1)(A). App. 54. The government did not argue that Rule 801(d)(1)(C) was contingent on Rule 801(d)(1)(A). App. 93. It did urge the district court's discretion under Rule 403. App. 93-95.

The panel did not discuss petitioner's case law or analysis of Rule 801(d)(1). It wrote, "Under the circumstances of this case, the district court's rulings regarding Lewis's testimony and the photo lineup were a reasonable exercise of its discretion and a reasonable application of Rules 403 and 801(d)(1) of the Federal Rules of Evidence." App. 3-4. In the context of petitioner's arguments, this can only be read as holding that, as a matter of law, the district court had discretion in the two areas that petitioner had argued it lacked. The panel did not hold in the alternative that any error was harmless beyond a reasonable doubt.

On severance, though petitioner had first sought severance on the grounds of mutually exclusive defenses, he focused on later motions premised how the joint trial was impairing his ability to present the Lewis evidence. He cited precedent from this Court and the Ninth Circuit on the need for severance when joint trials threaten to impair one defendant's defense. App. 61-63, 174-176.

The panel ignored this argument. Severance was properly denied because the defenses were not mutually exclusive. App. 2-3. Petitioner had not been denied the right to present "*a* defense" because defense counsel had been allowed to cross-examine witnesses and argue weaknesses in the prosecution's case. App. 4 (emphasis added).

Regarding *Pinkerton*, petitioner urged the panel to apply *Carcamo*, *supra*. App. 80-84, 178-180. The panel held that there "was sufficient evidence to support" the instruction. App. 13. It did not explain what that evidence was.

On the RICO instruction, petitioner joined Ferdinand's argument that it was plain error. It was prejudicial because, factoring out the invalid VICAR murder conviction, the remaining evidence showed, at most, association with CDP members and possible approval of their activities. App. 84-85, 181-183. The government did not argue that petitioner could not have been prejudiced. App. 145-147. The panel held without elaboration that the instructions as a whole "adequately advised the jury of the need to prove each defendant's agreement." App. 13.

On the section 924(j)/crime of violence issue, there was initial briefing, citations of supplemental authority by both parties under Federal Rules of Appellate Procedure, Rule 28(j), and court-ordered supplemental briefing. App. 86-89, 162-165, 205-253. The government never claimed prejudice. Nonetheless, the panel ruled that petitioner had insufficiently targeted California law in his initial argument, which "deprived the government of the opportunity to respond." This waived the claim. App. 19-20.

REASONS FOR GRANTING THE PETITION

I. Rule 801(d)(1)(C) of the Federal Rules of Evidence was Enacted to Deal with Recantations. A District Court Has no Discretion under Rule 403 to Exclude Evidence Admissible for its Truth Under Rule 801(d)(1)(C) Because it Believes a Later Recantation.

A. Introduction

The Ninth Circuit has held that district courts lack discretion to exclude evidence under Rule 403 because they don't believe it. *United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013). The First and Fifth Circuits have also so held. *Bowden v. McKenna*, 600 F.2d 282, 284-285 (1st Cir. 1979); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154 (5th Cir. 1981). The Fourth Circuit has agreed in an unpublished case. *E.I. Dupont de Nemours & Co. v. Kolon Indus.*, 564 Fed. Appx. 710, 715 (4th Cir. 2014).

The panel held that the district court had discretion to exclude Tierra Lewis's identification of Esau Ferdinand as the real killer because it believed her later recantation. As this contradicts both Ninth Circuit and sister circuit law, *certiorari* should be granted. Supreme Court Rule 10(a).

Whether district courts may exclude prior identifications admissible under Rule 801(d)(1)(C) because they believe a later recantation is an issue that will undoubtedly recur. This Court should grant *certiorari* to settle this important question about the scope of discretion under Rule 403. Supreme Court Rule 10(c).

The constitutional magnitude of the violation bolsters the case for review. Incorrect rulings that deny the defendant "a meaningful opportunity to present a complete defense" deny due process. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986);

Holmes v. South Carolina, 547 U.S. 319, 324-325 (2006). In the Ninth Circuit, due process is denied when incorrect rulings prevent consideration of evidence of third-party culpability. *United States v. Evans*, 728 F.3d 953, 967 (9th Cir. 2013); *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010).

Because this is constitutional error, the test for harmless is heightened. Petitioner argued that under Ninth Circuit precedent, the partial preclusion of argument on a validly supported defense that occurred here is structural error. *Frost v. Van Boening*, 757 F.3d 910, 915-918 (9th Cir. 2014) (*en banc*), rev'd on other grounds, *Glebe v. Frost*, 574 U.S. 21, 23-24 (2014).[3] Accord, *United States v. Brown*, 859 F.3d 730, 734-737 (9th Cir. 2017); *United States v. Smith-Baltiher*, 424 F.3d 913, 920-922 (9th Cir. 2005); *United States v. Miguel*, 338 F.3d 995, 1003 (9th Cir. 2003); *Conde v. Henry*, 198 F.3d 734, 739-741 (9th Cir. 1999). App. 56, 67-69. He argued alternatively that reversal was required under *Chapman v. California*, 386 U.S. 18, 24 (1967) unless the government could show that the constitutional errors were harmless beyond a reasonable doubt. App. 56, 69-70.

While the government disputed petitioner's structural error argument, it made no attempt to discharge its burden under *Chapman*. App. 128-133. Thus, under Ninth Circuit precedent, it waived the argument. *Clem v. Lomelli*, 566 F.3d 1177, 1182 (9th Cir. 2009). The Ninth Circuit did not address prejudice in ruling against petitioner on this issue.

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[3] The "other grounds" were that the Ninth Circuit's rule was not clearly established Supreme Court law justifying habeas relief under 28 U.S.C. § 2254(d)(1).

B. <u>The Merits</u>

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Federal Rules of Evidence, Rule 403.

The circuits have recognized legal limits to discretion under Rule 403. "'Weighing probative value against unfair prejudice under [Rule] 403 means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable.'" *United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013), quoting *Bowden v. McKenna*, 760 F.2d 282, 284-285 (1st Cir. 1979). The truth or falsity of exculpatory evidence "is a question of fact that should be decided by a jury, not a trial judge." *Id.* at 963-964. The district court's belief that exculpatory evidence is untrue is not grounds for excluding it under FRE 403 on the grounds that it would confuse the jury. *Id.* at 965-966. "It is the jury, not the trial judge, that must decide how much weight to give to Evans's delayed birth certificate in light of the government's evidence suggesting that the birth certificate is fraudulent[.]" *Id.* at 966. As noted, the Fourth and Fifth Circuits agree with *Evans* and *Bowden*. This Court should confirm that these cases state the better rule.

Even if there were contexts where district courts could take credibility decisions from the jury under Rule 403, application of Rule 801(d)(1)(C) is not one of them. The rule provides that an out-of-court identification is admissible for its truth if the declarant testifies and is available for cross-examination. It *exists in part to*

address recantations. *United States v. Elemy*, 656 F.2d 507, 508 (9th Cir. 1981). Prior identifications are admissible as substantive evidence regardless of whether the witness can repeat the identification, or is uncertain, or recants the prior identification at trial. That is the point of the rule. The drafters recognized that prior identifications are often more reliable than in-court identifications. *United States v. Owens*, 484 U.S. 554, 562-563 (1988). *See also*, *United States v. Anglin*, 169 F.3d 154, 159 (2d Cir. 1999); *United States v. Salameh*, 152 F.3d 88, 125 (2d Cir. 1998); *Samuels v. Mann*, 13 F.3d 522, 527 (2d Cir. 1993); *United States v. O'Malley*, 796 F.2d 891, 899 (7th Cir. 1986); *United States v. Lewis*, 565 F.2d 1248, 1252 (2d Cir. 1977); *Johnson v. United States* 820 A.2d 551, 557-559 (D.C. App. 2003) (construing analogous provision of D.C. Code to find admissible prior statement identifying defendants as shooters after witness recanted). Under Rules 403 and 801(d)(1)(C), the district court lacked discretion to do what it did.

II. A District Court has no Discretion to Exclude Evidence Admissible for its Truth Under Rule 801(d)(1)(C) Because it is not Also Admissible for its Truth under Rule 801(d)(1)(A).

A. Introduction

Again, the panel wrote that the district court reasonably exercised its discretion in applying "Rule 801(d)(1)." App. 3-4. The reference to Rule 801(d)(1) as a whole, rather than the prior identification prong of Rule 801(d)(1)(C), embraces the district court's legal conclusion that it could condition admissibility under Rule 801(d)(1)(C) on admissibility under Rule 801(d)(1)(A).

The government did not defend this conclusion on appeal. App. 93. It is contrary to the plain language of Rule 801(d)(1). That Rule 801(d)(1)(C) operates independently from Rule 801(d)(1)(A) is an important question that this Court should settle. Supreme Court Rule 10(c).

This is an appropriate case in which to do so. As explained above, the evidentiary error rises to the level of a constitutional violation, the error is either structural or subject to *Chapman*, the government made no attempt to discharge its burden under *Chapman*, and the Ninth Circuit made no alternative finding of harmlessness.

B. <u>The Merits</u>

Federal Rules of Evidence, Rule 801(d)(1) provides:

> "(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
> (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
> (B) is consistent with the declarant's testimony and is offered:
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
> (C) identifies a person as someone the declarant perceived earlier . . .."

Rule 801(d)(1) is written in the disjunctive. Rule 801(d)(1)(C) is preceded by an "or." Thus, under the plain language of the Rule, admission under Rule 801(d)(1)(C) is not contingent on admission under Rule 801(d)(1)(A). That these

subsections have independent significance is so obvious, petitioner has only located two cases that have addressed the matter. See *Johnson v. United States* 820 A.2d 551, 558-559 (D.C. App. 2003); *United States v. Parker*, 2020 U.S. Dist. LEXIS 114054 (Nor. Dist. Ill. June 29, 2020) (unpub.) at *8.

The type of evidence at issue bolsters petitioner's point. Under FRE 801(d)(1)(C), prior identifications of perpetrators at in-person lineups and in response to photo spreads are admissible. *United States v. Elemy*, *supra*, 656 F.2d at 508-509; *United States v. King*, 590 F.2d 253, 257 (8th Cir. 1978); *United States v. Lewis*, 565 F.2d 1248, 1252 (2d Cir. 1977). *See also*, *United States v. Owens*, *supra*, 484 U.S. at 556, 560-564 (construing FRE 801(d)(1)(C) in case involving prior identification from a photo spread). Such identifications, like Lewis's statement to Inspector Cunningham, will not have been made under oath at trial-like proceedings. Thus, hinging Rule 801(d)(1)(C) on Rule 801(d)(1)(A) effectively nullifies the former.

"A district court by definition abuses its discretion when it makes an error of law." *Fox v. Vice*, 563 U.S. 826, 839 (2017), quoting *Koon v. United States*, 518 U.S. 81, 100 (1996). "[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1749 (2020). Petitioner was entitled to the benefit of Rule 801(d)(1)(C) as written, whether or not the lower courts approved of the result.

III. A Defendant is Entitled to Have his Case Severed from a Codefendant When a Joint Trial will Lead to Rulings that will Prevent him from Presenting a Complete Defense, Including a Supported Defense of Third-Party Culpability.

A. Introduction

The panel held that petitioner's repeated unsuccessful requests for severance turned on whether, under *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991), his defense and Ferdinand's defense were mutually exclusive. App. 2-3. That holding is legally contrary to *Zafiro v. United States*, 506 U.S. 534, 539 (1993) and *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980), which hold that severance is required when, as here, a joint trial seriously impairs one defendant's defense, such as by requiring exclusion of key exculpatory evidence. Because the panel's decision "conflicts with relevant decisions of this Court," the petition should be granted. Supreme Court Rule 10(c).

This is an appropriate case in which to grant review. The panel misstates the record. Though petitioner's first motion for severance invoked the "mutually exclusive" test, as he confronted hurdle after hurdle with the Tierra Lewis evidence, he repeatedly sought severance on the grounds that his defense was being impaired. App. 72-73, 93-94.

The net effect of the failure to sever was, again, a constitutional violation with no finding or showing of prejudice to weigh against review. The district court's suggestion, which the Ninth Circuit did not adopt, that a jury crediting Tierra Lewis's identification of Ferdinand would have convicted petitioner on a *Pinkerton*

theory of coconspirator liability is unsound. The Lewis evidence was pursued to create reasonable doubt, not prove Ferdinand's guilt *beyond* a reasonable doubt, with petitioner thereby convicting himself under *Pinkerton*.

"The burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor." *Zafiro v. United States*, *supra*, 506 U.S. at 543 (Stevens, J., concurring). As discussed in the next claim, the government did not competently pursue a *Pinkerton* conviction. Review should be granted on this claim.

B. <u>The Merits</u>

"If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Cr.Proc. 14(a). "[T]he trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960).

Denial of severance is an abuse of discretion if joinder was "so manifestly prejudicial that it outweighed the dominant judicial concern with judicial economy[.]" *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980). Mutual exclusivity of defenses under *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) is not the sole consideration justifying severance.

"Manifest prejudice" to the defendant includes "violation of one of his substantive rights such as his right to present an individual defense." *United States*

v. Seifert, supra, 648 F.2d at 563. "[A] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

This describes the mishandling of the Tierra Lewis evidence. The district court admitted it acted to protect Ferdinand. App. 269. The government argued both below and on appeal that it was appropriate to do so. App. 258-262, 265-267, 126-128. It dismissed Ferdinand's claims of severance error because the court protected him. App. 136. Without Ferdinand to protect, the Lewis errors presumably would not have occurred.[5]

The holding that petitioner lost nothing because he presented "*a* defense" grounded in cross-examination and argument to the jury deserves little credence. That is the baseline in any trial. Petitioner lost "a meaningful opportunity to present a *complete* defense[.]" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (emphasis added); *Holmes v. South Carolina*, 547 U.S. 319, 324-325 (2006). In the Ninth Circuit, due process is denied when incorrect rulings prevent consideration of evidence of third-party culpability. *United States v. Evans*, 728 F.3d 953, 967 (9th Cir. 2013); *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010). That was the product of the failure to sever.

[5] Had the district court granted severance but excluded the Lewis evidence for its truth, petitioner would still be claiming that his constitutional rights were violated. Nonetheless, it is clear that the district court's stubborn insistence on trying petitioner with Ferdinand motivated its mishandling of the Lewis evidence.

IV. A *Pinkerton* Instruction on Coconspirator Liability may not be Given When the Government has not Attempted to Prove Beyond a Reasonable Doubt Who, Other than the Named Defendant, Committed the Charged Crime.

A. Introduction

The government promised the district court it would "tie up" its entitlement to a *Pinkerton* instruction in petitioner's case with alternative proof that Ferdinand killed Jelvon Helton. App. 77. It broke its promise. The district court acknowledged this but gave the *Pinkerton* instruction anyway. App. 210-211. Without discussion of the record, the Ninth Circuit affirmed. App. 13.

Giving the instruction worked considerable mischief. It let the government confuse the jurors by telling them they should translate any reasonable doubt they had grounded in the theory that Ferdinand might have killed Helton into a finding of petitioner's guilt *beyond* a reasonable doubt under *Pinkerton*.

In a conspiracy context, the government should not be entitled to a *Pinkerton* instruction without affirmatively proving who in the larger universe of potential actors might have committed a crime if the charged defendant did not. This Court should grant *certiorari* to settle this important question. Supreme Court Rule 10(c).

B. The Merits

Under *Pinkerton v. United States*, 328 U.S. 640 (1946), a charged defendant is liable for the criminal acts of his coconspirators if 1) the crime was committed in furtherance of the conspiracy; 2) it was within the scope of the conspiracy; and 3) the defendant reasonably could have foreseen the crime being committed pursuant

to the conspiracy. *United States v. Douglass*, 780 F.2d 1472, 1475-1476 (9th Cir. 1986).

In *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal. 2011), the district court refused to allow a *Pinkerton* instruction in another complex RICO conspiracy case in the Northern District of California. The court was concerned about giving the instruction because the actual perpetrator of the murder was not identified. *Id.* at *7. In the cases that allowed the *Pinkerton* instruction, the perpetrators of the VICAR murders were identified as well as their roles in the murder. *Id.* at *11. It refused the instruction on this basis. *Id.* at *12. *Carcamo* may be an unpublished district court decision, but it states the rule that should govern.

Carcamo's observation that the alternative perpetrators had been identified in cases allowing the *Pinkerton* instruction applies to the government's district court briefing here. See *United States v. Gadson*, 763 F.3d 1189, 1196-1197, 1216-1217 (9th Cir. 2014) (coconspirators possession of firearm in furtherance of drug trafficking established by evidence and not disputed by defendant); *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1203-1204 (9th Cir. 2000) (defendant contests only evidence of foreseeability of undisputed gun possession by coconspirators); *United States v. Carter*, 560 F.3d 1107, 1112-1113 (9th Cir. 2009) (same); *United States v. Moreland*, 622 F.3d 1147, 1169-1170 (9th Cir. 2010) (defendant challenges only evidence of foreseeability on three counts of massive money laundering conspiracy in which he was not directly involved); *United States v. Bingham*, 653 F.3d 983, 990, 996-998 (9th Cir. 2011) (Aryan Brotherhood member argues

unsuccessfully that grant of motion for acquittal on aiding and abetting theory required same relief under *Pinkerton*. No dispute that other identified gang member conspirators committed predicate murders); *United States v. Houston*, 648 F.3d 806, 811, 818 (9th Cir. 2011) (technical *Pinkerton* instruction issue in Aryan Brotherhood case. No dispute that other identified gang members committed predicate murders).

In *United States v. Ruiz*, 462 F.3d 1082 (9th Cir. 2006), the defendants' convictions for possessing firearms furthering a drug crime were reversed. Possession was foreseeable, but the government proved only mere access. *Id.* at 1088-1089. "[V]icarious liability is predicated upon proof that someone among the co-conspirators committed the substantive crime at issue." *Id.* at 1088. "[T]he government failed to meet its burden of proving possession[.]" The Court refused to "leap to [the] conclusion" that "somebody in that laboratory must have possessed the firearms[.]" *Id.* at 1088-1089. Unfortunately, the courts below indulged the government's desire to encourage the jury to leap to just such a conclusion.

V. Because the Ninth Circuit Neither Acknowledged nor Distinguished Both its own Binding Authority and this Court's Precedent in Deciding the Tierra Lewis and Severance Issues, it "so Far Departed from the Accepted and Usual Course of Judicial Proceedings" as to Require Summary Reversal and Remand.

Grounds for granting *certiorari* include where "a United States court of appeals . . . has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power[.]" Supreme Court Rule 10(a). This test

reflects the Court's "significant interest in supervising the administration of the judicial system." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010).

This Court employed the "so far departed" test to reverse where the Ninth Circuit had improperly decided a case with a non-Article III judge on the panel. *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 73-74 (2003). This power may also be invoked when, on the merits, "the court below is so clearly wrong" and contrary to governing law "that summary reversal is warranted." *Kalamazoo County Rd. Comm'n v. Deleon*, 574 U.S. 1104, 1104, 1107 (2015) (Alito, J., dissenting from denial of *certiorari*). The Ninth Circuit's disregard of precedent requires this Court's intervention.

Ninth Circuit courts are bound by decisions of this Court that are on point. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Any three-judge panel is also bound by a prior panel decision on the same issue. Only the *en banc* court can overrule it. *Ibid*; *United States v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011).

This latter rule is not some Ninth Circuit quirk. Every single circuit follows this rule. See *Talbott v. C.R. Bard, Inc.*, 63 F.3d 25, 27 (1st Cir. 1995); *Dale v. Barr*, 967 F.3d 133, 142 (2d Cir. 2020); *United States v. Mallory*, 765 F.3d 373, 381 (3d Cir. 2014); *United States v. Brooks*, 524 F.3d 549, 559 fn. 17 (4th Cir. 2008); *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014); *Salmi v. Secretary of Health & Human Services*, 774 F.2d 685, 689 (6th Cir. 1985); *In re Skupniewicz*, 75 F.3d 702, 705 (7th Cir. 1996); *United States v. Wilson*, 315 F.3d 972, 973 (8th Cir. 2003); *United States v. Marquez-Gallegos*, 217 F.3d 1267, 1270 (10th Cir. 2000); *Kondrat'Yev v.*

City of Pensacola, 949 F.3d 1319, 1324-1325 (11th Cir. 2020); *Ali v. Trump*, 959 F.3d 364, 372 (D.C. Cir. 2020); *Deckers Corp. v. United States*, 752 F.3d 949, 964 (Fed. Cir. 2014). As contemporary appellate practice evolved, this Court endorsed the practice of circuit courts sitting *en banc*. It ensured finality of decision and avoided conflict in the laws of a given circuit which, as a practical matter, was the court of last resort in most cases. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 334-335 (1948). Here, if the Ninth Circuit panel or the full Court believed its binding precedent was wrongly decided, it should have called for *en banc* review.

This Court takes seriously breaches bearing on the standard of review. In the habeas context, it has reversed at least 14 Ninth Circuit grants of habeas relief, ruling, often *per curiam*, that the Ninth Circuit failed to accord state court decisions the deference required by AEDPA. *Shinn v. Kayer*, 141 S.Ct. 517, 522 (2020) citing *Kayer v. Ryan*, 944 F.3d 1147, 1157 & fn. 1 (9th Cir. 2019) (Bea, J., dissenting from denial of rehearing *en banc*.) It has similarly reversed 22 Sixth Circuit habeas grants, twelve times *per curiam*. *Shoop v. Cunningham*, 143 S.Ct. 37, 44 (2022) (Thomas, J., dissenting from denial of *certiorari*) citing *Cassano v. Shoop*, 10 F.4th 695, 696-697 (6th Cir. 2021) (Griffin, J., dissenting from denial of rehearing *en banc*).

Petitioner recognizes that unpublished dispositions are truncated and must be read with the parties' arguments in mind. *Hart v. Massanari*, *supra*, 266 F.3d at 1177-1178. However, there is no way to read the panel's decision on the scope of discretion under Rule 403, the interpretation of Rule 801(d)(1), the considerations relevant to severance, and what constitutes an unconstitutional infringement on the

right to present a complete defense except as embodying legal conclusions that are contrary to Ninth Circuit precedent and grossly at odds with this Court's precedent.

An affirmance that severely overreaches should be as much of a cause for concern under the "so far departed" test as one that reverses a conviction.

> "The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes. . .. By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle." *Hollingsworth v. Perry*, *supra*, 558 U.S. at 196.

The Ninth Circuit should be ordered to rehear the case.

VI. The Circuits Have Split Over Whether a Defendant Must Agree to Personally Participate in the Affairs of the Enterprise for RICO Conspiracy Liability to Attach.

A. Introduction

As discussed below, the circuits have split on whether the government or plaintiff must prove the defendant agreed to *personally* participate in affairs of the RICO enterprise, directly or indirectly, or whether it suffices to agree that *someone else* will participate in the affairs of the enterprise, without any personal involvement by the defendant. The Ninth Circuit panel adhered to the latter view.

This is inconsistent with this Court's precedent, and it is not the better rule. This Court should grant *certiorari* to resolve the circuit split and settle this important question. Supreme Court Rule 10(a), (c). The fact that a RICO conspiracy conviction carries up to life imprisonment makes the question particularly important. 18 U.S.C. § 1963(a).

Petitioner's circumstances make this an appropriate case. He argued that reversal of his murder conviction invalidates his conspiracy conviction because conclusive proof that he committed a gang-related revenge killing would be the only strong evidence he conspired with CDP members as opposed to just associating with them. App. 84-85, 183. However, this Court or the Ninth Circuit on remand could disagree.

At a future resentencing without the murder conviction, if the Presentence Report attributed to petitioner first-degree murders committed by other CDP members, the offense level under the advisory Sentencing Guidelines would be 43. USSG §§ 2E1.1(a)(2); 2A1.1(a). The advisory sentencing "range" would be "life." Petitioner's conviction should be reversed now. Review should be granted.

B. <u>The Merits</u>

In *Salinas v. United States*, 522 U.S. 52, 61, 63–64 (1997), this Court held that under section 1962(d) a defendant need not personally "undertake all of the acts necessary for the crime's completion" nor agree to personally "commit or facilitate each and every part of the substantive offense." *Id.* at 65. However, a defendant must personally "intend to further the endeavor" and "adopt the goal" of doing so. *Id.* at 65. *Salinas* left open "what level of participation in the conduct of the enterprise . . . it take[s] to conspire to violate subsection (c)." *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 965 (7th Cir. 2000).

The Seventh Circuit in *Brouwer* is the only circuit to have addressed this question in a meaningful way. The plaintiffs argued that because *Salinas* concluded

that "it is enough that [someone else] commit the predicate acts" in a RICO conspiracy, then "it should also be enough" that someone else "conduct the affairs of the enterprise." *Id*. at 964. *Brouwer* concluded, however, that "some degree of personal participation" is required. *Id*. at 966. "An agreement to join a conspiracy is highly personal," as is "an agreement to participate in the conduct of an enterprise," even though "how one agrees to get the job done—through a pattern of racketeering activity—is not necessarily personal [and] can be delegated." *Brouwer*, 199 F.3d at 966. Thus, a defendant "cannot conspire to violate subsection (c) by agreeing that somehow an enterprise should be operated or managed by someone." *Id*. at 967. The defendant "must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner." *Id*.

The Eleventh Circuit is in accord. "Association, alone, with the enterprise is . . . insufficient for violation of RICO: an individual must *agree* to participate in the affairs of the enterprise." *United States v. Valera*, 845 F.2d 923, 929–30 (11th Cir. 1988). "The key is agreement on an overall objective, which can be proved by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity." *United States v. Gonzalez*, 921 F.2d 1530, 1540 (11th Cir. 1991) (internal quotation marks and citations omitted).

Consistent with this, the Seventh and Eleventh Circuits, as well as the Eighth, have adopted model instructions for RICO conspiracy making clear that the defendant must agree to personally participate in the affairs of the enterprise:

- The Seventh Circuit's model instruction requires the jury to find "[t]hat the defendant knowingly conspired to conduct or participate in the conduct of the affairs of [the RICO enterprise]."

- The Eighth Circuit's model instruction requires the jury to find "that the defendant was associated with an enterprise" and intended to "participate in the affairs of the enterprise."

- The Eleventh Circuit's model instruction requires the jury to find that the defendant intended "to participate in the enterprise's affairs."

The Third Circuit's model instruction is more opaque and requires an agreement to personally further, if not participate in, the enterprise. The jury must find that "two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity"; that defendant "was a party to or a member of that agreement"; and that defendant "joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity . . . and intending to join together with at least one other alleged conspirator to achieve that objective . . . ." Case law clarifies that a defendant must "agree to further an enterprise," although someone else could "conduct or participate directly or indirectly in the enterprise's affairs . . .." *United States v. Williams*, 974 F.3d 320, 369–70 (3d Cir. 2020). This leaves unexplained what it means to "further an enterprise" if one does not participate in it.

Under the jury instruction approved in petitioner's case, a defendant need not agree to personally participate in the affairs of the enterprise. It is enough if "the defendant knowingly agreed that either the defendant or another person would be

associated with the enterprise" and "either he or another person would conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise." App. 143. Although a latter portion of the instruction indicates that the government must prove that the "defendant agreed to participate in the enterprise with the knowledge and intent that at least one member" would commit two or more racketeering acts, the elements portion of the instruction tells the jury that a defendant can participate in the enterprise by merely agreeing that *someone else* will participate in it. *Id.*

The remaining circuits do not have model jury instructions. The First, Fourth, and Sixth Circuits require proof that the defendant agreed to further or facilitate the criminal endeavor, without explaining what that means and without clarifying whether the defendant must agree to personally participate in the enterprise. *United States v. Leoner-Aguirre*, 939 F.3d 310, 316 (1st Cir. 2019); *United States v. Barnett*, 660 F. App'x 235, 245 (4th Cir. 2016); *United States v. Bailey*, 2022 U.S. App. LEXIS 18441, at *9 (6th Cir. July 5, 2022).

The Second Circuit requires "that a defendant *agreed with others* (a) to conduct the affairs of an enterprise (b) through a pattern of racketeering," *i.e.*, that a "defendant knowingly agreed with others to function as a unit for the common purpose of engaging in racketeering activity." *United States v. Capers*, 20 F.4th 105, 117–18 (2d Cir. 2021). This requires an agreement to personally participate.

The Fifth Circuit requires proof that the defendant "knew of the [enterprise's] activities and agreed to facilitate the criminal enterprise," *United States v. Owens*,

724 F. App'x 289, 294–95 (5th Cir. 2018). It may or may not require personal participation. *See United States v. Phillips*, 664 F.2d 971, 1012 (5th Cir. 1981) (requiring that "[t]he defendant must have 'objectively manifested an agreement to participate directly or indirectly, in the affairs of an enterprise'" (citations omitted)). *But see United States v. Hinojosa*, 463 F. App'x 432, 440 (5th Cir. 2012) (disclaiming the need for an agreement to personally participate).

Finally, the Tenth and D.C. Circuits require proof that the defendant agreed to facilitate the racketeering activity and participate in the enterprise's activities. *United States v. Harris*, 695 F.3d 1125, 1131–32 (10th Cir. 2012); *United States v. Hoyle*, 122 F.3d 48, 50 (D.C. Cir. 1997). In sum, the circuits are split as to whether the defendant must agree to personally participate, directly or indirectly, in the enterprise's affairs to be liable for a RICO conspiracy.

The government defended its jury instruction without explaining the basis for such tangential liability. According to the government, the instructions as a whole "emphasize the personal nature of conspiracy liability." App. 146. However, the government never identified what the defendant must agree to personally do in support of the conspiracy, if anything. App. 145-147. The Ninth Circuit agreed that the instructions, as a whole, "adequately advised the jury" of the law, but the court failed to explain what that meant and what the defendant must do. App. 13.

The panel's decision and the similar decisions discussed above are at odds with *Salinas*. Although a defendant may be liable for conspiracy even if someone else will "commit the crime," the defendant must agree to *some personal* role in

furthering it. *Salinas*, 522 U.S. at 65. The defendant might "agree[] to facilitate . . . some of the acts leading to the substantive offense" *id*. (internal quotation marks and citation omitted), although it is unclear what qualifies as facilitating some acts.

Whether a defendant must agree to *personally participate* in the enterprise affects the already sweeping scope of conspiracy law. Courts must "view with disfavor" this type of "broaden[ing] [of] the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404 (1957). The substantive RICO offense is committed by conducting or participating in the affairs of the enterprise through a pattern of racketeering. Does a defendant facilitate that offense by merely agreeing that someone else will commit it? The answer should be "no." *Brouwer* and the other circuits requiring personal participation state the better rule.

VII. Petitioner did not Waive or Forfeit his Claim that his Section 924(j) Conviction Fails for Want of an Underlying Crime of Violence. The Panel Should be Ordered to Address it.

A. Introduction

Petitioner's claim was thoroughly, responsibly, and logically briefed from start to finish. The government never suggested otherwise or claimed prejudice. The panel should have reached the merits. Here, too, it "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power[.]" Supreme Court Rule 10(a).

B. The Merits

In his opening brief, petitioner summarized that the VICAR murder underlying the section 924(j) allegation had been charged under California law. He pointed out that the case was not charged as first-degree, premeditated murder under California law and that the jury did not so find. App. 86-88.

Petitioner pointed out that VICAR murder can be grounded in second-degree murder. App. 89. Citing the now-vacated panel decision, *United States v. Begay*, 934 F.3d 1033, 1038-1041 (9th Cir. 2019), which involved the federal murder statute, 18 U.S.C. § 1111, petitioner argued that because second-degree murder can be committed recklessly, *i.e.*, not intentionally, the government failed to prove a predicate crime of violence. App. 89. The cited portion of *Begay* states, "Reckless conduct, no matter how extreme, is not intentional." *Id.* at 1040. In its opposition brief, the government agreed that this case involved California law. App. 163. It disagreed on the merits. App. 162-165. It did not argue waiver or prejudice.

Thereafter, this Court decided *Borden v. United States*, 141 S.Ct. 1817 (2021). *Borden* held that "crime of violence" does not include reckless conduct. *Id.* at 1821-1822, 1834. The four-justice plurality held that "[t]he 'against' phrase indeed sets out a *mens rea* requirement—of purposeful or knowing conduct." *Id.* at 1827-1828. It "excludes conduct, like recklessness, that is not directed or targeted at another." *Id.* at 1833. Justice Thomas based his concurrence on the phrase "use of physical force," which "has a well-understood meaning applying only to intentional acts designed to cause harm." *Id.* at 1834-1835 (Thomas, J., concurring in the judgment).

Petitioner filed a Rule 28(j) letter discussing *Borden*. He noted *Borden* had reserved judgment on the issue of crimes involving extreme recklessness. However, the still-valid *Begay* panel decision was consistent with *Borden* because, "Reckless conduct, no matter how extreme, is not intentional." *United States v. Begay*, *supra*, 934 F.3d at 1040. The government had not charged or proved an intentional killing under California law, federal law, or any other law. App. 205-206.

Petitioner filed a second Rule 28(j) letter citing a Ninth Circuit memorandum disposition that, relying on *Borden*, held that generic murder under California law is not a crime of violence. App. 207-208. The government then filed a Rule 28(j) letter arguing that neither *Borden* nor the unpublished decision invoking it could control because *Borden* reserved the question of extreme recklessness. It also noted that the Ninth Circuit was considering rehearing *Begay en banc*. App. 209-210.

After the Ninth Circuit agreed to rehear *Begay* en banc, the panel stayed this case pending that decision. App. 246. In *Begay v. United States*, 33 F.4th 1081 (9th Cir. 2022), the *en banc* majority held that second-degree murder under 18 U.S.C. § 1111, committed with extreme recklessness, was a crime of violence under the elements clause. This decision was consistent with *Borden* because implied malice murder was highly blameworthy and readily equated to intentional conduct. *Id.* at 1093-1096. Concurring, Chief Judge Murguia relied exclusively on the view that wanton disregard is equivalent to knowledge, which is equivalent to an intended application of force. *Id.* at 1098 (Murguia, C.J., concurring). Judge Ikuta dissented,

writing that however intuitive this conclusion may feel, it was inconsistent with *Borden*. *Id.* at 1099-1107 (Ikuta, J., dissenting).[6]

The panel ordered the parties to file simultaneous supplemental briefs discussing the *en banc* opinion in *Begay*. App. 215, 246-247. At this point, for the first time, it became important to argue that "extreme recklessness" supporting second-degree murder under California law was less extreme than under federal law and did not amount to intentional targeting under *Borden*. Citing substantial California case law, petitioner so argued. App. 219-230. Embracing Judge Ikuta's dissent, he also argued that *Begay* was wrongly decided. App. 231. The government argued there was no difference between California and federal murder law. App. 248-252. It also suggested for the first time that California law was irrelevant because section 924(j) refers to section 1111. However, this did not have to be resolved because California and federal law were identical. App. 251-252. The government never claimed to have been blindsided, sandbagged, or prejudiced on any aspect of this claim.

This is not a case of a claim being raised for the first time in a supplemental brief. There was no waiver. The merits should be reached.

[6] This Court denied *certiorari* in *Begay* in case 22-5566.

CONCLUSION

This petition raises many issues. Unfortunately, many issues combined to work an injustice in petitioner's case, particularly on the principal charges of VICAR murder and RICO conspiracy. For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Dated: January 12, 2023

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