No. 23-7100

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT MERRITT, JR. — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THIRD CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Merritt, Jr.
(Your Name)

P.O. Box 420
(Address)

Fairton, NJ 08320
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

Whether Merritt's life sentence under RICO statutes violated Apprendi, and is plain-error reverse warranted.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v Savage,

United States v Savage,

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 27, 2023.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 27, 2023, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

A. Kaboni Savage orders Lamont Lewis to firebomb the home of a government witness.

Kaboni Savage headed a vast, extraordinarily violent drug enterprise that operated in North Philadelphia over a decade. After a massive Federal criminal investigation of what it termed the Kaboni Savage Organization ("KSO"), the government prosecuted Savage for drug distribution and, after a 2005 trial, Savage was convicted and sentenced to 30 years in prison.

At Savage's 2005 trial, one of the government's star witnesses was Eugene Coleman, who had been part of Savage's inner circle. Even though Savage was in prison serving his sentence, he decided to get revenge on Coleman. The way that Savage decided to punish Coleman for cooperating was horrifying: firebombing Coleman's home while the family was inside, asleep.

From prison, Savage ordered the Coleman firebombing done. By phone, he directed his sister, Kidada, to assign Lamont Lewis to carry it out. Lewis was a childhood friend of Savage's who became his most trusted killer. Lewis committed at least 11 murders, likely more victims than any other murderer in the history of the city.

Fatefully, Savage ordered Lewis to recruit a second person to help him carry out the Coleman firebombing. A.11368 (Kindada). When Kindada rejected Lewis's first proposed helper, Lewis decided to ask his younger cousin, Robert Merritt. A.11367-71.

B. Lewis recruits Merritt to help him.

Robert Merritt was 24 years old when Lewis approached him. Lewis was four years older than Merritt and like an older brother to him. As Lewis had become a central figure in Savage's violent enterprise, Merritt followed him into criminal activity. At age 19, Merritt was arrested three times in less than four months for selling drugs on the same street corner. After the third arrest, he was prosecuted for all three and pleaded guilty. Based on what Merritt had done and who he was, the judge sentenced him to no

prison, only probation. PSR. 13-14.

After his conviction for selling drugs at 19, Merritt continued to struggle. He got a tattoo of "EAM," which the government later asserted stands for "Erie Avenue Mob," and while with Lewis got another tattoo that read, "Ride or Die," which the government asserted was an anti-snitching message. PSR 20, A10971. The government alleged that Merritt helped to run Lewis's drug corner during a brief period when Lewis was in custody. A14148. And, significantly, Merritt had helped Lewis to set fire to a building -- a vacant building -- using gasoline cans, which Lewis did to facilitate a real-estate scam. A11358-59.

By 2004, the federal investigation of Savage's enterprise had been going on for years, and Lewis was one of its main targets. When Lewis celebrated his birthday at a bar that year, Merritt attended. He left the party in a car driven by a friend, the car was stopped by the police and a gun discovered under the seat. Merritt was charged with possessing the gun. But, aware that Merritt was Lewis's cousin and had prior guilty pleas for teenaged street-corner drug-selling, the government decided to adopt Merritt's criminal case federally and charge him with being a felon in possession of a firearm. Until that traffic stop, the Savage investigation had never even heard Merritt's name.

Merritt was released pending his trial date. Just weeks later and while still on release, Lewis approached Merritt about helping him with another arson, the arson that is the force of this case. How much Lewis told Merritt about this arson beforehand is hotly disputed, as detailed further below, but it is clear that Merritt agreed. Who actually set the fire, and what Merritt did that morning, are also hotly disputed, but it is clear that Savage's orders to Lewis were carried out. On October 9, 2004, all six of Coleman's family members in the house were burned to death.

After the Coleman fire, Merritt pleaded guilty to being a felon in possession for the vehicle stop outside of Lewis's party and was sentenced to 194 months' imprisonment. PSR 15.

C. Merritt is tried in a joint trial and convicted of RICO conspiracy.

On May 9, 2012, an Eastern District of Pennsylvania grand jury returned a 17-count fourth superseding indictment charging Savage, Kindada, Northington and Merritt with conspiracy to participate in a racketeering enterprise in violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 USC §1962(d) (Count One); murder in aid of racketeering in violation of 18 USC §1959(a)(1) (Counts Two to Seven and Ten to Fifteen); tampering with a witness in violation of 18 USC §1512(a) (Count Eight); conspiracy to commit murder in aid of a racketeering enterprise in violation of 18 USC §1959(a)(5) (Count Nine); retaliating against a witness in violation of 18 USC §1513(a) (Count Sixteen); and using fire to commit a felony in violation of 18 USC §844(h)(1) (Count Seventeen). A446. The four-defendant trial began on November 5, 2012, with Judge R. Barclay Surrick presiding, and lasted over six months.

Much of the trial focused on the other three defendants, not Merritt. As to Merritt, the key questions were (1) what involvement he had in Savage's enterprise, and (2) what role he played in the Coleman firebombing.

1. Evidence of Merritt's role in Savage's enterprise

The prosecutor's evidence showed that, over the course of several years of investigating Savage's operation, the FBI conducted surveillances at 52 separate properties. During approximately 150 separate instances of direct surveillance, no investigator ever saw Merritt. The FBI also investigated over 140 cars, which were parked near these suspected properties. No vehicle was ever linked to Merritt.

The FBI also listened to over 16,000 telephone calls, during which the agents identified 75 to 100 different voices. No one ever called Merritt or received a call from him or even mentioned his name. In addition, when the FBI seized photos and lists of phone numbers from the homes of various suspects, none of this evidence disclosed any connection between Merritt and the KSO.

Savage's prior, 2005 criminal prosecution had addressed the same drug conspiracy. In that indictment, the government had charged over 30 people with conspiring to distribute drugs with Kaboni Savage. Merritt was not one of them.

In Savage's 2005 trial and at this one, many KSO participants testified for the government. Admitted drug conspirators such as Paul Daniels, Myron Wilson, Miami Wilkes, Chuch Rosado, Darren Blackwell, and Craig Oliver -- cooperators with compelling incentives to implicate everyone they could -- never mentioned Merritt. Over time FBI showed Merritt's photo to many of these conspirators: none recognized Merritt.

Nor did the prosecution assert that Merritt had any connection to the murders of Mansur Abdullah, Carlton Brown, Barry Parker, Tyrone Tolliver or Tybius Flowers, all allegedly killed to further the interests of the KSO. Nor did the prosecution implicate Merritt in any other KSO act of violence, such as the brutal beating of Darren Blackwell.

Other evidence of whether Merritt was a KSO member came from the individual with the clearest incentive to offer incriminating testimony against him: Eugene Coleman. From 1999 to 2009 -- that is, for years after the firebombing that killed his family -- Coleman had countless meetings with FBI agents. He provided inculpatory information against 100 people. Yet, even after he was well aware that the FBI suspected Merritt of participating in the murder of his loved ones, Coleman did not claim that Merritt was part of the KSO. Although he testified for many days at the 2005 drug trial, he never mentioned Merritt. He first accused Merritt in 2009, a decade after he began cooperating and just before the first indictment in this case.

By the conclusion of trial in this case, the prosecution was constrained to acknowledge that Merritt "may have been more on the periphery" of the Savage enterprise. A14141; see also A14129 ("Now, Merritt wasn't as closely aligned with Kaboni Savage and the enterprise as Lamont Lewis was, but Robert Merritt knew full well who Kaboni Savage was.") Knowing a criminal, however, is not the same as being guilty of a crime, and in reality, Merritt was

so "peripher[al]" that, during a 10-year investigation, the FBI never saw him and the cooperators neither mentioned his nor recognized his photograph.

2. Evidence of Merritt's role in the Coleman firebombing.

The prosecution asserted that Merritt knew that Lewis planned to firebomb a house, that there would be people inside, and that the firebomb was in retaliation for a witness testifying against Savage. It asserted that Merritt was the one who threw a lit gasoline can into the house, and then threw a second can inside and left with Lewis. A3394-95. To prove these assertions of fact, the prosecution relied on the testimony of Lewis.

Lewis had been one of the original two defendants in the case, ECF No. 1, and in the superseding indictment he had been charged with 19 felony counts, including eight counts subject to the death penalty. ECF No. 51. Lewis agreed to become a cooperator for the government in exchange for a plea deal that removed his risk of being sentenced to death and allowed for a sentence as short as 40 years, which is what he ultimately received. A11510, 11515.

Lewis's deal depended on the prosecution agreeing that Lewis's account was truthful, in the prosecution's sole and unreviewable judgment. And, from the prosecution's perspective, the important thing was not for Lewis to implicate himself any further -- obviously -- but rather to implicate the others charged with participating in the Coleman firebombing, particularly Merritt. The prosecution said as much as Lewis's subsequent sentencing: "what really carried the day, in terms of us deciding whether to accept cooperation from Mr. Lewis was the fact that the most important thing, we felt was, collectively, that we felt was that everyone who was involved in the firebombing of the Lewis family, everyone who was involved in that should be brought to justice." A16990.

Lewis's account of his and Merritt's respective roles in the firebombing was contradicted by other trial evidence in two main respects.

First, the government's own arson expert, Arthur Czajkowski, a retired Philadelphia Firefighter with more than 36 years of experience in investigating and fighting fires, testified that the firebombing could not have happened the way Lewis said it had. Lewis testified that Merritt a lit gas can into the Coleman residence, which caused a "big explosion" in the room where Lewis was standing, and then Merritt threw a second gas can. A11002-03. The government's arson expert testified that this was impossible twice over. The expert testified that the gasoline was poured, not exploded from a gas can. A12586-91. And if Lewis had stood in the room passively watching as Merritt threw in the first gas can and it exploded, as Lewis claimed, that explosion would have killed Lewis. The expert said, "After the first explosion, I don't think that a person is going to be in that room to witness another one." A12621. Asked if it would be impossible, he answered, "Yes." Id

Second, the sworn grand jury testimony of neutral eyewitness Jorge Reyes matched Merritt's account, not Lewis's.* Reyes lived across the street from the Coleman residence. A13980. When the fire happened, Reyes heard gunshots, corresponding to the shots that Lewis admitted firing when he first entered the Coleman house and that forensics investigators confirmed. A13980. And Reyes saw two people on the street. Immediately after the shots but before the fire started, Reyes looked out his window and saw someone dressed in all black, running away from the Coleman home. A13980, 13985, 13896. After leaving the window for "a couple minutes," Reyes heard a series of louder booms, corresponding to the explosions caused by the ignition of the gas. A13981, 13989. Returning to the window, Reyes saw a second person, wearing a grey hooded sweatshirt, "walking down the street like he didn't give a fuck about nothing," alone. A13981, 13985. In a proffer session years before the trial, when Lewis

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* Reyes was no longer living in the continental US during Merrit's trial, and Merritt's extensive efforts to locate him in Puerto Rico, where he was believed to have moved, were unsuccessful. As grand jury testimony, Reyes's account was elicited by the government, without the defense being present.

was unlikely to have known what Reyes had seen, Lewis had admitted to investigators that Merritt had worn black that night, while he had worn a gray hoodie. A11436.

The verdict sheet and the jury instructions are central to this appeal, and they are described in detail in Claims I and II below.

On May 13, 2013, after more than six and a half months of trial, Merritt was convicted of RICO conspiracy and acquitted on all of the remaining counts. The jury found one special sentencing factor proven for Merritt. A661. The other three defendants were convicted on all counts.

D. Merritt is sentenced to life imprisonment.

In Merritt's nine years in prison between being sentenced for possessing a firearm and being sentenced in this case, he achieved significant rehabilitation. For example, Merritt was a positive influence on other inmates, leading Bible study classes and helping younger inmates avoid bad behavior and focus instead on education and rehabilitation. A13936-48.

The probation officer's pre-sentence report calculated Merritt's offense level at 48 by using the base offense level for first-degree murder instead of RICO conspiracy. PSR9, 13. In calculating his criminal history level as VI, due to his classification as a career offender based on his previous convictions, and resulting guidelines range as life imprisonment. PSR 15, 22.

The pre-sentence report stated, "The maximum term of imprisonment for Count One is life, pursuant to 18 USC §1962(d)" PSR22. But Section 1962(d) sets out the substantive offense of RICO conspiracy, not its sentence.

At Merritt's sentencing hearing, District Judge Surrick observed that "[t]his courtroom is filled with family members who have come in here and spoken on behalf of Robert Merritt." A16977. Merritt's counsel argued that the court should impose a sentence of less than life in prison, focusing on the jury's acquittals on all the other counts. A16949-60. Counsel acknowledged that Merritt was present when the fire was set, but argued that the jury's

verdict showed that Merritt did not know the house was occupied or that Lewis's aim was to kill them in retaliation. A16956-57. The prosecution argued that Merritt chose to be a thug and a murderer, that he failed to learn from his prior no-prison sentence for drug sales at age 19, that he had not shown remorse, that the jury found him guilty of the equivalent of first-degree murder which carries a mandatory sentence of the death penalty or life in prison, that the firebombing was a terrible crime, and that Merritt's family would be able to see him but the victim's family would not be able to see them. A16960-72. Finally, Merritt allocuted, stating that his heart went out to the victims and their family, that he had changed his life over the past nine years by embracing Christianity and working to better himself and help others. A16973-75.

To explain the basis for the sentence, Judge Surrick first observed that the firebombing was one of the most horrendous crimes he had ever heard of, and that Merritt was serving a 194-month federal sentence and had prior convictions for drug dealing. A16976. He expressed regret that the family is hurt as much as the defendant by incarceration. A16977. He stated that "there is not an awful lot to recommend moving away from the sentencing guidelines," but then stated that Merritt had made a "very, very strong argument" for a lesser sentence. A16977. But he said that argument was in many respects based on a disagreement with the facts as found by the jury. A16977-78. He concluded that the Guidelines sentence was an appropriate sentence, although it was a tragedy for Merritt because he had the potential to be better. A16978-79.

Section 1963(a), the RICO sentencing statute under which Merritt was sentenced, was not mentioned in his pre-sentence report or at his sentencing hearing.

REASONS FOR GRANTING THE PETITION

1. The District Court's sentencing decision violated Apprendi Standards.

The district court erred by sentencing Merritt to life imprisonment for a RICO violation without a jury determination that the offense was grounded in a racketeering activity for which a life sentence is prescribed.

Standard of Review: Plain Error

The standard of review is for plain error, as Merritt did not originally object on this basis. The appellate court has the authority to respond to an error that is apparent, affects the individual's substantial rights, and, if not corrected, could compromise the fairness, integrity or public reputation of the proceedings.

Merritt was sentenced under the RICO sentencing statute, which provides that whoever violates RICO may be "imprisoned not more than 20 years." 18 USC §1963(a). The trigger for Section 1963(a)'s increased statutory maximum -- "a racketeering activity for which the maximum penalty includes life imprisonment" -- is referred to here as a Qualifying Activity. The statute thus allows a more severe penalty when the crime involves more serious conduct, but it requires a connection between the crime and the conduct.

A. Absence of jury finding on racketeering activity

Merritt's sentence under the RICO statute, which in cases of racketeering activity permits life imprisonment, required that the jury identify the racketeering activity as a qualifying factor for such a sentence. The jury did find Merritt had committed such an act; however, it stopped short of connecting this act to his RICO conviction, thus falling short of the requirement set forth by Apprendi v New Jersey, which dictates that "any fact that increases the penalty for the crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt."

The verdict sheet in this case first directed the jury to decide whether the defendants were guilty of count one. A661. It

then directed jurors to decide whether the defendants had committed specific acts:

> Special Sentencing Factors As To Count 1
>
> If you have found one or more of the defendants guilty as to count 1, you are also required to find, beyond a reasonable doubt, whether those defendants committed the acts described in the following special sentencing factors:

A662*. Fifteen special sentencing factors followed. The only ones the jury found proven as to Merritt, numbered 9 through 14. A668. First degree murder is a crime "for which the maximum penalty includes life imprisonment," §1963(a), see 18 Pa. CS§§1102(a)(1). The sentencing factor did not ask whether Merritt committed the killings himself, nor did it require the jury to intent. Without the requisite mens rea, Merritt could have been guilty under Pennsylvania law of second-degree murder or either voluntary or involuntary manslaughter.

For Merritt's sentencing factors, the document read, "We, the jury, find that Sentencing Factors #9 through #14, as to defendant Robert Merrit are:" either proven or unproven. The jury found them proven, but they only required that he "aided, agreed or attempted to aid" in the murders.

Just as the verdict sheet did not require the jury to find that the sentencing factor acts were racketeering activities that the RICO violation was based on, the jury instructions failed to do so as well. Indeed, surprisingly, the jury instructions did not even mention the sentencing factors. A15089-15232. Nor, for that matter, did the parties' closing arguments address the point.

2. By its plain language, the RICO sentencing statute requires

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* This language contained a second legal flaw: it told jurors that their finding had to be beyond a reasonable doubt either way, proven or not proven. Proof beyond a reasonable doubt is not a two-way street; it is a burden placed on the prosecution alone. See In re: Winship, 397 US 358, 363 (1970). While Merritt does not assert the reasonable-doubt error, alone, satisfies the plain-error standard, it does reinforce the unreliability of the jury's verdict.

that the RICO violation was "based on" the Qualifying Activity, and a RICO violation is based on a Qualifying Activity if the Qualifying Activity is one of the two or more predicate acts upon which the underlying RICO conviction relies.

The plain language of Section 1963(a), the RICO sentencing statute (Note: §1963(a) is the sentencing statute for RICO conspiracy offenses such as Merrit's , §1962(d), as well as for §§1962 (a) through (c).) is the key. This section does not authorize a higher statutory-maximum sentence for a defendant who committed a life-sentence-eligible act unrelated to the RICO violation.

There is only one way for a RICO violation to be "based on" a "racketeering activity." This is apparent from the elements of the crime of RICO conspiracy. To prove a RICO conspiracy, the prosecution must show (1) an agreement to participate in an enterprise through a "pattern" of racketeering activity, (2) that the defendant was a party to that agreement, and (3) that the defendant joined the conspiracy knowing that its objective was to carry out the enterprise's affairs through a "pattern" of racketeering activity. United States v Fattah, 902 F.3d 197, 247 (3d Cir. 2018); A115141-43. To establish the required "pattern," the prosecution must show that the defendant agreed that a conspirator would commit at least two predicate acts -- two racketeering acts through which the enterprise would be conducted. A15163-66. Specific bad acts are required for the two-predicate-acts requirement, and the two-predicate-acts requirement is the only RICO requirement that specific bad acts would establish. Singular bad acts do not satisfy the other requirements for a RICO violation (the existance of a conspiracy, the defendant's having joined the conspiracy,and the defendant's knowledge of the conspiracy's objective). So the way a Qualifying Activity can form a basis for a RICO violation is if it was one of the two or more predicate activities found by the jury. Otherwise, the RICO violation was not based on that act. This is true whether the defendant committed the act or not, and whether the jury found that he committed it or not.

B. The clear application of Apprendi and Burrage

Barrage v United States emphasized the importance of but-for causation in relation to sentencing enhancements. By analogy, the same rigorous standard of proof should apply to Merritt's case concerning his RICO violation and related racketeering activities. Without proper jury findings on the required relationship, his life sentence under Section 1963(a) is inconsistent with Apprendi.

In Apprendi v New Jersey, the Supreme Court held that, "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 US 466, 490 (2000).

In Aprendi terms, Section 1963(a)'s "prescribed statutory maximum is 20 years, and the "fact" the increases the penalty beyond that maximum to life is that a life-imprisonment-eligible act is one of the racketeering activities that the defendant agreed a member of the conspiracy would commit for the enterprise -- that is, that a Qualifying Activity was a predicate act. To sentence Merritt to life imprisonment, Apprendi required that fact to be found by the jury, unanimously and beyond a reasonable doubt. It was not: The jury found Merritt guilty of RICO conspiracy, and it found that Merritt had committed murder, but it did not find any relationship between the two. Without the required jury findings, sentencing Merritt to life imprisonment violated Apprendi.

If the statutory text and foregoing precedent left any doubt about whether Apprendi required Merritt's jury to find not just the murder but also its relationship to the RICO conspiracy crime, that doubt evaporated eight months before Merritt's sentencing when the Supreme Court issued Burrage v United States, 571 US 204 (2014). Like the provision here raising the maximum sentence when the RICO offense is "based on" a Qualifying Activity, Burrage involved a provision that raised the minimum and maximum sentences when death "results from" a drug-distribution offense. Id at 209. Burrage took it as self-evident that Apprendi would not be satisfied by a jury's finding that there was a death, alone.

"Because the 'death results' enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." Id at 210 (citations omitted). "[I]t is one of the traditional background principles against which Congress legislates that a phrase such as 'results from' imposes a requirement of but-for causation." Id at 214 (internal quotation marks and alteration omitted). In both Burrage and this case, the sentencing statutes raised the default sentence when:

(a) an additional fact was present -- a Qualifying Activity in Merritt's case, a death in Burrage -- and

(b) a relationship between that additional fact and the underlying crime was present -- the RICO violation based on the Qualifyirg Activity in Merritt's case, the death resulting from the drug crime in Burrage.

So Burrage controls here. Because Apprendi required jury findings on both components in Burrage, it requires findings on both components here as well.

In Burrage, the real question was not whether the rule of Apprendi applied to the "results from" language in the statute, but how. Because the statute did not define the phrase, Burrage gave it its ordinary meaning, looking to dictionary definitions and cases interpreting the phrase in other statutes. Id at 210-11. The Court concluded its survey of these authorities by observing that, "in interpreting a criminal statute, the rule of lenity precluded courts from giving the text a meaning that was different from its ordinary meaning and disfavored defendents. Id at 217. The Court concluded that the death-resulting standard requires the jury to find that the distribution crime was the but-for cause of the death. Id at 219. All of this reasoning supports Merritt's position as well.

No precedential opinion, in this circuit or any other, has answered the exact question presented here. The only circuit that has discussed Apprendi's application to Section 1963(a) is the Sixth Circuit, and it has done so only in non-precedential opinions. In United States v Gills, it recognized that, "for a defen-

dant to receive a life sentence, a jury must find beyond a reasonable doubt that his RICO violation is 'based on' a murder," and without discussing or citing Burrage, it concluded that the verdict form satisfied Apprendi by asking whether, "[w]ith respect to Count One," the defendant committed the Qualifying Activity. 702 F.App'x 367, 384 (6th Cir. 2017), cert. denied, 138 S.Ct. 2663 (2018). The Sixth Circuit's most extended analysis of this issue came in United States v Johnson, 726 F.App'x 393 (6th Cir. 2018). Johnson again recognized that, under Apprendi, the jury was required to find that the RICO violation was based on a Qualfying Activity. Id at 408. In Johnson, the Qualifying Activity was robbery, and the special verdict form required the jury to find that the defendants were guilty of "agreeing and intending that at least one other conspirator would commit a racketeering act of robbery." Id (internal quotation marks omitted). Johnson concluded that requiring the jury to find "a racketeering act of robbery" satisfied Apprendi because it "required the jury to find that the robbery was related to, or based on, the RICO enterprise." Id. While the Sixth Circuit's non-precedential decisions do not address Burrage, and in some respects conflict with Burrage, they do support the basic point that Apprendi requires a jury finding as to Section 1963(a)'s "based on" requirement, not merely whether the defendant committed the Qualifying Act.

In the end, while the mechanics of RICO's elements and Section 1963(a) are complicated, the Apprendi issue is straightforward. The sentence Merritt received was available only if his RICO violation was based on a Qualifying Activity, but the jury findings established no connection between the violation and the Activity, and that violated Apprendi.

C. Plain error resulting in excessive sentencing.

The error of sentencing without conforming to the Apprendi requirement is undeniable and uncomplicated, and it has adversely affected Merritt's substantial rights by subjecting him to a life sentence. The absence of a proper jury finding created an unwarranted disparity between the potential 20-year maximum sentence

and the life sentence actually imposed.

An error is plain if it is "clear and obvious, rather than subject to reasonable dispute, at the time of the appellate consideration." Calabretta, 831 F.3d at 138 (internal quotation marks omitted).

Here, it is obvious from the fact of the RICO sentencing statute that the increased statutory maximum applies only when the RICO violation is based on a Qualifying Act. The relevant language is simple and clear: "Whoever violates any provision of 1962 of this chapter shall be ... imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment) ..." That language leaves no doubt that merely committing a life-sentence-eligible crime, untethered to the RICO violation, cannot trigger the higher statutory maximum. This plain statutory language, alone, is enough to render the error clear or obvious. See United States v Stinson, 734 F.3d 180, 185-86, 187 (3d Cir. 2013); United States v Dickerson, 381 F.3d 251, 260 (3d Cir. 2004); United States v Evans, 155 F.3d 245, 250-51 (3d Cir. 1998); United States v Knobloch, 131 F.3d 366, 373 (3d Cir. 1997). When "the question does not call for a complex analysis," and "the answer is dictated by common sense and basic principles of statutory construction," the error is plain. Dickerson, 381 F3d at 258-59.

The clarity and obviousness of the error is reinforced here by the fact that it arises under Apprendi v New Jersey. This was not a difficult-to-spot application of an obscure ruling; it was a straightforward application of a case that has been described as a "landmark," United States v Melgar-Cabrera, 892 F.3d 1053, 1059 (10th Cir. 2018), and a "seminal case," Reinhold v Rozum, 6y04 F.3d 149, 152 (3d Cir. 2010), cited in over 38,000 decisions. Cf. United States v Miller, 527 F.3d 54, 73 (3d Cir. 2008) (finding plain error: "Though we reach this conclusion as a matter of first impression, we do so on the basis of the Supreme Court's holding in Ball, which is well entrenched in our law and clear in its implications with respect to the double jeopardy question in

this case.").

In Merritt's case, his sentencing exposure for RICO conspiracy was less serious than the multiple death sentences the government was seeking in the other counts. Viewed in that context, the failure to catch the Apprendi here may have been, if not excusable, at least understandable. But understandable or not, the question here is simply whether the error is clear and obvious at the time of the appeal. Calabretta, 831 F.3d at 138. Because it is, the second plain-error requirement is met.

C. The error affected Merritt's substantial rights because the sentence he recieved was far longer than what the jury's findings authorized.

An error that is plain affects substantial rights when the defendant shows a reasonable probability that it caused him prejudice in that it affected the outcome of the district court proceedings. United States v Dahl, 833 F.3d 345, 358 (3d Cir. 2016); Calbretta, 831 F.3d at 138. The prejudice need not be severe: errors that affect substantial rights include those that increase a defendant's advisory range even if the defendant was sentenced within the correct range, Calbretta, 831 F.3d at 138, and errors that result in an additional concurrent conviction that does not increase the defendant's prison term and results in a negligible assessment, Tann, 577 F.3d at 539.

Here, the impact of the error was severe. Merritt received an illegal life sentence; his statutory-maximum sentence should have been 20 years. The difference between a life sentence and a 20-year sentence -- for a young man -- could be the difference between spending dozens of years in prison or at home with his family. "A sentencing error that results in a longer sentence undoubtedly affects substantial rights and affects the outcome of the district court proceedings." Stinson, 734 F.3d at 187 (internal quotation marks and alterations omitted). An error that adds "years" of additional time in prison "weighs strongly in favor" of an effect on substantial rights, Calabretta, 831 F.3d at 140 -- here, the error likely added decades.

Further, the record here demonstrates a reasonable probability that, had it been asked, the jury would not have found that a murder was a predicate act for Merritt's RICO conspiracy violation. The government's evidence on these points was far from overwhelming. While the prosecution presented evidence that Merritt agreed to help his older cousin Lamont Lewis commit an arson, it relied entirely on Lewis's unreliable word to try and show that Merritt was even aware that Lewis's purpose was to retaliate against a former Kaboni Savage lieutenant.

It is true, of course, that the jury found Merritt guilty of RICO conspiracy, and that the conviction necessarily entailed a finding that Merritt had agreed that a conspirator would commit at least two unspecified predicate acts. But finding Merritt responsible for at least two predicate acts does not require -- or even suggest -- that one of them was murder. There were six different types of predicate acts alleged to in the indictment and submitted to the jury: murder, drug distribution, arson, witness tampering, witness retaliation, money laundering, and derived monetary transactions. A15166-67. And, importantly, the jury was instructed that it could find that two acts of the same type -- for example, two drug distribution acts -- satisfied the two-predicate-acts requirement. A15170. Merritt previously had pled guilty to three separate acts of drug distribution at a location that the prosecution asserted was tied to the Savage enterprise, and the prosecution argued that these qualified as the requisite predicate acts. A14147, A14224-25. The prosecution also asserted that Merritt assisted Lamont Lewis with KSO drug distribution at 8th and Venango Streets, and urged the jury to find that this was a predicate racketeering act, too. A14225, A14228. So the jury could readily have determined that Merritt's drug distribution acts, alone, satisfied the two-predicate-acts requirement, without finding that murder was a predicate act for Merritt. The jury's finding that Merritt was guilty of RICO conspiracy thus provides no support for the position that the jury would have found that one of his predicate acts was murder.

To the contrary, the jury's findings on the other counts

that Merritt faced underscore the likelihood that the jury did not find, and if asked would not have found, that murder was one of Merritt's predicate racketeering acts:

* The jury found Merritt was not guilty of conspiring to commit murder in aid of racketeering, A673 (count 9, 18 USC §1959(a)(5)) and of murder in aid of racketeering A674-79 (counts 10 through 15, §1959(a)(1), (2)). By contrast, it found Merritt's co-defendants guilty on all these counts.
* The jury also found Merritt not guilty of retaliating against a witness for the firebombing deaths, A680 (count 16, §1513). It found both Savage and Kidada guilty. The disputed element of that crime was whether Merritt acted with the intent to retaliate for a witness's testimony or cooperation.
* And the jury found not proven the special sentencing factor that Merritt killed or aided and abetted the killing the six arson victims with the intent to retaliate against Coleman, A669 (special sentencing factor #15, 18 USC §1513).

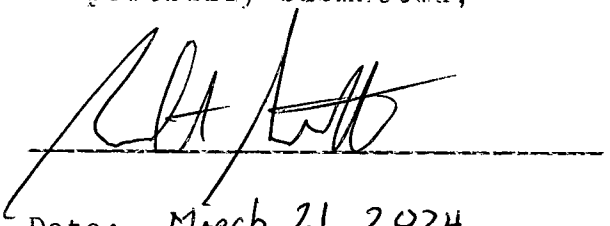
The jury rejected the prosecutor's urging to find Merritt guilty of racketeering murder, and it rejected the prosecutor's urging to find that Merritt shared Savage's and Kidada's intent to retaliate against Coleman. These findings clearly suggest that it may well not have found that murder was a predicate act for Merritt.

The district court's failure to secure a jury finding on Merritt's RICO violation's connection to a qualifying racketeering activity resulted in a sentencing decision that fundamentally conflicts with established precedent under Apprendi v New Jersey and its progeny, including Burrage v United States. Given the repercussions of this error upon Merritt's substantial rights and the integrity of the judicial proceedings, this case poses a significant constitutional question meriting this court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: March 21, 2024