No. _____

In The

Supreme Court of the United States

JONATHAN WRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Kelly Margolis Dagger
Counsel of Record
ELLIS & WINTERS LLP
Post Office Box 33550
Raleigh, North Carolina 27636
(919) 865-7000

Counsel for Petitioner Jonathan Wray

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

Does this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), require that the Government prove beyond a reasonable doubt to a jury that there is a nexus between a potential predicate act and a RICO conspiracy before the defendant can be subjected to an enhanced penalty based on the predicate act?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Jonathan Wray.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by amended published opinion issued January 9, 2024, in which it rejected the arguments Wray and his co-appellants advanced on appeal and affirmed the judgment of the district court sentencing Wray to life in prison. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of the Fourth Circuit's opinion affirming the judgment of the district court sentencing Wray to life in prison on his conviction of conspiracy to violate the RICO Act, 18 U.S.C. § 1962(d). J.A.3788-3790. The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Investigation and indictment

Through an investigation led by the Federal Bureau of Investigation ("FBI"), Jonathan Wray was identified as a suspected member of the Nine Trey Gangsters ("Nine Trey") set of the United Blood Nation ("UBN") in western North Carolina. J.A.488-490.

Wray was among eighty-three individuals named in an indictment in the United States District Court for the Western District of North Carolina charging RICO conspiracy and other crimes. J.A.6-7. Wray was charged by a third

superseding indictment with conspiracy to conduct and participate in the affairs of the UBN through a pattern of racketeering activity consisting of murder, narcotics trafficking, and other acts, in violation of 18 U.S.C. § 1962(d) (Count 1). J.A.155-183.

The Government gave notice of special sentencing factors that could increase Wray's statutory maximum sentence. *See* J.A.218. The Government alleged that Wray, as part of the RICO conspiracy, agreed that multiple acts of murder would be committed. J.A.218 (sentencing factor 1). In a separate sentencing factor, the Government alleged that Wray murdered Christopher Odoms. J.A.218 (sentencing factor 2).

Trial proceedings

Wray pleaded not guilty, J.A.146, and he was tried together with three co-defendants, J.A.35.

The United Blood Nation

The Government called law enforcement officers and cooperating witnesses to testify about the Nine Trey set, the medical examiner involved in investigating the murder of Christopher Odoms, and various other officers and eyewitnesses. *See* J.A.461-3109.[1]

Chad Pupillo

Special Agent Chad Pupillo of the FBI testified that he served as the lead case agent for the investigation of the Nine Trey set in western North Carolina.

[1] Wray has summarized only what he believes is the most pertinent trial evidence.

J.A.465-466. Pupillo testified that he determined from his investigation that Jonathan Wray and his co-defendants were members of the Nine Trey set. J.A.488-490. Pupillo identified photographs of individuals he said were Nine Trey members, including Wray, also known as Yungin or Jon-Jon. J.A.512, J.A.514, J.A.518.

Maurice Robinson

Maurice Robinson testified that he was a Nine Trey member starting at age 12. J.A.581-582. Robinson testified to the structure and practices of the gang, and the gang's symbols, hand signals, colors, and ranks. J.A.582-588. Robinson testified that members gained rank by doing the work required by the gang—including disciplining other gang members, and sometimes assaulting and killing individuals as assigned by the gang. J.A.588. Robinson testified that the gang held meetings, known as "911" or "powwow," to carry out gang-imposed discipline, pay dues, and assign tasks. J.A.591-592.

Robinson testified that he recognized Wray as Yungin, and he understood Yungin to be a Bloods gang member who was "supposed to be under," or report to, another member called Black Montana. J.A.595-596. Robinson said he had seen Wray at a UBN meeting. J.A.667, J.A.670.

Robinson testified that the UBN maintained gang documents, known as "Inglewood," containing "[c]odes, oaths, pledges," and the names of gang members and which "line" or "lineup" they were in (to whom they reported within the gang). J.A.600; *see* J.A.589. Robinson recounted that the Inglewood contains the thirty-one rules governing the Nine Trey set. J.A.600-601. Violations of the rules, Robinson

said, subjected gang members to discipline; for example, death was the punishment for violating the "no snitching" rule. J.A.601-602. Robinson explained that UBN members value respect and reputation and are willing to commit violence to earn respect. J.A.602.

Robinson testified to the meanings of words he said were gang code. *See* J.A.602-603. For example, "Billy" or "Billy Bad Ass" meant a Nine Trey member, J.A.603-604; "doa" meant, "Okay, Blood," J.A.604; "ola" or "emu" meant "Blood," J.A.604. Robinson testified about drug slang words, J.A.605, and said that "lick" or "jug" meant robbery, J.A.605-606. Robinson also testified to various terms referring to firearms, including "top," "platinum," "tool," and "nine." J.A.606-607. Robinson testified that to be "put on a plate" or labeled "food" meant to be subject to an order from the gang to be killed. J.A.614.

Gang rules, Robinson testified, required all members to pay monthly dues to be transmitted to higher-ranking members. J.A.607-610. According to Robinson, UBN members committed crimes to make money—selling drugs and committing robberies. J.A.610-613.

Robinson identified the Crips gang as the main rival to the Bloods gang. J.A.615. Robinson testified that the "Crip walk" is a dance move originated by Crips in California. J.A.616. Doing the Crip walk, according to Robinson, is a sign of disrespect to Bloods. J.A.616. If a Crip disrespects a Blood, Robinson testified that the appropriate response was to "[b]eat them up, shoot them, stab them. Make sure they don't do it again." J.A.616. Robinson said that a Blood would make sure a Crip stopped doing the Crip walk. J.A.617.

Kellie Starr

The Government also called former UBN member Kellie Starr to testify about the gang. J.A.743-744. Starr was a paid government informant who previously breached her cooperation agreement by stealing money from law enforcement and dealing drugs. J.A.479-484, J.A.843-844.

Starr told the jury about the history of the UBN, J.A.744-746, its subgroups, known as "sets" or "hoods," including Nine Trey, J.A.746-747, and the ranking structure, J.A.747-748.

Starr explained that new members were expected to "put in work" for the gang by committing robberies, selling drugs, and engaging in violence. J.A.752-753. Members went by nicknames to avoid identification by the police. J.A.753-754. UBN members, according to Starr, were required to learn oaths and codes; they received Inglewood and were taught about gang history. J.A.755-756, J.A.760. Starr testified that a low-ranking gang member, known as a "skrap," was expected to follow orders, including "anything from committing robberies to beating somebody up, a shooting, anything." J.A.762, J.A.810. Starr confirmed that UBN members were expected to pay monthly dues to the gang. J.A.794-795.

Starr testified to the meanings of a variety of slang terms: "jug" or "lick" for robbery, J.A.802, and "JJ," "Jim J," "iron," "platinum," "hammer," "strap," "tool," "trip," "top," or "nine" for gun, J.A.803-805. She identified many of the same Blood slang words as Robinson had—billy, ola, emu, and damu. J.A.841-842. She also translated a series of drug slang words—"G" for gram, "herb" or "reefer" for marijuana, and so on. J.A.848-851. Starr testified that many of the terms were not unique to the UBN. J.A.950.

Starr explained that, when writing, Bloods often crossed out or did not use the letter "C," to show disrespect to Crips. J.A.825. For example, she testified about a message where "respect" was spelled "respext." J.A.827. Starr said that "Crip walking" is a "dance that Crip homies do," and that it can become disrespectful depending on what hand signs they use. J.A.828. She testified that she had seen violence between Bloods and Crips. J.A.828.

Starr testified about Inglewood, the rules of the gang and how they were applied, her participation in controlled drug buys, and other gang matters. J.A.831-903, J.A.907-921.

Starr recalled that there was a Nine Trey member under Black Montana who went by Jon-Jon. J.A.924. She could not recall meeting Jon-Jon, and she said she would not recognize him. J.A.925.

Michael Sardelis

The Government called FBI task force officer Michael Sardelis. J.A.1031-1032. Through Sardelis, the Government introduced Facebook records allegedly belonging to Wray. J.A.1172-1196, J.A.1212-1237.

Sardelis identified pictures of Wray and his co-defendants alongside other suspected gang members, and sometimes wearing colors or using hand signs allegedly associated with the UBN. *E.g.*, J.A.1047-1053, J.A.1336-1337. He also read aloud numerous private messages and Facebook posts containing some of the words Robinson and Starr discussed, including words used to identify and introduce Bloods and discussion of drugs, guns, and robberies. J.A.1190-1191, J.A.1214, J.A.1222, J.A.2840-2842.

Killing of Christopher Odoms

The Government offered evidence that Christopher Odoms, a Crip, was shot and killed at a post-Thanksgiving party on November 26 or 27, 2015. J.A.1441, J.A.1624-1625, J.A.1631. Witnesses testified that Wray was at the party along with other Bloods, including Black Montana. J.A.1633, J.A.1681. Odoms had been drinking heavily. J.A.1585-1586, J.A.1633-1634. Witnesses saw Odoms dancing, but did not say what kind of dance he was doing. J.A.1613, J.A.1634, J.A.1651-1654. Odoms walked out of the party and ten or more people followed. J.A.1587-1588, J.A.1636-1637. A minute or two later, shots rang out and Odoms was killed. J.A.1589-1590.

One witness, Kiara Jackson, said Odoms was known for "a dance that he used to do all the time." J.A.1604. She identified a video from social media of Odoms doing the dance at some earlier time, not on the day of the party, and agreed with the Government's counsel that the dance was called the "Crip walk." J.A.1604-1606. She testified that she saw Odoms dancing at the party before he was killed. J.A.1613. Jackson did not say Odoms was doing the Crip walk at the party. *See* J.A.1602-1620.

Odoms' cousin, Antonio Odoms, testified that he was talking to Wray outside the party when he heard shots and fell to the ground. J.A.1637. When Antonio Odoms stood up, he felt Christopher Odoms, then injured, grab his shirt. J.A.1639. Antonio Odoms testified that he did not see anyone shoot. J.A.1641. Later in the trial, the Government recalled Antonio Odoms and showed him documentary evidence that the morning after the shooting, he had identified Wray as the shooter with "one hundred percent" certainty. J.A.2978-2987.

Forensic evidence showed that Odoms died of multiple gunshot wounds, J.A.1521-1568, and that he had gunshot residue on both palms and the back of both hands when he died, J.A.1493-1495. An investigator testified that gunshot residue can come from firing a gun, handling a fired gun, being in close proximity when a gun is fired, or touching a surface contaminated with residue. J.A.1494. Four shell casings were found at the scene—three from nine-millimeter rounds, and one from a .32-caliber[2] round. J.A.1462. The investigator testified that a .32-caliber round could be fired through a nine-millimeter gun, and that ballistics analysis of the shell casing suggested that the .32-caliber round may have been fired from an improper caliber gun. J.A.1462, J.A.1477.

Sergeant Amy Lail of the Cleveland County, North Carolina Sheriff's Office testified that she interviewed Wray after his arrest, and that Wray initially denied shooting Odoms. J.A.1659-1660, J.A.1670. In a later interview, according to Lail, Wray admitted to shooting Odoms. J.A.1674. Lail said Wray changed his story in the second interview, claiming that he shot Odoms because he saw Odoms had a gun and fired at Wray first. J.A.1680.

Final proceedings and verdicts

The district court denied Wray's s motion for judgment of acquittal at the close of the Government's evidence. J.A.3135. The defendants did not present evidence. J.A.3124-3125. The court instructed the jury and the parties presented closing arguments. J.A.3275-3535.

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[2] A .32-caliber round measures 7.65 millimeters. J.A.1462.

The jury found Wray guilty as charged. J.A.3577-3578. As to the sentencing factors, the jury found that Wray agreed that multiple acts of murder would be committed as part of the conspiracy (sentencing factor 1), and that he murdered Odoms (sentencing factor 2). J.A.3577.

Sentencing

The district court concluded, over Wray's objection, that Wray's offense level was 43, based on the first-degree murder cross-reference in U.S.S.G. § 2A1.1. J.A.3737, J.A.4317-4318, J.A.4353. With a criminal history category of II, Wray faced a Guidelines range of life. J.A.3737, J.A.4319, J.A.4323. The district court denied Wray's motion for a downward departure or variance. J.A.3735-3737, J.A.3744-3745, J.A.3753. The district court sentenced Wray to a life term of imprisonment. J.A.3754, J.A.3789.

Wray's appeal

Wray timely filed a notice of appeal. J.A.3795. On appeal, Wray challenged the sufficiency of the evidence to support his RICO conspiracy conviction and sentencing factor 1; argued that the district court committed a number of trial errors; and that the district court erred by sentencing him to life in prison. Consolidated Opening Br. 64-67, 72-84, 108-11. As relevant to this petition, Wray argued that the Government offered no evidence that Wray agreed to commit or have someone else commit murder as part of his participation in the UBN. *Id.* 66. There was no evidence that he ever discussed murder with other gang members. *See id.* In sentencing factor 2, the Government alleged only that Wray killed Odoms; it

did not allege or prove that Wray agreed to kill Odoms as part of Wray's participation in the UBN. *Id.* Although Wray acknowledged that the Government offered evidence from which a jury could find that Wray killed Odoms, he argued that sentencing factor 2 could not trigger the enhanced statutory maximum of life in prison, because it was not a finding that his RICO conspiracy conviction was "*based on* a racketeering activity for which the maximum penalty includes life imprisonment." *Id.* at 108-11 (quoting 18 U.S.C. § 1963(a)) (emphasis added). Therefore, Wray argued that the district court committed *Apprendi* error by sentencing him according to the enhanced statutory maximum—life instead of twenty years—without the jury finding beyond a reasonable doubt the facts necessary to invoke the enhanced statutory maximum. *See id.*

Fourth Circuit opinion

In an amended published opinion issued January 9, 2024, the Fourth Circuit affirmed Wray's conviction and sentence, and affirmed the convictions and sentences of his co-defendants. App. 4. The Fourth Circuit concluded that the evidence was sufficient to support Wray's conspiracy conviction. *Id.* 9, 11. The Fourth Circuit rejected Wray's challenges to the Government's closing arguments and the district court's jury instructions. *Id.* 24-30. Finally, the Fourth Circuit considered and rejected Wray's *Apprendi* argument. *Id.* 30. The Fourth Circuit recognized that "[t]he Sixth Amendment requires that 'any fact'—here, that murder was one of the relevant racketeering acts—'that increases the penalty for a crime beyond the [otherwise] prescribed statutory maximum must be submitted to a jury,

and proved beyond a reasonable doubt." *Id.* (quoting *Apprendi*, 530 U.S. at 490) (brackets in Fourth Circuit opinion). The Fourth Circuit saw no reversible error in the district court's reliance on the sentencing factors to enhance Wray's sentence, explaining that "everyone involved understood the purpose of the special sentencing factors was to comply with *Apprendi*." *Id.* 31-32. The Fourth Circuit thus affirmed Wray's life sentence. *Id.* 33.

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. § 1962 provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (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.

2. 18 U.S.C. § 1963(a) provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined under this title or 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) . . . .

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed below because Wray moved for judgment of acquittal, and he argued on appeal that the Government did not prove beyond a reasonable doubt that his RICO conspiracy conviction was based on a crime punishable by life in prison. *See* App. 9-11, 30-33. The district court denied the motion for judgment of acquittal, J.A.3110-3112, and the Fourth Circuit affirmed, App. 9-11, 30-33.

REASON FOR GRANTING THE WRIT

Wray respectfully contends that there is a "compelling reason[]" for granting his petition for writ of certiorari because the Fourth Circuit decided an important federal question in a way that conflicts with the relevant decisions of this Court. *See* S. Ct. R. 10. The Fourth Circuit's decision is at odds with this Court's decision in *Apprendi*. Wray was exposed to an enhanced statutory maximum term of imprisonment—life instead of twenty years—but the Government did not prove beyond a reasonable doubt the fact necessary to increase the statutory maximum. Specifically, the Government failed to offer evidence that Wray agreed, as part of his participation in the conspiracy, that *multiple* acts of murder would be

committed, and the evidence was legally insufficient to allow the jury to find the first special sentencing factor. As to the second special sentencing factor, the jury found only that Wray murdered Odoms. That finding, while supported by evidence, is facially insufficient to trigger the enhanced sentence because it does not connect Wray's RICO conspiracy conviction to the killing of Odoms, and thus it is not a finding that the conspiracy conviction was based on the killing of Odoms.

DISCUSSION

THE FOURTH CIRCUIT ERRED BY UPHOLDING WRAY'S LIFE SENTENCE WHEN THE GOVERNMENT DID NOT PROVE THAT HIS RICO CONSPIRACY CONVICTION WAS BASED ON A PREDICATE RACKETEERING ACT PUNISHABLE BY LIFE IN PRISON.

To establish RICO conspiracy, the Government is required to prove "that an enterprise affecting interstate commerce existed; that each defendant knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise; and . . . that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (citations and quotation omitted); *see United States v. Mathis*, 932 F.3d 242, 258 (4th Cir. 2019); *United States v. Cornell*, 780 F.3d 616, 621 (4th Cir. 2015). A RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Pinson*, 860 F.3d 152, 161 (4th Cir. 2017). "Racketeering activity" includes any act or threat involving murder, robbery, extortion, or dealing in a controlled substance chargeable under state law and punishable by imprisonment for more than one year. 18 U.S.C. § 1961(1).

"[A] defendant can conspire to violate RICO and violate [§] 1962(d) without himself committing or agreeing to commit the two or more acts of racketeering activity." *Mouzone*, 687 F.3d at 218 (brackets and quotation omitted). Although such "conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part" of a racketeering act, each conspirator must "agree to pursue the same criminal objective." *Salinas v. United States*, 522 U.S. 52, 63-64 (1997). Mere association with a RICO enterprise is insufficient to establish a conspiracy to commit racketeering activity. *Mouzone*, 687 F.3d at 218.

A. The District Court Erred by Denying Wray's Motion for Judgment of Acquittal.

1. The Government failed to offer substantial evidence that Wray conspired to engage in a pattern of racketeering activity.

An essential element of the conspiracy in Count 1 was that Wray agreed with another that at least two predicate racketeering acts—a pattern of racketeering activity—would be committed as part of the affairs of the UBN. *See Mouzone*, 687 F.3d at 218. The Government presented evidence from which the jury could find that Wray associated with members of the UBN, *e.g.*, J.A.1175-1185, and that he discussed drug transactions over Facebook, *e.g.*, J.A.1186-1196. In addition, the Government offered evidence, including Wray's confession, from which the jury could find that Wray killed Odoms. J.A.1674. The Government failed to show that Wray agreed that these acts, or any other acts, would be committed as part of the UBN enterprise. *See infra* section A.2. Therefore, Wray's conviction on Count 1 is properly vacated, and the Fourth Circuit erred by concluding otherwise.

2. The Government failed to offer substantial evidence supporting the jury's findings on sentencing factors 1 and 2.

The maximum sentence for a RICO offense is twenty years, unless the violation of RICO "is based on a racketeering activity for which the maximum penalty includes life imprisonment"; in that case, the maximum is life. 18 U.S.C. § 1963(a). To trigger the enhanced statutory maximum, the Government had to prove that Wray's RICO violation—conspiracy—was based on a predicate crime punishable by life imprisonment. *United States v. Perez*, 21 F.4th 490, 493 (7th Cir. 2021). To that end, the Government alleged two "special sentencing factors": that Wray agreed to conduct and participate in the affairs of the UBN through a pattern of racketeering activity including murder, and that Wray committed the murder of Christopher Odoms. *See* J.A.218. The district court denied Wray's Rule 29 motion, J.A.3110-3112, the jury made a finding of "yes" on both factors. J.A.3577. The Government's evidence fails on both sentencing factors because the Government did not show that Wray's alleged RICO violation—conspiracy—was based on a pattern of racketeering activity including murder or on the murder of Odoms.[3]

The Government did not offer evidence that Wray agreed to commit or have someone else commit murder, or that he even discussed committing murder with other gang members. *See* J.A.1172-1196, J.A.1212-1237. The Government's theory was that Wray committed sentencing factor 1 "[b]y associating with the Bloods,

[3] The district court erroneously failed to require the jury to find, in sentencing factor 2, that the killing of Odoms was a predicate racketeering act. *See infra* section B. Wray also advances this sufficiency of the evidence argument on factor 2 because the evidence would have been insufficient to support the required finding.

knowing Bloods commit murder." J.A.3383. Evidence that some UBN members committed murder on behalf of the gang, *e.g.*, J.A.588, J.A.762, does not show that everyone who joins the UBN agrees to a pattern of racketeering activity involving murder. *See Barnett*, 660 F. App'x at 248 (association with and knowledge of affairs of UBN was insufficient to show that defendant agreed to particular predicate racketeering acts). Wray's membership in the gang was not substantial evidence that he agreed that he or others would commit murder as part of the UBN. *See id.* To the extent that the Fourth Circuit ruled otherwise, its decision was erroneous.

Contrary to the Fourth Circuit's conclusion, the killing of Odoms also does not support the jury's finding on sentencing factor 1, and could not support a finding that the killing of Odoms was a predicate act on which Wray's conspiracy conviction was based. Although Wray does not dispute that the evidence, viewed in the light most favorable to the Government would be legally sufficient for the jury to find that Wray killed Odoms, the Government did not show that the killing was related to the RICO conspiracy.

The Government offered no evidence that Wray agreed with anyone else to murder Odoms. The Government attempted to characterize the shooting as Wray demanding respect—a UBN tenet—by killing a member of a rival gang who disrespected the Bloods by doing the Crip walk. *See* J.A.3383. But the Government's evidence did not show that Odoms did the Crip walk before he was killed; the Government showed only that Odoms was dancing, and that on a *different* occasion, he did the Crip walk. J.A.1604-1606. Even if the Government

could have offered evidence that Odoms Crip walked, there was no evidence that Wray retaliated against Odoms for a dance move. Maurice Robinson's opinion that a Blood would retaliate against a Crip who Crip walked, J.A.616-617, could not support a finding about what Wray did—not every person who joins the UBN agrees to all acts that other members may be involved in. *See Barnett*, 660 F. App'x at 248.

The district court erred by denying Wray's motion for judgment of acquittal as to both sentencing factors. *See* J.A.3110-3112. The Fourth Circuit compounded this error by upholding the district court's judgment as to both sentencing factors. App. 11. The Fourth Circuit said that Wray conceded his participation in the enterprise, and that the jury found that he personally committed at least one murder. But that evidence was not sufficient to support either sentencing factor. As shown above, that Wray killed Odoms does not show that Wray agreed, as part of his participation in the enterprise, that multiple acts of murder would be committed. *See supra* pp. 16-17. And the fact that Wray both participated in the enterprise and killed Odoms does not show that Wray's conspiracy conviction was *based on* the killing of Odoms—which the jury did not find.

B. The District Court Committed Reversible *Apprendi* Error by Relying on Sentencing Factor 2 to Increase the Statutory Maximum for Wray.

As Wray argued to the Fourth Circuit, and the Fourth Circuit accepted, App. 30, a defendant can be subjected to the enhanced statutory maximum of life only if the defendant's violation of the RICO statute is "based on a racketeering activity for which the maximum penalty includes life imprisonment." 18 U.S.C. § 1963(a). Racketeering activities, known as "predicate acts," *United States v.*

Carrington, 700 F. App'x 224, 229 (4th Cir. 2017), include murder, robbery, and drug trafficking, 18 U.S.C. § 1961(1)(A). Under *Apprendi*, the Government must prove to the jury beyond a reasonable doubt that the RICO conviction is based on a predicate act punishable by life in prison. *E.g.*, *United States v. Simmons*, 11 F.4th 239, 256 (4th Cir. 2021).

The district court submitted two questions to the jury in addition to whether Wray was guilty of RICO conspiracy: (1) whether Wray agreed to conduct and participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity that included acts of murder (sentencing factor 1); and (2) whether Wray committed, or aided, abetted, counseled, commanded, induced, or procured the murder of Christopher Odoms (sentencing factor 2). J.A.3577.[4] The jury checked "yes" as to each factor. J.A.3577. The evidence was insufficient to support the jury's finding on sentencing factor 1, and therefore that factor cannot support the application of the increased statutory maximum. *See supra* section A.2.

Regardless of whether the jury's finding as to sentencing factor 2 was supported by the evidence, that finding could not be used to increase Wray's statutory maximum, because it was not a finding that Wray's RICO conspiracy conviction was *based on* the killing of Odoms. *See* 18 U.S.C. § 1963(a). To check "yes" on sentencing factor 2, the jury was required only to find that Wray committed or was involved in the murder of Odoms. *See* J.A.3577. In contrast to sentencing

[4] Sentencing factor 2 was listed first on Wray's verdict form, followed by sentencing factor 1. J.A.3577.

factor 1, where the jury was required to find that Wray agreed to participate in the affairs of the UBN through a pattern of racketeering activity including murder, nothing in the jury instructions or on the verdict form on sentencing factor 2 required the jury to find any association between the UBN and the killing of Odoms. J.A.3577; *see* J.A.3275-3353, J.A.3532-3535. Section 1963(a) requires more than proof that the defendant committed RICO conspiracy and that the defendant committed murder; the murder must be one of the predicate racketeering acts on which the RICO conspiracy conviction was based. *See Perez*, 21 F.4th at 493 ("The proper inquiry is whether the RICO 'violation'—here, conspiracy—was based on a predicate crime punishable by life imprisonment.").

Because the jury did not find the murder of Odoms was a predicate offense for Wray's RICO conspiracy conviction—a fact necessary to increase the maximum sentence—the district court committed *Apprendi* error by relying on the murder of Odoms to support the enhanced statutory maximum. *See* J.A.4315, J.A.4323, J.A.4353.

Wray did not argue at sentencing that *Apprendi* precluded reliance on the murder of Odoms; therefore, his claim was reviewed by the Fourth Circuit for plain error.[5] In light of established law requiring the court to submit to the jury whether the RICO conspiracy was based on a predicate racketeering act punishable by life,

[5] At trial, Wray's counsel requested that the predicate acts be listed on the verdict sheet; the district court denied the request. J.A.3262-3263. The Fourth Circuit's conclusion that Wray forfeited any claim that the verdict form was insufficient is erroneous. *See* App. 32.

see Simmons, 11 F.4th at 256, the district court's error was plain. The error affected Wray's substantial rights because it increased the maximum possible sentence from twenty years to life in prison, 18 U.S.C. § 1963(a), enabling the district court to impose a life sentence that would not have been permissible otherwise. *United States v. Johnson*, 26 F. App'x 111, 117 (4th Cir. 2001) (per curiam) (error that results in sentence in excess of statutory maximum affects substantial rights).[6] Given the discrepancy between Wray's life sentence and the sentence the district court could otherwise have imposed, and the lack of evidence connecting the killing of Odoms to the RICO conspiracy, *see supra* section A.2, the Fourth Circuit erred by refusing to notice this plain error. *Cf. United States v. Cotton*, 535 U.S. 625, 633 (2002) (declining to notice *Apprendi* error resulting in sentence above otherwise-applicable maximum where overwhelming evidence supported findings necessary to enhanced maximum).

The Fourth Circuit's observation that "everyone involved understood the purpose of the special sentencing factors was to comply with *Apprendi*" is beside the point. App. 31-32. While the special sentencing factors were an apparent attempt to comply with *Apprendi*, they were a failed attempt—the jury did not have to find that there was any connection between the killing of Odoms and the RICO conspiracy to find sentencing factor 2. Vindication of a defendant's Sixth

[6] Wray contends that the evidence was insufficient to support the jury's finding on sentencing factor 1, *see supra* section A.2, and thus that finding cannot support the enhanced statutory maximum. Wray acknowledges that, if this Court upholds the jury's finding on sentencing factor 1, that finding alone would trigger the enhanced statutory maximum and allow the imposition of a life sentence.

Amendment rights as recognized in *Apprendi* requires more than a failed attempt to have the jury find the facts necessary to increase the statutory maximum.

CONCLUSION

For the foregoing reasons, Petitioner Jonathan Wray respectfully requests that the Court grant his petition for writ of certiorari, reverse the decision of the Fourth Circuit, and remand for resentencing within the twenty-year maximum for his 18 U.S.C. § 1962(d) conviction.

This the 5th day of April, 2024.

/s/ Kelly Margolis Dagger
Kelly Margolis Dagger
Counsel of Record
N.C. State Bar No. 44329
ELLIS & WINTERS LLP
Post Office Box 33550
Raleigh, North Carolina 27636
Telephone: (919) 865-7000
Facsimile: (919) 865-7010

Counsel for Petitioner
Jonathan Wray