

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

ANTONIO JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

6th Circuit Case No. 15-2089

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QUESTIONS PRESENTED

I.

Whether the United States Court of Appeals for the Sixth Circuit erred in holding that the United States Government had proven the Phantoms Outlaw Motorcycle Club was a RICO Enterprise when the Government did not prove an enterprise separate and apart from the pattern of racketeering activity contrary to the clear directives of this Court's opinion in *United States v. Turkette*?

II.

Whether the United States Court of Appeals for the Sixth Circuit acted contrary to this Court's precedent in *Remmer v. United States* and created a Circuit split of authority on the proper procedure for a *Remmer* hearing?

III.

Whether Antonio Johnson's Constitutional Right to a Fair Trial was violated by a jury instruction relating to a Government informant who was also an active member of the alleged conspiracy?

IV.

Whether Congress intended the scope of the RICO statute, enacted in 1970 to extend to a loosely affiliated group of individuals in a Motorcycle Club?

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rule 14(1)(b), your Petitioner states that the parties to this Petition are as follows:

Petitioner: Antonio Johnson

Respondent: United States of America

The opinion of the United States Court of Appeals for the Sixth Circuit that is the subject of this appeal also addressed the consolidated appeals of co-defendants and co-appellants Marvin Nicholson, Brian Jackson, Sherman Brown, Matthew Schamante, and Bryan Sorrell. As of this date, the Petitioner Antonio Johnson is not aware of any of co-defendant/co-appellant filing a Petition for Writ of Certiorari.

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**IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
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**PETITION FOR WRIT OF CERTIORARI
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The Petitioner Antonio Johnson respectfully prays that a Writ of Certiorari issue to review the Judgement and Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-styled proceeding on November 17, 2017, and an Order denying petition for rehearing en banc, entered on January 3, 2018.

OPINIONS BELOW

(1) Judgment in a Criminal Case, *United States v. Antonio Johnson*, Case No. 2:13-cr-20764, United States District Court for the Eastern District of Michigan, September 8, 2015 (Appendix 1).

(2) Opinion, *United States v. Antonio Johnson*, No. 15-2089, United States Court of Appeals for the Sixth Circuit, November 17, 2017 (Appendix 2).

(3) Order denying Petition for Rehearing with Suggestion of Rehearing En Banc, *United States v. Antonio Johnson*, Court of Appeals for the Sixth Circuit, January 3, 2018 (Appendix 3).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth (6th) Circuit was entered on November 17, 2017, affirming the Petitioner Antonio Johnson's conviction pursuant to the Trial Court's Judgment of conviction entered on September 8, 2015. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied by an Order entered on January 3, 2018.

The United States Court of Appeals for the Sixth (6th) Circuit had jurisdiction over Johnson's appeal pursuant to 28 U.S.C. §1291 which confers upon the United States Court of Appeals jurisdiction from all final decisions of the District Courts of the United States.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), which provides that cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party. Jurisdiction is also invoked by United States Supreme Court Rules 10 and 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth (5th) Amendment to the United States Constitution states in relevant part as follows:

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

U.S. CONST., amend V

The Sixth (6th) Amendment to the United States Constitution states in relevant part as follows:

“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...”

U.S. CONST., amend VI

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1962(c)

Prohibited Activities.

(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 an unlawful debt.

18 U.S.C. §1962(c) (West 2017).

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

18 U.S.C. §1962(d) (West 2017).

STATEMENT OF THE CASE

A.

1. On June 11, 2014, the Petitioner Antonio Johnson was indicted in a 15-count Third Superseding Indictment. Johnson was charged in Six (6) Counts: Count I – Conspiracy Under the Racketeering Influenced Corrupt Organizations Act (“RICO”) in violation of 18 U.S.C. §1962(d) and 1973(a); Count V – Assault with a Dangerous Weapon in Aid of Racketeering in violation of 18 U.S.C. §1959(a)(3); Count VI- Conspiracy to Assault with a Dangerous Weapon in Aid of Racketeering in violation of 18 U.S.C. §1959(a)(6); Count VII – Use and Carry of a Firearm During and In Relation to a Crime of Violence in violation of 18 U.S.C. §924(c) and 924(c)(1)(A)(iii); and Count VIII – Conspiracy to Commit Murder in Aid of Racketeering in violation of 18 U.S.C. §1959(a)(5), and Count 13 – Felon in Possession of a Firearm in violation of 18 U.S.C. §922(g)(1) and §924(a)(2).

There were eight (8) co-Defendants in the District Court and six (6) in the consolidated appeal before the Sixth (6th) Circuit: Marvin Nicholson, Bryan Sorrell, Matthew Schumante Brian

Jackson, and Sherman Brown. *United States v. Antonio Johnson*, Case No. 15-2089, United States Court of Appeals for the Sixth Circuit, slip op. at 1, November 17, 2017 (Appendix 2, at pp. 1 – 2, Appendix 3 at p. 1).¹ Johnson pleaded not guilty to all six (6) counts, and proceeded to trial by jury.

2. Johnson was the National President of the Phantoms Outlaw Motorcycle Club (“Phantoms”). The Phantoms have chapters in Michigan and seven (7) other states. The Detroit, Michigan chapter is the home chapter for all other chapters. Each Chapter has its own president, vice-president, enforcer, and treasurer. The Phantoms also have bylaws governing their various chapters and national organization. (Appendix 2 at pp. 2- 3).

3. The Phantoms consider themselves to be an “outlaw” Motorcycle Club, and take pride in being the toughest motorcycle club. They have in the past stripped other rival motorcycle clubs of their rages or vests, which are sacred to Motorcycle Club members. The Phantoms take pride in not letting anyone take their rages. (Appendix 2 at pp. 2 - 3).

4. At trial, the Government called 24 witnesses and introduced numerous exhibits. The Government’s Chief Witness was Carl Miller who went by the nickname “Fats”. Miller spent nine (9) days on the witness stand. Miller – a member of the Phantoms - turned Government informant after he was arrested on violations of Michigan State law. Investigators had been trying to prompt the United States Attorney’s Office for the Eastern District of Michigan to prosecute Miller on charges of being a Felon in Possession of a Firearm. Rather than face a certain federal prosecution and sentence, Miller agreed to cooperate with the Government, and as part of his role as an informant, began recording conversations and providing information to federal agents.

¹ References to the Trial Court Record are made using Page Identification Numbers (“Page ID”), if available, and by the applicable page numbers.

Among the highlights of Millers' testimony was the Phantoms' organizational structure, an incident which occurred on September 9, 2013 in which Leon McGee – a member of the rival Motorcycle Club Satan Sidekicks – was shot. Miller relayed second-hand information regarding a meeting where Johnson allegedly hatched a plan to retaliate against another rival Motorcycle Club, the Hell Lovers, who he believed to be responsible for death of Phantoms' member Steven "Shoe Boots" Caldwell. Miller, however, also testified that he'd stolen motorcycles for his own financial benefit as a Phantom' member; that Johnson was unhappy after McGee was shot; and that he had very seldom seen Johnson carrying firearms. (Appendix 2 at pp. 3; 5; 7 -8; 9 – 10; 11 - 13).

5. Two other key Government witnesses were Roger Valdez and Vincente Phillips a/k/a "Ghost". Valdez testified while there had been fights between the Phantoms and other Motorcycle Clubs, until the altercation on September 9, 2013, there had never been a shooting or stabbing. Valdez also testified that during the meeting where Johnson allegedly gave orders to kill members of the Hell Lovers there were no specific instructions to that effect.

Phillips testified that the Phantoms bylaws were not strictly followed; that Johnson operated as a peace-maker on several occasions with both the Phantoms and other clubs; admitted that Phantoms stole motorcycles for their own financial gain; and that Johnson never gave any specific instruction to kill a member of the Hell Lovers. (Appendix 2 at pp. 3; 5; 7 – 8; 9 -10; 11 – 13).

6. Additional testimony came from a member of the Vice Lords street gang, Maurice Williams. Williams testified that he stole motorcycles along with his cousin/Phantoms' member Raynard Brown. But, Williams again testified that those thefts were for his and Brown's own

benefit and did not benefit the Phantoms financially. (Appendix 2, at pp. 3; 5; 7 – 8; 9 – 10; 11-13).

7. Following a lengthy jury trial, Johnson was convicted on all six (6) counts. Judgment was entered on September 8, 2015. At sentencing Johnson was ordered to serve 420 months imprisonment. *Judgment in a Criminal Case, United States v. Antonio Johnson*, No. 15-2089, United States District Court for the Eastern District of Michigan, September 8, 2015. (Appendix 1 at pp. 1 – 7, Page ID #7627 - 7633).

B.

1. In his Brief to the United States Court of Appeals for the Sixth (6th) Circuit, Johnson argued that his RICO conviction must be REVERSED as the Government failed to prove an enterprise separate and apart from the alleged pattern of racketeering activity. Johnson also challenged his conviction based on the ground that both his Sixth (6th) Amendment right to a fair trial and his Fifth (5th) Amendment right to due process were violated by the Court's failure to conduct a proper *Remmer* hearing, and by permitting the jury to consider testimony from a Government informant who was in fact a co-conspirator. (Appendix 2 at pp. 4 – 6; 21 – 23; 26).

2. On direct appeal, the three-judge panel of the United States Court of Appeals for the Sixth (6th) Circuit affirmed Johnson's conviction in an opinion dated November 17, 2017. The panel concluded the Government had shown an enterprise, although curiously never addressed whether the Government had proven an enterprise separate and apart from the alleged pattern of racketeering activity as required by this Court's holding in *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). The panel also concluded that Johnson had received a fair trial as the Court conducted a proper *Remmer* hearing. The Court also held that the jury could consider the testimony of Phantom turned Government snitch Carl Miller who was indisputably

working as both a Government informant while also serving as an active member of the alleged conspiracy. (Appendix 2 at pp. 1 – 36).

C.

The Petitioner Johnson now seeks review by the United States Supreme Court for the following reasons:

1. First, by failing to require the Government prove an enterprise separate and apart from an alleged pattern of racketeering activity, the Sixth (6th) Circuit Court of Appeals has decided an important question of federal law in a way that conflicts with this Court's decision in *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). The Sixth Circuit simply ignored the requirement that a separate enterprise be shown apart from the pattern of racketeering activity and overruled this Court's binding precedent by holding that the Government can prove a RICO enterprise by showing only a pattern of racketeering activity.

2. Secondly, the United States Court of Appeals for the Sixth (6th) Circuit has decided an important question of federal law regarding the scope of a proper *Remmer* hearing in conflict with other circuits. This case is illustrative of the fact that there are no set guidelines or criteria that lower courts should employ in a *Remmer* hearing. The various District Courts and Circuit Courts fashion their own procedures which are not uniform and in this case is not close to being Constitutional. This Court should take this opportunity to clarify the proper procedure under *Remmer*.

3. Third, the Defendant Johnson's Constitutional right to a fair trial was violated by permitting Carl Miller to testify for the prosecution when he was both a government informant and an active member of the Conspiracy.

4. And, finally this Court has not addressed or resolved whether the reach of RICO is so broad as to encompass a loose organization of individuals such as the Motorcycle Club in this case as being within the scope of what Congress intended when it enacted RICO in 1970. This is an opportunity for this Court to place proper boundaries on RICO that is clearly being used by prosecutors to venture into areas where Congress did not intend it to reach.

REASONS FOR GRANTING THE WRIT

I. **THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN CONCLUDING THAT THE PHANTOMS OUTLAW MOTORCYCLE CLUB WAS A RICO ENTERPRISE WITHOUT ACTUALLY HOLDING THAT THE GOVERNMENT PROVED AN ENTERPRISE SEPARATE AND APART FROM A PATTERN OF RACKETEERING ACTIVITY CONFLICTS WITH THIS COURT’S HOLDING IN *UNITED STATES V. TURKETTE***

In its opinion, the United States Court of Appeals for the Sixth (6th) Circuit correctly noted that the Defendant Johnson alleged the Government failed to show at trial that the Phantoms Outlaw Motorcycle Club was an enterprise; and further correctly noted that an association-in-fact enterprise has three (3) structural features: a purpose, relationships among those associated with the enterprise and longevity sufficient to permit those associated to pursue the enterprise’s purpose. (Appendix 2 at p. 4).

The Court of Appeals then concluded that the Government presented ample evidence that the Phantoms had the required purpose, relationships and longevity to qualify as an enterprise:

“The Government showed that PMC’s purpose was to promote and protect the organization’s power, territory and reputation through the use of intimidation and violence by introducing testimony outlining the importance to PMC of earning respect as the ‘baddest’ motorcycle club. **It also determined that PMC had the purpose of enhancing its members’ money-making activities, including trafficking in stolen motorcycles by showing that Phantoms assisted each other in stealing motorcycles and transporting them across state lines. For example, Phantoms would alert each other when a member had stolen a motorcycle, and a Phantom would be assigned to teach new members how to steal motorcycles.**” (emphasis added).

(Appendix 2 at p. 5).

The Sixth (6th) Circuit opinion highlights the problem with the Defendant Johnson's conviction. The Government's illustrated purpose of the Phantoms is **exactly** the same as the pattern of racketeering activity. Without a purpose, the other two factors (relationships and longevity) do not matter and there cannot be a separate enterprise. The Sixth Circuit simply rubber stamped the District Court without any consideration or thought whether the Government had in fact proven a separate enterprise. The appellate court decision is thus in direct conflict with the well-established standard set forth in this Court's case of *United States v. Turkett*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981), as well as cases from other Circuit Courts of Appeal.

In *Turkette*, this Court was clear that an enterprise must be proven separate from a pattern of racketeering activity:

“The enterprise is an entity, for present purposes, a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts defined by the statute.”

Id. at 583.

“The former is proved by an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The later is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.”

Id.

“The enterprise is not the pattern of racketeering activity; it is an entity separate and apart from the pattern in which it engages.”

Id.

“The existence of an enterprise at all times remains a separate element which must be proved by the Government.”

Id.

At trial, the only proof presented by the Government was testimony regarding various acts of racketeering. At no point did the Government show the purpose of the Phantoms was to commit crimes. At most, it was a social club in which members got into scrapes with other motorcycle clubs, but it wasn't a RICO criminal enterprise. That is why review in this case is so important. The Sixth (6th) Circuit has ignored this Court's precedent and held that the Government needs only to show a pattern of racketeering and if that is accomplished, a RICO enterprise necessarily follows. This is not what this Court said unambiguously in *Turkette* and as the Sixth Circuit has decided a question of law in conflict with this Court's precedent, a Writ of Certiorari is necessary.

II. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN ISSUE REGARDING THE SCOPE OF A REMMER HEARING CONTRARY TO THIS COURT'S BINDING PRECEDENT AND IN DOING SO, HAS CREATED A CIRCUIT SPLIT OF AUTHORITY ON THE PROPER REMMER PROCEDURE. IN ADDITION, THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE PROPER PROCEDURE REQUIRED FOR A REMMER HEARING AND RESOLVE VARIOUS PROCEDURES, INCLUDING THE UNCONSTITUTIONAL PROCEDURE IN THIS CASE

The Sixth Amendment to the United States Constitution provides –

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...”

U.S. CONST, amend VI

The United States District Court for the Eastern District of Michigan violated the Defendant Johnson's Sixth Amendment right to an impartial jury by denying Johnson a proper *Remmer* hearing to discover juror bias and permit the Defendant Johnson to attempt to carry his

burden to show such bias. By affirming that decision, and in the manner in which they did so, the Sixth Circuit has made a ruling contrary to this Court's binding precedent and whether intentional or unintentional, created a circuit split on the proper procedure needed for a proper *Remmer* hearing. This Court should thus review the Sixth Circuit decision, the Circuit split and resolve the question that was left open by *Remmer*. What is the proper procedure to assure that a defendant's Sixth Amendment right to an impartial jury is protected where there is an allegation of outside juror influence?

In *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954), this Court held that “[i]n a criminal case, any private communication, control, or tampering, directly or indirectly with a jury during a trial, about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuant of known rules of the court and the instructions and direction of the court made during the trial with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish after notice and a hearing of the defendant, that such conduct was harmless to the defendant...” *Id.* at 451.

In *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), this Court further clarified the scope of a *Remmer* hearing while stopping short of actually implementing a procedure that the lower courts should follow in conducting such hearing. In *Phillips*, this Court stated that due process requires only that the trial court hold a hearing to determine the existence of prejudice.. “This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.” *Id.* at 215.

In this case, the District Court held a hearing in which it asked two questions of the jurors: (1) whether they understood that the defendants had nothing to do with the juror being followed

from the Courthouse on the previous day?; and (2) whether they could remain impartial? The court did invite counsel to submit questions, however when counsel asked the District Court to probe a little deeper into possible juror bias, the court refused.

In the Sixth Circuit's opinion, the Court concluded that the District Court did not err in denying Johnson's motion for a mistrial:

"Appellants argue that the district court did not do enough to ascertain what each individual thought and felt about the incident. Some of the appellants also argue that defense counsel should have been allowed to directly question jurors individually and under oath. Neither argument has merit."

(Appendix 2 at p. 22).

"The defense bears the burden of proving prejudice and if a district court views juror assurances of continuing impartiality to be credible, the court may rely upon such assurances in deciding whether a defendant has satisfied the burden of proving actual prejudice."

(Appendix 2 at p. 22).

"Appellants first argue that the district court failed to engage in a searching inquiry and that the questions were not phrased to elicit honest responses. The Sixth Circuit, however, has recently spoke on this point. In *United States v. Taylor* the panel affirmed a district court's Remmer hearing as effective, noting that the appellant's argument centered not on a denial of opportunity to establish bias, but on the district court's not having questioned the jurors as extensively as [the defendant] would have liked. It held that all Remmer requires is that the defendant be given an opportunity to prove juror bias, not that he be given the opportunity to prove jury bias based on answers to pre-determined questions."

(Appendix 2 at pp. 22 - 23).

"Appellants next claim that defense counsel should have had the opportunity to directly question the jurors during the *Remmer* hearing – though none of the defense attorneys actually request this during the proceeding. They contend *United States*

v. Corrado, 227 F.3d 528 (6th Cir. 2000), mandates that defense counsel be permitted to directly question jurors about potential bias.”

(Appendix 2 at p. 23).

“However, this case does not mandate defense counsel participation in every *Remmer* hearing and both precedent and common sense indicate that the district judge can accurately and effectively assess issues of juror outside influence, particularly when these issues arise in a middle of a trial.”

(Appendix 2 at p. 23).

“Here, upon receiving the Note from Juror 11, the district court immediately questioned the jurors individually. This questioning, though not phrased precisely how defendants may have wished allowed the court to sufficiently probe whether each juror had been impacted by the reported incident. The effectiveness of the questioning is exemplified by the district court’s decision to excuse one of the jurors. The district court did not commit an abuse of discretion in questioning the jurors itself and in refusing to ask the defense counsel’s preferred questions.”

(Appendix 2 at p. 23).

The Sixth Circuit heavily relied upon the case of *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) in denying the Defendant Johnson’s appeal under *Remmer*. If nothing else, the Taylor case illustrates the lack of a clearly defined procedure for a *Remmer* hearing. Moreover, it is distinguishable on its facts.

In *Taylor*, the defendant appealed his conviction and death sentence to the Sixth Circuit Court of Appeals. The defendant was convicted of carjacking resulting in death, kidnapping resulting in death, and using a firearm to commit murder while committing carjacking and kidnapping. *Id.* at 345. Among the grounds asserted by the defendant on appeal was that the District Court for the Eastern District of Tennessee erred in not “more strenuously” questioning a

trial juror to determine whether an out of court statement affected the jurors' ability to remain impartial. *Id.*

Taylor had been convicted, but while awaiting the penalty phase of his case, he had been recorded on a jail telephone call as calling the jurors "racist rednecks." *Id.* at 346. The Government had given notice to the Court and the defendant of its intent to use this phone call as part of his sentencing hearing. *Id.* Taylor's attorney moved the court to declare a mistrial, and requested the District Court Judge question the jurors about the comments. *Id.* Taylor's attorney – and this is key to distinguishing the facts of *Taylor* to this case – asked the Judge to question the jurors out of the presence of counsel, an arrangement to which the Government agreed. Taylor's attorney specifically declined the opportunity to participate in the hearing. *Id.*

After reviewing the Jurors' responses to the Judge's questions, Taylor's counsel again moved for a mistrial and, in the alternative, moved for a hearing during which he could question jurors. *Id.* at 347. The District Court denied both requests and held that Taylor's concerns about juror bias had been addressed since defense counsel specifically declined to participate in a hearing and had proposed the arrangement used by the court. *Id.*

The Sixth Circuit affirmed Taylor's conviction and sentence, holding that the District Court has "considerable discretion" in deciding how to conduct an inquiry of jurors.. Among the reasons stated by the Court of Appeals for permitting the District Court to have such discretion was that the District Court is "uniquely qualified" to ascertain the communications effect on jurors and to determine the procedures to deal with it. As the Sixth Circuit stated: There is a world of difference between failing to conduct a Remmer hearing and failing to ask a particular question at that Remmer hearing. The former is flatly unconstitutional." "All that Remmer requires is that he defendant be given an opportunity to prove juror bias." *Id.* at 351.

Taylor best illustrates the conflict the Sixth Circuit has with other Circuits and District Courts in applying *Remmer*. The Sixth Circuit panel in Taylor essentially states that as long as jurors are questioned by the District Court then a defendant had a meaningful opportunity to prove juror bias. This is obviously a position adopted by the panel assigned to this case. But, other Sixth Circuit panels have held the opposite. For example, in *United States v. Walker*, 1 F. 3d 423, 431 (6th Cir. 1993), the Sixth Circuit panel assigned to that case stated “denying the reasonable request to inquire into the jurors’ states of mind deprived the defendants of the opportunity to meet their burden of proving actual juror bias and defendants were thereby denied a fair trial.”

Remmer states specifically that all parties should be afforded an opportunity to participate. Taylor was offered that chance and declined. The Court in this case just refused to permit counsel to participate effectively holding no *Remmer* hearing at all. “At such a hearing, the defendant should be afforded the opportunity to question jurors individually and under oath.” *United States v. Corrado*, 227 F.3d 528, 537 (6th Cir. 2000).

There are no established procedures for *Remmer* hearings. There is no clear definition of what “participation” means. Left to the discretion of the trial courts, the parameters of *Remmer* are all over the place varying from Circuit to Circuit and District Court to District Court.

Other Courts have clearly indicated – contrary to what the Sixth Circuit held in this case – that the defendant’s participation is essential. See, for example the Fifth Circuit case of *United States v. Sylvester*, 143 F. 3d 923, 932 (5th Cir. 1998). (“We have consistently required the inclusion of all parties in jury tampering cases. For example, in *United States v. Webster*, 750 F.2d 307, 338 (5th Cir. 1984), we noted that when the possibility of outside influence in the jury arises, the failure to hold a hearing in such a situation constitutes an abuse of discretion and is reversible.” “*Remmer* and its applications in this Court thus require a district judge, when confronted with

credible allegations of jury tampering to notify counsel for both sides and hold a hearing with all parties participating.” “Remmer requires that counsel for both sides have the opportunity to examine jurors.”).

See also, *United States v. Williams-Davis*, 319 U.S. App. D.C. 267, 90 F. 3d 490, 491 (D.C. Cir. 1996) (“Counsel for both sides shall be given the opportunity to examine the jurors on the record under oath.” “Subject to ultimate review by this Court, if the district court concludes that the contacts did not result in prejudice, the convictions shall stand affirmed, and if the court concludes that he contacts did result in prejudice, the applicants are entitled to a new trial.”).

In *McCauley v. Palmer*, Case No. 2:14-cv-11198., 2014 U.S. Dist. Lexis 184808 at *23 (E.D. Mich. 2014) the Court noted as “required by Remmer and Smith, the trial court held a hearing in which it questioned each juror regarding his or her knowledge of the fears expressed by Juror 66. The Court also permitted counsel for each defendant to question each juror. This was sufficient under the circumstances of the case to satisfy Remmer’s hearing requirement.” In *United States v. Wheaton*, 426 F. Supp. 2d 666, 680 (N.D. Ohio 2006) the Court stated in its opinion that “[w]here unauthorized contact with a juror is allowed to have tainted a trial, a Remmer hearing is required. At the hearing, the trial court determine(s) the circumstances of the unauthorized contact, the impact thereof upon the juror, and whether or not it was prejudicial...with all interested parties permitted to participate.” “Defendant, through counsel, was allowed to fully participate in the hearing.”

In the First Circuit case of *Lacy v. Gabriel*, 737 F. 2d 7, 12 (1st Cir. 1984) the First Circuit Court of Appeals noted that a post-trial hearing was held in the state court in which all interested parties participated “This is precisely the type of procedure ordered by the court in *Remmer* and approved in more recent cases as an appropriate method of uncovering jury bias.” See also, *Burns*

v. Gerry, Civil No. 06-cv-131-PB, 2012 U.S. Dist. Lexis 81349 at *21 (D.N.H. 2012) (“The Supreme Court has held that a post-trial evidentiary hearing is constitutionally sufficient to decide allegations of juror partiality. See, *Smith v. Phillips*, 455 U.S. 209, 218, 102 S.Ct. 940, 71 L. Ed. 2d 78 (1982); *Remmer v. United States*, 347 U.S. 227, 230, 74 S. Ct. 450, 98 L. Ed 654 (1954), “The Supreme Court has never held, however, that a hearing or any other particular procedure must be employed when the trial court inquires in the first instance into potentially prejudicial contacts between jurors and third parties, after disclosing to counsel, the fact of the contact.”); and *Williams v. Wenerowicz*, Civil Action No. 1407126, 2016 U.S. Dist. Lexis 60511 at *40 (E.D. Pa. 2016) (“In this case, the trial court followed this (Remmer) procedure and questioned both Juror #2 and Juror #5 to determine the impact upon them and whether it was prejudicial or if they could remain as impartial jurors. Counsel was present and permitted to ask questions.”).

In the Fifth Circuit, the United States District Court for the Eastern District of Louisiana stated that “[d]ue process requires the court to determine the circumstances, the impact thereof upon the juror and whether or not it was prejudicial. When questionable conduct occurs, the trial judge should assess prejudicial impact by questioning the juror directly, with counsel’s participation and input.” *El-Amin v. Cain*, Civil Action No. 15-1425, 2016 U.S. Dist. Lexis 91018 at *50 (E.D. La. 2016).

Other Circuits have also opined about the requirements for a proper Remmer hearing which further illustrates why review in this Court is necessary to better define the parameters of such a hearing. In *Hedlund v. Ryan*, 815 F. 3d 1233, 1247 (9th Cir. 2016) the Ninth Circuit Court of Appeals noted that “the trial judge conducted a hearing involving all interested parties to explore the issue of juror bias. At this hearing, Hedlund had the opportunity to prove actual bias. This is the remedy prescribed by the Supreme Court.”). See also, *Salagado v. Yarborough*, 267 Fed.

Appx. 714, 716 (9th Cir. 2008) (“Salgado next argues the State violated his right to due process by denying him a full evidentiary hearing with live testimony concerning all allegations of juror misconduct. We reject this argument. A court confronted with a colorable claim of juror bias must undertake an investigation that is reasonably calculated to resolve doubts raised about the juror’s impartiality. The Court of Appeals reasonably applied *Remmer* and *Phillips* in finding that the trial court’s investigation was sufficient. The trial court considered affidavits from each of the jurors and the arguments presented by both parties prior to denying the motion. The Court also determined on the basis of all of the evidence that Juror No. 5’s allegations lacked credibility and therefore did not warrant further inquiry. Given the extent of the documentary record, it was not unreasonable to conclude live testimony was unnecessary.”); and *Montes v. Macomber*, Case No. 15cv2377-H-BGS, 2016 U.S. Dist. Lexis 185789 at *40 – 41 (S.D. Cal. 2006) (“In *Remmer*, the Supreme Court found a criminal defendant’s right to an impartial jury was violated where a trial court dismissed allegations of juror misconduct after an ex parte meeting with prosecutors. In that context, the Supreme Court held that a trial court should not decide and take final action ex parte, but instead should determine the circumstances, the impact thereof upon the jury and whether or not it was prejudicial, in a hearing with all parties invited to participate. The Ninth Circuit has observed that such a hearing provides little prospective guidance as to when a hearing is required or even appropriate. Indeed, a plausible reading posits that the *Remmer* Court merely condemned the ex parte manner in which the trial judge and the prosecutor handled the situation without knowledge of the defendant or his counsel.”).

In the 10th Circuit Case of *United States v. Armendariz*, 922 F. 2d 602, 606 (10th Cir. 1990), the 10th Circuit stated “[t]o overcome the presumptively prejudicial impact of any unauthorized private communication with a juror in a criminal case, under *Remmer v. United States* (citations

excluded), the trial court should not decide and take final action *ex parte*...but should determine the circumstances, the impact thereof upon the juror, and whether or not, it was prejudicial, in a hearing with all interested parties permitted to participate. The government bears a heavy burden to establish that the communication was harmless. The Court subsequently clarified the nature of that burden and rejected the notion that the law must impute bias to a juror's answers. Once the government rebuts the presumption of prejudice in a *Remmer* hearing, the burden then shifts to a defendant to show actual prejudice.”).

See also, United States v. DeLeon, 187 F. 3d 60, 67 (1st Cir. 1979). (“The Trial Judge’s primary obligation is to fashion a requisite procedure for ascertaining whether misconduct actually occurred and, if so, whether it was prejudicial. DeLeon argues that the procedure constituted an abuse of discretion because defense counsel was not invited to the interviews. He relies on *Remmer v. United States* (citation excluded), in which the Supreme Court held that the trial court should not decide and take final action on *ex parte* information...but should determine the circumstances...in a hearing with all interested parties permitted to participate.” “We have consistently reaffirmed that a model inquiry into jury tampering allegations should indicate the presence of all counsel or prior consultation with counsel in order to allow counsel to help guide the questioning. But, we have also recognized that the trial judge is not...shackled to a rigid and unyielding set [of] rules and procedures that compel any particular form or scope of inquiry.”).

This Court has – based on the facts of this case – the opportunity to grant certiorari and establish the proper procedure for a constitutionally sufficient *Remmer* hearing. The potential violation of Due Process is too great to permit District Courts and Circuit Courts to continue down the current path where discretion has turned the application of *Remmer* into a complete mess.

III THE DEFENDANT JOHNSON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE JURY INSTRUCTIONS

On direct appeal, the Defendant Johnson argued that the jury was given a faulty jury instruction when it was instructed that Carl Miller could not be considered a member of the RICO Enterprise because he was working as a Government informant at the time. There is no dispute that a Government informant cannot also be a co-conspirator.

See, *United States v. Pennell*, 737 F.2d 521, 536 (6th Cir. 1984) (“Proof of mere negotiations between drug traffickers will not suffice; the conspirators must actually agree to accomplish an illegal objective or accede to illegal terms that are acceptable to both. Moreover, proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction.”); *See also, United States v. Enstam*, 622 F.2d 857, 867 (5th Cir. 1981) (“it is impossible to conspire with government agents”); *United States v. Williams*, 274 F.3d 1079, 1084 (6th Cir. 2001) (holding a government agent cannot be a conspirator); *United States v. Keeler*, 285 Fed. Appx. 262, 265 - 266 (6th Cir. 2008) (“[a] conspiracy charge cannot be proven solely on the basis of an agreement between a defendant and a Government agent since Government agents cannot count as co-conspirators”); and *Clark v. United States*, Case No. 4:02-cr-17, 2012 U.S. Dist. Lexis 128899 at *28 (E.D. Tenn. 2012) (“a person who is acting as a government agent or informant cannot be a conspirator”).

In this case, the Sixth Circuit panel held that the Defendant Johnson could not challenge a jury instruction that he agreed to under the doctrine of “invited error.” (Appendix 2 at p. 26). The Court also held “Although the invited error doctrine does not foreclose relief when the interest of justice demand otherwise, justice does not so demand in this case as Johnson merely challenges the instructions as incorrect – not as a serious breach of his constitutional rights.” (Appendix 2 at p. 26).

This is simply not correct. Johnson argued that he was deprived of a substantial constitutional right; the right to a fair trial. This Court should therefore grant review and determine whether Johnson's conviction based primarily on the testimony of an admitted member of the conspiracy, deprived him of a fair trial.

IV. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE RICO STATUTE EXTENDS TO THE LEVEL OF A LOOSELY ORGANIZED MOTORCYCLE CLUB

There is no question that the "basic purpose of the Organized Crime Control Act of 1970 was to seek eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process by establishing new penal prohibitions, and by providing enhanced sentences and new remedies to deal with the unlawful activities of those engaged in organized crime." *Ianelli v. United States*, 420 U.S. 770, 786, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). The loosely based organization known as the Phantoms Outlaw Motorcycle Club could not have possibly been what Congress envisioned in enacting RICO in 1970. As this Court stated in *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) when discussing the purpose of RICO:

"The statement of findings that prefaces the Organized Crime Control Act of 1970 reveals the pervasiveness of the problem that Congress was addressing by this enactment: The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drives billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic process; (4) organized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security and undermine the general welfare of Nations and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal

and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

In light of the above findings, it was the declared purpose of Congress to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”

Id. at 588.

It’s time to revisit RICO in light of Justice Stevens dissent in *United States v. Boyle*, 556 U.S. 938, 129 S. Ct. 2237, 173 L Ed. 2d 1265 (2007) in which he took issue with the scope of a RICO Enterprise. In his dissent Justice Stevens wrote: “In my view Congress intended the term ‘enterprise’ as it is used in the Racketeering Influenced and Corrupt Organizations Act....to refer only to businesslike entities that have an enterprise apart from the predicate acts committed by their employees or associates.” *Id.* at 952. The *Boyle* case is a perfect example of Justice Stevens’ concerns that RICO was going way too far. “It is clear from the statute and or earlier decisions construing the term that Congress used ‘enterprise’ in these provisions in the sense of business organization...rather than venture, undertaking and project.” *Id.* In concluding specifically that the evidence presented in the *Boyle* case did not satisfy the requirement that an alleged enterprise had an existence separate and apart from the pattern of activity in which it engages, Justice Stevens wrote:

“The trial judge also erred in finding the Government’s evidence in this case sufficient to support petitioner’s RICO convictions. Petitioner was alleged to have participated and conspired to participate in the conduct of an enterprise’s affairs through a pattern of racketeering activity consisting of one bank robbery and three acts of interstate transportation of stolen funds. And it’s modus operandi was to congregate periodically when an associate had a lead on a night deposit box that the group could break into. Whoever among the associates was available would bring screwdrivers, crowbars and walkie-talkies to the location. Some acted as lookouts, while others retrieved the money. When the endeavor was successful, the participants would split the proceeds. Thus, the group’s purpose and activities and petitioner’s participating therein, were limited to

sporadic acts of taking money from bank deposit boxes. There is no evidence in RICO's text or history that Congress intended to reach such ad hoc association of thieves.”

Id. at 958 – 959.

To be certain, RICO is to be construed liberally, but every statute has a limit on how far it may be stretched. The Sixth Circuits, as well as other Circuits have stretched it beyond Congress' initial purpose. If this Court does not grant review and set some boundaries on the scope of RICO, prosecutors are going to continue to use it in ways that Congress clearly did not intend.

CONCLUSION

This case presents several important issues that require Supreme Court review. Thus the Defendant-Appellant Antonio Johnson respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted this 15th day of March 2018.

/s/ Mark E. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2018, I served a true and exact copy of the foregoing document on the following: OFFICE SOLICITOR GENERAL OF THE UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, ROOM 5616, 950 PENNSYLVANIA AVENUE, N.W., WASHINGTON, D.C. 20530-0001 by placing the same in the United States Mail, first class postage pre-paid.

/s/ Mark E. Brown

Mark E. Brown