No. _________

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2017

ALEXANDRA NORWOOD, Petitioner

v

UNITED STATES OF AMERICA, Respondent

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

PETITION FOR A WRIT OF CERTIORARI

HAROLD GUREWITZ (P14468)
GUREWITZ & RABEN, PLC
333 W. FORT STREET, SUITE 1400
DETROIT, MI 48226
(313) 628-4733
Attorney for Petitioner

QUESTIONS PRESENTED

In this case, the government prosecuted Alexandra Norwood and other residents of a neighborhood in Flint, Michigan, for RICO conspiracy (18 USC §1962(d)) and VICAR murder (18 USC §1959). Each statute uses the term "enterprise" as an element of the offense. The term "enterprise" is defined to include "a group of individuals associated in fact." (18 USC §1961(4)).

Based on this Court's decision in *Boyle v. United States*, 556 US 938 (2009), the lower courts found sufficient evidence that neighborhood residents who sold drugs on neighborhood street corners in a similar fashion and used acts of violence to protect their territory, without leaders, hierarchy or rules, were a RICO enterprise. And, based on evidence that Norwood's reputation for violence increased when he killed a local drug dealer on a Howard neighborhood street in daylight hours, the lower courts sustained his conviction for VICAR murder because it was done to "maintain or increase" his position in the street gang enterprise.

The Questions Presented are:

I. Whether proof of a RICO enterprise alleged as an association-in-fact gang made up of a neighborhood residents without hierarchy or rules requires proof of activity or organization "separate and apart from the pattern in which it engages" to distinguish it from a conspiracy to commit racketeering acts.

II. Whether this Court should grant certiorari to resolve the split among the circuits concerning the meaning of the motive element of the VICAR statute, 18 USC §1959, which requires that a racketeering act of murder must be committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity."

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Leon Gills, Johnathan Oldham, Jonathan Walker and Jatimothy Walker, were defendant-appellants below, and were represented by separate counsel.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

US DISTRICT COURT CASES

RULES, STATUTES

OTHER & PUBLICATIONS

PETITION FOR WRIT OF CERTIORARI

Petitioner Alexandra Norwood respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

The Sixth Circuit issued its decision on August 4, 2017, amended on November 6, 2017 (Pet App 3a-25a), and, it denied Petitioner Norwood's request for rehearing or rehearing en banc on January 3, 2018. (Pet App 1a). This Court has jurisdiction to review the Sixth Circuit's decision under 28 USC §1254(1).

OPINIONS BELOW

The Amended Opinion of the Sixth Circuit issued on November 6, 2017 (Pet App 3a-25a). It is unpublished but is available at 782 Fed Appx 367. The district court opinion denying Norwood's motion for judgment of acquittal is unpublished, but is available at 2015 WL 2250493. It is reproduced in full at Pet App 26a-74a. The District Court Opinion Granting the Government's Motion for Admission of Coconspirator Statements, is reproduced in full at Pet App 75a-97a.

STATUTORY PROVISIONS

The Violent crimes in aid of racketeering activity statute, 18 USC §1959, provides in pertinent part as follows:

> (A) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything

> of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished –
>
> (B)(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

This petition concerns the interpretation of the following provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC §1961, et seq.

18 USC §1961(4), states:

> (4) "enterprise" includes any individual, partnership, corporation , association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

18 USC §1962(c), states in pertinent part:

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

18 USC §1962(d) states:

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

STATEMENT OF THE CASE

This case presents two pressing and related questions concerning use of the RICO enterprise statute, 18 USC §1961(4), *Boyle v. United States*, 556 US 938 (2009), to prosecute a member of a neighborhood street gang characterized by name and neighborhood identification but lacking leaders or rules, for RICO conspiracy, 18 USC §1962(d) and VICAR Murder (18 USC §1959).

1. Alexandra Norwood was convicted for RICO conspiracy (18 USC §1962(d)) and VICAR murder (18 USC §1959) based on an indictment alleging that he was a member of a RICO association-in-fact enterprise known as the Howard Boys. (Pet App 98a-143a). The Howard Boys name is derived from the Howard neighborhood in Flint, Michigan where Norwood lived from about 2002 to 2006, the time period relevant to his offense conduct. His charges arise from evidence of his drug sales and violent acts and those of others identified with the Howard Boys. The allegations as to Mr. Norwood particularly concern two crack cocaine transactions in 2002 and the murder of Jonathan Parker on July 17, 2004, all in the Howard neighborhood. (Pet. App. at *98a-119a)* The enterprise continued after Mr. Norwood's arrest in 2006 and incarceration and was known as MurdaVille.

The evidence at trial, viewed most favorably to the government, established that twelve defendants and others, including witnesses for the government at trial, were associated with a group originally identified as Howard Boys because of the name of their neighborhood in Flint, Michigan, Howard Estates. Their primary endeavor was their more or less independent sale of crack cocaine. They cooperated with each other to the extent they would loan drugs to someone whose supply ran short. Howard Boys also used acts of violence, individually and sometimes with others, and their reputations for violence to keep strangers out of their neighborhood. (Pet App 75a-97a). They also used hand signs, graffiti and tattoos to establish their identify with the neighborhood. These attributes led the district court to conclude the group existed. (Pet App 26a-74a). The evidence of their violence used to further their drug trade, sharing customers and warnings given if police entered the neighborhood, also supports the district court's conclusion that the defendants conspired to use violent acts to further group efforts. (Pet. App. at 77a-80a).

Witnesses testified at trial about the July 17, 2004 murder of Jonathan Parker as he rode his bicycle through the Howard neighborhood. Xavier Turner, who testified he was a Howard Boy, testified he saw Alexandra Norwood shoot Parker. Eddie Williams, a drug dealer and supplier to some Howard Boys, testified that he solicited the murder because he feared Parker and had a long-running feud with Parker. According to Williams, Jonathan Parker robbed Williams of drugs and money in 1999, shot him in a separate incident later that year, and continued to threaten him and cause him fear up to July 17, 2004. (Pet. App. 42a-48a)

Williams testified that he offered Norwood "two stacks" or $2,000, on July 17, 2004, to kill Jonathan Parker. He picked Norwood for the job because he thought Norwood had a reputation for violence. According to witnesses, the shooting took place in the Howard neighborhood in the middle of the day, a short time after they saw Norwood talking on a cell phone with Williams. According to Williams, he paid Norwood $1400 a few days later. Charles Orr, Norwood's cousin, and Xavier Turner, testified that Norwood was more respected by other Howard Boys after the shooting. (Pet App 44a)

2. The district court denied Norwood's motion for acquittal because it found there was sufficient evidence that the Howard Boys shared a common economic function – to promote individuals drug sales – and were a RICO enterprise, even though there was no evidence of any leadership, hierarchy or group rules. (Pet App 32a-34a). According to the district court, although members kept their own profits from their drug sales, members had a common economic function because they would take turns selling to minimize competition, lend drugs to others who ran out, and used their reputation for violence to dissuade outsiders. (Pet. App.32a-34a).

There was also evidence of other homicides that took place between 2006 and 2011 when the Howard Boys was known as MurdaVille. By that time, however, Norwood was incarcerated based on his arrest in 2006 and remained in custody. He was not a participant in any of the events described by the witnesses after 2006.

The district court also denied Norwood's motion for acquittal on the VICAR murder charge. (Pet App 26a-74a). It concluded the evidence was sufficient to prove that Norwood's animating purpose was to promote the Howard Boys' drug business, to show that interfering with drug sales in the neighborhood would not be tolerated; or, that carrying out the shooting in daylight could have been viewed as an act to enhance his reputation for violence. (Pet. App. 43a).

3. The Court of Appeals affirmed. (Pet App 3a-25a). It held that the Defendant's VICAR motive element was satisfied because "an animating purpose of the defendant's action was to maintain or increase his position" in the gang. (Id. at Pet. App. 8a), citing *United States v. Hackett*, 762 F3d 493, 500 (6th Cir. 2014). But it also concluded there was evidence Norwood had a mercenary purpose because he was paid $1,400 by Williams. ("For at least four reasons, however, a rational jury could find that he had both purpose.")(Pet. App. 9a). According to the circuit court, however, the evidence established a VICAR motive, because it was "likely" that the shooting would raise Norwood's gang status. Id.

REASON FOR GRANTING THE PETITION.

I. THIS CASE PRESENTS AN IMPORTANT AND PRESSING QUESTION CONCERNING THE SCOPE OF THE RICO STATUTE LEFT UNDECIDED BY *BOYLE V. UNITED STATES*, 556 US 938 (2009): WHETHER PROOF OF AN ASSOCIATION-IN-FACT ENTERPRISE REQUIRES EVIDENCE OF ACTIVITY OR ORGANIZATION "SEPARATE AND APART FROM THE PATTERN IN WHICH IT ENGAGES." *UNITED STATES V. TURKETTE*, 452 US 576 (1981), IN ORDER TO DISTINGUISH IT FROM A CONSPIRACY TO COMMIT ITS RACKETEERING ACTS.

In *Boyle v. United States*, 556 US 938 (2009), this Court holds that "an association-in-fact enterprise under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 USC §1961 *et seq.*, must have a "structure" but that an instruction framed in this precise language is not necessary." *Id*. at 941. The Court also explains that an enterprise "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit those associates to purse the enterprise's purpose." *Id* at 946.

While the Opinion concludes that possible structural attributes, such as "hierarchy," "role differentiation," "membership dues," "regular meetings" and an "enterprise name," are not essential to proof of an enterprise because they are without any basis in the statute, *Id*. at 948, it fails to explain any principled basis on which to distinguish its definition of enterprise limited to the three " features" it describes – purpose, relationships, and longevity – from concert of action offenses, including RICO conspiracy in violation of 18 USC §1962(d). *Id* at 949-950.

The petitioner and his co-defendants in *Boyle* were found to have carried out a series of bank night-deposit box thefts in New York, New Jersey, Ohio and Wisconsin. While the group was only "loosely and informally organized," *Id.*, and had no apparent leader and was without any long-term plan, *Id*., consistent with the broad, expansive interpretation this Court has given to the RICO statute, *Id*. at 944 ("The statute does not specifically define the out boundaries of the "enterprise" concept . . . "), *Boyle* explains that an association-in-fact enterprise only need have "three structural features *Id.* at 946. *See, United States v. Turkette*, 452 US 576 (1981)(An enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.") *Id*., at 583. That is, a hallmark of an enterprise is that it only need be informal. It "need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." *Boyle*, 556 US at 948.

This Court also explains in *Boyle* that its expansive definition adequately distinguishes RICO enterprise from offenses that inherently require joint action, such as the RICO conspiracy offense charged against Norwood in violation of 18 USC §1962(d), gambling in violation of 18 USC §1955, and conspiracy in violation of 18 USC §371. *Boyle*, *supra* at 949-950. As an example, this Court explains that "[p]roof that a defendant violated the gambling statute, §1955, does not necessarily establish that the defendant conspired to participate in the affairs of a gambling enterprise through a pattern of racketeering activity." *Id.* at 949. Similarly, proof of an arson conspiracy in violation of 18 USC §371 does not require that the defendant participated in an arson enterprise through a pattern of arson acts. *Id.* at 949-950. That is so, according to *Boyle*, because "[s]ection 1962(c) demands much more than conspiracy: the creation of an "enterprise" – a group with a common purpose and course of conduct – and the actual commission of a pattern of predicate offenses." *Id.* at 950.

The dissent in *Boyle,* however, argues that the majority formulation is insufficient to distinguish evidence that might be marshaled to identify an enterprise from evidence of a conspiracy to commit the predicate offenses. ("Only if proof of the enterprise element – the"group with a common purpose and course of conduct" – requires evidence of activity or organization beyond that inherent in the pattern of predicate acts will RICO offenses retain an identity distinct from §371 offenses.") *Id.* According to the dissent, *Id.* at 954, the existence of an association-in-fact enterprise, must be established by evidence "that an alleged enterprise has an existence separate from the pattern of racketeering activity undertaken by its constituents." *Id* at 955.[1]

Decisions of the circuit courts that have applied the enterprise structural features identified in *Boyle* to association-in-fact allegations, particularly in cases of alleged neighborhood street gangs defined primarily by geography, are split. Some look to evidence of rules and hierarchy to establish an enterprise. Others find evidence of a common purpose shared by residents of the same neighborhood to be enough. Circuit courts have also struggled to find a consistent rationale in civil RICO cases. *UFCW v. Walgreen Co.*, 719 F3d 849 (7th Cir. 2013)("Despite the expansive nature of this definition, it is not limitless") *Id.* at 853.

Responses by circuit courts to the *Boyle* enterprise formulation, particularly in the context of RICO street gang prosecutions, exemplify these concerns. Where gang prosecutions include evidence of leadership, hierarchy, or national structure – all of the features this Court in *Boyle* found non-essential to the definition of "enterprise," 566 US at 948 – these courts have readily concluded that enterprises exist. *United States v. Ramirez–Rivera*, 800 F3d 1 (1st Cir. 2015)(enterprise was a

---

[1] The distinction drawn in *Boyle*, between"enterprise" and the elements of RICO conspiracy, 18 USC §1962(d), ("[e]ven if the same evidence may prove two separate elements, this does not mean that these two elements collapse into one." *Id.* at fn.5), has faded further with circuit decisions that have eliminated the requirement for proof of an enterprise as an element of RICO conspiracy. In *Salinas v. United States*, 522 US 52, 63 (1997), this Court held that RICO conspiracy does not require proof of an overt act. Based on *Salinas*, at least two circuits have concluded that "*Salinas* counsels that the establishment of an enterprise is not an element of the RICO conspiracy offense." *United States v. Applins*, 637 F3d 59, 75 (2nd Cir. 2011); *United States v. Harris*, 695 F3d 1125, 1133 (10th Cir. 2012). These cases eliminate any basis on which to distinguish a conspiracy to violate predicate acts from an alleged enterprise.

"super-gang" with rules and structure requiring permission to commit violent acts); *United States v. Pimentel*, 346 F3d 285 (2nd Cir. 2003); *United States v. Henley*, 766 F3d 893 (8th Cir. 2014)(national motorcycle club had "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity) *Boyle* at 906. Some courts, like those in *Norwood*, have found sufficient evidence of street-gang enterprise structures without these attributes, based only on parallel conduct or conduct of individuals related by group name or geography. *United States v. Applins*, 637 F3d 59, 76-78 (2nd Cir. 2011); *United States v. McGill*, 815 F3d 846,930-32 (DC Cir. 2016); *United States v. Kamahele*, 748 F3d 984, 1003-05 (10th Cir. 2014).

However, at least three circuits have crafted boundaries to limit the *Boyle* enterprise formulation where the RICO statute has been used to prosecute both criminal and civil claims against businesses or individuals conducting "parallel" or "hub and spoke" associations. *UFCW v. Walgreens Co.*, 719 F3d 849, 856 (7th Cir. 2013)(the civil complaint did not describe how cooperation was different for an enterprise than that "inherent in every commercial transaction"); *In re Insurance Brokerage Antitrust Litigation*, 618 F3d 300 (3rd Cir. 2010)(cooperation between insurance providers and brokers to steer clients was not a RICO enterprise); *United States v. Pinson*, 860 F3d 152, 161-63 (4th Cir. 2017)(overlapping conspiracies were not a RICO enterprise); see also, *City of New York v. Chavez*, 944 F Supp 260 (SD NY 2013)("[T]he court is left with the question of what is required to prove the existence of a RICO enterprise specifically in the context of what appears to be a "hub-and-spokes association").

This Court should resolve these differences by requiring that an enterprise must be established not only by evidence of the three structural features defined in *Boyle*, 556 US at 946, (purpose, relationships and longevity), but also by evidence of conduct that is "separate and apart from the pattern in which it engages." *Turkette*, 452 US at 583. While the broad enterprise definition in *Boyle* may grant prosecutors a powerful tool for use when focusing on criminal conduct by groups rather than discrete acts of individuals, and harsh federal penalties that include mandatory life terms or the death penalty,[2] as formulated in *Boyle*, the present enterprise definition sweeps too broadly, as it does in *Norwood*. It allows prosecutors to target "relatively small and local groups of racial minority offenders and ascribe them names and labels as gangs even though the suspects disagree with "gang" labels." *Id*. at 308. *Kolender v. Lawson*, 461 US 352, 358 (1983). This broad definition similarly "federalizes" paradigmatic local violent crimes such as murder, based on minimal evidence of a gang motive or connection to interstate commerce, and raises "the potentially thorny issue of federal-state balance."[3]

---

[2] Woods, Jordan Blair, *Systemic Racial Bias And RICO's Application To Criminal Street And Prison Gangs,*, 17 Mich. J. Race & L.303, 304.

[3] Morrissey, Michael, "Structural Strength: Resolving A Circuit Split In Boyle v. United States With A Pragmatic Proof Requirement For RICO Associated-in-Fact Enterprises," 77 Fordham L. Rev. 1939 (2009)("Moreover, the law must differentiate the racketeer from the common, ad hoc criminal.") *Id*. at 2000; Henning, Peter, J., "Misguided Federalism", 68 Mo. L. Rev. 389 (2003)("The issue, then, is whether federalism's structural protections of state authority limit the power of the executive Branch to apply the law in a particular case.") *Id.* at 397;

II. THIS CASE ALSO PRESENTS AN IMPORTANT QUESTION THAT HAS DIVIDED THE CIRCUIT COURTS CONCERNING THE MEANING OF THE MOTIVE ELEMENT OF THE VICAR STATUTE, 18 USC §1959, WHICH REQUIRES THAT A RACKETEERING ACT OF MURDER MUST BE COMMITTED "FOR THE PURPOSE OF GAINING ENTRANCE TO OR MAINTAINING OR INCREASING POSITION IN AN ENTERPRISE ENGAGED IN RACKETEERING ACTIVITY."

The VICAR statute, 18 USC §1959, was enacted as part of the congressional initiative aimed at suppressing organized crime. *United States v. Concepcion*, 983 F2d 369, 381 (2nd Cir. 1992). Section 1959 was intended to compliment RICO by allowing the government "to prosecute under §1959 for violent crimes intended, *inter alia*, to permit the defendant to maintain or increase his position in a RICO enterprise." *Id.* at 381. Its sparse legislative history, however, evinces a limited purpose to employ federal criminal powers in a targeted fashion when murders are carried out as an aspect of membership in an enterprise "which is engaged in, or the activities of which affect, interstate commerce." 18 USC §1959(b)(2); *See*, S. Rep. 98-225, 1984 U.S. Cong. And Adm. News 3182, 3484 ("Here, again, however, the Committee does not intend that all such offenses should be prosecuted federally. Murder, kidnaping, and assault also violate state laws and states still have an important role to play in many such cases that are committed as an integral part of any organized crime operation").

That is, violence by a an enterprise or gang member, unrelated to the conduct of a RICO enterprise, carried out as part of a separate conspiracy or carried

---

Waucaush v. United States, 380 F3d 251 (6th Cir. 2004)("RICO regulates enterprises, not people.") *Id.* at 255.

out by a member for personal rather than RICO purposes, should not be subjected to federal prosecution under the VICAR statute. *United States v. Morrison*, 529 US 598 (2000)("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.") *Id.* at 617; *Waucaush v. United States*, 380 F3d 251 (6th Cir. 2004)(violent acts committed by members of a street gang that did not affect interstate commerce were not subject to prosecution under the RICO statute.) *Id*. at 255-258.

Thus, according to the plain words of the statute, murder is only a VICAR federal capital offense when it is committed "for the purpose of gaining entry to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 USC §1959(a). There is, however, a clear split among the circuits defining the meaning of this essential element, particularly where evidence establishes neither group rules or hierarchy.

The VICAR motive element, according to the **Second Circuit** ("gaining entry to or maintaining or increasing position"), *Id*; *United States v. Dhinsa*, 243 F3d 635, 670 (2nd Cir. 2001), requires proof that the defendant both holds a position or has a status in a RICO enterprise, and that he commits a violent act prosecuted pursuant to the VICAR statute "with a motive of retaining or enhancing that position, *United States v. Concepcion,* 983 F2d 369, 381 (2nd Cir. 1992). According to *Concepcion*, the defendant's violent crimes must be integrally related to the criminal organization or its membership. *Id*. The Second Circuit, as summarized in

Dhinsa, consistently limits VICAR murder to those that are committed by leaders of highly structured gangs or organizations and are carried out for the purpose maintaining or enhancing their positions.

> Accordingly, we have affirmed convictions under section 1959(a) for violent crimes committed or sanctioned by high ranking leaders of the enterprise for the purpose of protecting the enterprise's operations and furthering its objectives or where the defendant, as a leader within the enterprise, was expected to act based on the threat posed to the enterprise and that failure to do so would have undermined his position within that enterprise. See *Diaz*, 176 F.3d at 95-96 (defendant sanctioned murder because "it was expected of him as one of the highest ranking... leaders [of the organization] to protect the block's drug business" and that "failure to do so would have undermined his leadership position within the [organization]."); *United States v. Reyes*, 157 F.3d 949, 955 (2d Cir. 1998) (defendant, head of a large drug distribution organization, murdered rival who was encroaching on his drug business); *United States v. Rosa*, 11 F.3d 315, 340-41 (2d Cir. 1993) (murder committed by "one of [the organization's] leaders" following a dispute over a narcotics distribution spot controlled by the defendant); *Concepcion*, 983 F.2d at 382-83 (defendant, a lieutenant in a narcotics enterprise, initiated gun battle in response to threat to the organization's drug business); see also *United States v. Tse*, 135 F.3d 200, 206 (1st Cir. 1998) (defendant, leader of a powerful crime organization, ordered murders of rival gang members because they "threatened the security and supremacy of his leadership and of his enterprise."); *United States v. Muyet*, 994 F. Supp. 550, 556 (S.D.N.Y. 1998)("As [defendant] was the leader of the gang, a rational jury easily could conclude that [he] ordered and participated in this killing in order to maintain or increase his position in the [organization]."). However, we have held that the motive requirement under section 1959(a) is not satisfied where the evidence demonstrated that the killing was "purely mercenary," *Thai*, 29 F.3d at 818, or that the defendant was neither a member of the enterprise nor involved in its criminal activities. See *Polanco*, 145 F.3d at 540.

See, *United States v. Pimentel*, 346 F3d 285 (2nd Cir. 2003)(evidence sufficient that allowed the jury to infer the defendant “ordered the Santiago murder to preserve and cement both her authority as a leader of the Netas and her control over the discipline of the Netas’ members.”). *Id*. at 296. But where evidence of motive is limited to “respect,” or that a murder was committed in retaliation for an act of personal disrespect, *United States v. Jones*, 291 F Supp 2d 78 (D. Conn. 2003), the evidence, or theory of prosecution, must present a “principled basis for distinguishing between violence that is within the ambit of VICAR and violence that is not within its reach.” *Id.* at 89. It is not a VICAR violation where the evidence shows only disrespect and poses no “threat to the Enterprise or to Jones’s leadership role.” *Id*. at 92.

The **Ninth Circuit**, however, permits motive to be found without regard to leadership or role, or whether a gang or enterprise has positions based on rank, if the defendant’s general or dominant purpose is one to enhance his gang status. *United States v. Banks*, 514 F3d 959 (9th Cir. 2008). Banks was prosecuted for VICAR murder of a rival gang member, Gilmore. Banks shot Gilmore in an “ongoing battle” initiated after Gilmore disrespected Banks’ girlfriend. *United States v. Banks*, 514 F3d 959, 963 (9th Cir. 2008). Banks argued on appeal that his jury instructions allowed his conviction where “his primary motive was personal revenge and he was only incidentally motivated by the desire to regain the respect of fellow gang members.” *Id*. at 965. The Court reversed because the instructions allowed conviction even if the jury “found that his battle with Gilmore was generally motivated by personal animosity and by a desire to regain the respect and affection of his girlfriend, so long as the jury also found some *incidental* purpose to maintain his position in the gang. " *Id.* at 969. (emphasis in original). That is, "[m]urder *while* a gang member is not necessarily a murder *for the purpose of* maintaining or increasing position in a gang, even if it would have the effect of maintaining or increasing position in a gang." *Id.* (emphasis in original). But, the Court held that a VICAR jury instruction only requires the jury to find "the defendant's general purposes or dominant purposes were to enhance his status." *Id.* at 969. While the court recognized that the statue must be limited in scope in order to assure that it is not "used to turn every criminal act by a gang member into a federal crime," *Id*. at 970, ("Otherwise, every traffic altercation or act of domestic violence, when committed by a gang member, could be prosecuted under VICAR as well.") *Id.* at 968, it permits VICAR conviction based only on a violent act that may be viewed as one motivated by general gang/enterprise purpose, or a personal purpose. In effect, although the court warns of the potential that the statute could be used to allow a gang member to be prosecuted for a VICAR violation based only his status as a gang member, it allows just what it warns against.

According to the **Sixth Circuit**, VICAR liability similarly extends to a member of a neighborhood street gang whose "members" are those who may only identify with a neighborhood name but have no leaders or rules, who commits a murder for the purpose of maintaining or increasing his position in the enterprise, if his VICAR motive was an "animating purpose . . . to maintain or increase his position in the racketeering enterprise." *United States v. Hackett,* 762 F3d 493, 500 (6th Cir. 2014).

According to the Sixth Circuit, while the government is not required to prove that the defendant acted "solely' or primarily for a gang related purpose," *Id.,* evidence of a VICAR motive must be only some undefined amount more than "merely incidental," *Id*, in order to distinguish a group motive from one that is personal such as revenge or personal reputation. That a member of a street-gang enterprise is animated by a gang related motive, rather than a personal motive, according to the court, can be established by evidence the defendant "went to extraordinary lengths to fight back." *Id.* Because Hackett "went to great lengths to comply with the gang's code of conduct . . . the jury was entitled to find that Hackett shot Perkins to maintain his position in the gangs." *Id*. at 501.

In *Norwood*, however, the Sixth Circuit applied its "animating purpose" rule in *Hackett,* to a neighborhood street gang alleged as a RICO enterprise where an "animating purpose" for Norwood's violent act was described as only one carried out for a gang purpose rather than one that was done to enhance his personal reputation for violence. *United States v. Gills*, 702 Fed Appx 367, 375 (6th Cir. 2017). There was no evidence that Norwood occupied any position of leadership or that there were any leaders or rules. The Court affirmed and concluded that a rational jury could have found a VICAR motive based on the evidence that Norwood had both a personal, mercenary motive – insufficient for VICAR purposes according to *United States v. Thai*, 29 F3d 785 (2[nd] Cir. 1994) – and an intent to enhance his reputation in the Howard Boys gang. (Pet. App. 11a) Based on *Banks* and *Hackett*, neither leadership or role – other than affiliation with a neighborhood group – is necessary to establish a VICAR motive. VICAR prosecution does become a status offense: violence while a gang member.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

GUREWITZ & RABEN, PLC

By: /s/Harold Gurewitz (P14468)
Harold Gurewitz
Attorney for Petitioner Norwood
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 628-4733

DATE: April 2, 2018