

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

LEON GILLS, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Gills, individually, presents the following questions:

- I. When a district court, through serial inaction, delayed action, and confounding actions, “guides” a jury away from a reasonably likely “not guilty” verdict, on a crucial count of an indictment, it wrongfully deprives a defendant of his fundamental Sixth Amendment right to a full and fair jury trial. In this case, the district court “guided” petitioner Gills’ jury away from a reasonably likely “not guilty” verdict, by a combination of inaction, delayed action, and eventually confounding actions. Did the district wrongfully deprived petitioner of his fundamental Sixth Amendment right to full and fair jury trial.
- II. When a district court responds to a deliberating jury’s questions about the law of aiding and abetting, and the law of accessory after the fact, not by precisely answering the jury’s questions, but by engaging in a combination of inaction, delayed action, and confounding actions, the district court’s behavior is subject to review on appeal. In this case, the Sixth Circuit, although being provided repeated opportunities to review the district court’s serial inaction, delayed action, and confounding action, all in response to the jury’s questions, repeatedly refused to even address either petitioner’s argument on the issue, or the supporting precedent cited by the petitioner. Is the Sixth Circuit’s refusal to address petitioner’s argument and citations to precedential authority reviewable by this court, either as behavior far outside the accepted and usual course of judicial proceedings, or as comprising a *sanction* of such behavior by the district court?

PARTIES TO THE PROCEEDINGS

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Leon Gills respectfully prays that a writ of certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 3, 2018.

JURISDICTION

The Sixth Circuit issued its decision on August 4, 2017, (Pet App 1a-24a), amended it on November 6, 2017, (Pet App 25a-47a), and, on January 3, 2018, denied Petitioner Gills' request for rehearing or rehearing en banc. (Pet App 48a-49a). This Court has jurisdiction to review the Sixth Circuit's decision under 28 USC §1254(1).

Jurisdiction was generally conferred upon the Court of Appeals pursuant to 28 U.S.C. §1291.

This Petition is timely filed, as this Court, on March 27, 2018, granted Petitioner Gills' application for a thirty-day extension of time, (beyond April 3, 2018), to file a petition for a writ of certiorari,

OPINION BELOW

The Amended Opinion of the Sixth Circuit was issued November 6, 2017 (Pet App 25a-47a). It is unpublished but is available at 782 Fed Appx 367. On January 03, 2018, the Sixth Circuit Court of Appeals denied petitions for rehearing *en banc*

filed in the case by Leon Gills, Alexandra Norwood, and Jonathan Walker. The Order is attached hereto. (Pet. App, 48a-49a.)

CONSTITUTIONAL PROVISIONS APPLICABLE TO ISSUES RAISED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS APPLICABLE TO ISSUES RAISED

The Violent crimes in aid of racketeering activity statute, (commonly known as "VICAR"), 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, by its joinder in the arguments made in a separate Petition for Writ of Certiorari, filed by co-petitioner Alexandra Norwood, (Case No. 17-8386), 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 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

Leon Gills, along with a number of other residents of a Flint, Michigan neighborhood, were prosecuted, under 18 U.S.C. §1962(d), for their alleged group status as an unlawful RICO “Enterprise.” Petitioner Gills, individually, was also prosecuted for two counts of attempted murder in aid of racketeering, in violation of 18 USC § 1959(a)(5), and two counts of use and discharge of a firearm during and in relation to a crime of violence, in violation of 18 USC § 924 (c).

Gills pled not guilty, and proceeded to trial. Trial (the “Howard Boys Trial”) began on May 27, 2014, and on July 22, 2014, the jury returned a verdict of guilty as to all counts against Gills *excepting* the second count (of two counts) regarding 18 U.S.C. §924(c), for which Gills was acquitted.

On May 19, 2015, the court gave Gills a LIFE sentence on the 18 U.S.C. §1962(d) count; 120 months on both of the 18 U.S.C. §1959(a)(5); 18 U.S.C. §2 counts, to run concurrent with the 18 U.S.C. §1962(d) count; and 120 months on the 18 U.S.C. §924(c) count, to run consecutive with all other counts of conviction, all to be followed by 10 years supervised release.

At the “Howard Boys Trial,” itself, the government’s proofs failed to satisfy the jury that Gills either “used or discharged” any firearm during the shooting of one Charles Orr. (This was the “acquitted” count noted above.)

Concerning that shooting, Mr. Orr was himself a trial witness, and he provided *no* testimony to support the government's theory that Petitioner Gills had shot, or shot at, him.

Instead, Orr testified that he was shot by an alleged (but unindicted) co-conspirator, Shawn Gardner. Orr further testified that a second shooter – *not* Gills – also shot at him, from an open, rear door of a vehicle that Gills was driving.

Petitioner Gills also testified at his trial. He admitted he was driving the vehicle – a van – from which Mr. Orr was shot. He further admitted that Shawn Gardner was in the van with him, riding in the front passenger seat, and that another person, "Little James," was riding in the back seat of the van. Gills also told the jury that he was aware Orr had shot Gardner years before, and that Orr had also killed one Matthew Oldham (a/k/a "Hinks") during the same incident.

Gills also testified, however, that his purpose in going to the area where Gardner shot Orr had nothing to do with Orr. Instead, he said, he went there for the purpose of locating a female friend whom he knew. As for Mr. Orr's presence in that area, Gills testified that he had no awareness that Orr had even returned to the Flint area, after a long absence from the area, (which he did know about). He certainly did not know, he testified, that Orr was in the area where he (Gills) had gone looking for his female friend.

While driving, he testified, Mr. Gardner, without any warning, suddenly yelled "I'm 'bout to kill this bitch ass nigga [, referring to Orr.]" (R. 876, Trial, PAGE ID # 10904.) When Gills heard Gardner say this, he testified, he told Gardner "chill

out . . . , not out this van, chill out,” but Mr. Gardner began firing anyway. (R.876, Trial, PAGE ID # 10903.) Petitioner Gills, in response, immediately began to drive away, but was unable to prevent Mr. Gardner from shooting Orr.

No other government trial witness – neither Gardner nor any other passenger in the vehicle – gave testimony regarding Gills’ state of mind at the time of the Orr shooting. Thus, with the exception of Orr and Gills, the jury heard *no* testimony from which it might reasonably draw any inference that Gills either (a) helped or encouraged the shooter(s), or (b) did so in order to maintain or increase his alleged status within the purported enterprise.

Most crucially, however, even Orr, who identified Petitioner Gills as the driver of the van from which he was shot, offered not a scintilla of evidence from which any intent by Gills to aid and abet Gardner might reasonably have been inferred.

A. On Day One of Jury Deliberations, the Jury Asked a Question that Clearly Described Accessory After The Fact Factual Predicates.

On its first day of deliberations, the jury asked its very first question regarding the Orr shooting. Specifically, as read into the record by the trial court, the jury asked:

if someone shoots someone out of a vehicle I am driving and I didn’t know they were going to do it until they did, but I then drive away with them and then not report it, is that considered aiding and abetting?

(Pet App 65a.)

Given that there was *no* evidence produced at the trial from which it could be even *inferred* that Petitioner Gills either possessed or fired a firearm at Charles Orr, this question by the jury unmistakably pertained to whether Gills had aided and abetted the shooter. Unmistakably, as well, the premise of the question was that the crime was “did,” i.e., *completed*, when the driver (Gills) “then [drove] away with [the shooter] and then [did] not report it”

As such, it is simply beyond debate that the jury’s question directly addressed the distinction between the crimes of aiding and abetting, on the one hand, and accessory after the fact, on the other. Indeed, after some discussion with counsel, regarding how the jury’s question might properly be answered, the Court stated:

“Well, I don’t think we can reason our way through this, we have to look at the cases. I just point out in my very quick look through the booklet on Sixth Circuit pattern jury instructions, points out at page 127, quote:

The line between an aider and abettor and an accessory after the fact is sometimes difficult to draw, particularly when dealing with the escape immediately following the crime.”

End quote. *That seems to be exactly the fault line that we are crossing right here so it looks like we all may have some homework to do.* I think I need to know the answer to that question before I can figure out exactly how to formulate a response to the jury so if you want to get me something by 9:00 p.m. tonight, I will be happy to look at it before I retire. (Emphasis added.)

(Pet App 72a.)

Consequently, there being no ambiguity in the jury’s question, (“if Gills ‘didn’t know’ that the shooter was going to shoot ‘until [the shooter] did’ shoot, could

he still be guilty of aiding and abetting the shooting if he 'then drove away with [the shooter] and then [did] not report it?' *see supra*, p. 7), the Court could have, consistent with Sixth Circuit Pattern Instruction 4.01, simply answered in the negative.

Alternatively, since the jury's question was one of law, the Court could have, as defense counsel for Gills urged at the time, (see Pet App 66a- 72a), answered the jury's question by reading Sixth Circuit Pattern Instruction 4.02, Accessory After the Fact, (along with a re-reading of pattern instruction 4.01, Aiding and Abetting.)

But the court did neither, reserving to the next morning any decision on how to properly respond to the jury's question.

On the following morning, however, before entertaining any further arguments from counsel regarding the issue, the trial court circulated a written, proposed response to the jury's question that read as follows:

Regarding yesterday's question concerning aiding and abetting, I cannot answer your question as phrased. Courts do not answer hypothetical questions that contain factual predicates based on the specifics of a case as contrasted with more generally-phrased questions about the law. At this point you should review the instructions I gave you including the aiding and abetting instruction. If you have additional questions, I will respond to those.

(Pet App 79a - 82a.)

Gills' counsel, however, maintained his position that the appropriate response would instead be to read the accessory after the fact instruction, 4.02, together with the aiding and abetting instruction, 4.01, stating explicitly "I'll rely on

the brief[,]” (Pet App 79a - 80a), and “I . . . prefer that the jury be given better or given more information about the legal question that they have asked.” (Id.)

Literally moments after the Court provided its chosen “response” to the Jury’s initial “aiding and abetting” question, (the trial transcript is imprecise on this point, since the exact time that the Court provided the jury its written “instruction” is not noted – (see Pet App 82a - 93a), the jury presented yet another question to the Court, as follows:

“How long must a person know about a crime before it occurs to be considered prior knowledge?” (Pet App 83a - 93a.)

Again, it was unclear whether the jury, before formulating this question, had the “benefit” of the Court’s previous, uninformative, response. What is obvious, however, is that the jury remained without any direction from the court regarding, in the court’s own words, the “fault line” between aiding and abetting and accessory after the fact.

Indeed, during the on-the-record discussion concerning this question that followed, the government recognized the question as the jury’s further plea for help with the aiding and abetting issue. The government, in fact, stated *agreement* with the defense request to instruct the jury that

“[an accused] would need to know about [the crime] before or learn about it during the commission of the crime and encourage or otherwise assist the commission of the crime and after-the-fact knowledge isn’t sufficient”

(Pet App 93a- 94a.)

The Court, however, professed ignorance regarding the subject matter of the Jury's "prior knowledge" question:

THE COURT: Well, I frankly am not sure I understand fully what the question is asking because there isn't any instruction I've given that specifically mentions prior knowledge. I think we're all speculating on what they're talking about, but we don't know for sure. Maybe the best response to this question is to say that the Court's not sure what the jury's asking and if they want to reformulate their question, I'll respond to a reformulated question so we're not guessing at what they're asking about.

(Pet App 95a - 96a.)

Without relinquishing his continuing request that the jury be given both an accessory after the fact instruction and a re-read aiding and abetting instruction, Gills' counsel assented to the Court's suggestion. (If the Court could not understand what the jury was asking, it could not be expected to provide an answer, regardless of how well understood the jury's question was by government's counsel and defense counsel.)

The problem with the Court's "responses," however, is apparent: having first told the jury that its aiding and abetting question was improper, ("courts do not answer hypothetical questions"), the court then told the jury that its questions, taken as a whole, were "not understandable."

Thus, confounded by the court's responses, the jury was left with only a direction to reformulate its questions. But the context had now changed. Plainly, the jury was considering factual findings ("no prior knowledge") that would lead to a verdict of not guilty, but the Court was giving them the message that they should

not ask legal questions – about the law that should be applied to those factual findings!

Tragically, from Petitioner Gills' standpoint, the Court appeared to engaging in "dodges" to the jury's aiding and abetting questions, and the court's dodge-like responses were having the effect of guiding the jury away from considering whether a defendant could be convicted of aiding and abetting a crime with respect to which he had no knowledge "before it was [did]," to a consideration of the *degree* of "prior knowledge" that might be considered sufficient to find the defendant *guilty* of aiding and abetting.

Worse, so "guided," (and undaunted by the court's "dodges"), the jury did in fact reformulate its question by then asking two additional questions, both of which continued to address the question of "what length of time is considered prior knowledge for aiding and abetting?"

Specifically, the jury sent the following, two-part question out to be read by the court:

Now we have one other question, I should say its two questions, but it's on the same sheet of paper, they appear to be related. One is if someone tells me they are going to commit a crime seconds before they do, do I have prior knowledge of that crime? On the second question on the same piece of paper reads ["] by law, what length of time is considered prior knowledge for aiding and abetting?" (Pet App 118a - 119a.)

Two points are crucially important about this later, two-part question from the jury. First, *by that time*, it is readily apparent that the Court's refusal to do anything more – in terms of providing *legal* guidance to the jury regarding its

initial *legal* “aiding and abetting” question – than to instruct the jury it must rely on the instructions it had already received concerning aiding and abetting, *had the effect of guiding the jury away from questioning whether a person who has no knowledge of a crime before the crime has been completed can nevertheless be found guilty of aiding and abetting*, (i.e., “if that person ‘*then* drive[s] away with [the perpetrator] and then [does] not report [the crime]?’”). (Emphasis added.)

Second, *at the time* of the jury’s eventual “two-part question,” above-described, neither Gills nor his counsel had ever waived, or abandoned, Gills’ original position.

Moreover, given the Court’s steadfast refusal to honor Gills’ consistent position in that regard, Gills’ counsel *also* did not waive or abandon that position when, after being asked by the Court whether this *new* question from the jury “[would be answered] if [the court] explain[ed] . . . that what is required is that the help and encouragement must occur and the intent to help or encourage must be formed before completion of the crime[.]” he answered the Court’s question by stating that “it would.” (Pet App 119a - 120a.)

B. The Court’s Steadfast Refusal to Grant Gills’ Proper Jury Instruction Request Guided the Jury in such a Substantial Way as to Violate Due Process.

As noted *supra*, following the jury’s first “aiding and abetting” question, the court explicitly acknowledged that the question “seem[ed] to [pose] *exactly* the fault line that we are crossing right here . . . [.] i.e., the line between aiding and abetting

and accessory after the fact.” (Pet App 72a.) (Emphasis added.) Then, after also explicitly acknowledging that this line “is . . . difficult to draw, particularly when dealing with an escape immediately following a crime[,]” the court simply opted to refuse to give *any* direction to the jury, at any point, that would *assist them in knowing the difference*.

Thus, even though the court left no doubt that it understood what the jury was asking, it simply *refused*, during the rest of the jury deliberations, to provide the jury with the legal instruction it persistently sought.

The Petitioner, just like this Honorable Court, can only speculate regarding the trial court’s underlying reason for refusing Gills’ request (after the very first of these jury questions) to read Sixth Circuit Pattern Instruction 4.02, Accessory After the Fact, (together with the re-read of the Aiding and Abetting instruction, 4.01). Such speculations are unnecessary, however. Regardless of the trial court’s underlying reason, the fact that the trial court steadfastly refused to provide the jury with the instruction it needed to resolve its initial question, rendered the jury’s guilty verdict on the attempted murder of Charles Orr, by aiding and abetting, a miscarriage of justice that compelled, “in the *interest of justice*,” the ordering of a new trial by the Sixth Circuit.

C. The Sixth Circuit Repeatedly Refused to Acknowledge, much less Address, Gills' Citations to, and Reliance upon, *Nunez* (and Related Cases).

In an effort to achieve that end, Petitioner Gills explicitly emphasized to the Sixth Circuit that “this case does not involve a challenge to jury instructions provided at the close of proofs; pertinent here, *instead*, are instructions that should be given when a *deliberating* jury seeks clarification of the law.” (R24, Page ID # 34.) . (Counsel for Gills explicitly, and unequivocally, also emphasized that point when imploring the trial court to provide the jury with a legal instruction regarding the distinction between assistance provided *after* a crime has been completed, and assistance provided during the commission of the crime. (*See* Pet App 66a - 72a.)

In such cases, Gills informed the Sixth Circuit – and in particular when a jury “indicates confusion about an important legal issue – it is not sufficient for the court to rely on more general statements in its prior charge.” (*Citing United States v. Nunez*, 889 F.2d 1564, 1569 (6th Cir. 1989)). Further, Gills told the Sixth Circuit, “[a]s stated in *Bollenbach v. United States*, 326 US 607, 612-13, 66 S.Ct. 404, 405 (1946), “[a] conviction ought not to rest on an equivocal direction to the jury on a basic issue.” *Id.*, at 613, 66 S.Ct. at 405; *Cf. United States v. Davis*, 490 F.3d 541, 548 (6th Cir. 2007) (“the propriety of such an instruction must be measured by whether it ‘fairly responds to the jury’s inquiry without creating . . . prejudice.’”); *United States v. Fifer*, 206 Fed. Appx. 502, 510 (6th Cir. 2006) (citing *United States v. Giacalone*, 588 F.2d 1158 (6th Cir. 1978)).

In *United States v. Nunez*, 889 F.2d 1564, 1569-70 (6th Cir. 1989), it was held that when a deliberating jury asks legal questions, and the trial court fails to instruct on the legal question posed, a defendant is entitled to a new trial upon a showing that the court's failure "could have been interpreted by the jury as responding that [the factual predicates contained within the jury's question] would be sufficient to establish [the crime charged]."

Regarding *Nunez*, Gills' brief to the Sixth Circuit provided a thorough and careful analysis of that case pointing out (over the course of five pages) the closely analogous factual scenarios involved in *Nunez* and his own case. Gills' brief also, based on the analogous nature *Nunez*, asked the panel to follow the rule in *Nunez*, wherein Mr. Nunez had been granted a new trial, based upon the district court's failure "to instruct on the legal issue posed," under circumstances where that failure "could have been interpreted by the jury as responding that [the factual predicates contained within the jury's question] would be sufficient to establish [the crime charged]."

Incomprehensively, when the panel issued its original, August 4, 2017 Opinion, (Pet App 1a-24a), that Opinion said not a single word about *Nunez* (or, for that matter, even this Court's opinion in *Bollenbach, supra*).

Consequently, left with the distinct impression that the panel had either overlooked Gills' argument about the district court's *refusal* to fairly respond to the jury's question, (or that it had misapprehended Gills' argument entirely), Gills brought a petition for rehearing or for rehearing *en banc*. In that petition,

Petitioner Gills again laid out his argument regarding the applicability of *Nunez*, *Bollenbach*, and the other cases cited in his original brief, and renewed his request for a new trial.

Then, on January 3, 2018, the Court of Appeals denied Gills' petition (along with the companion petitions of his co-defendants, Alexandra Norwood and Johnathan Walker). In what petitioner Gills believes, and avers, was unacceptable "support" for the denial, the Sixth Circuit said "the original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were *fully considered* upon the original submission and decision of these cases. (Emphasis added.) (Pet App 47a - 48a.)

This reference to "full consideration" by the appeals Court, particularly as it relates to Gills' repeated arguments, and citations to authority, regarding *Nunez*, *Bollenbach*, et al., is curious, given the fact that neither the Sixth Circuit's original Opinion, nor its Amended Opinion, so much as mentioned either Gills' explicit arguments, or the supporting authorities cited. (Pet App 1a-24a; Pet App 25a-47a.)

The direct effect, of course, of the Sixth Circuit's complete refusal to even acknowledge, much less to address, Gills' argument that the district court abused its discretion by repeatedly refusing to answer Gills' jury's request for clarification of the law of aiding and abetting, (i.e., "[where] someone shoots someone out of a vehicle I am driving and I didn't know they were going to do it until they did, but I then drive away with them and then not report it [,]"), was to *sanction* the district court's behavior.

In the language of *Bollenbach*, what the Sixth Court sanctioned was an abandonment, by the district court, “of the judge’s responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria[,]” (i.e., when a jury is attempting to “[d]ischarge *[its]* responsibility for drawing appropriate conclusions from the testimony” (Emphasis added.) Gills’ jury, by asking for guidance regarding what the district court expressly recognized as the “fault line” between aiding and abetting, and accessory after the fact, had “[made] explicit its difficulties,” and as *Bollenbach* teaches, in such circumstances, “a trial judge should clear them away with concrete accuracy.” *Bollenbach v. United States*, 326 US 607, 612-13, 66 S.Ct. 404, 405 (1946). This the district court here could easily have done, simply by honoring Gills’ request that the jury be provided, (in addition to a “re-read” of the aiding and abetting instruction), with an instruction on the law of accessory after the fact.

Instead, the district court *deferred* the question overnight; *refused* to answer it in the morning; and then *professed a lack of understanding* when the jury, at the court’s direction, reformulated the question as the deliberations proceeded.

And worse, through its serial inaction, delayed action, and confounding actions toward the jury, the district court guided the jury *away* from a question that prefigured a verdict of “not guilty” of aiding and abetting the attempted murder of Charles Orr, and *directly* to a different question, crafted by the court, pointed toward an opposite result: “what is required is that the help and encouragement

must occur and the intent to help or encourage must be formed before completion of the crime.” (*See* pp. 13-14, *supra*.)

In essence, this series of judicial acts *reframed* the Jury’s original aiding and abetting question – the one the court said it “could not answer” – to one involving “someone who *did have knowledge of the crime before it was completed*, (so that he *could* intentionally help and encourage the crime);” thereby, the court “guided” the jury to the *conviction* of Petitioner Gills, as an aider and abettor of the attempted murder of Charles Orr.

The Sixth Circuit – twice – was made thoroughly aware of Gills’ position that the district court’s behavior had deprived Gills of his fundamental Sixth Amendment jury trial right, but the Sixth Circuit – twice – completely failed to acknowledge or address this fundamental constitutional deprivation. Hence, Petitioner Gills has filed this petition for certiorari.

REASONS FOR GRANTING THE PETITION

- I. The district court’s abject refusal to answer Gills’ jury’s legitimate request for *legal* clarification of a pattern instruction regarding aiding and abetting, which refusal deprived petitioner of his Sixth Amendment right to a full and fair jury trial, represented a striking departure from the accepted and usual course of trial court proceedings; and the Sixth Circuit’s repeated failures to *even address* petitioner’s argument regarding this unjustified departure *sanctioned* that departure, which calls for this Court to exercise its supervisory powers to remedy Petitioner’s constitutional deprivation.

II. In their petitions for a writ of certiorari, both of which are currently pending before the Court, co-defendant's Alexandra Norwood, and Johnathan Oldham have argued that certiorari should be granted to resolve significant questions of whether, during their joint trial with Mr. Gills, the district court (1) erroneously denied Motions for Directed verdict of acquittal, based on the government's failure of adequate proof that the "Howard Boys" met the legal requirements to constitute a RICO Enterprise; (2) unconstitutionally denied mistrial motions based on the development, during trial, of a tainted, fearful, and unfairly prejudiced jury; and (3) erroneously denied motions for directed verdict of acquittal on the various Counts brought against the defendants under the "VICAR Statute," 18 USC § 1959. (*See* respective Briefs of each of the above-named petitioners; Case Nos. 17-8386, and 17-7703.)

Petitioner Gills, who is similarly situated to his co-appellants, respectfully joins in those arguments.

The questions presented in this Petition are of exceptional importance. It is a fundamental premise of American criminal law that an accused is entitled to trial by an impartial jury. U.S. Const. Amend VI. It is further a basic tenet that an individual's liberty may not be proscribed without due process of law.

U.S. Const. amend. V.

Indeed, it is because of the exceptional importance of the right to trial by an impartial jury, and of the fundamental liberty interest embodied in the due process clause, that "when a jury seeks clarification of particular issues . . . , the

judge should clear away its difficulties ‘with concrete accuracy’.” *Bollenbach*, *supra*, at 326 U.S. 612-613.

Petitioner Gills recognizes, as the *Nunez* case also recognized, “[that a] trial court ‘must exercise its sound discretion in determining what type of supplementary instructions should be given to a deliberating jury that seeks clarification of the law.’” *Nunez*, *supra*, at 889 F.2d 1568, *citing Davis v. Greer*, 675 F.2d 141, 145 (7th Cir.), *cert. denied*, 459 U.S. 97, 103 S.Ct. 310 (1982). Nonetheless, it is of equal importance that “[a] trial court, when exercising its discretion, must be “zealous to protect the rights of the accused.” *Dennis v. United States*, 339 U.S. 162, 168 (1950). Preserving the impartiality of a jury, although just one means of protecting the rights of the accused, is “constitutional bedrock,” in terms of guaranteeing a criminal defendant a fair trial. And plainly, under our law, it is settled that “a fair trial is understood as a trial resulting in the verdict worthy of confidence.” *Kyles v Whitley*, 514 US 419, 433–34 (1995).

What happened at Petitioner’s trial – the manner in which the district court, over the course of two days, reframed the jury’s original “aiding and abetting” question, from one containing “not guilty” factual predicates, to one predicated factual “guilt” – produced not a “fair trial,” but an unfair one. The district court’s two-day endeavor failed to protect Petitioner’s fundamental jury trial right, and manifestly did not result in a “verdict worthy of confidence.” Viewed in its entirety – see Jury Deliberations “Guidance” At a Glance, Pet App 134a · 135a – the district court’s handling of Petitioner’s jury’s aiding and abetting clarification request did

not meet with, and should not be considered to have met with, “the accepted and usual course of [trial court] proceedings.” *United States Supreme Court Rule 10*.

Through its serial inaction, delayed action and confounding actions, the district court “guided” petitioner’s jury away from a reasonably likely “not guilty” verdict on a crucial count of his indictment. (Pet App 134a- 135a.) And as a reasonably likely consequence of the district court’s “misguidance,” petitioner’s jury instead convicted him of a crime which, in the end, placed him a sentencing guideline range which enabled the district court to impose upon him a “within guidelines” sentence of LIFE in prison. (Pet App 140a - 141a; 154a.)

This Court has supervisory power to remedy extraordinary departures from the usual and common judicial practices that are expected from district courts. Supreme Court Rule 10, in pertinent part provides:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. *The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:*

- (a) *a United States court of appeals has entered a decision [that] . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power[.]*

(Emphasis added.)

It is this power – the supervisory power entrusted to this court by Supreme Court Rule 10 – that Petitioner Gills’ urges this Court to now invoke, by granting his petition for a writ of certiorari.

CONCLUSION

Petitioner recognizes that it is not the “usual” function of this Court to review district court decisions for “reversible” error. But when a circuit court of appeals serially refuses to even address such errors, despite an appellant’s multiple entreaties that it do so, that circuit court “sanctions” district court departures going “far [outside] . . . the accepted and usual course of judicial proceedings” engages in behavior that itself represents judicial “action” far outside the accepted and usual course of judicial proceedings; or does both.

Under Rule 10, when the consequence of such departures from accepted and usual judicial practice is that a defendant not otherwise “eligible” for a “within guidelines” sentence of LIFE imprisonment *both becomes eligible for, and receives*, such a “within guidelines” LIFE sentence, a “compelling reason” exists for this Court to exercise its supervisory authority to require that the lower court errors be addressed.

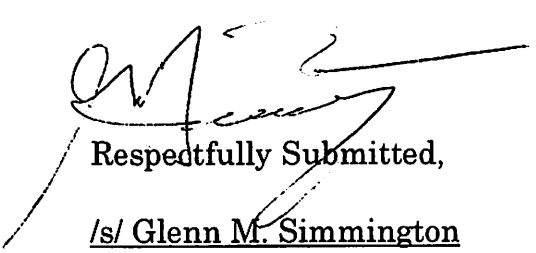
This court should grant petitioner’s petition for a writ of certiorari because this case presents an opportunity for the court to exercise its supervisory powers to instruct federal trial courts that they may not, consistent with the Sixth Amendment right to a full and fair jury trial, refuse to answer legitimate legal

questions from a deliberating jury, merely because those questions contain factual predicates which, if true, would require a verdict of "not guilty."

To the end of persuading this Court that, in the interest of justice, it should seize that opportunity, (and to the end of asking the Court to recognize, and address, the issues raised in the Petitions filed by Gills' co-defendants Alexandra Norwood and Jonathan Oldham), Petitioner Leon Gills respectfully requests that this Honorable Court will grant his petition for a writ of certiorari.

REQUESTED RELIEF

For all of the above reasons, Petitioner Gills' petition for writ of certiorari should be granted.



Respectfully Submitted,

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