

**IN THE
SUPREME COURT OF THE UNITED STATES**

Application No.____

Marvin Pippins,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The most serious of the charges upon which Petitioner was tried concerned his having killed Sean Peart in retaliation for the murder of Petitioner's twin brother, Melly. Count One of Superseding Indictment S-3 charged RICO Conspiracy (18 U.S.C. § 1962(d)); Count Two charged Conspiracy to Murder in Aid of Racketeering (18 U.S.C. § 1959(a)(5)); Count Three charged Murder in Aid of Racketeering (18 U.S.C. § 1959(a)(1)); and Count Four charged Unlawful Use of the Firearm (used in Count Three) Resulting in Death (18 U.S.C. § 924(j)(1)).¹

At trial, both during opening statements and during his testimony, Petitioner admitted that he killed Peart but said he did so purely for personal reasons and not because of his affiliation with the named gang, the "5-9 Brims." Substantial evidence supported his position. The government argued otherwise.

Petitioner therefore asked the trial court to instruct the jury that to find a sufficient enterprise-related motive it must find it was a "substantial" one or one "integral" to his position in the 5-9 Brims. The court denied this request. It said the proper instruction was subject to "reasonable debate" (Tr. 1826); (Pet. App. 78a).² and it was concerned "there's a possibility that a jury might find that it [*i.e.*, the 5-9 Brims] was a motive but maybe not the substantial motivating factor" and therefore acquit

¹ Additionally, Count Six charged Petitioner with Conspiracy to Possess with Intent to Distribute Controlled Substances (21 U.S.C. §§ 846, 841(b)(1)(C)), and Count Seven charged him with Unlawful Use of a Firearm (18 U.S.C. § 924(c)(1)(A)(i)). Petitioner was not charged in Count Five and Counts Eight through Eleven.

² Citations to "Tr." or a number refer to the trial transcript from the lower court proceedings. Certain transcript excerpts are reproduced herein as part of Petitioner's Appendix.

Petitioner (1821); (Pet. App. 73a), and that “if the law allows the government to win its case that way [*i.e.*, by rejecting the requested instruction], I think that that’s how I should instruct them, so as not to essentially put my finger on the scale in terms of the jury’s verdict.” *Id.* The court thereafter instructed the jury that the motive element,

is therefore established if the defendant had a personal motive for committing the act of violence so long as he was also motivated by the desire to gain entrance to, or maintain or increase his position in, the racketeering enterprise. If, however, you find that the defendant **was not motivated at all** by the desire to gain entrance to, or maintain or increase his position in, the enterprise, but was motivated only by other factors, then you cannot find him the [sic] guilty of this count.

(2126) (emphasis added).

The trial court therefore instructed the jury, in essence, that Petitioner could be found to have had the requisite enterprise-related motive even if his principal motive was personal and even if the enterprise-related motive was *de minimis* or vanishingly small. This instruction was error.

The Second Circuit panel that heard this appeal ruled that the trial court’s instructions would not have allowed the jury to convict Petitioner based on a finding that his enterprise-related motivation was “incidental or insubstantial.” It further found that, in any event, any error was harmless error.

The questions presented are: (a) Could the Second Circuit have rationally concluded that the instructions did not permit conviction if the jury found the enterprise motivation to be “incidental or insubstantial” where the district court

instructed the jury to acquit only if it found petitioner “was not motivated at all” by his gang membership; (b) Could the instructional error be harmless beyond a reasonable doubt where there was substantial evidence from the government’s linchpin witness as well as from Petitioner himself supporting the conclusion that Petitioner had no gang-related motive for the killing; and (c) Did the Second Circuit fulfill its obligation to this Court by declaring that any instructional error was harmless absent any explanation of that conclusion.

II. Substantial evidence at trial supported the conclusion that Petitioner had no loyalty at all to the enterprise named in the indictment – the “5-9 Brims” – and that if he had loyalty to a gang it was to “Breadgang” – a “party” and “scamming” gang which Petitioner’s brother Melly had founded. Although Breadgang had many members from the Marlboro housing projects in Brooklyn, New York, who were also members of the 5-9 Brims, Breadgang had other members who were affiliated with another gang, including gangs that were rivals of the 5-9 Brims.

Concerned that the jury might find that Petitioner’s loyalty was to Breadgang and not to the 5-9 Brims – and therefore find that Petitioner was motivated in part to kill Sean Peart as a result of his Breadgang – and not his 5-9 Brim – affiliation, the government concocted a never-before-used nickname for Breadgang – the “5-9 Brims of Marlboro” – in order to create in the jurors’ minds an association between the 5-9 Brims and Breadgang. It implemented this strategy by using the term “5-9

Brims of Marlboro” extensively, as a stand-in for “Breadgang,” when it questioned its two cooperating witnesses about Breadgang.

During summation, defense counsel argued to the jury – with related PowerPoint slides – that the made-up name “5-9 Brims of Marlboro” was a “sneaky” effort by the government to “train” the jury to associate the Breadgang with the 5-9 Brims. The trial court sustained the government’s objection to this argument, ruling that defense counsel is not permitted to “impugn the integrity of the government” (1921); (Pet. App. 82a), and forcing a lengthy delay in the defense summation while defense counsel purged his argument and slides of any criticism of the government.

The question presented is: Was the trial court’s order contrary to this Court’s jurisprudence by establishing two sets of rules: one that permits sharp government criticism of defense counsel, and another that shields the government from similar, justified scrutiny.

PARTIES TO THE PROCEEDING

Petitioner Marvin Pippins was the appellant below. Respondent United States of America was the appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marvin Pippins respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and sentence.

OPINIONS AND ORDERS BELOW

The court of appeals' summary order affirming Petitioner's conviction and sentence (Pet. App. 1a-13a) does not have an official citation but is reported at 2026 WL 277682 (2d Cir. Feb. 3, 2026). The court of appeals' order denying Petitioner's petition for rehearing en banc (Pet. App. 14a) is unpublished. The district court's decision denying Petitioner's motion for a new trial may be found at 733 F. Supp. 3d 136 (E.D.N.Y. 2024) (Pet. App. 15a-60a).

JURISDICTION

The court of appeals issued its opinion and entered judgment on February 3, 2026, and denied rehearing en banc on March 11, 2026, (Pet. App. 1a-14a). On June 4, 2026, Justice Sotomayor extended the time to file a petition for a writ of certiorari to July 9, 2026. *See* 28 U.S.C. § 2101(c). This petition is timely filed on July 9, 2026. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. 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 U.S. 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.

STATEMENT OF THE CASE

A. Legal Background

Petitioner was charged with several others in Indictment 1:19-cr-378 (E.D.N.Y.) (PKC) for crimes related largely to the murder of Sean Peart. The top count charged Petitioner with Murder in Aid of Racketeering in violation of 18 U.S.C. § 1959(a)(1). All his codefendants pleaded guilty, and he proceeded to trial. Following a jury verdict convicting him of all counts, Petitioner was sentenced, on January 14, 2024, principally to a mandatory term of life imprisonment (Pet. App. 61a).

Petitioner appealed his conviction and sentence to the Second Circuit Court of Appeals, which issued a summary order of affirmance on February 3, 2026. Thereafter, on March 11, 2026, the Second Circuit denied Petitioner's Petition for Rehearing En Banc.

B. Factual and Procedural Background

The trial centered on the charges relating to the murder of Sean Peart, a member of the Real Ryte gang. Petitioner testified and admitted that he killed Peart, saying he did so to avenge the murder of his twin brother Melly and also because he believed that if he didn't kill him, Peart and his fellow gang members would eventually kill Petitioner. Here we summarize the facts in the light most favorable to the government and discuss in greater detail the facts specifically relevant to each of the two grounds for certiorari in their corresponding points below.

Viewed in the light most favorable to the government, the 5-9 Brims – which was the “enterprise” named in the Indictment – is a set of the national Bloods gang involved in various crimes, including drug dealing, fraud, and violence. Petitioner and his twin brother Melly were 5-9 Brim members and also were members of the Breadgang, which Melly founded. Melly was murdered October 14, 2015, because one or more members of the Real Ryte gang – which also had been affiliated with the 5-9 Brims – believed that Melly had aligned himself with the rival “Folk Nation” gang.

After his brother's murder, Petitioner embarked on a focused effort to determine who killed his brother and came to believe the responsible party was Real Ryte member Sean Peart. Acting alone, Petitioner killed Peart on December 19, 2015, as Peart sat in a car across from 1625 Dean Street, where Petitioner had spent the night with his cousin and others. The defense, in opening statement, acknowledged that Petitioner killed Peart, but maintained he did so purely for personal – rather than enterprise-related – reasons, a position Petitioner would later repeat in his testimony.

The government's case was introduced largely through the testimony of two cooperating witnesses, Marcus Laborde and Khalif Watson, as well as the introduction of various social media posts by 5-9 Brim members and others. Also introduced were the lyrics of several songs Petitioner wrote in the aftermath of Melly and Peart's murder. Although Marcus Laborde, the government's main witness, testified on direct examination that Petitioner was a member of the 5-9 Brims, a gang whose credo Laborde testified was "you kill my dog I kill your cat" or "murder for murder," Laborde acknowledged on cross-examination that Petitioner in fact was not at all loyal to the 5-9 Brims, but rather was loyal to his friend "Sherrod," who at that point was not a 5-9 Brim.

Additionally, there was evidence that Petitioner associated himself far more with the gang his brother Melly founded – Breadgang – than with the 5-9 Brims. Concerned that the jury might find that Petitioner was motivated to kill Peart in part by his association with Breadgang and not the 5-9 Brims (the enterprise named in the Indictment), the government, throughout its examination of its two cooperating witnesses used the made-up nickname "5-9 Brims of Marlboro" as a substitute for "Breadgang," in order to create in the jurors' minds an association between Breadgang and the 5-9 Brims.

The defense case consisted of Petitioner's testimony and that of Ed McCarthy, who was member of a "Fresh Air Fund" family with which Petitioner spent many summers and with whose family he continued to maintain a close friendship (Ed McCarthy: 1725-1747); *see also* Doc. 581-1, Petitioner's Sent. Memo Exhibit A, at 7-

12 (sentencing letters submitted by McCarthy family).³ Petitioner explained in detail his relationship with his brother Melly, his obsession with avenging Melly's murder, and his singularly personal decision to kill Peart.

As noted in the Questions Presented, above, and in the Reasons for Granting the Petition, below, the defense requested a "theory of defense" instruction, that the jury was required to find that Petitioner's association with the 5-9 Brims was a "substantial motivating factor" for his killing of Sean Peart. The district court declined to give the instruction and instead told the jury it should acquit Petitioner if it found he "was not motivated at all by the desire to gain entrance to, or maintain or increase his position in, the enterprise, but was motivated only by other factors."

Additionally, the court interrupted defense counsel's summation to require him to purge his summation and his slide deck of any criticism of the government, after counsel argued that the government had used the made-up term "5-9 Brims from Marlboro" in a "sneaky" attempt to "train" the jurors to associate Breadgang with the 5-9 Brims. The court explained, "I'm not allowing you to make that argument to impugn or attack the government." (Tr. 1921); (Pet. App. 82a).

³ Unless otherwise noted, citations to "Doc." are to the docket of the district court proceedings.

REASONS FOR GRANTING THE WRIT

- I. (a) The Second Circuit erroneously and irrationally ruled that the district court's jury instruction to acquit only if Petitioner "was not motivated at all" by an enterprise-related, would not have wrongly permitted conviction if the jury believed Petitioner's enterprise-related motive was *de minimis*; (b) The district court's instructional error could not have been harmless beyond a reasonable doubt where there was substantial evidence that Petitioner had no gang-related motive for the killing, and where the trial judge admitted that if she gave an instruction consistent with the law the jury might acquit; and (c) the Second Circuit, by citing no support for its harmless error finding, failed in its obligation to provide this Court a record sufficient to permit meaningful review.

Because the 5-9 Brims was the enterprise named in the indictment, the government was obliged to prove that Petitioner killed Sean Peart to maintain or increase his position in the 5-9 Brims. Petitioner testified that his decision to kill Peart was entirely personal and unrelated to any association he had with the 5-9 Brims, and he argued both at trial and on appeal that there was no evidence supporting the contrary conclusion. But assuming *arguendo* there was such evidence, there undeniably was, at the least, substantial evidence to the contrary.

In particular, principal government cooperator Marcus Laborde, who had been the 5-9 Brims "godfather," testified that Petitioner had no loyalty at all to the 5-9 Brims (Tr. 734). He followed none of 5-9 Brims' rules, didn't take orders from the leadership, didn't attend meetings, didn't "kick up" to the leadership, and didn't contribute money to incarcerated members (651-53). Further, there was no evidence Petitioner told anyone in the gang that he intended to kill Peart before he did so, and he sought no advantage within the gang for having done so. Further, when Petitioner – a rapper – wrote and rapped about the killing he did so in purely personal terms,

never suggesting he was motivated to do so by his association with the 5-9 Brims. When asked about conversations with Petitioner about the murder, both cooperating witnesses recounted that Petitioner was emotional and cited the death of his brother as his reason for killing Peart. (Tr. 521, Laborde: Petitioner “had an emotional breakdown and he was saying things like miss my brother, he had to go, I had to do it.”); (Tr. 1005, Watson: Petitioner said, “They took my baby boy” – *i.e.*, Melly – adding, while making a gun gesture, “I did boy dirty for that, I did boy dirty for that.”)

Given this evidence, Petitioner asked the court to instruct the jury that the government was required to prove that Petitioner’s gang-related motivation to kill Peart was “substantial,” or one “integral” to Petitioner’s association with the 5-9 Brims. Otherwise, he said, the jury could find the motive element satisfied even if his enterprise-related motive was *de minimis*, even vanishingly small. This request, said counsel, was supported by both the legislative history of section 1959 and by abundant case law within and without the Second Circuit. (Pet. App. 74a-76a).

The district court, acknowledging that the language quoted above had been used in the case law, opined that the proper instruction was nonetheless subject to “reasonable debate” (1826); (Pet. App. 78a), and refused to give the requested instruction, fearful that it might result in acquittal. Specifically, the court said,

I think there's a possibility that a jury might find that it [*i.e.*, the 5-9 Brims] was a motive but maybe not the substantial motivating factor; and if the law allows the government to win its case that way [*i.e.*, by refusing to give the requested instruction], I think that that's how I should instruct them, so as not to essentially put my finger on the scale in terms of the jury's verdict.

(1821); (Pet. App. 73a). The district court instructed the jury consistent with its draft instructions (2125-26), telling the jury Petitioner could avoid conviction if he “was not motivated at all,” by his association with the 5-9 Brims:

If, however, you find that the defendant was not motivated at all by the desire to gain entrance to, or maintain or increase his position in, the enterprise, but was motivated only by other factors, then you cannot find him the [sic] guilty of this count.

Tr. 2126.

The Second Circuit Panel’s Summary Order does not decide whether the district court’s jury instruction on motive was deficient for not including the “substantial” and/or “integral” language requested by defense counsel, but rather concludes, in conclusory form and in the alternative, that “We doubt the instructions, when taken as a whole, allow the jury to convict Pippins on this count even if his enterprise motivation was incidental or insubstantial. But we conclude based on the trial record that any error arising from the statement that he must be acquitted if he was ‘not motivated at all’ by an enterprise purpose was harmless.” *United States v. Pippins*, No. 25-154, 2026 WL 277682, at *3 (2d Cir. Feb. 3, 2026); (Pet. App. 8a).

Discussion

The Second Circuit’s decision did not disavow its case law holding that the enterprise-related motive must be “substantial” or “integral” but rather concluded that the instruction, as given, could not have been interpreted to permit conviction upon the jury’s finding of a de minimis enterprise-related motive. It further held that, in any event, any error was harmless. We respectfully ask this Court to not let stand

a murder conviction that resulted from unquestionably prejudicial instructional error, which the Second Circuit has papered over with an unpublished opinion that bears no resemblance to the actual facts of the case and which finds harmless error with no analysis at all, and contrary to the district court's stated concern that the requested instruction might result in acquittal.

A. Petitioner was entitled to an instruction incorporating the “substantial motivating factor” or “integral aspect of membership” language.

As early as 1992, in *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), the Second Circuit endorsed the “integral aspect of membership” language. Commenting on the meaning of § 1959's element requiring that the defendant act for the purpose of “maintaining or increasing position in” the enterprise, it explained that the legislative history contains no indication that Congress meant to require proof that self-promotion within the enterprise was the defendant's only or primary concern. However, said the court, the defendant must be shown to have committed the charged conduct “as an integral aspect” of his association in the enterprise:

the history states that this phrase was included as a means of proscribing murder and other violent crimes committed “as an integral aspect of membership” in such enterprises. S. Rep. No. 225, at 304, *reprinted in* 1984 USCCAN at 3483.

United States v. Concepcion, 983 F.2d at 381 (emphasis added). Applying *Concepcion* and other cases, the Second Circuit in *United States v. White*, 7 F.4th 90 (2d Cir. 2021) explained the same instruction proposed by Petitioner was “consistent with this principle.” *White*, 7 F.4th at 102. In the next sentence, the Second Circuit excerpted the instruction approved in *White*:

The government does not need to prove that maintaining or increasing his position in the enterprise was the defendant's sole or principal motive, so long as it was **a substantial motivating factor** in the defendant's decision to participate in the attempted murder and/or the assault with a deadly weapon.

Id. at 97 (emphasis added). The Second Circuit then said, “[Defendant] does not claim here that it erred in doing so.” *Id.* Petitioner requested the district court deliver the same instruction given in *White*. (Pet. App. 67a).

Other circuit courts have held similarly. For example, in *United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008), the Ninth Circuit rejected a rule that would find sufficient an enterprise-related motive “no matter how incidental...” *See also United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (rejecting presumption that gang members are always motivated to some extent by gang status, because “[o]therwise, in gang cases, the purpose element would be merely a tautology” and finding, consistent with *Banks*, that “VICAR's ‘purpose’ element is met if the jury could find that an ‘animating purpose’ of the defendant's action was to maintain or increase his position in the racketeering enterprise.”); *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir.1994) (relying on § 1959 legislative history and *United States v. Concepcion*, *supra*, court explains “violent crimes committed as an integral aspect of membership in such enterprises”); *United States v. McClaren*, 13 F.4th 386, 406 (5th Cir. 2021) (“the statute does criminalize violent acts committed as an integral aspect of membership in a racketeering enterprise.”); *United States v. Kamahale*, 748 F.3d 984, 1008 (10th Cir. 2014) (approving “integral aspect” language, citing *United*

States v. Concepcion, supra); *United States v. Heilman*, 377 F. App'x 157, 207 (3d Cir. 2010) (adopting “integral aspect” formulation).

Congress’s intention to require that the defendant’s enterprise-related motive be “substantial” or an “integral aspect of” the defendant’s association to the named enterprise, as reflected in the above-cited legislative history and case law, likely reflects, at least in part, a concern to not further dilute the jurisdictionally-focused interstate nexus requirement established by the definition of “enterprise,”⁴ which generally is satisfied by proof establishing even a de minimis effect on interstate commerce. *United States v. Riddle*, 249 F.3d 529 (6th Cir. 2001); *United States v. Garcia*, 74 F.4th 1073 (10th Cir. 2023). Authorizing conviction, as did the trial court, upon a finding that the defendant’s enterprise-related motivation was de minimis exponentially reduces the requirement that the defendant’s activities affect interstate commerce.⁵ At some point the required effect on interstate commerce becomes virtually non-existent.

⁴ 18 U.S.C. § 1959(b)(2) provides:

“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.

⁵ This is so in the sense that, say, a 10% likelihood of an event is reduced to a 1% likelihood if the event’s occurrence is also dependent on a second variable which itself has a 10% likelihood of occurring.

B. The panel’s doubt that the instructions “when taken as a whole, allowed the jury to convict Petitioner ... even if his enterprise motivation was ‘incidental or insubstantial’ enjoys no support in the record.

The panel’s Summary Order briefly summarizes the district court’s motivation instruction but does not acknowledge that it was error for failing to incorporate the “substantial motivating factor” or “integral aspect of membership” language. Rather, the panel concludes, “We doubt the instructions, when taken as a whole, allow the jury to convict Pippins on this count even if his enterprise motivation was incidental or insubstantial.” (Pet. App. 8a).

The Second Circuit finding that the trial court’s motivation instruction would not have allowed the jury to convict Petitioner based on a finding that his enterprise-related motivation was “incidental or insubstantial” enjoys no support in the record, and the panel cites none. On the contrary, how else could the jury have interpreted the instruction that it must acquit if it found Petitioner “was not motivated at all” by an enterprise-related purpose. Indeed, the district judge acknowledged she was omitting the “substantial” and “integral” language – even though accurate – precisely so the jury could convict should it find that Petitioner’s gang motivation was de minimis. (Tr. 1821) (Pet. App. 73a). Given the court’s failure to require that Petitioner’s motivation be a “substantial motivating factor” or “integral,” and its instruction to acquit if Petitioner “was not motivated at all” by an enterprise-related purpose, the instructional error is incontrovertible and the Second Circuit’s finding that the jury would not have read the instruction to permit conviction upon evidence of a de minimis enterprise motivation is irrational.

C. The Second Circuit's conclusion that any error was "harmless" is equally unsustainable.

Also unsustainable is the Second Circuit panel's unadorned conclusion that "any error arising from the statement that he must be acquitted if he was 'not motivated at all' by an enterprise purpose was harmless." This finding not only enjoys no support in the record but also is directly contrary to the district judge's candid acknowledgement that she was omitting the "substantial" and "integral" language precisely so the jury could convict should it find that Petitioner's gang motivation was de minimis. Tr. 1821 (Pet. App. 73a) ("I think there's a possibility that a jury might find that it was a motive but maybe not the substantial motivating factor; and if the law allows the government to win its case that way, I think that that's how I should instruct them....").

The district judge, who of course sat through the testimony and was in a far better position than the appellate panel to assess the weight of the evidence, understood that substantial evidence supported the conclusion that Petitioner had no enterprise-related motivation to kill Sean Peart. In addition to his own testimony that his motivation was personal, the record — including the testimony of government cooperating witness Marcus Laborde — is replete with evidence that Petitioner had no loyalty at all to the 5-9 Brims; Laborde, the 5-9 Brims' "godfather," testified Petitioner had no loyalty at all to the 5-9 Brims (Tr. 734). He followed none of 5-9 Brims' rules, didn't take orders from the leadership, didn't attend meetings, didn't "kick up" o the leadership, and didn't contribute money to incarcerated

members (651-53). Laborde likewise testified that Petitioner's related to him that his motive to kill Peart was personal:

Q When you got out of jail after S. Dot [*i.e.*, Peart] was murdered, did you have any conversations with Mukk [*i.e.*, Petitioner]?

A Yes.

Q What did you guys discuss in those conversations?

A It was just regular talking, we was in our car and smoking and he just had an emotional breakdown and he was saying things like miss my brother, he had to go, I had to do it.

(521).

D. The Second Circuit's harmless error analysis was insufficient to permit meaningful review by this Court.

This case rose and fell on whether Petitioner's motive — his intent — was to gain or increase his position within the named enterprise, the 5-9 Brims. Nothing else was at issue because Petitioner admitted to the murder. But, as explained above, there was abundant evidence — which even the district court acknowledged — that Petitioner's enterprise-motive was not a substantial motivating factor. The Second Circuit's barebones and cryptic harmless error analysis was insufficient under this Court's precedent to permit meaningful review by this Court.

In 1985, this Court explained, "The primary task of this Court upon review of a harmless-error determination by the court of appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis v. Franklin*, 471 U.S. 307, 326, n. 10 (1985). Likewise, in *Neder v. United States*, 527 U.S. 1 (1999), where the Court held that instructional error omitting an element of an offense might be harmless, it warned that "safeguarding the jury guarantee will

often require that a reviewing court conduct a thorough examination of the record.” *Id.* at 19. Consistently, where this Court could not decipher the lower court’s reasoning for its finding of harmless error, or its finding was contradicted by the emphasis placed on the contested issue in the lower court proceedings, remand is necessary for a more searching inquiry. *See Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O’Connor, J., concurring) (“An appellate court’s bald assertion that an error of constitutional dimensions was ‘harmless’ cannot substitute for a principled explanation of how the court reached that conclusion.”), citing *Clemons v. Mississippi*, 494 U.S. 738 (1990) (where, explained Justice O’Connor in *Sochor*, this Court “did not hesitate to remand ... for ‘a detailed explanation based on the record’” because “the lower court failed to undertake an explicit analysis supporting its ‘cryptic,’ one-sentence conclusion of harmless error.”).

Here, the Second Circuit has provided this Court no means to review the propriety of its harmless error determination, which apparently rejected the district court’s finding that giving the requested instruction would create “a possibility that a jury might find that it was a motive but maybe not the substantial motivating factor.” This is precisely the type of “cryptic” decision that required remand in *Clemons*.

Thus, there can be no doubt that the trial court erred in not giving the requested instruction and in giving a contrary one, and that the error was not harmless. This Court should grant certiorari not only because Petitioner was denied

a fair trial for which he is wrongly serving a sentence of life imprisonment but also to confirm that when an appellate court concludes that any error is harmless it at least provide some analysis sufficient to permit meaningful review by this Court. This is particularly so where, as here, the district court candidly acknowledged its concern that Petitioner might be acquitted were the requested instruction to be given.⁶

II. Was the trial court's order contrary to this Court's jurisprudence by establishing two sets of rules: one that permits sharp government criticism of defense counsel, and another that shields the government from similar, justified scrutiny.

As this Court stated in 1975, "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial." *Herring v. New York*, 422 U.S. 853, 858 (1975). This Court was not breaking new ground in announcing this rule:

The widespread recognition of the right of the defense to make a closing summary of the evidence to the trier of the facts, whether judge or jury, finds solid support in history. In the 16th and 17th centuries, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the Crown.

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It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier

⁶ The Bureau of Justice Statistics reports 2,453 § 1959 prosecutions between 2013 and 2023.

of fact that there may be reasonable doubt of the defendant's guilt. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

Id. at 860–62.

To convict Petitioner of murder in aid of racketeering, the government was required to prove that he killed Sean Peart at least in part to maintain or increase his position in the 5-9 Brims, the enterprise identified in the indictment. Substantial evidence, however, supported the conclusion that, if Petitioner was loyal to any gang, it was not the 5-9 Brims but rather the Breadgang — a partying and scamming gang founded by his murdered twin brother Melly. Although many of the Breadgang members were also members of the 5-9 Brims and lived in Brooklyn's Marlboro housing complex, the Breadgang had many members who were not 5-9 Brims and who, rather, were members of rival gangs. In fact, the government's own cooperating witness, Marcus Laborde, testified that the Breadgang was not part of the 5-9 Brims but rather was associated with the rival Folk Nation (Tr. 667-69). And the evidence further supported the conclusion that Petitioner's murdered brother Melly had been more associated with the Breadgang – which he founded – than with the 5-9 Brims.

In short, there was a powerful argument that the government had identified the wrong gang as the one to which Petitioner was loyal, and which may, in part, have provided him a motive to kill Sean Peart. The government therefore needed to find a way to “train” the jury to associate the Breadgang with the 5-9 Brims, so if the jury determined that Petitioner was motivated to kill Sean Peart by his — Petitioner's

— association with the Breadgang, it could nonetheless convict him on the theory that Breadgang was a “set” of the 5-9 Brims.

As part of its effort to “train” the jury to associate Breadgang with the 5-9 Brims, the government concocted the phrase “5-9 Brims from Marlboro” as a synonym for “Breadgang,” thereby creating a semantical association between the two gangs. Thus, when it questioned its cooperators, Marcus Laborde and Khalif Watson, about the Breadgang, it did not use that gang’s actual name but rather referred to the Breadgang as the “5-9 Brims from Marlboro,” asking the witnesses questions such as:

- Q How is committing acts of violence like the shootings you just described looked at by the 5-9 Brims from Marlboro (349).
- Q Did people within the 5-9 Brims from Marlboro talk about crimes that other members of the gang committed? (350).
- Q Did people within the 5-9 Brims from Marlboro talk about crimes that other members of the gang committed? (350).
- Q I want to talk now about some of the other members of the 5-9 Brims from Marlboro. (392).
- Q Was he part of your group of 5-9 Brims from Marlboro? (411).
- Q Other members of 5-9 Brims from Marlboro? (424).
- Q Did she ever hang with members of 5-9 Brims from Marlboro? (450).
- Q Did other members of the 5-9 Brims from Marlboro go to her baby shower? (451).
- Q Did Melly's death have an impact on the 5-9 Brims from Marlboro? (513).
- Q Aside from Sdot and Melly’s murder, do you know of any other shootings between the 5-9 Brims from Marlboro and Real RYTE? (537).

As cooperator Laborde testified, however, he had never heard Breadgang referred to as the “5-9 Brims from Marlboro” until the government used that term. (Tr. 643: “Q. So, as a matter of fact, prior to this case, had you ever used [the] term 5-9 Brims of Marlboro to refer to Bread Gang? A. No. Q. That’s not your term; right? A. No. Q. That’s Government’s term? A. Correct.”)

Counsel asked the trial court to give a theory-of-defense instruction stating, in sum and substance, that the 5-9 Brims was the enterprise named in the indictment and if the jury found that Petitioner was motivated to kill Sean Peart by his allegiance to the Breadgang, it must acquit unless it found Breadgang was part of the 5-9 Brims. *See* Doc. 473 (proposed instruction). The trial court refused to give this instruction, stating the parties could argue in summation whether Breadgang was part of the 5-9 Brims (1410, 1412).

Given what defense counsel considered the government’s devious use of the made-up moniker “5-9 Brims from Marlboro” counsel criticized its use during summation as a “sneaky” effort to “train” the jury to associate the Breadgang with the 5-9 Brims. The government objected to counsel’s argument and related slides. The court agreed, criticizing defense counsel in the jury’s presence, saying, “the titling of this is inappropriate. I’m telling the jury that. I reject your notion that you are going to argue in any way that the government is ‘training the jury.’ That’s not an appropriate argument.” (Tr. 1919-20); (Pet. App. 80a-81a). Outside the presence of the jury, the court continued, “Do not impugn the integrity of the government as if they’re trying to pull a fast one. ... I’m not allowing you to make that argument to

impugn or attack the government.” (Tr. 1921) (Pet. App. 82a); *id.* at 1922, (Pet. App. 83a) (“Talk about the evidence but do not impugn the motive of the government.”); *id.* at 1924 (Pet. App. 85a) (“I understand but I don’t want you to make that point, to attack the government as if they’re trying to fool the jury or manipulate them or somehow sending them into a trance of some kind that they just accept this characterization. Argue the evidence but do not impugn the government based on how they phrased a simple preposition.”) The court then required counsel to take a 20-minute break to purge his argument and slides of any criticism of the government. (1925-26); (Pet. App. 86a-87a). Counsel did as he was ordered.

On appeal, defense counsel argued the district court committed reversible error when it interrupted defendant’s closing argument and required him to delete all his PowerPoint slides that argued the government invented the phrase “5-9 brims of Marlboro” in a “sneaky” effort to “train” the jury to make an unsupportable association between the charged enterprise – the “5-9 brims” – and the Breadgang, which was not named in the indictment. The panel rejected this argument, stating simply:

Though lawyers are sometimes given leeway, erroneously or not, to make somewhat inflammatory comments about opposing counsel, the Supreme Court has instructed district courts not to allow such mudslinging. *United States v. Young*, 470 U.S. 1, 9 (1985) (“Defense counsel, like [the government], must not be permitted to make unfounded and inflammatory attacks on the opposing advocate.”). The court acted within its discretion in prohibiting Pippins from accusing the government of “training” the jury.

United States v. Pippins, 2026 WL 277682, at *3 (2d Cir. Feb. 3, 2026); (Pet. App. 10a-11a).

Discussion

The panel's decision was erroneous. The Second Circuit and numerous other courts routinely affirm the government's strident attacks on defense counsel during summation, often made during rebuttal summation when defense counsel can't respond. The case law permits the government to argue in summation that defense counsel's summation arguments were "smoke and mirrors" (*Rodriguez v. Morris*, No. CV-19-04957-PHX-GMS, at *17-18 (D. Ariz. May 17, 2021)); or that defense counsel was lacking "common decency" and "'made up' testimony" (*United States v. Salameh*, 152 F.3d 88, 138 (2d Cir. 1998)); or that "the defense is attempting to trick the jury" (*United States v. August*, 984 F.2d 705, 715 (6th Cir. 1992)); or that "the defense lawyer pulled out 'these inconsistencies like a magician pulls rabbits out of his hats,' such that he was trying to 'trick' the jury by presenting 'illusions.'" (*Lindgren v. Lane*, 925 F.2d 198, 204 (7th Cir. 1991)); or that the defense theories were "nonsense" and that the defense's opening statement "attempt[ed] to manipulate you, to play on our emotions, and to distract you from what this case is actually about" (*United States v. Fox*, 761 F. App'x 765, 768 (9th Cir. 2019) ("Criticism of defense theories and tactics is a proper subject of closing argument.") (citations omitted)); or that the defense case "was a total sideshow." *United States v. Rainford*, 110 F.4th 455, 474 (2d Cir. 2024).

"[S]uch comments are usually not improper because the prosecution 'necessarily has wide latitude during closing argument to respond to the defense's strategies, evidence and arguments.'" *Davis v. Napel*, No. 2:14-cv-10019, at *22-23 (E.D. Mich. Feb. 29, 2016), quoting *Bedford v. Collins*, 567 F.3d 225, 233 (6th Cir.

2009); *see also Salameh*, 152 F.3d at 139, *supra* (“Attorney Campriello also remarked that the weakness of the government’s evidence required the prosecutors to ‘do a little slipping and sliding, a little bobbing, weaving, a little zigging and zaggin[g] as the case developed.’ In light of Attorney Campriello’s criticisms, the government was entitled to respond with similar language in rebuttal.”). And therefore, the prosecution is “permitted to comment on the defense’s trial strategy” during closing. *Slagle v. Bagley*, 457 F.3d 501, 522 (6th Cir. 2006). “Moreover, a prosecutor is not required to use the most benign terminology or avoid reasonable descriptions of the events in question. One of the purposes of the closing argument is to persuade the jury not to buy into the opposing party’s theory of his case.” *Robertson v. Simpson*, No. 5:05CV-239-R, 2011 WL 3880940, at *14 (W.D. Ky. Sept. 2, 2011) (cleaned up, emphasis added).

The Second Circuit in particular has countenanced a broad range of hard-hitting rhetorical flourishes, even during the government’s rebuttal summation. *See e.g., United States v. Caputo*, 808 F.2d 963, 968 (2d Cir. 1987) (government’s reference to the “misrepresentations and sheer inventions” of defense counsel was appropriate response since defense counsel made several statements during summation which led the judge to reprimand him for statements which compared the government’s investigatory tactics to “Hitler’s Germany”); *United States v. Praetorius*, 622 F.2d 1054, 1060-61 (2d Cir. 1979) (holding that defense counsel’s accusations of a “frame up” or attempt to “dupe” the jury, “rendered quite proper the relatively mild response of the Assistant United States Attorney” in criticizing the

defense counsel's attacks on the integrity of the government's case and the good faith of the government's agents, witnesses, and prosecutorial staff). In *United States v. Marrale*, 695 F.2d 658, 667 (2d Cir. 1982), the Second Circuit stated that the prosecution's comments in direct response to defense counsel's arguments were provoked by a "permissible desire to dispute defense histrionics."

United States v. Young, 470 U.S. 1 (1985), cited by the Second Circuit panel, does not support the panel's holding. There, defense counsel intimated that the prosecution deliberately withheld exculpatory evidence, and pointed directly at the prosecutor's table stating, "I submit to you that there's not a person in this courtroom including those sitting at this table who think that Billy Young intended to defraud" the alleged victim. Counsel also argued that defendant had been "the only one in this whole affair that has acted with honor and with integrity" and told the jury "[t]hese complex [Department of Energy] regulations should not have any place in an effort to put someone away."

Thus, counsel in *Young* alleged government wrongdoing with no evidentiary support; claimed – irrelevantly and wrongly – that the prosecutors did not personally believe the defendant was guilty and purported to instruct the jury that certain Department of Energy regulations should be disregarded.

In the instant case, defense counsel did nothing analogous, but instead rightly criticized the government for its substitution of a totally fabricated nickname for Breadgang as a sneaky effort to train the jury to associate the Breadgang with the 5-9 Brims.

The trial court's wrongful conduct was not harmless. Courts permit such focused argument because "One of the purposes of the closing argument is to persuade the jury not to buy into the opposing party's theory of his case." *Robertson v. Simpson*, No. 5:05CV-239-R, 2011 WL 3880940, at *14 (W.D. Ky. Sept. 2, 2011) (cleaned up). That is precisely what Petitioner's counsel was endeavoring to do: persuade the jury to reject the government's arguments that Petitioner was a loyal member of the 5-9 Brims who acted in concert with that enterprise to commit the charged enterprise-related offenses. If the jury agreed the government was using sneaky tactics to train the jurors by using the term "5-9 Brims of Marlboro," counsel hoped the jury would question other of its arguments as well. The court's order foreclosed such argument by counsel, relegating him to arguments that merely pointed out the government's use of that phrase without the power of argument that the government was being sneaky and couldn't be trusted.

Additionally, the district court's actions interrupted counsel during a critical part of his argument, causing a lengthy hiatus while counsel obeyed the court's order to sanitize his slides and argument. The court also disparaged counsel in front of the jury, telling the jurors that counsel's slide using the term "sneaky" was "inappropriate" and instructing the jury to "disregard this slide title and any suggestion somehow that the Government has done anything improper or is any way trying to train you." (Tr. 1919). What began, therefore, as proper criticism of the government, ended with unfair criticism of defense counsel.

The district court's rulings worked an obvious unfairness on Petitioner. It also provides good cause for this Court to clarify whether there are two sets of rules at play during summation — one for the government, where anything goes, and the other for the defense, which may not so much as criticize the government.

CONCLUSION

Marvin Pippins admitted he killed Sean Peart because he believed Peart was responsible for his twin brother Melly's murder and because he believed Peart or his associates would eventually target him as well. But his conduct was a federal crime only if his enterprise-related motive was a "substantial" one or one "integral" to his position in the enterprise, *i.e.*, the 5-9 Brims.

The trial judge, however, refused to instruct the jury to include the "substantial" and/or "integral" requirement, for no other reason than that doing so might catalyze acquittal. The judge thereafter disrupted defense counsel's summation and criticized him in the jury's presence, ordering him not to impugn the prosecutors' integrity by making an entirely proper argument regarding the government's use of a concocted nickname for the Breadgang to train the jury to associate Breadgang with the 5-9 Brims.

Thereafter, on appeal, the Second Circuit panel, in its Summary Order, affirmed Petitioner's conviction, ruling with no record support that the trial court's erroneous motive instruction could not have been interpreted by the jury to mean precisely what it said — and was intended to say — and that any error was harmless, when the erroneous instruction was given explicitly to avoid the possibility of

acquittal, which the trial court recognized would have been a distinct possibility for a properly instructed jury.

In short, the trial was rigged against Petitioner. He had no chance.

We respectfully ask the Court to grant certiorari to right the blatant wrong that was done in this case and to (1) clarify the proper motive instruction that should be given in a § 1959 case, and (2) instruct the lower courts that we don't play by two sets of rules on summation, one for the government and the other for the defense. In the alternative we ask the Court to remand to the Second Circuit for further consideration of its harmless error analysis.

Dated: July 9, 2026

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard Levitt', written over the typed name.

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