No.

IN THE
SUPREME COURT OF THE UNITED STATES

PEDRO VIGIO-APONTE,

PETITIONER

v.

UNITED STATES,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
First Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

In a RICO-conspiracy case, must the government present proof of, *inter alia*, an existing enterprise, which is engaged in activities that actually affect interstate or foreign commerce?

Parties to the Proceedings

1. Petitioner Pedro Vigio-Aponte, was the defendant in the district court and the appellant in the First Circuit.

2. Victor M. Rodríguez-Torres, Tarsis Guillermo Sánchez-Mora, Reinaldo Rodríguez-Martinez, and Carlos M. Guerrero-Castro were co-defendants in the district court and their appeals were joined with Vigio-Aponte's in the First Circuit.

3. The Respondent is the United States of America, which prosecuted the case in the district court and was the appellee in the First Circuit.

List of Related Proceedings

Vigio-Aponte and his co-defendants were convicted in the United States District Court for the District of Puerto Rico, the Hon. Jose Antonio Fuste presiding. The district court docket number is 3:15-cr-00462-FAB-2.

Vigio-Aponte appealed his conviction and sentence to the First Circuit Court of Appeals. The docket number for the appeal is 16-1984.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

Pedro Vigio-Aponte petitions this Court for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the First Circuit affirming his convictions and sentence.

Opinion Below

The decision of the Court of Appeals for the First Circuit, *United States v. Rodríguez-Torres*, 939 F.3d 16 (1st Cir. 2019), is Appendix A to this petition.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

Statutory Provisions Involved

There are two provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") statute, 18 U.S.C. § 1962, that are relevant to this case.

Subsection (c) provides:

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

Subsection (d) provides:

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

Defendant was charged with conspiring to violate Subsection (c) of the RICO statute. This is sometimes referred to as a violation of § 1962(d) based on § 1962(c). Throughout, defendant refers to this as "RICO conspiracy."

Statement of the Case

During the timeframe relevant to this case, most street-level drug sales in the San Juan, Puerto Rico area were controlled by gangs operating out of public housing projects. These gangs expressed loyalty to an umbrella organization that called itself, La ONU. (12.7.15 Tr. 62). Eventually, some members became disenchanted with La ONU and the organization split apart. *Id.* at 62-63. Out of this division, the government contends, the organization "La Rompe ONU" was born. *Id.* at 63. Thereafter, La ONU and La Rompe ONU were bitter rivals. *Id.*

According to the government, as part of its turf war with La ONU, and to further its members' interests of becoming "filthy rich" from narcotics trafficking, members of La Rompe ONU robbed innocent people, stole cars, and killed perceived enemies. *United States v. Rodríguez-Torres*, 939 F.3d 16, 25-26 (2019). In time, La Rompe ONU acquired "drug points" at public housing projects, from which they peddled illegal drugs. *Id.* at 25. These drug points were run in a business-like, hierarchical manner: each La Rompe ONU member had a designated task and established line of authority. *Id.* La Rompe ONU members trained new members, disciplined wayward members, and

strategically planned ways to ensure that each "drug point" remained profitable. *Id.* at 25-26.

In 2012, the government began to prosecute members of La ONU. *See e.g. United States v. Ramírez-Rivera*, 800 F.3d 1 (1st Cir. 2015). Then, in 2015, the government turned its sights on La Rompe ONU, and obtained a single indictment against 105 alleged La Rompe ONU members. These defendants were divided into groups for purposes of trial, and defendant and his four co-defendants made up the first batch to go to trial. Defendant and his co-defendants were charged with, *inter alia*, an association-in-fact conspiracy, in violation of the Racketeer Influenced and Corrupt Organizations Act "RICO," 18 U.S.C. § 1962(d). At the conclusion of a week-long trial, a jury found defendant guilty. He was principally sentenced to a lifetime of imprisonment.

On appeal to the First Circuit Court of Appeals, defendant argued that the district court plainly erred by erroneously instructing the jurors on the RICO charge. *Id.* at 34, 37. The district court repeatedly instructed the jurors that the government was not required to prove that an "enterprise" actually existed; or that defendant was actually employed

by or associated with the enterprise; or that the enterprise's activities actually affected interstate commerce.

The district court's instruction began:

> In order to convict a defendant on the RICO conspiracy offense, based on an agreement to violate Section 1962(c) of Title 18, the government must prove the following five elements beyond a reasonable doubt. First, that an enterprise existed *or that an enterprise would exist.* Second, that the enterprise was *or would be* engaged in or its activities affected *or would effect* interstate or foreign commerce.
>
> Third, that a conspirator was *or would be* employed by or associated with the enterprise. Fourth, that a conspirator did *or would* conduct or participate in – either directly or indirectly, the conduct of the affairs of the enterprise. And, fifth, that a conspirator did *or would* knowingly participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity as described in the indictment.

12.18.15 Tr. 67-68 (Emphasis added).

Never once did the district court include any guidance about when a would-be enterprise, et al., would need to come to fruition to fall within the statute's reach. The instruction ended just like it began:

> The government is not required to prove that the alleged enterprise was actually established; that the defendant was actually employed by or associated with the enterprise; or that the enterprise was actually engaged in or its activities actually affected interstate commerce.

12.18.15 Tr. at 82-83.

Sandwiched between these bookends, the district court repeatedly reiterated the same. *See e.g. id.* at 68, lines 19-22 ("The first element of the RICO conspiracy the government must prove beyond a reasonable doubt is that an enterprise existed *or would exist* as alleged in the indictment."); *id.* at 69, lines 9-12 ("The government must prove an association in fact, an enterprise, and that that existed *or would exist* by evidence of the organization, whether formal or informal."); *id.* at 71, lines 10-14 ("Although whether an enterprise existed *or would exist* is a distinct element…"); *id.* at 72, lines 9-12 ("The second element the Government must prove beyond a reasonable doubt is that the RICO enterprise was *or would be* engaged in or its activities effected *or would effect* interstate or foreign commerce."); *id.* at 73, lines 7-11 ("If you find that the evidence is sufficient to prove that the enterprise was *or would be* engaged in interstate commerce or foreign commerce, the required

nexus to interstate or foreign commerce is established."); *id.* at 74, lines 3-9 ("Moreover, it is not necessary for the government to prove…that the defendants *were or would be* engaged in or their activities affected *or would* effect interstate commerce."); *id.* at 75, lines 3-7 ("The third element that the government must prove beyond a reasonable doubt is that a conspirator, which may include the defendant himself, was *or would be* employed by or associated with the enterprise about which I already instructed you.") (emphasis added throughout). Other examples abound.

Opinion Below

The First Circuit began its analysis as follows:

> Even assuming (without deciding) that the judge's "would-related" instructions – that "the enterprise *would* exist," that the enterprise's "activities *would* [a]ffect interstate or foreign commerce," *etc.* (emphasis added) – would amount to an error that is also obvious (and to be perfectly clear, we intimate no judgment on those questions), we conclude that the defendants fail to establish prejudice or a miscarriage of justice.

Rodríguez-Torres, 939 F.3d at 38. The Court next emphasized, by way of a footnote, that "no binding precedent exists" as to whether a prosecutor in a RICO-conspiracy case must prove that the enterprise actually existed, and that it "need not stake out a position on these points today" because "the defendants lose on plain-error review even if their view is correct (and we, of course, whisper no hint that it is)." *Id.* at 38 n. 12.

The First Circuit concluded that "[t]he government charged an actual enterprise" and it "presented overwhelming evidence…to back up its theory." *Id.* at 38. After cataloguing that evidence, the court added that: "In their presentations to the jury, even defense counsel did not dispute that La Rompe existed, affected interstate or foreign commerce, and conducted its affairs through drug-trafficking and murder." *Id.* at 38. Therefore, the court reasoned, "defendants cannot show that the 'would'-related instructions…prejudiced them or caused a miscarriage of justice" and, citing to case-law from this Court, emphasized that "if an instruction omitting an offense element did not affect the judgment, it 'would be the *reversal* of [such] a conviction' that would seriously affect the fairness, integrity, and public reputation of the judicial proceedings, thereby causing a miscarriage of justice…." *Id.* at 39 (citing *Johnson v.*

United States, 520 U.S. 461, 470 (1997) (emphasis added by the First Circuit).

Reasons for Granting the Writ

The First Circuit's newfound reluctance to take a position on whether an association-in-fact RICO conspiracy requires proof of an actual enterprise, etc., puts its decision in this case at odds with the text of the RICO statute, this Court's case-law, case-law from some (but not all) of the other Courts of Appeal, and with its own case-law. Alternatively, to the extent that this is an "open question," it is one badly in need of resolution, given the frequency with which the government utilizes the RICO statute in criminal prosecutions.

A. The text of the RICO statute

The substantive RICO statute provides that:

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

18 U.S.C. § 1962(c). The plain language contemplates an enterprise that is in existence; association with that enterprise; and a connection between the enterprise and interstate or foreign activity.

B. This Court's case-law

The notion that a RICO conspiracy conviction requires an already-in-existence enterprise was confirmed by the this Court in *United States v. Turkette*, 452 U.S. 576 (1981). The defendant in that case was charged with RICO conspiracy (§ 1962(d) based on § 1962(c)), and this Court issued a lengthy opinion that defined the meaning of "enterprise" – an opinion that would have been wholly unnecessary if the existence of an "enterprise" were not an element of a RICO conspiracy charge. *Id.* at 578-59 (explaining the nature of the charge). This Court's remedy in *Turkette* – reversing the Court of Appeals, which vacated the defendant's RICO conspiracy conviction – removes any doubt that the existence of an "enterprise" is an integral part of any RICO conspiracy conviction. *Id.* at 580.

The *Turkette* Court instructed that: "In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected pattern of racketeering activity.'" *Id.* at

583. Whereas the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct," a "pattern of racketeering is, other the other hand, a series of criminal acts defined by statute." *Id.* at 583. This Court reiterated: "The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* at 583; *see also United States v. Nascimento*, 491 F.3d 25, 32 (1st Cir. 2007) (The government "must prove that the enterprise existed in some coherent and cohesive form" and "the enterprise must have been an ongoing organization operating as a continuous unit.") (quoting *United States v. Connolly*, 341 F.3d 16, 28 (1st Cir. 2003)).

Years later, this Court granted certiorari in *Boyle v. United States*, 556 U.S. 938, 941-42 (2009), a case involving one substantive RICO conviction (§ 1962(c)) and one RICO conspiracy conviction (§ 1962(d) based on § 1962(c)). This Court's aim was to "resolve conflicts among the Courts of Appeals concerning the meaning of a RICO enterprise." *Id.* at 943. The precise contours of that debate are unimportant to this case; suffice it to say, the Court never once suggested that its opinion applied only to the substantive RICO conviction. To the contrary, this Court

referred to the jury instruction regarding "enterprise" on both "RICO counts" – plural. *Id.* at 943. This further underscores the notion that the existence of an "enterprise" is a material element of both a substantive RICO conviction and a RICO conspiracy conviction.

It helps to consider the "age-old principles of conspiracy law" that this Court articulated in *Salinas v. United States*, 522 U.S. 52 (1997) and reiterated in *Ocasio v. United States*, 136 S.Ct. 1423, 1427 (2016). Under "established case law, the fundamental characteristic of a conspiracy is a joint commitment to an 'endeavor which, if completed, would satisfy all of the elements of the underlying substantive criminal offense.'" *Id.* at 1429 (quoting *Salinas*, 522 U.S. at 65). Conspirators must "pursue the same criminal objective," but "a conspirator need not agree to commit or facilitate each and every part of the substantive offense." *Id.* at 1429 (quoting *Salinas*, 522 U.S. at 63).

Also, the government "does not have to prove that the defendant intended to commit the underlying offense himself." *Id.* at 1429 (internal quotation omitted). For example, "if conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide

support, the supporters are as guilty as the perpetrators." *Id.* at 1429-30 (quoting *Salinas*, 522 U.S. at 64).

In fact, a conspirator may be convicted "even though he was incapable of committing the substantive offense" himself. *Id.* at 1430 (quoting *Salinas*, 522 U.S. at 64). This is because "a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas*, 522 U.S. at 65.

All of this is another way of saying that RICO conspiracy shares some, but not all, of the same elements of a substantive RICO offense. In particular, the racketeering (or action) element is not the same. The commission of two or more predicate acts is required for a substantive RICO offense, but not RICO conspiracy. *Salinas*, 522 U.S. at 63-64; Gov't Br. 48 (so stating). The "enterprise" element, however, is the same. The existence of an enterprise is the hallmark of a criminal conspiracy.

The true essence of a RICO conspiracy is the existence of an enterprise that the defendant actually associated with "in fact" for a long enough period to pursue the enterprise's objectives. 18 U.S.C. § 1961(4). The reason that a RICO conspirator need not commit the substantive

offense himself (or even be capable of committing the substantive offense) is because the "evil" in question is the "shared common purpose" that the underlying crime be committed by a member of the conspiracy who is capable of committing it. *Ocasio*, 136 U.S. at 1432; *Salinas*, 522 U.S. at 63-64.

Stated differently: "Conspiracy law punishes the collective criminal agreement because a "combination" or "group association for criminal purposes" is more dangerous than separate individuals acting alone." *Ocasio*, 136 S.Ct. at 1441 (Sotomayor, J., dissenting) (quoting *Callanan v. United States*, 364 U.S. 587, 593 (1961)). A "conspiracy is 'a partnership in crime,' a 'confederation,' a 'scheme,' and an 'enterprise.'" *Id.* at 1441-42 (quoting *Pinkerton v. United States*, 328 U.S. 640, 644, 646-47 (1946)). And, a defendant "is guilty of conspiracy only if he agrees that the conspiratorial group intends to commit all the elements of the criminal offense." *Id.* at 1442 (quoting *Salinas*, 522 U.S. at 65).

If the group or enterprise does not actually exist, and/or the defendant was never actually employed by or associated with the enterprise, and/or the enterprise was never actually engaged in or its activities never actually affected interstate commerce, *see e.g.* 12.18.15

Tr. 82-83, then there is no conspiratorial evil. There is just a lonely, solo actor yearning for associates who have not yet volunteered to commit crimes that have not happened.

C. Case-law from other Courts of Appeal

The RICO conspiracy pattern jury instructions in the Seventh and Eighth Circuits direct jurors to decide whether an enterprise existed. *See* Model Crim. Jury Inst. Seventh Circuit § 1962(d); Model Crim. Jury Inst. Eighth Circuit § 6.18.162B.[1] The Fourth, Fifth, Sixth, Ninth, and D.C. Circuits all similarly recognize that the existence of an enterprise is an element of RICO conspiracy. *See e.g. United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) ("[T]o satisfy § 1962(d), the government must prove that an enterprise affecting interstate commerce existed…."); *United States v. Posado-Rios*, 158 F.3d 832, 838 (5th Cir. 1998) (government does not have to prove that defendant knew all the details of the enterprise to sustain a conviction under § 1962(d)); *United States v. Sinito*, 723 F.2d 1250, 1260 (6th Cir. 1984) ("In a substantive or conspiracy RICO prosecution, the government has the burden of showing

[1] Defendant was unable to find pattern jury instructions on § 1962(d) from the First, Fourth, Fifth, Sixth, Ninth, Tenth or D.C. Circuits.

the existence of an enterprise that affects interstate commerce."); *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004) ("[A] defendant is guilty of conspiracy to violate § 1962(c) if the evidence showed that she knowingly agreed to facilitate a scheme which includes the operation or management of a RICO enterprise.") (internal citation omitted); *United States v. White*, 116 F.3d 903, 923 (D.C. Cir. 1997) (recognizing the "enterprise element" of a RICO conspiracy charge).

In contrast to these circuits, the Third Circuit pattern jury instruction – which the district court here appears to have adopted – directs jurors that they do not need to decide whether an enterprise actually existed, *see* Model Crim. Jury Inst. Third Circuit § 6.18.192D,[2] but this appears to be at odds with Third Circuit case-law. *See United States v. Console*, 13 F.3d 641, 653 (3d Cir. 1993) ("[A] conviction under

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[2] The Third Circuit pattern jury instruction provides, in pertinent part: "However, the RICO conspiracy charged in Count (no.) is a distinct offense from the RICO offense charged in Count (No.). There are several important differences between these offenses. One important difference is that, unlike the requirements to find (name) guilty of the RICO offense charged in Count (No.), in order to find (name) guilty of the RICO conspiracy charged in Count (No.) the government is not required to prove that the alleged enterprise actually existed, or that the enterprise actually engaged in or its activities actually affected interstate or foreign commerce. Rather, because an agreement to commit a RICO offense is the essence of a RICO conspiracy, the government need only prove that (name) joined the conspiracy and that if the object of the conspiracy was achieved, the enterprise would be established and the enterprise would be engaged in or its activities would affect interstate or foreign commerce." Mod. Crim. Jury Instr. 3d Cir. 6.18.1962D.

18 U.S.C. § 1962(d) for conspiracy to violate section 1962(c) requires proof that the individual defendants knowingly agreed to participate in the enterprise through a pattern of racketeering activity.") (internal citation omitted); *but see Smith v. Berg*, 247 F.3d 532 (3d Cir. 2011) ("[A]ll that is necessary for a [RICO] conspiracy is that the conspirators share a common purpose.").

Case-law from the Second and Tenth Circuits is more of a mixed bag. In *United States v. Benevento*, 836 F.2d 60, 73 (2d Cir. 1987), *abrogated by United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), by way of explaining why defendant's dual convictions for RICO and RICO conspiracy satisfy the *Blockburger* test, the court commented that "the government necessarily had to establish that [the defendant] agreed with his criminal associates to form the RICO enterprise…." *Id.* at 73. The court in no way suggested that an agreement-to-form, as opposed to the actual formation, of an enterprise was sufficient. And, in *Indelicato*, 865 F.2d at 1376-77, the court unambiguously confirmed that a RICO conspiracy required proof of an enterprise that actually existed. Quoting *Turkette*, 452 U.S. at 583, the Second Circuit reiterated that: "The

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

That leaves *United States v. Applins*, 637 F.3d 59, 74-75 (2d Cir. 2011), a decision that, respectfully, is difficult to parse. On the one hand, the court extends *Salinas's* instruction that RICO conspirators need not commit predicate racketeering acts to conclude that the government also need not prove "the establishment of an enterprise." On the other hand, the court admonishes that a RICO conspiracy requires proof that the defendant agreed with others "to conduct the affairs of an enterprise," and it holds that in the particular case at issue, the defendant proved that "the defendants agreed that an enterprise would be established (and also that one was actually established)…." *Id.* at 77. Suffice it to say, *Applins*' reasoning has not caught on, either within the Second Circuit or outside it.

The Tenth Circuit, in *United States v. Harris*, 695 F.3d 1124, 1133 (10th Cir. 2012), said that although *Salinas* "did not present the precise question," "its discussion of the difference between a [substantive RICO] violation and a [RICO conspiracy] violation leads us…to conclude that just as the Government need not prove that a defendant personally

committed or agreed to commit the requisite predicate acts to be guilty of a [RICO] conspiracy, neither must the Government prove that the alleged enterprise actually existed." But, the Tenth Circuit has not consistently carried this reasoning forward.

In *United States v. Kamahele*, 748 F.3d 984, 1102-1103, n. 13 (10th Cir. 2014), the government conceded that it had to prove the existence of an enterprise, the court accepted that concession, and discussed the requisite enterprise element at length.

And in *United States v. Garcia*, 793 F.3d 1194 (10th Cir. 2015), the court appeared to simultaneously embrace and retreat from *Harris*. The defendants' challenged the trial court's RICO conspiracy "enterprise" instruction, and the government answered that the court "need not address this issue because it had no obligation to prove a RICO conspiracy in the first place; rather all it had to show under [the RICO conspiracy statute] was that Defendants belonged to a conspiracy to associate with a RICO enterprise." *Id.* at 1209. The court responded: "We disagree." *Id.* at 1209. The court explained that although RICO conspiracy "does not require the Government to establish that an enterprise existed…the jury still needed to be told what Defendants

allegedly conspire to do." *Id.* at 1209. According to the court, the jury "had to find that Defendants 'intended to further an endeavor which, *if completed*, would satisfy all the elements of a substantive criminal offense.'" *Id.* at 1209 (quoting *Salinas*, 522 U.S. at 65) (Emphasis in original). Leaving aside the fact that "enterprise" and "endeavor" are, at least in this context, synonymous, none of this helps the government because the jurors in our case were never instructed in the manner that the Tenth Circuit commands, either.

Importantly, both the Second Circuit's decision in *Applins* and the Tenth Circuit's decision in *Harris* rely on – and, defendant respectfully suggests, misinterpret – the U.S. Supreme Court's decision in *Salinas*.

Salinas concerned a criminal RICO prosecution under both §1963(c) itself and § 1963(d) based on § 1963(c), and the opinion was aimed at the requirement for predicate acts. The defendant in *Salinas* argued that he could not be convicted of RICO conspiracy unless the government proved that he personally agreed to commit two predicate acts, and the Court disagreed. The Court held:

> A conspirator must intend to further an endeavor which, if completed would satisfy all the elements of a substantive criminal offense, but it suffices that he adopt the goal of

> furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.

Id. at 52. At no point did the Court suggest that the existence of an "enterprise" was not an element of RICO conspiracy.

A conspiracy to violate RICO can be analyzed as two agreements: "an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts." *United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986). The *Salinas* opinion was focused on the issue of predicate acts, and did not modify the requirement that an enterprise actually exist. Indeed, *Salinas* contemplates the existence of an enterprise; its guidance is directed towards understanding defendant's relationship to that enterprise. *See Salinas*, 522 U.S. at 65-66 (discussing the "enterprise"). As the Seventh Circuit has helpfully explained:

> Agreeing to participate somehow in an enterprise is active; it is personal. In *Salinas*, the Court noted a close identity between the enterprise itself and the conspiracy to run it. An agreement to join a conspiracy is highly personal; similarly, an agreement to participate in the conduct of an enterprise is also personal and active. But how one agrees to

> get the job done – through a pattern of racketeering activity – is not necessarily personal; it can be delegated.

Brouwer v. Raffensperger, 199 F.3d 961, 966 (7th Cir. 2000); *see also United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (examining *Salinas* and concluding that the enterprise element remains for RICO conspiracy).

D. The First Circuit's case-law

Outside of our case, the First Circuit has repeatedly instructed that:

> For a defendant to be found guilty of *conspiring* to violate RICO, the government must prove (1) the existence of an enterprise affecting interstate commerce, (2) that the defendant knowingly joined the conspiracy to participate in the conduct of the affairs of the enterprise, (3) that the defendant participated in the conduct of the affairs of the enterprise, and (4) that the defendant did so through a pattern of racketeering activity by agreeing to commit, or in fact committing, two or more predicate offenses.

United States v. Shifman, 124 F.3d 31, 35 (1st Cir. 1997) (internal citation omitted; emphasis in original);

In *Ramirez-Rivera*, 300 F.3d at 18, the First Circuit again drew from its extensive RICO conspiracy progeny and reiterated the elements of RICO conspiracy:

> The major difference between a violation of § 1962(c) itself and a violation of § 1962(d) based on § 1962(c) is the additional required element that the defendant knowingly joined a conspiracy to violate § 1962(c)." [Citation to *Shifman*].
>
> Thus, for a defendant to be found guilty of conspiring to violate RICO, the government must prove (1) the existence of an enterprise affecting interstate [or foreign] commerce, (2) that the defendant knowingly joined the conspiracy to participate in the conduct of the affairs of the enterprise, (3) that the defendant participated in the conduct of the affairs of the enterprise, and (4) that the defendant did so through a pattern of racketeering activity by agreeing to commit, or in fact committing, two or more predicate offenses.

There is no "or would" language in this formulation. The First Circuit has never retreated from this position – until now.

E. This issue is worthy of this Court's attention

As the foregoing demonstrates, there is conflict and confusion among and within the Courts of Appeal over the requisite elements of an association-in-fact RICO conspiracy. This ambiguity is intolerable given

the high rate of RICO prosecutions. Respectfully, guidance from this Court is greatly needed.

Conclusion

Vigio-Aponte respectfully requests that this Court grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Appendix

United States Court of Appeals
For the First Circuit

Nos. 16-1507
16-1527
16-1596
16-1984
17-1660

UNITED STATES OF AMERICA,

Appellee,

v.

VICTOR M. RODRÍGUEZ-TORRES, a/k/a Cuca;
TARSIS GUILLERMO SÁNCHEZ-MORA, a/k/a Guillo;
REINALDO RODRÍGUEZ-MARTÍNEZ, a/k/a Pitbull;
PEDRO VIGIO-APONTE, a/k/a Pedrito and He Man;
CARLOS M. GUERRERO-CASTRO, a/k/a Carlitos el Negro,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. José Antonio Fusté, U.S. District Judge]

Before

Torruella, Thompson, and Kayatta,
Circuit Judges.

Lydia Lizarríbar-Masini for appellant Víctor M. Rodríguez-Torres.

Theodore M. Lothstein, with whom Lothstein Guerriero, PLLC, was on brief, for appellant Tarsis Guillermo Sánchez-Mora.

Vivian Shevitz for appellant Reinaldo Rodríguez-Martínez.

Jamesa J. Drake, with whom Drake Law, LLC was on brief, for appellant Pedro Vigio-Aponte.

Raúl S. Mariani-Franco on brief for appellant Carlos M. Guerrero-Castro.

Stratton C. Strand, Attorney, Criminal Division, Appellate Section, U.S. Department of Justice, with whom Brian A. Benczkowski, Assistant Attorney General, and Matthew S. Miner, Deputy Assistant Attorney General, Rosa Emilia Rodríguez-Vélez, United States Attorney, Alberto R. López-Rocafort, Assistant United States Attorney, and Victor O. Acevedo-Hernández, Assistant United States Attorney, were on brief, for appellee.

September 18, 2019

THOMPSON, **Circuit Judge**.

PREFACE

La Rompe ONU (just "La Rompe" from now on) was one of the largest and most violent of Puerto Rico's street gangs. Another was La ONU. Deadly rivals, each wreaked much havoc on Puerto Rico through serial drug sales, violent robberies and carjackings, and ghastly killing sprees.

After law enforcement took La Rompe down, La Rompe members Rodríguez-Torres, Sánchez-Mora, Rodríguez-Martínez, Vigio-Aponte, and Guerrero-Castro (their full names and aliases appear above) found themselves indicted, then convicted, and then serving serious prison time for committing some or all of the following crimes: conspiracy to violate RICO (short for "Racketeer Influenced and Corrupt Organizations Act"), see 18 U.S.C. § 1962(d); conspiracy to possess and distribute narcotics, see 21 U.S.C. §§ 846, 860(a); use and carry of a firearm in relation to a drug-trafficking crime, see 18 U.S.C. § 924(c)(1)(A); and drive-by shooting, see 18 U.S.C. §§ 36(b)(2)(A), 2 (aiding and abetting) — to list only a few. The testimony of several cooperating witnesses — Luis Yanyoré-Pizarro, Oscar Calviño-Ramos, Luis Delgado-Pabón, and Oscar Calviño-Acevedo (persons indicted with our defendants, but who later pled guilty) — helped seal their fate.

Collectively, our defendants' appeals (now consolidated) raise a battery of issues concerning the sufficiency of the evidence for the RICO-conspiracy, drug-conspiracy, and firearms convictions; the admission of out-of-court statements about a murder-by-choking incident; the correctness of the RICO-conspiracy jury instructions; and the reasonableness of two of the sentences.[1] We address these subjects in that order, filling in the details (like which defendant makes which claims) as we move along.[2] But for anyone wishing to know our ending up front, when all is said and done we *affirm*.

[1] Rodríguez-Martínez also argues that his trial attorney rendered ineffective assistance by failing to object to certain jury instructions and to any aspect of the sentencing. He debuts the argument here, however. And the record is not suitably developed for deciding that issue now. So we dismiss this claim, without prejudice to his raising it (if he wishes) in a timely postconviction-relief petition under 28 U.S.C. § 2255. See, e.g., United States v. Tkhilaishvili, 926 F.3d 1, 20 (1st Cir. 2019).

[2] We do have a small speed bump to clear first, however. Rodríguez-Torres, Sánchez-Mora, and Vigio-Aponte try to join some of their coappellants' arguments. There is a mechanism for doing this, see Fed. R. App. P. 28(i), though appellants must "connect the arguments" they wish to "adopt[] with the specific facts pertaining to [them]," see United States v. Bennett, 75 F.3d 40, 49 (1st Cir. 1996) – *i.e.*, they must show "that the arguments" really are "transferable" from their coappellants' case to theirs, see United States v. Ramírez-Rivera, 800 F.3d 1, 11 n.1 (1st Cir. 2015) (quotation marks omitted). We question whether Rodríguez-Torres and Sánchez-Mora did enough to satisfy this standard. But because the arguments are not difference-makers, "we will assume" (without holding) "that each appellant effectively joined in the issues that relate to his situation." United States v. Rivera-Carrasquillo, 933 F.3d 33, 39 n.5 (1st Cir. 2019).

SUFFICIENCY CLAIMS

Overview

Rodríguez-Torres, Rodríguez-Martínez, Guerrero-Castro, and Sánchez-Mora (but not Vigio-Aponte) claim that the prosecution submitted insufficient evidence to sustain some of their convictions:

- Rodríguez-Torres challenges his RICO- and drug-conspiracy convictions, plus his firearm conviction;
- Rodríguez-Martínez contests his RICO- and drug-conspiracy convictions;
- Guerrero-Castro questions his RICO-conspiracy and firearm convictions; and
- Sánchez-Mora (by adopting his codefendants' arguments that apply to his situation) disputes his RICO- and drug-conspiracy convictions.

And so they fault the judge for denying their motions for judgments of acquittal. We will turn to the specifics of their arguments and the government's counterarguments in a minute. But like the government, we find none of their claims persuasive.

Analysis

Standard of Review

We assess preserved sufficiency claims *de novo* (with fresh eyes, in plain English), reviewing the evidence, and making all inferences and credibility choices, in the government's favor — reversing only if the defendant shows that no rational factfinder

could have found him guilty. See, e.g., Ramírez-Rivera, 800 F.3d at 16; United States v. Casas, 356 F.3d 104, 126 (1st Cir. 2004). For convenience, we'll call this the regular sufficiency standard. An unpreserved challenge, contrastingly, requires reversal only if the defendant shows — after viewing the evidence the exact same government-friendly way — that allowing his conviction to stand will work a "clear and gross injustice." See, e.g., United States v. Freitas, 904 F.3d 11, 23 (1st Cir. 2018); United States v. Foley, 783 F.3d 7, 12-13 (1st Cir. 2015) (calling the clear-and-gross injustice metric a "stringent standard" that is "a particularly exacting variant of plain error review"). For easy reference, we'll call this the souped-up sufficiency standard.

Adopting a scorched-earth approach, the parties fight over which standard to apply. Convinced that they preserved their sufficiency arguments, Rodríguez-Torres, Rodríguez-Martínez, Guerrero-Castro, and Sánchez-Mora argue that we should use the regular sufficiency standard. Unimpressed by their assertions, the government believes that the quartet "waived" aspects of their arguments and that we must therefore apply the souped-up sufficiency standard to those claims. But rather than spend time grappling with the intricacies of this issue, we will assume *arguendo* in their favor that they preserved each sufficiency argument.

RICO-Conspiracy Crime

RICO makes it a crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity" — or to conspire to do so. See 18 U.S.C. § 1962(c), (d). Broadly speaking (we will have more to say on this below), a RICO-conspiracy conviction requires proof that the defendant knowingly joined the conspiracy, agreeing with one or more coconspirators "to further [the] endeavor which, if completed, would satisfy all the elements of a substantive [RICO] offense." Salinas v. United States, 522 U.S. 52, 65 (1997); see also Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994).

Rodríguez-Torres, Rodríguez-Martínez, Guerrero-Castro, and Sánchez-Mora offer a litany of reasons why the evidence does not support their RICO-conspiracy convictions. Disagreeing with everything they say, the government thinks that the evidence is just fine. We side with the government.[3]

[3] A quick heads-up: in a part of our opinion addressing the defendants' jury-charge complaints, the parties argue over whether the judge properly instructed on the enterprise, interstate-or-foreign-commerce, association, participation, and mental-state elements. Those arguments are not relevant here, however, given how the defendants frame their sufficiency challenges.

(i)
enterprise

Enterprises under RICO include "any union or group of individuals associated in fact although not a legal entity." See United States v. Turkette, 452 U.S. 576, 578 n.2 (1981); see also Ramírez-Rivera, 800 F.3d at 19. Such so-called association-in-fact enterprises may be "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." See Turkette, 452 U.S. at 583. The group need not have some decisionmaking framework or mechanism for controlling the members. See Boyle v. United States, 556 U.S. 938, 948 (2009) (holding that a RICO enterprise "need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods — by majority vote, consensus, a show of strength, *etc.*"). Instead the group must have "[1] a purpose, [2] relationships among those associated with the enterprise, and [3] longevity sufficient to permit these associates to pursue the enterprise's purpose."[4] Id. at 946.

As to [1] — "purpose" — the group must share the "common purpose of engaging in a course of conduct." Id. As to [2] — "relationship" — there must also be evidence of "interpersonal

[4] We added the bracketed numbers for ease of discussion.

relationships" calculated to effect that purpose, *i.e.*, evidence that the group members came together to advance "a certain object" or "engag[e] in a course of conduct." Id. (quotation marks omitted). And as to [3] – "longevity" – the group must associate based on its shared purpose for a "sufficient duration to permit an association to 'participate' in [the enterprise's affairs] through 'a pattern of racketeering activity,'" id., though "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence," id. at 948. Also and importantly, because RICO's plain terms "encompass '*any* . . . group of individuals associated in fact,' . . . the definition has a wide reach," meaning "the very concept of an association in fact is expansive." Id. at 944 (emphasis added by the Boyle Court).

Measured against these legal standards, the record – visualized most favorably to the government – adequately shows that La Rompe operated as an association-in-fact enterprise.

For starters, the evidence reveals La Rompe's purpose: to get filthy rich by selling drugs at La Rompe-controlled housing projects, using violence (and deadly violence at that) whenever necessary to protect and expand its turf. As cooperator Delgado-Pabón put it, La Rompe's "purpose" was "to make the organization bigger" and "stronger" – "to control all of the housing projects

in the metro area" so that it would be rolling in money. On top of that, the evidence shows the necessary relationships between La Rompe members: associates named their group "La Rompe ONU," reflecting that they saw themselves as a united, organized group of drug traffickers — the "ONU" stands for "Organización de Narcotraficantes Unidos" (in English, "Organization of United Drug Traffickers"); self-identified as La Rompe "members," flashing a hand signal to show their loyalty; got together daily to peddle massive amounts of drugs at La Rompe's many drug points; had meetings to discuss decisions that "[a]ffect[ed] the organization," like whether to kill a traitor or take over a La ONU-controlled housing project (La Rompe and La ONU were archfoes, don't forget), or how to keep the peace among the members; worked together — pooling resources, for example (manpower, guns, and cars, *etc.*) — to boost profits and gain more territory, principally through jointly-undertaken activities like robberies, carjackings, and murders; and followed La Rompe "rules" like their lives were on the line — because they were. And finally, the evidence shows La Rompe continued as a cohesive unit for at least eight years. See Ramírez-Rivera, 800 F.3d at 19 (finding similar evidence "more than" adequate to prove "a RICO enterprise").

Though not necessary thanks to Boyle (which remember held that a RICO enterprise "need not have a hierarchical structure

or a "chain of command'; decisions may be made on an ad hoc basis and by any number of methods — by majority vote, consensus, a show of strength, *etc.*"), the evidence also shows that La Rompe had business-like traits as well. In addition to its name, meetings, and rules, La Rompe had a loose hierarchical structure. Josué Vázquez-Carrasquillo was La Rompe's "supreme leader," and Vigo-Aponte was its "second" leader. Each La Rompe-controlled housing project had a La Rompe-appointed "leader" and drug-point owners, the latter of whom had responsibility over "employees" like enforcers, sellers, runners, and lookouts. Also much like a business, La Rompe rewarded good performance and loyalty. In the words of cooperator Calviño-Acevedo, "practically all of us, we worked for the organization like normal employees," growing "within the organization" to the point "we'd be given a drug point." One way to advance within La Rompe was by being close to the "boss," Vázquez-Carrasquillo. Another way was by "killing people." And with these extra structural features, the evidence here far surpasses what Boyle requires for a RICO enterprise.

Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora resist this conclusion on several grounds. The government sees no merit in any of them. Neither do we.

Despite conceding in their appellate briefs that La Rompe was indeed a "drug trafficking *organization*" (emphasis

ours), the trio argues that La Rompe was not an enterprise because (in their telling) the housing-project crews were "independen[t]" entities that did not "coordinat[e]" with each other. The evidence cuts against them, however. According to the record, while there were "different crews," La Rompe "controlled" the housing-project drug points — with "one same boss" (Vázquez-Carrasquillo) at the top. And everyone in the organization — from the supreme leader and his second-in-command, to the housing-project leaders, to the drug-point owners, to the low-level employees — were La Rompe members who (among other things) had to follow the organization's rules or else (with the "or else" ranging all the way from a beating, to death). Unsurprisingly then, La Rompe members often worked together, regardless of crew affiliation. One example is that La Rompe frequently "call[ed] in several enforcers from different groups" when taking over La ONU-controlled housing projects. Another example is that La Rompe sometimes used members from across the organization when carrying out killings. See generally Ramírez-Rivera, 800 F.3d at 19 (holding that, although La ONU came about as a "merging of smaller gangs that still operated their existing drug points," it qualified as a RICO enterprise because (among other things) the groups combined their efforts "to sell drugs, and later, to also stomp out the competition (specifically, La Rompe)").

Not so fast, say Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora. They contend that crews from different housing projects did not "share . . . resources for purchase of narcotics or firearms," which, they believe, kiboshes any notion that La Rompe was a RICO enterprise. But they ignore Yanyoré-Pizarro's testimony that "La Rompe" committed robberies and carjackings to (among other things) "get the money to maintain drug points that we were acquiring little by little" and to "buy materials, buy weapons, buy ammo, bullets." And they ignore Calviño-Acevedo's testimony to the same effect.[5]

In a somewhat related vein, Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora insist that La Rompe did not own or have "a cache of firearms." But the testimony shows that La Rompe had "pistols, rifles, AR-15s, AK-47s," which, when "not in the hands of enforcers," the organization stored in various apartments.

[5] The trio also blasts the government for not producing evidence of how La Rompe members communicated with or even knew each other. The gaping hole in this argument is that the government can prove a RICO conspiracy without showing that each conspirator "knew all the details or the full extent of the conspiracy, including the identity and role of every other conspirator." Aetna Cas. Sur. Co., 43 F.3d at 1562. Still, the evidence shows that La Rompe members knew each other by nickname or identified each other by hand signal. And a rational jury could reasonably infer that members developed a level of familiarity with each other by, for example, attending organizational meetings or committing countless crimes together. "[A]s [you] grew in the organization," Calviño-Acevedo told the jury, "you learn[ed] . . . who's who and who's not who."

Enforcers could own their own guns. But leaders could take them away if the enforcers did "something wrong." And enforcers also had to lend their guns to other La Rompe members when needed.

Still trying to spin the gun evidence in their favor, the trio claims that La Rompe members would "fight over, steal and even kill each other to get firearms." But the episode they discuss involved a *non*-La Rompe member (known as "Colo") who sold guns to one La Rompe crew who was having an "internal war" with another crew (cooperator Calviño-Acevedo and his colleagues killed Colo, but they also killed a four-year-old boy with a stray bullet). Despite the conflict between the crews, Calviño-Acevedo testified that both crews were still part of La Rompe.

Curiously, Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora claim that "La Rompe had no economic activity" or "financial organization" and derived no "economic or organizational benefit" from its members' drug dealing. This is curious because making money through drug selling was La Rompe's *raison d'être*. Whether drug sales directly benefited La Rompe is irrelevant, because the sales contributed to La Rompe's goal of enriching its members. And the drug dealing did benefit La Rompe organizationally, because one of La Rompe's main goals was "to control all of the housing projects of the metro area," which required tons of cash. Insofar as the trio means that La Rompe

did not have a bank account or balance sheet, these formalities are not required for an association-in-fact enterprise. See Boyle, 556 U.S. at 948. Regardless, some La Rompe members *did* perform accounting functions — Rodríguez-Torres, for example, "took care of [Vázquez-Carrasquillo's] finances" and helped with Vigo-Aponte's "finances" too.

Taking another tack, the trio claims that La Rompe did not pay Yanyoré-Pizarro and Calviño-Acevedo for their work as enforcers — which, they contend, shows no enterprise existed. But Yanyoré-Pizarro testified that some owners gave him "[c]ars, firearms," and sometimes "cash" for contract killings. And Calviño-Acevedo testified that "the organization" compensated him for killings by giving him "[c]ountless drug points."

As a last gasp, Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora say that we should see the enterprise issue their way, because no evidence shows that La Rompe had "colors, initiation rites, and a formal hierarchy" or even "trained" its members "in the use of weapons and criminal conduct." This argument is beside the point. When they exist, such features certainly are relevant to the enterprise inquiry. But none is necessary. And the absence of any is not determinative. See Boyle, 556 U.S. at 948; see also United States v. Nascimento, 491 F.3d 25, 33 (1st Cir. 2007). As explained above, however, the

record does show that La Rompe had these or similar features — La Rompe members identified themselves with a hand signal, had a rite of passage (killing to get a drug point), and a loose hierarchical structure. To this we add that when cooperator Calviño-Acevedo joined La Rompe, a La Rompe leader "explained to [him] how everything was," which disposes of their no-training suggestion.

The bottom line is that the government presented sufficient evidence that La Rompe was an association-in-fact enterprise, despite what the trio thinks.

(ii)
effect on interstate or foreign commerce

Prosecutors had to show La Rompe's interstate- or foreign-commerce effects. Insisting that "La Rompe did not operate outside of Puerto Rico" and that the "violent actions imputed to La Rompe occurred in Puerto Rico," Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora contend that "no evidence" shows that La Rompe impacted "interstate commerce" in a RICO sense. The government disagrees. And so do we.

La Rompe need only have had a "*de minimis*" effect on interstate or foreign commerce, see Ramírez-Rivera, 800 F.3d at 19 — which is a fancy way of saying that "RICO requires no more than a slight effect upon interstate commerce," see United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989). And viewed in the proper light — afresh and in a way most pleasing to the prosecution — the

record shows that La Rompe's many drug points ran daily (some on a 24-hour, 7-day-a-week basis), selling endless amounts of cocaine, heroin, and marijuana, to name just some of the narcotics dealt there. A government expert testified that cocaine and heroin are not produced in Puerto Rico, and so must be imported from South American countries like Colombia. He also testified that marijuana is not produced in Puerto Rico (except for the hydroponic form, which is "very limited"), and so must be imported from states like Arizona, California, and Texas. Cooperator Yanyoré-Pizarro testified that a La Rompe leader called "Pekeko" imported "marijuana pounds" from Texas. And cooperator Calviño-Acevedo testified that he supplied La Rompe with "pounds of marijuana" that he got "through the mail."

All of this evidence shows that La Rompe's activities affected not only foreign commerce, but also interstate commerce. See Ramírez-Rivera, 800 F.3d at 19-20.

(iii)
participation

Prosecutors also had to prove that the defendants had "some part in directing" La Rompe's affairs – *i.e.*, that they participated in the "operation or management" of the enterprise itself. See id. at 20 (relying in part on Reves v. Ernst & Young, 507 U.S. 170, 179, 183 (1993), in assessing the evidentiary sufficiency of the government's RICO-conspiracy case); see also

Reves, 507 U.S. at 184-85 (explaining that persons who participate in the operation or management of the enterprise's affairs will, of course, necessarily meet the RICO statute's requirement that he be "associated with" the enterprise). "An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." Reves, 507 U.S. at 184.

Calling the government's participation evidence too skimpy, Rodríguez-Torres, Rodríguez-Martínez, Guerrero-Castro, and Sánchez-Mora variously argue that "there was no testimony" that they were "leader[s]" or that they "participated in decision making events" — in their view of things, they were "merely present" when key events went down. As the government notes, we must take all evidence and draw all reasonable inferences in the prosecution's favor — *not* theirs. And having done so, we see plenty of evidence pegging them as drug-point owners: Rodríguez-Torres owned a marijuana drug point in the La Rompe-controlled housing project of Covadonga; Rodríguez-Martínez owned a heroin drug point in the La Rompe-controlled housing project of Monte Hatillo; Guerrero-Castro owned a marijuana drug point in the La Rompe-controlled housing project of Los Laureles; and Sánchez-Mora owned a heroin drug point in the La Rompe-controlled housing project of Covadonga. Which is important because drug-point owners

played a critical role in achieving La Rompe's goal of "control[ling] all of the housing projects of the metro area" to generate "more money" so La Rompe could "grow and have more power."

As in Ramírez-Rivera, these facts easily satisfy the participation element. See 800 F.3d at 20 (holding that drug-point ownership met the operation-or-management test).[6]

(iv)
pattern of racketeering

A pattern of racketeering activity requires at least two predicate acts of racketeering within ten years of each other. See 18 U.S.C. § 1961(5); United States v. Tavares, 844 F.3d 46, 54 (1st Cir. 2016). Predicate acts include murder and drug dealing, as well as aiding and abetting such acts. See Ramírez-Rivera, 800

[6] Citing out-of-circuit law — United States v. Wilson, 605 F.3d 985 (D.C. Cir. 2010), and Smith v. Berg, 247 F.3d 532 (3d Cir. 2001) — the government suggests (first quoting Wilson, then quoting Smith, adding its own emphasis) that "[l]iability for a RICO-conspiracy offense . . . requires only that the defendant has 'knowingly agree[d] to facilitate a scheme which *includes* the operation or management of a RICO enterprise'" and that under the RICO-conspiracy statute, "the defendant need not '*himself* participate in the operation or management of an enterprise.'" The evidence in our Ramírez-Rivera case showed that the challenging defendants actually played a part in directing the enterprise's affairs, given their drug-point-owner status — which necessarily showed that they agreed to a scheme that included such participation. So too here. Which is why we need not decide whether to adopt the Wilson/Smith approach in this case, thus leaving that issue for another day. See generally PDK Labs., Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (noting that "if it is not necessary to decide more, it is necessary not to decide more").

F.3d at 20 (citing 18 U.S.C. § 1961(1)). The acts must be "related" and "amount to or pose a threat of continued criminal activity." H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989). A RICO-conspiracy defendant, however, need not have personally committed — or even agreed to personally commit — the predicates. See Salinas, 522 U.S. at 63; United States v. Cianci, 378 F.3d 71, 90 (1st Cir. 2004). All the government need show is that the defendant agreed to facilitate a scheme in which a conspirator would commit at least two predicate acts, if the substantive crime occurred. See, e.g., Salinas, 522 U.S. at 64-65; Cianci, 378 F.3d at 90.

Without citing to the record, Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora claim that cooperators offered "discredit[able]" testimony because they (the cooperators) "could not" provide dates and times for some events — and thus, the thesis runs, the government did not prove the pattern-of-racketeering element. But again, and as the government stresses, we must inspect the record in the light most flattering to the government's theory of the case, resolving all credibility issues and drawing all justifiable inferences in favor of the jury's guilty verdicts — which undercuts any credibility-based argument.

Rodríguez-Torres, Guerrero-Castro, and Sánchez-Mora also suggest that "while the first predicate act may be the drug

trafficking imputed to [them], there is simply no additional evidence to establish another predicate act as required by the RICO statute." To the extent they suggest that the two predicate acts must be of *different* types, they are wrong. See generally Boyle, 556 U.S. at 948 (noting that "a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within [RICO's] reach"); Fleet Credit Corp. v. Sion, 893 F.2d 441, 444-48 (1st Cir. 1990) (holding that multiple acts of "mail fraud" can satisfy the pattern-of-racketeering requirement, provided they amount to – or constitute a threat of – continuing criminal activity). Nevertheless, and as the government is quick to point out, the evidence shows that La Rompe members – including drug-point owners (which all three were) – committed or aided and abetted scads of drug deals (the government estimated that La Rompe sold thousands of kilograms each of marijuana, cocaine, crack cocaine, and heroin), plus scores of murders (drug-point owners, for instance, used "enforcers" to "kill[] people").[7] These acts were related to each other (they

[7] Sticking with murder for just a bit, we note that cooperator Yanyoré-Pizarro fingered Rodríguez-Torres as a participant in the drive-by killing of a La Rompe leader who had "turned" on the organization (a killing we discuss in the sentencing section of this opinion). And cooperator Calviño-Acevedo said that Guerrero-Castro "kill[ed] people" for La Rompe too.

were La Rompe's business, after all), occurred over a lengthy period (at least eight years) and, at a minimum, threatened to keep on going (the trio makes no convincing argument to the contrary).

All in all, the government offered enough evidence of a racketeering pattern.

(v)
knowingly joined

Each RICO-conspiracy defendant must have knowingly joined the conspiracy. See, e.g., Aetna Cas. Sur. Co., 43 F.3d at 1562. And "[a]ll that is necessary to prove" this RICO-conspiracy element is to show "that the defendant agreed with one or more co-conspirators to participate in the conspiracy." See Ramírez-Rivera, 800 F.3d at 18 n.11 (quotation marks omitted). Rodríguez-Torres, Rodríguez-Martínez, Guerrero-Castro, and Sánchez-Mora think that the government's evidence falls short of satisfying that element, because, the argument goes, they were at most merely present (which is all they'll cop to) at the scene of conspiratorial deeds. But we agree with the government that a rational jury could infer their knowing agreement to conspire from their actual participation as drug-point owners. See id. Making money through drug dealing was a key object of the conspiracy. And a reasonable jury could conclude that their drug-point ownership was intended to — and actually did — accomplish that

object. See id. (finding the knowledge element met by similar evidence).

So the government presented ample evidence on this element as well.

Drug-Conspiracy Crime

Moving on from the RICO-conspiracy crime, Rodríguez-Torres, Rodríguez-Martínez, and Sánchez-Mora protest that the government provided insufficient evidence that they knowingly joined the drug conspiracy. Not so, says the government. As for us, we agree with the government that their challenges necessarily fizzle because (as just indicated) adequate evidence showed that they knowingly joined the RICO conspiracy, of which the drug conspiracy was an integral part.

Firearms Crime

Federal law punishes persons for using or carrying a gun "during and in relation to any . . . drug trafficking crime" or possessing a gun "in furtherance of any such crime." 18 U.S.C. § 924(c)(1)(A); see also United States v. Gonsalves, 859 F.3d 95, 111 (1st Cir. 2017) (explaining that to secure a conviction under the statute, the government must show that the defendant "(1) possessed a firearm (2) in furtherance of (3) a drug-trafficking crime"). To satisfy the in-furtherance requirement, the government must establish "a sufficient nexus between the

firearm and the drug crime such that the firearm advances or promotes the drug crime." United States v. Gurka, 605 F.3d 40, 44 (1st Cir. 2010) (quotation marks omitted).

Rodríguez-Torres and Guerrero-Castro insist that the prosecution put forward no evidence showing that they used or carried a firearm in furtherance of drug trafficking. Ergo, their argument continues, the judge should have entered verdicts of acquittal on the firearm charge. The government, for its part, believes the opposite is true. And we, for our part, again side with the government.

Cooperator Delgado-Pabón testified that Rodríguez-Torres owned drug points in housing projects that La Rompe controlled. He testified too that Rodríguez-Torres served as an armed enforcer, carrying a .10 caliber Glock – among other duties, an enforcer "intimidat[ed]" and "kill[ed]" people for the organization. Anyway, cooperator Calviño-Acevedo added that Rodríguez-Torres supplied guns to La Rompe and kept a .40 caliber Glock at his (Rodríguez-Torres's) house, where he "decked" marijuana ("decked" is slang for prepared for distribution). Shifting from Rodríguez-Torres, Delgado-Pabón testified that he saw an always-armed Guerrero-Castro at a La Rompe-controlled drug point, pretty much daily at one point. Add to this the large amount of evidence showing that La Rompe's aim was to defend its

drug turf, with violence if necessary, and we conclude that a rational jury could easily find that the guns Rodríguez-Torres and Calviño-Acevedo carried, and the guns Rodríguez-Torres gave to La Rompe, "advance[d] or promote[d]" their own and their coconspirators' drug-dealing business. See Gurka, 605 F.3d at 44; see also Ramírez-Rivera, 800 F.3d at 23 (reaching a similar conclusion in a similar case involving similar evidence).

Rodríguez-Torres's and Guerrero-Castro's counterarguments do not do the trick either. Rodríguez-Torres, for example, seemingly questions Delgado-Pabón's and Calviño-Acevedo's credibility, calling their testimony occasionally contradictory and uncorroborated. What he overlooks is that we must draw all inferences — including inferences about credibility — in favor of the jury's verdict. So to the extent that his counterargument turns on showing Delgado-Pabón and Calviño-Acevedo were not credible — an issue the jury resolved against them — it fails. Also damaging to him is that our sufficiency cases say that "[t]estimony from just one witness can support a conviction." United States v. Negrón-Sostre, 790 F.3d 295, 307 (1st Cir. 2015) (quotation marks omitted). As for Guerrero-Castro, he contends that Delgado-Pabón did not describe "the type" of gun he (Guerrero-Castro) carried at the drug points. But no such evidence was needed. See Ramírez-Rivera, 800 F.3d at 23. Still searching for

a game-changing theory, he speculates that maybe he had a "[r]eplica" gun. A problem for him is that he approaches the record the wrong way – for after drawing all plausible inferences in favor of the verdict (something he does not do), we think a reasonable jury could infer from the evidence (*e.g.*, that he was an "always armed" drug-point owner who "would kill") that he possessed a firearm as defined in the criminal code. See 18 U.S.C. 921(a)(3) (explaining that "firearm" in § 924(c) means a weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive").[8]

Wrap Up

Sufficiency challenges are notoriously difficult to win, given the standard of review. See, e.g., United States v. Tum, 707 F.3d 68, 69 (1st Cir. 2013). And having spied no winning argument here, we press on.

OUT-OF-COURT-STATEMENTS CLAIMS

Overview

Guerrero-Castro argues that the judge slipped by admitting two out-of-court statements allegedly made by him – one

[8] The indictment also charged the duo with aiding and abetting the possession of a firearm in relation to a drug-trafficking conspiracy. And Rodríguez-Torres claims the evidence inadequately supported that theory. But because the evidence sufficed to convict him as a principal, we need not address that facet of his sufficiency claim.

to cooperator Calviño-Ramos, the other to cooperator Calviño-Acevedo. Both statements indicated that Guerrero-Castro had choked a La ONU member to death. As he sees it, the government violated federal Criminal Rule 12 by not notifying him of its plan to use these statements at trial.[9] Disagreeing, the government asserts that Guerrero-Castro "waived" any problem he had with the admission of Calviño-Ramos's testimony by not raising it below. Waiver aside, the government sees no error because Guerrero-Castro made that statement before Calviño-Ramos became a government cooperator and so was not discoverable under Rule 12. As for the statement to Calviño-Acevedo, the government relevantly contends that Guerrero-Castro cannot show prejudice, because the jury had already heard Calviño-Ramos's testimony. In the pages that follow,

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[9] Rule 12(b)(4)(B) provides that

> [a]t the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

And federal Criminal Rule 16(a)(1)(A) says that

> [u]pon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

we explain why the government has the better of the argument – but first, some context.

A couple of weeks before trial, Guerrero-Castro asked the judge to have prosecutors disclose pretrial all statements he was entitled to under federal Criminal Rule 16(a)(1)(A) – a provision (we note again) that makes discoverable "the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." Guerrero-Castro wanted to know if prosecutors planned to "rely on any such statements" so he could decide if he should move to suppress them. The judge issued a minute order granting Guerrero-Castro's "Rule 16" motion. A few days later, complying with a previous order requiring early disclosure of witness statements covered by the Jencks Act, 18 U.S.C. § 3500, the government handed the defense "4,000 pages" of materials relating to cooperators Yanyoré-Pizarro, Delgado-Pabón, Calviño-Ramos, and Calviño-Acevedo.[10]

At trial, Calviño-*Ramos* testified that Guerrero-Castro got a drug point at "Los Laureles" by "kill[ing]" for La Rompe.

[10] The Jencks Act is named after Jencks v. United States, 353 U.S. 657 (1957). See United States v. Acosta-Colón, 741 F.3d 179, 189 n.1 (1st Cir. 2013).

Asked how he knew this, Calviño-Ramos testified (over leading-question and asked-and-answered objections by the defense) that Guerrero-Castro, "Bin La[den]," "Bryan Naris," and "Kiki Naranja" told him in "Los Laureles" that Guerrero-Castro had choked a La ONU member to death. At a bench conference after Calviño-Ramos's testimony, Guerrero-Castro's counsel raised a "Jencks" concern, saying he needed any Jencks statements about the choking incident for cross-examination purposes. No such statements existed, the prosecutor told the judge. The prosecutor added that the government had disclosed in pretrial plea negotiations that it would put on evidence that Guerrero-Castro had committed a choking murder. And after the judge said "[l]et's proceed with cross," Guerrero-Castro's lawyer said that he had "no issue then."

Several days later, Calviño-*Acevedo* testified that Guerrero-Castro "is known as a person who grabs people by the neck and chokes them." Asked how he knew this, Calviño-Acevedo said that Guerrero-Castro "confessed . . . one time" when "we were at MDC" Guaynabo, a federal prison in Guaynabo, Puerto Rico. Guerrero-Castro's counsel objected. And another bench conference took place. Guerrero-Castro's lawyer noted that "[t]he government informed me of the statement that you heard." But he said that the government had not given "written notice" that it intended to introduce the statement as "a confession." Responding to questions

from the judge, the prosecutor said that Guerrero-Castro's counsel knew from "several proffer sessions that evidence would come out that his client would choke people, that our cooperating witnesses would say in open court under oath that his client would choke people, so he knew this was coming." Asked by the judge if the government had told the defense that "this evidence was coming out today?" the prosecutor responded (without contradiction from defense counsel) that he had. The prosecutor also said that Calviño-Acevedo's comment involved the same choking incident that Calviño-Ramos had testified to. Finding that the government had given the defense "plenty of notice" and that Calviño-Acevedo would simply be "confirming what [Calviño-Ramos] said," the judge overruled the objection.

Now on to our take.

Analysis

Standard of Review

Abuse-of-discretion review applies to preserved claims that the judge should not have admitted evidence because the government infracted Rule 12. See, e.g., United States v. Marrero-Ortiz, 160 F.3d 768, 774 (1st Cir. 1998). The parties, however, disagree on whether Guerrero-Castro properly preserved all his arguments here. Guerrero-Castro says he did. The government says he is only half right, insisting that he waived or forfeited his

arguments about Calviño-Ramos's testimony but agreeing that he preserved his arguments about Calviño-Acevedo's testimony. We bypass any concerns about waiver or forfeiture, because his challenge fails regardless.

Statement to Calviño-Ramos

Rule 12(b)(4)(B) applies to evidence that is "discoverable under Rule 16." United States v. de la Cruz-Paulino, 61 F.3d 986, 993 (1st Cir. 1995). To be discoverable under Rule 16, the statement had to have been made to a government agent. Fed. R. Crim. P. 16(a)(1)(A). But Guerrero-Castro offers no Rule 16-based argument – *i.e.*, that he made the statement "in response to interrogation by a person [he] knew was a government agent." And that is probably because – as the government notes, without being contradicted (Guerrero-Castro filed no reply brief) – Guerrero-Castro made the statement to Calviño-Ramos *before* Calviño-Ramos became a government cooperator. See generally United States v. Taylor, 417 F.3d 1176, 1181 (11th Cir. 2005) (spying no abused discretion "in admitting" the challenged testimony because the defendant "made . . . voluntary statements to an individual who was not a government agent" – thus "the statements are . . . not discoverable under" Rule 16(a)(1)(A)).

Statement to Calviño-Acevedo

We can also make quick work of Guerrero-Castro's challenge to Calviño-Acevedo's testimony. That is because even if Guerrero-Castro could show a Rule 12 violation (and we intimate no hint of a suggestion that he could), he cannot show prejudice, because the jury had already heard Calviño-Ramos's testimony to the same effect. See generally de la Cruz-Paulino, 61 F.3d at 993 (noting that to get a reversal for a Rule 12 violation, "[a] defendant must prove that the alleged violation prejudiced his case" (quotation marks omitted and brackets in original)). And despite hearing both Calviño-Ramos and Calviño-Acevedo testify about the choking admission, the jury found Guerrero-Castro not guilty of two murder counts – this fact is significant, because a "discriminating verdict . . . tends to" undercut an "assertion of prejudice." United States v. Tashjian, 660 F.2d 829, 836 (1st Cir. 1981); accord United States v. Boylan, 898 F.2d 230, 246 (1st Cir. 1990).

Wrap Up

Guerrero-Castro's Rule 12 complaint is not the stuff of reversible error.

JURY-INSTRUCTION CLAIMS

Overview

Each defendant challenges various parts of the judge's general RICO-conspiracy instructions.[11] Here is what you need to know.

After the government concluded its case-in-chief, the judge excused the jury and handed counsel a "draft" of the proposed jury instructions so that they could "take [the draft] with" them that night. The judge warned them to "be prepared to do closings" the following day.

The next morning, the judge discussed with counsel a few tweaks he made to the draft instructions (adding, for example, conspiracy-withdrawal and multiple-conspiracy instructions). The defendants completed their cases that morning (Rodríguez-Martínez's mother took the stand, for instance) and then rested. Before breaking for lunch at 12:45 p.m., the judge distributed the revised instructions.

[11] To save the reader from having to flip back a few pages, we repeat that RICO forbids "person[s] employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of [that] enterprise's affairs through a pattern of racketeering activity" — or to conspire to do so. See 18 U.S.C. § 1962(c), (d).

At around 2:00 p.m., the court came back into session. The government, Guerrero-Castro, and Vigio-Aponte gave their closing arguments. And Rodríguez-Martínez started his. After excusing the jury for the evening, the judge asked counsel if they had "[a]ny questions about the instructions." Speaking first, Guerrero-Castro's lawyer said that he had "reviewed" the draft instructions, "checked some cases," and made written "notes" about "questions or suggestions." He then asked for a couple of changes. But concerning the RICO instructions, he only objected to what the parties (and we) call the "essence of a RICO conspiracy" charge (representing the judge's summary of RICO law), arguing that "it's repetitive, because the elements have been discussed in detail in the prior instructions" and that it unduly "simplifie[s] . . . the elements that have to be proven beyond a reasonable doubt." Sánchez-Mora's counsel joined in that objection. Counsel for Rodríguez-Torres, Rodríguez-Martínez, and Vigio-Aponte raised no objections to the RICO-conspiracy instructions. The judge declined to eliminate the essence-of-a-RICO-conspiracy charge.

The following day, after the remaining defendants' closing arguments and the government's rebuttal, the judge charged the jury. On the RICO-conspiracy count, the judge said that to establish guilt, "the government must prove that each defendant knowingly agreed that a conspirator, which may include the

defendant himself, would commit a violation of . . . 18 U.S.[C. §] 1962(c), which is commonly referred to as the substantive RICO [s]tatute." After quoting § 1962(c), the judge stated (emphasis ours) that the government must prove five elements beyond a reasonable doubt:

> First, that an enterprise existed or that [an] enterprise *would* exist. Second, that the enterprise was or *would* be engaged in or its activities [a]ffected or *would* [a]ffect interstate or foreign commerce. . . . Third, that a conspirator was or *would* be employed or associated with the enterprise. Fourth, that a conspirator did or *would* conduct or participate in — either directly or indirectly — the conduct of the affairs of the enterprise. And, fifth, that a conspirator did or *would* knowingly participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity as described in the Indictment. That is, a conspirator did or *would* commit at least two acts of racketeering activity.

The judge then said a little bit about each element. For example, and as relevant here, the judge said (emphasis ours) that "racketeering activity" includes "drug trafficking, robbery, murder, carjacking, and *illegal use of firearms*, among many others." And then the judge gave the essence-of-a-RICO-conspiracy charge (again, emphasis ours):

> [B]ecause the essence of a RICO conspiracy offense is the agreement to commit a substantive RICO offense, the government need only prove beyond a reasonable doubt that if the conspiracy offense was completed as contemplated, the enterprise *would* exist, that this enterprise *would* engage in or its activities *would* [a]ffect interstate or foreign commerce[,] [a]nd that a conspirator, who could be but need not be the defendant himself, *would* have been employed by or associated with

> the enterprise through a pattern of racketeering activity.
>
> The government is not required to prove that the alleged enterprise was actually established; that the defendant was actually employed by or associated with the enterprise; or that the enterprise was actually engaged in or its activities actually [a]ffected interstate or foreign commerce.

Wrapping up, the judge explained what the government had to establish to show that a defendant "entered into the required conspiratorial agreement" — namely, "that the conspiracy existed and that the defendant knowingly participated in the conspiracy with the intent to accomplish [its] objectives or assist other conspirators in accomplishing [its] objectives," with knowingly "mean[ing] that something was done voluntarily and intentionally, and not because of a mistake, accident or other innocent reason."

After completing the charge, the judge gave the lawyers a chance to object at sidebar. Only Guerrero-Castro's attorney objected to the RICO-conspiracy instructions, repeating his claim that the essence-of-a-RICO-conspiracy charge "oversimplifies the elements of the offense."

With this background in place, we flesh out the parties' claims.

Our defendants argue — in various combinations — that the judge gave improper and confusing RICO-conspiracy instructions

(in delivering both the long version and the essence-of-a-RICO-conspiracy charge) by

> (1) not requiring findings that (a) the enterprise actually existed; (b)the enterprise actually affected interstate or foreign commerce; (c) the defendant actually was employed or associated with the enterprise; and (d) the defendant actually participated in the conduct of the enterprise's affairs;
>
> (2) not saying that a defendant must have "knowingly joined" the RICO conspiracy; and
>
> (3) stating that a firearms crime constitutes racketeering activity.

For ease of reference, we will call these — perhaps somewhat unimaginatively — argument (1), argument (2), and argument (3).

Anyhow, their argument (1) theory is that the judge's repeated use of "would" — that "the enterprise *would* exist," that the enterprise's "activities *would* [a]ffect interstate or foreign commerce," *etc.* (emphasis ours) — clashes with Ramírez-Rivera, where we said that a RICO-conspiracy conviction requires that the government establish

> the existence of an enterprise affecting interstate [or foreign] commerce[;] . . . that the defendant knowingly joined the conspiracy to participate in the conduct of the affairs of the enterprise[;] . . . that the defendant participated in the conduct of the affairs of the enterprise[;] and . . . that the defendant did so through a pattern of racketeering activity by agreeing to commit, or in fact committing, two or more predicate offenses.

800 F.3d at 18 (alteration in original) (quoting United States v. Shifman, 124 F.3d 31, 35 (1st Cir. 1997)). Their argument

(2) claim is that given cases like Ramírez-Rivera, the judge had to — but did not — tell jurors that to convict on a RICO-conspiracy charge, they must find that each defendant knowingly joined the conspiracy. And their argument (3) contention relies on United States v. Latorre-Cacho, where we held that a judge erred by instructing the jury that "'firearms' constitute 'racketeering activity'" — the rationale being that "the commission of firearms offenses, or even the involvement with firearms," is not included in the statutory definition of "racketeering activity." 874 F.3d 299, 301, 302 (1st Cir. 2017).

Responding to argument (1), the government claims that the judge correctly and clearly instructed the jury on the enterprise, interstate-commerce, association, and participation elements of the RICO-conspiracy crime. "[T]his [c]ourt," writes the government, "has not decided whether" RICO conspiracy "requires proof of an existing enterprise; and the Supreme Court, though describing the nature of a RICO conspiracy in terms that foreclose such a requirement, has not explicitly decided the question" either — "[t]he same is true" of the other contested elements, the government adds. So in the government's view (based mainly on its reading of the tea leaves in the United States Report), the prosecution can satisfy "its burden by proving that the conspirators agreed to *form* an enterprise" — which, the

government argues, undercuts the defendants' "interstate-commerce, association, and participation" arguments as well. As for Ramírez-Rivera, the government calls the passage excerpted above — requiring "the existence of an enterprise," for instance — "dicta," because prosecutors there, "like th[e] one[s]" here, "relied on evidence of an *actual* racketeering enterprise to prove the agreement that one would be established, and no argument was raised [there] that the existence of an enterprise was not a necessary element" of a RICO-conspiracy offense.

As for argument (2), the government insists that the judge's instructions — *e.g.*, "that the conspiracy existed and that the defendant knowingly participated in the conspiracy with the intent to accomplish [its] objectives or assist other conspirators in accomplishing [its] objectives" — made clear that the defendants had to have knowingly joined the conspiracy. Which means that the government believes the judge gave error-free instructions on these matters — though the government does argue that even if the judge did err, the defendants still lose, because they cannot show "prejudice" or "a miscarriage of justice."

Moving to argument (3), the government admits that, given Latorre-Cacho, the judge did err in telling the jury that a firearms crime is a racketeering activity for RICO-conspiracy purposes. But, the government assures us, we need not reverse on

this issue, because no challenging defendant can show "prejudice []or a miscarriage of justice," given the "strength of the . . . evidence of more than two qualifying predicate acts."

Time for us to explain why no reversal is called for here.

Analysis

Standard of Review

Conceding that they did not preserve their jury-instruction arguments, Rodríguez-Torres, Sánchez-Mora, Rodríguez-Martínez, and Vigio-Aponte admit that they now must satisfy the demanding plain-error standard, showing not just error but error that is obvious, that is prejudicial (meaning it affected the proceeding's outcome), and that if not fixed by us (exercising our discretion) would cause a miscarriage of justice or undermine confidence in the judicial system. See, e.g., Rivera-Carrasquillo, 933 F.3d at 48 n.14.

Desperate to escape plain-error review, Guerrero-Castro says that he did object to the judge's essence-of-a-RICO-conspiracy charge. True, but that does not help him. His arguments below (that the essence charge was repetitive of the previous instructions that stated "the elements" and was also too simplified to boot) are different from his arguments here (that the instructions did not accurately define the RICO elements, for

the reasons described in arguments (1) and (2), above – a/k/a, the "would"-related-instruction and the knowledge-instruction claims). And our caselaw says that a timely objection on one ground does not preserve an objection on a different ground. See United States v. Glenn, 828 F.2d 855, 862 (1st Cir. 1987).

Undaunted, Guerrero-Castro claims that he should get a pass because the judge conferenced with counsel on the instructions after the first day of closing arguments, which (supposedly) gave his attorney "no time to properly prepare and provide the [judge] more detailed objections." Call us unconvinced. Not only does he cite us no authority to support his free-pass proposition, but the record refutes his no-time assertion. The judge gave counsel the proposed instructions two days before he charged the jury; over those two days, the judge had several discussions with counsel about the instructions, including one in which Guerrero-Castro's lawyer acknowledged that he had reviewed and researched the instructions and asked for some changes; and the judge held a sidebar with counsel after delivering the charge, during which Guerrero-Castro's counsel objected to the essence-of-a-RICO-conspiracy charge, but, again, not on the grounds raised here. See United States v. Henry, 848 F.3d 1, 13-14 (1st Cir. 2017) (finding an instructional claim not preserved because counsel did not raise it at the post-charge sidebar).

The net result is that we apply plain-error review to these challenges, knowing too that unpreserved claims of error like these "*rare*[*ly*]" survive plain-error analysis. See Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (emphasis added); accord United States v. Gómez, 255 F.3d 31, 37 (1st Cir. 2001) (stressing that "the plain-error exception is cold comfort to most defendants pursuing claims of instructional error"); United States v. Paniagua-Ramos, 251 F.3d 242, 246 (1st Cir. 2001) (noting that "the plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors").

Argument (1)

Even assuming (without deciding) that the judge's "would"-related instructions — that "the enterprise *would* exist," that the enterprise's "activities *would* [a]ffect interstate or foreign commerce," *etc.* (emphasis added) — amount to an error that is also obvious (and to be perfectly clear, we intimate no judgment on those questions), we conclude that the defendants fail to establish prejudice or a miscarriage of justice.[12]

If an instruction leaves out an offense element, that "alone is *insufficient* to demonstrate prejudice." United States

[12] This is as good a place as any to say a few words about the parties' views on Ramírez-Rivera. As noted, the defendants read Ramírez-Rivera as holding that prosecutors in a RICO-conspiracy case must prove that the enterprise actually existed, that the defendant was actually employed by or associated with the

v. Hebshie, 549 F.3d 30, 44 (1st Cir. 2008) (emphasis added).[13] Rather, a defendant "must satisfy the difficult standard of showing a likely effect on the outcome or verdict." Id. (quotation marks omitted). And this our defendants have not done.

The government charged an actual enterprise. And prosecutors presented that theory to the jury in its opening statement, closing summation, and rebuttal argument. "Power, money, control," the prosecution's opening statement began. "The means[:] drug trafficking, robberies, carjackings, shootings, violence, murder" — "[t]hat was the business of La Rompe . . ., and that is what this case is about." In its closing, the

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enterprise, that the enterprise's activities actually affected interstate or foreign commerce, and that the defendant actually participated in the enterprise's affairs. But as the government correctly states, Ramírez-Rivera did not have to confront that issue, because prosecutors there relied on evidence of the enterprise's actual existence, the defendant's actual employment or association with the enterprise, *etc.*, to prove the RICO-conspiracy charge. See 800 F.3d at 18-21. As the government also correctly states, no binding precedent exists on this issue. And we need not stake out a position on these points today, because (as we explain in the text) the defendants lose on plain-error review even if their view is correct (and we, of course, whisper no hint that it is). See generally United States v. Caraballo-Rodríguez, 480 F.3d 62, 70 (1st Cir. 2007) (explaining that a holding that a party "has not met his burden of showing there was an error which was plain" is not a "ruling on the merits").

[13] As the government explains, the assumed errors here are perhaps better described as "misdescription[s] of . . . element[s]" rather than omissions. See Johnson v. United States, 520 U.S. 461, 469 (1997). But the defendants offer no reason (and we see none) for why this distinction should matter for our analysis.

prosecution stressed that "La Rompe was a violent gang that controlled the drug trafficking activities in more than 18 areas, including housing projects and wards within the Municipalit[ies] of San Juan, Carolina, and Trujillo Alto," with its "enem[y]" being "La ONU." The prosecution also called La Rompe "[a]n organization that killed" in its rebuttal — "[a]n organization that [killed] to become more powerful[,] [f]or control, power, money."

And the government presented overwhelming evidence (which we spotlighted pages ago) to back up its theory. For example, the evidence showed that La Rompe actually existed as an enterprise, given how associates: self-identified as La Rompe members; had meetings to discuss matters that affected La Rompe; shared resources, including manpower, guns, and cars; got together every day to peddle monstrous amounts of drugs at La Rompe's many drug points; committed robberies, carjackings, and murder in La Rompe's name; and had to follow strict rules of conduct, on pain of death. The evidence also showed that La Rompe's actions had at least a *de minimis* effect on interstate or foreign commerce, seeing how (among other things) La Rompe imported cocaine and heroin from South America. As for participation, the evidence showed that the defendants owned drug points in La Rompe-controlled housing projects. And on the pattern-of-racketeering question, the evidence showed that La Rompe members — leaders, drug-point owners,

runners, and sellers, *etc.* — actually committed (or aided and abetted the commission of) countless drug sales and scores of murders, all to advance the enterprise's ghastly business.

In their presentations to the jury, even defense counsel did not dispute that La Rompe existed, affected interstate or foreign commerce, and conducted its affairs through drug-trafficking and murder. For example, Vigio-Aponte's counsel predicted in her opening statement that the evidence would show that some of Yanyoré-Pizarro's murders were (emphasis ours) "related to the La Rompe . . . *organization*." In his closing argument, Guerrero-Castro's attorney called La Rompe "a clan of killers" that operated through "a whole bunch of leaders . . .[,] runners, and sellers, and drug point owners." Vigo-Aponte's lawyer admitted in her closing that La Rompe had "area[s]." Rodríguez-Martínez's attorney conceded in his closing that his client's cousin was a La Rompe member (implicitly acknowledging that La Rompe does exist). And summarizing — without contesting — the cooperators' testimony about how La Rompe's drug operation worked, Sánchez-Mora's counsel noted in his closing that

> [t]here are leaders in different housing projects, and . . . these leaders appoint people to become drug point owner[s]. . . . [T]he person that becomes a drug point owner has basically proven [his] worth to the organization, and that's by killing someone. The person that kills on behalf of the organization, proves . . . [his] loyalty.

No surprise, then, that defendants cannot show that the "would"-related instructions — that "the enterprise *would* exist," that the enterprise's "activities *would* [a]ffect interstate or foreign commerce," *etc.* (emphasis added, and apologies for the repetition) — prejudiced them or caused a miscarriage of justice. See Hebshie, 549 F.3d at 44-45 & n.14 (holding that (a) the defendant did not show prejudice from an instruction that "eliminated an element of the crime," because the government provided "strong" evidence of the omitted element and defense counsel failed to contest that evidence; and that (b) even if the defendant had shown prejudice, the omission did not cause a miscarriage of justice, "[b]ecause the evidence was not closely contested and [was] sufficient to support [his] conviction"). Rodríguez-Torres, Sánchez-Mora, and Vigio-Aponte claim that "insofar as" their "conviction[s]" are "based on erroneous elements," that in itself is enough to show prejudice and a miscarriage of justice. But this argument conflicts with settled law. See id. at 44 (explaining that "[t]he mere fact that an erroneous instruction resulted in the omission of an element of the offense is not alone sufficient to demonstrate a prejudicial [e]ffect on the outcome of the trial"); see also Johnson, 520 U.S. at 470 (noting that (a) if an instruction omitting an offense element did not affect the judgment, it "would be the *reversal* of

[such] a conviction" that would seriously affect the fairness, integrity, and public reputation of judicial proceedings, thereby causing a miscarriage of justice; and that (b) "[r]eversal of error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it" (emphasis added and internal quotation marks omitted)). Rodríguez-Martínez makes no effort to show prejudice.[14] And he wrongly argues that a misinstruction automatically causes a miscarriage of justice. As for Guerrero-Castro, he makes no attempt to show either prejudice or a miscarriage of justice. All of which devastate their plain-error bids. See Rivera-Carrasquillo, 933 F.3d at 49; see also United States v. Gordon, 875 F.3d 26, 30 (1st Cir. 2017) (stressing that "[t]he party asserting that an error was plain must carry the burden of establishing that the claimed error satisfies each element of this standard"); United States v. Ponzo, 853 F.3d 558, 586 (1st Cir. 2017) (deeming an argument waived because defendant made no effort to meet each part of the plain-error test).[15]

[14] To the extent Rodríguez-Martínez tries to fix this by mentioning prejudice and miscarriage of justice in his reply brief, his effort comes too late. See, e.g., United States v. Marino, 833 F.3d 1, 6 n.3 (1st Cir. 2016) (stressing that an argument introduced in a reply brief is waived).

[15] Rodríguez-Torres, Sánchez-Mora, and Vigio-Aponte label the instructions generally confusing. But they offer no miscarriage-

Argument (2)

We shift then to argument (2), involving the knowledge-instruction claim. Recall that the judge (among other things) told the jury that the government had to prove that "the defendant knowingly participated in the conspiracy with the intent to accomplish [its] objectives or assist other conspirators in accomplishing [its] objectives," with knowingly "mean[ing] that something was done voluntarily and intentionally, and not because of a mistake, accident or other innocent reason." We need not — and thus *do not* — decide whether the judge committed an error that is plain here, because even if defendants could show error and plainness (and we do not suggest that they can), they have not shown prejudice or a miscarriage of justice. Each defendant owned a drug point. And because "drug-point ownership was a vital component" of the "conspiracy, given that the whole point of the enterprise was to maintain control of as many drug points as possible to earn more money," we easily conclude that "the jury had abundant evidence to find that the [d]efendants were integral parts of the enterprise's activities," see Ramírez-Rivera, 800 F.3d at 20 — evidence that satisfies the "knowledge" element too, see id. at 18 n.11. So the supposed instructional error could not

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of-justice argument — which dashes their hopes for a reversal on that basis. See, e.g., Ponzo, 853 F.3d at 586.

have changed the outcome. See United States v. O'Brien, 435 F.3d 36, 40 (1st Cir. 2006) (explaining that "it is enough to sustain the conviction that the result would quite likely have been the same" despite the off-target instruction).

Apparently forgetting about Johnson and Hebshie, Rodríguez-Torres, Sánchez-Mora, and Vigio-Aponte try to head off this conclusion by again wrongly asserting that misinstruction necessarily prejudices a defendant. Rodríguez-Torres, Sánchez-Mora, and Guerrero-Castro also call the evidence of their knowingly joining the conspiracy "weak" — an assertion we have already disposed of.

But even if they could show prejudice (which, again, they cannot), they have not shown that their convictions caused a miscarriage of justice. That is so because they rely on the already-rejected argument that a verdict based on an instructional error automatically constitutes a miscarriage of justice.

Argument (3)

Given Latorre-Cacho, Rodríguez-Torres, Sánchez-Mora, Vigio-Aponte, and Guerrero-Castro have shown that the instruction about a firearms crime being a RICO predicate is both error and obviously so.[16] But even if we assume (without granting) that they

[16] Latorre-Cacho came down years after our defendants' trial. But plain error's "error and plainness" requirements "are judged

can also show prejudice, they still must prove a miscarriage of justice. And unfortunately for them, they have not.

Noting that only two predicates are needed to support a RICO-conspiracy conviction, the government sees no miscarriage of justice. According to the government, "because it was undisputed that the La Rompe conspiracy comprised" many instances of "drug-trafficking and murder, the jury necessarily would have found those predicates." For their part, and as the government also notes, the challenging defendants base their miscarriage-of-justice argument entirely on the false premise that a jury's being "misinstructed as to an element of the offense" necessarily "cast[s] doubt [on] the integrity and fairness of a judicial process." We say "false" because, as we have been at pains to explain, Johnson and Hebshie reject that premise.[17] And by failing

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as of the time of appeal." United States v. Torres-Rosario, 658 F.3d 110, 116 (1st Cir. 2011).

[17] Latorre-Cacho does not help their miscarriage-of-justice theory either. Because the evidence of the proper predicates there — drug trafficking, robbery, and carjacking — was not "overwhelming" (for example, the Latorre-Cacho defendant testified, contesting any ties to the alleged predicate acts), we could "not see how [the miscarriage-of-justice] prong of the plain error standard precludes [him] from demonstrating plain error," especially since prosecutors waived any argument that might have refuted his miscarriage-of-justice theory. See 874 F.3d at 311. Two things distinguish Latorre-Cacho from our case. Here, unlike there, the evidence of the proper predicates — drug selling and murder (discussed in addressing argument (1), which recaps info discussed in addressing the sufficiency claims) — was overwhelming (or at least our defendants make no effort to show a lack of

on the miscarriage-of-justice front, defendants' argument (3) contentions come to naught. See, e.g., Ponzo, 853 F.3d at 586.

Wrap Up

Having reviewed defendants' instructional-error claims with care, we find that none strike home, because they failed to satisfy all facets of the plain-error inquiry.

SENTENCING CLAIMS

Overview

Rodríguez-Torres and Rodríguez-Martínez attack their concurrent, within-guidelines sentences as procedurally and substantively unreasonable. The pertinent background is as follows (fyi, given the issues in play, there's no need to get into all the sentencing math behind their terms).

The judge assigned Rodríguez-Torres an offense level of 43 and a criminal-history category of II, which yielded a guidelines-sentencing range of life in prison. But the judge varied downward, sentencing him to concurrent 405-month terms on the RICO-conspiracy count, the drug-conspiracy count, and a drive-by-shooting count. The judge later assigned Rodríguez-Martínez an offense level of 31 and a criminal-history category of III, which

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overwhelming evidence in pushing their miscarriage-of-justice plea). And here, unlike there, prosecutors waived no miscarriage-of-justice argument.

resulted in a sentencing range of 135-168 months. And the judge sentenced him to concurrent 168-month terms on the RICO-conspiracy count and the drug-conspiracy count.

On the procedural front, Rodríguez-Torres — repeating arguments that he made and lost below — insists that the judge doubly erred. He first argues that the judge stumbled by applying a first-degree murder cross-reference specified in USSG § 2D1.1(d)(1) — a provision that jacks up a defendant's penalty range if a person is killed during an offense under circumstances that would constitute murder under federal law. As he tells it, the cross-reference should not apply because he lacked the *mens rea* ("guilty mind," in nonlegalese) for first-degree murder, since his only involvement in a drive-by shooting (the relevant count of conviction here) was to drive the car whose passengers shot and killed several persons. He then argues that the judge also blundered by applying a manager/supervisor penalty enhancement under USSG § 3B1.1, because — in his view — no evidence showed that he actually "supervised any other defendant []or that he had sellers, runners, lookouts or any other type of supervision over anyone serving a role in the alleged conspiracy." As for Rodríguez-Martínez, he contends for the first time that the judge procedurally erred by attributing too much marijuana to him, by wrongly concluding that his drug activities qualified him for a

manager/supervisor penalty enhancement, and by miscalculating his criminal history points.[18]

Responding to the procedural-reasonableness arguments, the government insists that the evidence showed that Rodríguez-Torres aided and abetted the premediated killings. The government then says that role-in-the-offense enhancement had no effect on his offense level, because his offense level was already at 43 — which is the highest offense level allowable under the sentencing guidelines. And the government thinks that Rodríguez-Martínez waived his procedural-reasonableness claim by not objecting to the calculations in the presentencing report.

Rodríguez-Torres and Rodríguez-Martínez then argue in unison that these procedural flubs caused them to get excessive sentences. To which the government replies that because they are merely recycling their failed procedural-reasonableness theories, their substantive-reasonableness claims go nowhere too.

Our reaction is basically the same as the government's.

[18] He also says in a single sentence in his brief that the judge "ignored the individualized sentencing required by 18 U.S.C. § 3553(a)." But we deem that suggestion waived for lack of development. See, e.g., United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

Analysis

Standard of Review

The standard of review is not without nuance. See, e.g., United States v. Severino-Pacheco, 911 F.3d 14, 21 (1st Cir. 2018); United States v. Pérez, 819 F.3d 541, 545 (1st Cir. 2016). But for today we need only say that preserved claims of sentencing error trigger abuse-of-discretion review. See, e.g., Pérez, 819 F.3d at 545.

Procedural Reasonableness

Up first is Rodríguez-Torres's *mens rea* attack on the judge's application of the first-degree-murder cross-reference. Federal law defines first-degree murder as "the unlawful killing of a human being with malice aforethought," including "premeditated murder." 18 U.S.C. § 1111(a). Even a brief moment of premeditation suffices. See United States v. Catalán–Román, 585 F.3d 453, 474 (1st Cir. 2009). Federal law also says that a person who aids or abets the commission of a federal crime "is punishable as a principal." 18 U.S.C. § 2. And for current purposes it is enough to say that a person is liable for aiding and abetting if he "'consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal' accomplish it." United States v. Iwuala, 789 F.3d 1, 12 (1st Cir.

2015) (quoting United States v. Taylor, 54 F.3d 967, 975 (1st Cir. 1995)).

The evidence here easily proves that Rodríguez-Torres aided and abetted the premediated killing of Santos Díaz-Camacho (a La Rompe leader who had "turned" on the organization) and his escorts. Rodríguez-Torres drove one of the cars used to carry out the drive-by killings. And it is reasonable to infer that he knew about the plan to commit the killings and intended by his actions to help make the plan succeed. We say this because the evidence revealed that Rodríguez-Torres arrived at a prearranged meeting with Vázquez-Carrasquillo (La Rompe's top leader, who had ordered Díaz-Camacho's killing) and a group of armed La Rompe enforcers. He then went off with them to "hunt down" Díaz-Camacho. And he helped them at each step, taking some of the posse to Díaz-Camacho's housing complex; waiting with them for hours; tailing Díaz-Camacho and his escorts to a different location; pulling up his car so others could shoot and kill them; and then ditching his (Rodríguez-Torres's) car. Cinching our conclusion is the fact that Rodríguez-Torres drove a person who communicated with a La Rompe leader to coordinate the group's actions and pass along Vázquez-Carrasquillo's orders — so Rodríguez-Torres could have no doubt about the group's murderous intentions.

Very little need be said about the manager/supervisor enhancement, for the simple reason that this enhancement had *no* effect on Rodríguez-Torres's offense level.

As for Rodríguez-Martínez's procedural-reasonableness arguments, we also spend no time on them. And that is because he abandoned them at sentencing, given how his counsel told the judge that he agreed with the relevant calculations as the judge reviewed them. See United States v. Ramírez-Negrón, 751 F.3d 42, 52 (1st Cir. 2014) (finding waiver in a similar situation).

Substantive Reasonableness

A sentence flunks the substantive-reasonableness test only if it falls beyond the expansive "universe of reasonable sentencing outcomes." See United States v. Bermúdez-Meléndez, 827 F.3d 160, 167 (1st Cir. 2016); see also United States v. Tanco-Pizarro, 892 F.3d 472, 483 (1st Cir. 2018) (noting that "a sentence is substantively reasonable if the court's reasoning is plausible and the result is defensible"). Rodríguez-Torres and Rodríguez-Martínez believe that the judge's procedural errors led him to impose overly-harsh sentences, amounting to substantive unreasonability. But having shown that their procedural-reasonableness theories lack oomph, we cannot say that the judge acted outside the realm of his broad discretion in handing out the within-guidelines sentences. So their substantive-reasonableness

claims are no-gos. See, e.g., United States v. Madera-Ortiz, 637 F.3d 26, 30 (1st Cir. 2011).

Wrap Up

Concluding, as we do, that Rodríguez-Torres's and Rodríguez-Martínez's sentencing challenges lack force, we leave their prison terms undisturbed.

ENDING

All that is left to say is: *Affirmed*.

trafficking offenses. That is, drug trafficking crimes. It involves the use and carrying of firearms in relation to crimes of violence. And it also includes allegations of drive-by shootings.

Well, let's start with RICO. Let's land into the first count. RICO. Count I of the Indictment charges that from on -- from in or about, here we go again, on or about 2004 through and including July 2015, Pedro Vigio Aponte, also known as Pedrito, also known as Pedrito He Man, also known as Pello, also known as Pedrito Trauma; Reinaldo Rodriguez-Martinez, also known as Pitbull; Victor M. Rodriguez Torres, also known as Cuca, also known as Cucaracha, also known as Papotin; Guillermo Sanchez Mora, also known as Gillo; and Carlos M. Guerrero Castro, also known as Carlitos El Negro, also known as Marcel, along with others, knowingly conspired and agreed to conduct and participate directly and indirectly in the conduct of the affairs of an enterprise through a pattern of racketeering activity.

This is the so-called RICO conspiracy count. The name RICO comes from the title of the law, which addresses Racketeering Influence Corrupt Organizations. In order to convict the defendants of the RICO conspiracy charge that appears in Count I, the government must prove that each defendant knowingly agreed that a conspirator, which may include the defendant himself, would commit a violation of

this Statute.

I'll give you the section, 18 U.S. Code Section 1962(c), which is commonly referred as to the substantive RICO Statute. And the relevant portion of that Statute says the following: It shall be unlawful for any person employed by or associated with an enterprise engaged in or the activities of which effect interstate or foreign commerce to conduct or participate directly or indirectly in the conduct of such enterprise affairs through a pattern of racketeering activity or collection of unlawful debt.

In order to convict a defendant on the RICO conspiracy offense, based on an agreement to violate Section 1962(c) of Title 18, the government must prove the following five elements beyond a reasonable doubt. First, that an enterprise existed or that enterprise would exist. Second, that the enterprise was or would be engaged in or its activities effected or would effect interstate or foreign commerce.

Third, that a conspirator was or would be employed by or associated with the enterprise. Fourth, that a conspirator did or would conduct or participate in -- either directly or indirectly in the conduct of the affairs of the enterprise. And, fifth, that a conspirator did or would knowingly participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity as described in the

Indictment. That is, a conspirator did or would commit at least two acts of racketeering activity.

You heard a word that I mentioned, which was knowingly. Let me tell you right up front what this means, knowingly. You're going to hear the word knowingly many times, but it means the following when you refer to it in the context of indictments and crimes charged in an indictment. The term knowingly means that something was done voluntarily and intentionally, and not because of a mistake, accident or other innocent reason. That's what it means.

Let me define for your benefit what is a racketeering activity. Racketeering activity is designed to include a variety of crimes subject to, include imprisonment more than one year, as well as a variety of crimes subject to Federal indictment. I am instructing you as a matter of law that drug trafficking and murder both qualify as racketeering activities.

Let's try to define what is an enterprise or an association in fact. The first element of the RICO conspiracy the government must prove beyond a reasonable doubt is that an enterprise existed or would exist as alleged in the Indictment.

As used in this instruction the term enterprise includes any individual partnership, corporation, association or other legal entity and any union or group of individuals

associated in fact, although not as a legal entity. The term enterprise as used in these instructions may include a group of individuals associated in fact even though this association is not recognized as a legal entity. Thus, an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals.

A group or association of people can be an enterprise if these individuals have associated together for a common purpose of engaging in a course of conduct. The government must prove an association in fact, an enterprise, and that that existed or would exist by evidence of the organization, whether formal or informal. And that the evidence is that the various associates functioned as a continuing unit.

The enterprise must have the three following structural features. A purpose, that's number one. Number two, relationships among those associated with the enterprise. And three, longevity, sufficient to permit these associates to pursue the enterprise's purpose.

It is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organizations -- or organization, I'm sorry, that its members did or would function in and operate in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise.

Such a group need not have hierarchical structure or

a chain of command. Decisions may be made on a day-to-day basis or what we call an ad hoc basis, and by a number of methods. By majority vote, consensus, a show of strength, et cetera.

Members of the group need not have fixed roles. Different members may perform different roles at different times. The group need not have a name, need not have regular meetings. No dues payable are needed. There is no need for established rules and regulations, no need for particular disciplinary procedures, no need for induction or initiation ceremonies.

While the group must or would function as a continuing unit, and remain in existence long enough to pursue a course of conduct, you may nonetheless find that the enterprise element is satisfied by finding a group whose associates engaged in spurts of activity punctuated by periods of quiescence or inactivity.

Thus, an enterprise need not have role differentiation or a unique modus operandi or a chain of command or professionalism or sophisticated organization or diversity and complexity of the crimes or uncharged or additional crimes aside from the predicate acts, an internal discipline mechanism or an enterprise name.

Moreover, an enterprise is not required to be business like in its form or function, and it may but need not

have an economic or profit seeking motive. Indeed, criminal RICO is not limited to groups whose crimes are sophisticated, diverse, complex, or unique.

Such an association of individuals may retain its status as an enterprise even though the membership of the association changes over time by adding or losing individuals during the course of its existence. The existence of the enterprise continues even if there is a gap or interruption of the enterprise's racketeering activities.

Although whether an enterprise existed or would exist is a distinct element that must be proved by the government beyond a reasonable doubt, it is not necessary to find that the enterprise had some function wholly unrelated to racketeering activity.

Common sense dictates that the existence of an enterprise is often times more readily proven by what it does rather than by an abstract analysis of its structure. Thus, the evidence used to prove the pattern of racketeering and the enterprise may blend or come together. Therefore, you may consider the proof of the racketeering acts to determine whether the evidence establishes the existence of an enterprise. And further, you may infer the existence of the enterprise from evidence of the pattern of racketeering activity.

Finally, the term enterprise includes legitimate and

illegitimate enterprises. An enterprise can be a vehicle used by a defendant to commit a crime. I would say even a legal enterprise can be a vehicle used by a defendant to commit a crime. And the enterprise itself may be the victim. The government is not required to prove each and every allegation about the enterprise or the manner in which the enterprise operated or would operate.

Let's talk about the enterprise of business in interstate or foreign commerce. The second element the Government must prove beyond a reasonable doubt is that the RICO enterprise was or would be engaged in or its activities effected or would effect interstate or foreign commerce. Interstate commerce means trade or conducting business or travel between one state and another state or the District of Columbia. And foreign commerce means such trade, business, or travel between the United States and another country.

Therefore, interstate and foreign commerce may include the movement of money, goods, narcotics, firearms, services or persons from one state to another state or the District of Columbia or between the United States or another country. This may include, among other matters, the purchase or sale of goods or supplies from outside the United States or the state in which the enterprise was located.

The use of interstate -- of interstate or international mail or wire, which is telephone communications,

facilities or the causing of any of those things. I will tell you that for purposes of this instruction, the Commonwealth of Puerto Rico is as if it was a state in the context of this type of definition.

An enterprise is generally engaged in commerce when it itself directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce. If you find that the evidence is sufficient to prove that the enterprise was or would be engaged in interstate commerce or foreign commerce, the required nexus to interstate or foreign commerce is established. And therefore, the government is not required to prove the alternative, that the activities of the enterprise effected or would effect interstate or foreign commerce.

Regarding that alternative method of satisfying this element to establish the requisite effect on interstate or foreign commerce, the Government is not required to prove a significant or substantial effect on interstate or foreign commerce. Rather, a minimal effect on interstate or foreign commerce is sufficient.

It is also not necessary for the government to prove that the individual racketeering acts themselves effected interstate or foreign commerce. Rather, it is the enterprise and its activities considered in their entirety that must be shown to have that effect. On the other hand, this effect on

interstate or foreign commerce may be established through the effect caused by the individual racketeering acts.

Moreover, it is not necessary for the government to prove that the defendants knew that the enterprise effected or would effect interstate or foreign commerce, that the defendants intended to effect interstate or foreign commerce, or that the defendants were or would be engaged in or their activities effected or would effect interstate or foreign commerce.

In this case, the government contends that the enterprise was or would be engaged in or its activities effected or would effect interstate or foreign commerce in the following ways, among others. One, members of the enterprise and their associates trafficked in cocaine base, which is crack, powder cocaine, heroin, and marijuana.

Two, members of the enterprise and their associates possessed firearms that traveled in interstate or foreign commerce. The government is not required to prove all the circumstances outlined above to satisfy this element. The government need only prove beyond a reasonable doubt either that the activities of the enterprise considered in their entirety had or would have some minimal effect on interstate or foreign commerce or that the enterprise was or would have some minimal effect on interstate or foreign commerce or that the enterprise was or would be engaged in interstate or

foreign commerce.

Well, let's talk now about the third element, which is employed by or associated with the enterprise. The third element that the government must prove beyond a reasonable doubt is that a conspirator, which may include the defendant himself, was or would be employed by or associated with the enterprise about which I already instructed you.

The government need not prove both. Either employed by or associated with is sufficient to establish this element. The term employed by should be given its common, plain meaning. Thus, a person is employed by an enterprise when for example there is a payroll of the enterprise, and services are performed for the enterprise. And the person holds a position in their enterprise or has an ownership interest in the enterprise.

Associated with also should be given its plain meaning. As stated in Websters Third New International Dictionary, to associate means to join. Often in a loose relationship as a partner, fellow worker, colleague, friend, companion or ally, to join or connect with one another.

Therefore, a person is associated with an enterprise when, for example, that person joins with other members of the enterprise, and he knowingly aides or murders the activities of the enterprise or he conducts business with or through the enterprise. It is not required that the defendant agree that

any particular conspirator was or would be employed by or associated with the enterprise for the entire time the enterprise existed.

The government also is not required to prove that the defendant agreed that any particular conspirator had a formal position in the enterprise or participated in all the activities of the enterprise or had full knowledge of all the activities of the enterprise or knew about the participation of all the other members of the enterprise. Rather, it is sufficient that the government prove beyond a reasonable doubt that at some time during the existence of the enterprise, as alleged in the Indictment, a conspirator was or would be employed or associated with the enterprise within the meaning of those terms as I have just explained them. And that he knew or would know of the general nature of the enterprise and knew or would know that the enterprise extended beyond his own role in the enterprise.

There is a fourth element, which is conduct or participation in the affairs of the enterprise. The fourth element the government must prove beyond a reasonable doubt is that the defendant must have agreed that a conspirator would conduct or participate in the conduct of the affairs of the enterprise.

A defendant may be convicted of a RICO conspiracy offense even if he did not personally participate in the

operation or the management of the enterprise when the evidence establishes that the defendant knowingly agreed to facilitate a scheme which if completed, would constitute a RICO substantive violation involving at least one conspirator who would participate in the operation or management of the enterprise.

Such proof of an operation and management may include evidence that the defendant agreed that a conspirator would intentionally perform acts, functions, or duties which are necessary to or helpful in the operation of the enterprise, or that a conspirator had some part in directing the enterprise's affairs.

Nevertheless, the government need not prove that the conspirator would exercise significant control over or within the enterprise or that he had a formal position in the enterprise or that he had a primary responsibility for the enterprise's affairs. Rather, an enterprise is operated not just by upper management, but also by lower rung participants in the enterprise who are under the direction of upper management or who carry out upper management orders. An enterprise also might be operated or managed by one who exerts control over the enterprise.

There is a fifth element, which is the pattern of racketeering activity. Let's deal with that now.

The fifth element the government must prove beyond a

reasonable doubt is that a defendant agreed that a conspirator would engage in a pattern of racketeering activity. A pattern of racketeering activity requires at least two acts of racketeering, the last of which occurred within ten years after the commission of a prior act of racketeering.

To establish a pattern of racketeering activity, as alleged in Count I of the Indictment, the government must prove three elements beyond a reasonable doubt. First, that the defendant agreed that a conspirator, which could include the defendant himself, did or would intentionally commit or cause or aid and abet the commission of two or more of the racketeering acts of the type or types alleged in the Indictment. Your verdict must be unanimous as to which type or types of racketeering activities you find that the defendant agreed was or would be committed, caused, or aided and abetted.

Later in these instructions, I will instruct you in more detail on the elements regarding each of the charged types of racketeering activity. But you know now, from the summary I have given you, the types of racketeering activities alleged in this Indictment, which include, among others, possession with intent to distribute narcotics and murder.

Second, that the racketeering activity must have or would have a nexus, a connection, nexus, to the enterprise, and that the racketeering activity was or would be related.

Racketeering activity has a nexus to the enterprise, connection to the enterprise, if it has a meaningful connection to the enterprise.

To be related, the racketeering activity was or would have the same or similar purposes, results, participants, victims, or methods of commission or be otherwise interrelated by distinguishing characteristics and not being merely isolated events.

Two racketeering acts of the type or types of racketeering activity described in the Indictment may or would be related even though they are dissimilar or not directly related to each other, provided that the racketeering acts are or would be related to the same enterprise.

For example, for both nexus and relatedness purposes, the requisite relationship between the RICO enterprise and the racketeering act may or would be established by evidence that the defendant was or would be enabled to commit the racketeering act solely by virtue of his possession in the enterprise or involvement in or control over its affairs or by evidence that the defendant's position in the enterprise would facilitate his commission of the racketeering act, or by evidence that the racketeer was authorized by the enterprise or by evidence that the racketeering act would promote or further the purposes of the enterprise.

And third, that the racketeering activity must have

extended over a substantial period of time, or posed or would pose a threat of continued criminal activity. The government need not prove such a threat of continuing -- of continuity by any mathematical formula or by any particular method of proof. But rather may prove it in a variety of ways.

For example, the threat of continued unlawful activity may or would be established when the evidence shows that the racketeering activity is a part of a long-term association that exists for criminal purposes or when the racketeering activity is or would be shown to be the regular way of conducting the affairs of the enterprise.

Moreover, in determining whether the government has proven the threat of continued unlawful activity beyond a reasonable doubt, you are not limited to consideration of the specific type or types of racketeering activity charged against the defendants. Rather, in addition to considering such activity, you may also consider the nature of the enterprise and other unlawful activities of the enterprise and its members viewed in its entirety, including both charged and uncharged unlawful activities.

In order to convict the defendants of the RICO conspiracy offense, your verdict must be unanimous as to which type of predicate racketeering activity the defendants agreed to be committed. For example, at least two acts of drug trafficking or of murder or of any combination thereof.

The Indictment at pages 14, 15, and 16 charge the defendant or accuse the defendants of several types of racketeering activities, including drug trafficking, robbery, murder, carjacking, and illegal use of firearms, among many others. Drug trafficking is a Federal offense, and I will describe the elements of this offense in a moment. And I will later cover the issue of firearms.

Murder, however, is a state offense. It is defined in Article 105 of the 2004 Puerto Rico Penal Code as intentionally causing the death of a person. Article 106 of the 2004 Puerto Rico Penal Code meanwhile prohibits first degree murder, which requires that there be premeditation.

Premeditation is defined as the deliberation occurring prior to the resolve to perpetrate the act after having considered it for some time. Thus, for first degree murder, the government must prove beyond a reasonable doubt that first, a person caused the death of another person; second, the person intended to cause the death; and the person did so with premeditation.

Defining robbery. Robbery is the taking of property from a person or business by use of force, violence, or intimidation. Carjacking is a form of robbery. It is the taking of a motor vehicle that has been transported in interstate or foreign commerce by force, violence or intimidation.

Let's define attempt. An attempt to commit an offense, whether it's murder, robbery, carjacking or any other crime, is itself a crime. Every attempt is an act done with intent to commit the offense so attempted. The existence of this ulterior attempt or motive is the essence of the attempt. It consists of steps taken in furtherance of a crime, such as a murder, which the defendant attempting intends to carry out if he can. It is an act done with intent to commit a crime such as murder, but falls short of completion of the crime of murder defined in the previous instruction.

So let's say then something about the essence of a RICO conspiracy offense. As I've instructed you, because the essence of a RICO conspiracy offense is the agreement to commit a substantive RICO offense, the government need only prove beyond a reasonable doubt that if the conspiracy offense was completed as contemplated, the enterprise would exist, that this enterprise would engage in or its activities would effect interstate or foreign commerce. And that a conspirator, who could be but need not be the defendant himself, would have been employed by or associated with the enterprise, and would have conducted or participated in the affairs of the enterprise through a pattern of racketeering activity.

The government is not required to prove that the alleged enterprise was actually established; that the

defendant was actually employed by or associated with the enterprise; or that the enterprise was actually engaged in or its activities actually effected interstate or foreign commerce.

Let's say something about the agreement to commit a RICO offense. As I already told you before, the agreement to commit a RICO offense is the essential aspect of a RICO conspiracy offense. You may find that a defendant has entered into the requisite agreement to violate the RICO when the government has proven beyond a reasonable doubt that defendant agreed with at least one other co-conspirator that at least two racketeering acts of the type or types of racketeering activity listed in the Indictment would be committed by a member of the conspiracy in the conduct of the affairs of the enterprise.

The government is not required to prove that the defendant personally committed two racketeering acts or that he agreed to personally commit two racketeering acts. Rather, it is sufficient if the government proves beyond a reasonable doubt that the defendant agreed to participate in the enterprise with knowledge and intent that at least one member of the RICO conspiracy, who could be but need not be the defendant himself, would commit at least two racketeering acts in the conduct of the affairs of the enterprise.

Furthermore, to establish the requisite conspirators'

agreement, the government is not required to prove that each co-conspirator explicitly agreed with every other conspirator to violate this law, knew all his fellow conspirators, or was aware of all the details of the conspiracy. Rather, to establish sufficient knowledge, it is only required that the defendant knew the general nature and common purpose of the conspiracy, and that the conspiracy extended beyond his individual role. Moreover, the elements of the RICO conspiracy, such as the conspirator agreement, the defendant's knowledge of it, and the defendant's participation in the conspiracy, may be inferred from the circumstantial evidence.

For example, when the evidence establishes that the defendant and at least one other conspirator committed several racketeering acts in furtherance of the charged enterprise affairs, you may infer the existence of the requisite agreement to commit the RICO offense. Nevertheless, you must determine whether based on the entirety of the evidence, the government has proved beyond a reasonable doubt that the defendant entered into the required conspiratorial agreement.

Furthermore, it is not necessary that the government prove that the defendant was a member of the conspiracy from its beginning. Different persons may become members of the conspiracy at different times. If you find that there is a conspiracy, you may consider the acts and statements of any

other member of the conspiracy during and in the furtherance of the conspiracy as evidence against a defendant whom you have found to be a member of it.

When persons enter into a conspiracy, they become agents for each other, so that the act or statement of one conspirator during the existence of and in furtherance of the conspiracy is considered the act or statement of all the other conspirators, and it's evidence against them all.

Moreover, a defendant may be convicted as a conspirator even though he or she plays a minor role in the conspiracy, provided that you find beyond a reasonable doubt that the conspiracy existed and that the defendant knowingly participated in the conspiracy with the intent to accomplish his objectives or assist other conspirators in accomplishing the objectives.

I also instruct you that once a person becomes a member of a conspiracy, that requires proof of specified overt acts, that person remains a member until that person withdraws from it. A person may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to make the other conspirators aware of those inconsistent acts.

You may consider any definite positive step that shows that a conspirator is no longer a member of the conspiracy to be the evidence of withdrawal. The government

must prove beyond a reasonable doubt that the defendant did not withdraw from the conspiracy before the overt act on which you all agree was committed by some member of the conspiracy.

That ends the instruction on the RICO charge. Let's talk now about Count II, which is the conspiracy to possess with intent to distribute narcotics.

Remember what I told you at the beginning, multiple counts, multiple defendants, individual consideration of everything. Don't forget that.

Pursuant to Count II of the Indictment, defendants Pedro Vigio Aponte, also known as Pedrito, also known as Pedrito He Man, also known as Pello, also known as Pedrito Trauma; Reinaldo Rodriguez-Martinez, also known as Pitbull; Victor Rodriguez Torres, also known as Cuca, Cucaracha, or Papotin; Guillermo Sanchez Mora, also known as Gillo; and Carlos Guerrero Castro, also known as Carlitos El Negro, and Marcel; and many others, are accused of conspiring to commit a Federal crime, specifically, the crime of possession with intent to distribute heroin, crack cocaine, powder cocaine and marijuana.

It is against Federal law to conspire with someone to commit this kind of crime. For you to find defendants guilty of a conspiracy of this nature, you must be convinced that the government has proven beyond a reasonable doubt each of the