No. 19-

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IN THE SUPREME COURT OF THE UNITED STATES

LUIS RIVERA CARRASQUILLO,
EDWIN BERNARD ASTACIO ESPINO,
and RAMÓN LANZA VÁZQUEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is first degree murder, as broadly and idiosyncratically defined under the 2004 Puerto Rico Penal Code: (a) included in the category of "murder" as used in 18 U.S.C. § 1959(a), prohibiting "Violent Crimes in Aid of Racketeering"; or (b) categorically a "crime of violence," as interpreted in this Court's cases, for the purpose of applying the enhanced penalty under 18 U.S.C. § 924(j), particularly insofar as the 2004 Penal Code definition of "intent" encompasses killings committed "recklessly"?

2. Did the Court of Appeals misapply the "plain error" rule, Fed.R. Crim.P. 52(b), when it refused, for two invalid reasons, to address the "crime of violence" issue that was raised for the first time on appeal, that is, because: (i) petitioners argued the four "plain error" factors only once and not twice in support of this point, where they had presented two legal arguments in support of the same, single claim of "error" in the instructions; and (ii) petitioners could not cite "controlling precedent," even though their position is clearly correct under the governing statutes (interpreted in light of this Court's cases).

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this petition (petitioners Rivera Carrasquillo, Astacio Espino and Lanza Vázquez, and respondent United States). There were many related cases in the district court under the same and different dockets, but no co-defendants at trial or consolidated appellants.

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

LUIS DANIEL RIVERA CARRASQUILLO, EDWIN BERNARD ASTACIO ESPINO, and RAMÓN LANZA VÁZQUEZ respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit affirming their convictions and sentences in a federal criminal case.

OPINIONS BELOW

The First Circuit's opinion (per Thompson, J., with Howard, Ch.J. & Barron, J.), filed August 2, 2019, published at 933 F.3d 33, is attached as Appendix A. There is no published or unpublished decision of the district court on either of the questions presented.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit (per Thompson, J., with Howard, Ch.J. & Barron, J.), affirming the petitioners' convictions and sentences, was filed August 2, 2019. Appx. A. The petitioners filed a timely joint petition for rehearing, which was denied on October 3, 2019. *See* Appx. B. On December 20, 2019, under Docket No. 19A694, Justice Breyer granted the petitioners' timely application for a 60-day extension of time to file this petition, to and including Monday, March 2, 2020. This joint petition is being filed electronically and by postmark on or before that extended date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES and RULE INVOLVED

Title 18, United States Code, provides, in pertinent part:

§ 924. Penalties

* * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment * * *

* * * *

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * * *

In general. – Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute ... shall be sentenced in accordance with the provision of this chapter ....

* * * *

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; * * *

* * * *

§ 1959. Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine ... under this title, or both.

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

The official English language version of **the 2004 Penal Code of the Commonwealth of Puerto Rico** provides, in pertinent part:

Article 23. – Intent. The crime is committed with intent:

(a) when the corresponding act has been performed with a conduct voluntarily geared toward accomplishing it[;]

(b) the corresponding act is a natural consequence of the voluntary conduct of the author; or

(c) when the subject has wanted his/her conduct conscious of the fact that it implied a considerable and illegal risk of producing the criminal act produced.

Article 105. – Murder.- Murder is to kill another human being with intent.

Article 106. – Degrees of Murder.- First degree murder is constituted by:

(a) Any murder committed by means of poison, stalking or torture, or with premeditation.

(b) Any murder committed as a natural consequence of the attempt or consummation of aggravated arson, sexual assault, robbery, aggravated burglary, kidnapping, child abduction, serious damage or destruction, poisoning of bodies of water for public use, mayhem, escape, and intentional abuse or abandonment of a minor.

(c) The murder of a law enforcement officer, school police, municipal guard or police officer, marshal, prosecutor, solicitor for minors' affairs, special family solicitors for child abuse, judge or custody officer in the performance of his duty, committed while carrying out, attempting or concealing a felony.

Any other intentional killing of a human being constitutes second degree murder.

* * * *

Article 107.- Penalties for Murder.- Any person convicted of first degree murder shall be punished with the sentence established for a first degree felony. Any person convicted for second degree murder shall be punished with the penalty established for a second degree felony.

Article 108.- Manslaughter.- Notwithstanding the provisions of Article 107, when the murder occurs in circumstances of sudden heat of passion or rage, the convict shall receive the penalty established for a third degree felony.

Article 109.- Negligent Homicide.- Any person who causes the death of another through negligence shall incur a misdemeanor, but shall receive the penalty established for a fourth degree felony.

* * * *

The **Federal Rules of Criminal Procedure** provide, in pertinent part:

Rule 52. Harmless and Plain Error

* * * *

(b) **Plain Error**. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

The petitioners, Luis Daniel Rivera Carrasquillo ("Rivera"), Edwin Bernard Astacio Espino ("Astacio"), and Ramón Lanza Vázquez ("Lanza"), were three of 33 defendants named on June 20, 2012, in a superseding indictment in the U.S. District Court for the District of Puerto Rico. The indictment charged that the petitioners were affiliated with a "racketeering enterprise," that is, a group known as "La ONU," which used violence, including murder, to secure and maintain its control of drug trafficking in and around certain housing projects in San Juan, Puerto Rico.[1] The petitioners stood trial together for nine days in late 2013. Based on testimony describing their participation in a violent rivalry between La ONU another gang (known as "La Rompe ONU," meaning breakaway ONU), the jury convicted the three petitioners of numerous federal offenses.

The counts of conviction included racketeering conspiracy ("RICO," 18 U.S.C. § 1962(d)) (Rivera, Astacio), drug distribution conspiracy near public housing (21 U.S.C. §§ 846, 860) (Rivera, Astacio), conspiracy to possess firearms, including machineguns, in aid of drug trafficking (18 U.S.C. § 924(o)) (Rivera, Astacio), violent crime (murder and attempted murder under Puerto Rico law) in aid of racketeering ("VICAR," *id.* § 1959(a)(1)) (Rivera, Astacio, Lanza), causing death by use of a firearm

[1] The government initially suggested that it would seek capital punishment, but later withdrew the notice.

in furtherance of a crime of violence (*id.* § 924(j)) (Rivera, Astacio, Lanza), destruction of an aircraft (a police helicopter) resulting in death (*id.* §§ 32(a), 34) (Astacio), murder by drive-by shooting in aid of drug trafficking (*id.* § 36(b)(2)(A)) (Astacio), violence against persons on an aircraft (*id.* § 32(a)(6)) (Astacio), and possession of a machine gun (*id.* §§ 922(o), 924(a)(2)) (Astacio). In June 2014, former U.S. District Judge José A. Fusté imposed life sentences, *inter alia*, on each of the petitioners.[2]

The petitioners appealed to the First Circuit, raising, collectively, some eight issues arising out of their trial and post-trial proceedings. Most of the issues were directly applicable to all and were therefore cross-adopted under Fed.R.App.P. 28(i) in coordinated briefing. During the course of their appeal, petitioners secured a remand for an evidentiary hearing on one issue, and filed a joint motion for a new trial based on unrelated, newly discovered evidence. After argument (with one judge in attendance, one on speakerphone, and one absent), the appellate court issued a precedential opinion on August 2, 2019. Appx. A. The court held, as to petitioners' joint claim that "first degree murder" under the 2004 Penal Code of Puerto Rico is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A), as incorporated into *id.* § 924(j), that petitioners had entirely "waived" their plain error argument by failing to "explain why

[2] Rivera was sentenced to concurrent terms of life imprisonment on Counts One (RICO conspiracy, 18 U.S.C. § 1962(d)), Two (drug conspiracy, 21 U.S.C. § 846), Three (firearms conspiracy, 18 U.S.C. § 924(o)), Six, Eight and 29 (VICAR murder, 18 U.S.C. § 1959(a)(1)), Seven, Nine and 30 (firearms murder, 18 U.S.C. § 924(j)(1)). The court imposed a concurrent sentence of 10 years' imprisonment on Count 31 (transfer of firearm for use in crime of violence, 18 U.S.C. § 924(h)). Astacio was sentenced to life imprisonment on Counts 1–3, 17–20, and 23–30, ten years as to Count 21, and 20 years on Count 22. The terms imposed on Counts 3, 20, 23, 28, and 30 run consecutively; all other terms are concurrent. Lanza received sentences of life on Count Four (VICAR murder) and ten years consecutive on Count Five (firearms murder).

reliance on the *force clause* here is plain error ... 'given controlling precedent.'" Appx. A, 933 F.3d at 55–56 (quoting Circuit precedent; emphasis original).

The court of appeals denied a joint petition for rehearing. Appx. B. This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. The courts of appeals are divided on how to apply the "categorical approach" to state-law "crimes of violence," including "murder," when incorporated through the VICAR Act in a federal firearms prosecution.

Each of the petitioners was convicted on one or more counts under 18 U.S.C. § 924(j) for using a firearm during and in relation to a "crime of violence," as defined in § 924(c)(3), resulting in a death under circumstances amounting to "murder" as defined in federal law.[3] The "crime of violence" at issue in each count was a violation of 18 U.S.C. § 1959(a) ("Violent Crimes in Aid of Racketeering," or "VICAR"), which in turn references and incorporates the crime of "murder" under local law.[4] But under the plain language of § 924(c)(3), applied in accordance with binding precedent of this

[3] The pertinent provisions of 18 U.S.C. § 924 are set forth in the Statutes Involved *ante*. In contrast with the undefined reference to "murder" as a manner of committing the offense in § 1959(a), the *resulting death* that is an element under § 924(j) must also be a "murder" as defined in 18 U.S.C. § 1111(a). That this latter element was satisfied was not disputed at trial or on appeal, and is not at issue in this petition.

[4] The pertinent provisions of 18 U.S.C. § 1959 are set forth in the Statutes Involved *ante*.

Court describing the "categorical approach," the crime of "murder" as idiosyncratically defined in the Puerto Rico Penal Code does not coincide with the crime known generically as "murder," and does not qualify as a federal "crime of violence." Accordingly, petitioners' convictions under 18 U.S.C. § 924(j) and 18 U.S.C. § 1959(a) cannot stand. On appeal, however, the First Circuit refused to find plain error and affirmed. Similar convictions have been reversed as plain error in other circuits, including the Fourth and Ninth. *See* subpoint 1.c. *post*. Accordingly, this petition should be granted.

At the time of trial, it was thought that a state offense might qualify as a "crime of violence," as that term is defined and used in this and other federal criminal laws, in either of two ways: under the "residual clause," 18 U.S.C. § 924(c)(3)(B); or under the "force" or "elements clause," *Id.*(c)(3)(A). During the pendency of petitioners' appeal, however, this Court declared the "residual clause" of § 924(c)(3) to be unconstitutionally vague. *United States v. Davis*, 588 U.S. —, 139 S.Ct. 2319 (2019). The petitioners' convictions on the various § 924(j) counts, insofar as they depend on whether the referenced § 1959(a) violations qualify as "crimes of violence," therefore now must stand or fall on the potential application of the "elements clause."

The "crime of violence" cited in each of the § 924(j) counts at issue in this petition was a specified violation of 18 U.S.C. § 1959(a)(1) ("VICAR"), as charged in a paired count of the indictment. The VICAR statute, in turn, incorporates as an element any of a list of five types of violent crime,[5] one of which is referred to as

[5] Also covered in § 1959(a) are threats to commit a violent crime, as well as attempts and conspiracies.

"murder," if committed "in violation of the laws of any State." VICAR is thus a prototypical "divisible" statute, where different *elements* are required to prove a violation of the statute in various different ways (listed in the introductory language and again in the six numbered paragraphs of § 1959(a)). See *Mathis v. United States*, 579 U.S. —, 136 S.Ct. 2243, 2249 (2016) (explaining concept of "divisible" statutes). Reference to the indictment and jury instructions under a "modified categorical approach" is thus needed (and permissible) in this case to establish which of those sets of elements (that is, which of the five listed offense types) underlies the petitioners' convictions on these counts. See *Descamps v. United States*, 570 U.S. 254 (2013). Here, each of the cross-referenced VICAR counts identified a particular "murder," said to have been committed in violation of Articles 23, 105 and 106 of the 2004 Penal Code of the Commonwealth of Puerto Rico.[6] This answers the "divisibility" question: it was by virtue of a Puerto Rico "murder" that the petitioners were said to have violated § 924(j) in each such count, and to have violated § 1959(a) in each of those associated counts.

Petitioners did not challenge this incorporation of Puerto Rico murder law at trial,[7] including when Judge Fusté, after instructing on the elements of "first degree

[6] The pertinent provisions of the 2004 Penal Code, in their official English language version, are set forth in the Statutes Involved *ante*. The First Circuit opinion mistakenly cites a later (2012) codification of the Puerto Rico criminal law than the 2004 version identified in the indictment, and omits the referenced provision on "intention" (Art. 23), which is highly pertinent here. *See* Appx. A, 933 F.3d at 54 n.22. There is no material difference, in the respects at issue here, between the correct and later versions, however. See, *e.g.*, *Pueblo v. Concepción Guerra*, 194 D.P.R. 291, 306 n.6, 2015 WL 9264049 (P.R. 2015).

[7] For these purposes, the Commonwealth of Puerto Rico is encompassed within the applicable definition of "State," found in 18 U.S.C. § 1958(b)(3).

murder" with premeditation (and no other form of "murder"), charged the jury as a matter of law that "murder in violation of Puerto Rico law" qualifies as a "crime of violence." CA1 Jt.Appx., vol. 3, at 1396a; *see also id.* 1380a, 1398a, 1404–05a. But the trial court's instruction, declaring Puerto Rico murder to be categorically a "crime of violence" under federal law, amounted to plain error. *See* Fed.R.Crim.P. 52(b); *Pipefitters Local Union v. United States*, 407 U.S. 385, 440–42 (1972) (improper instruction as to what facts or circumstances would establish the charged offense qualifies as plain error).[8] The trial court also erred in accepting that first degree, premeditated murder in violation of Article 106 amounted to "murder," as that term was used by Congress in VICAR. The court below then failed to correct these fundamental errors when raised on appeal.

Murder as defined in the cited provisions of the 2004 Puerto Rico Penal Code is itself a "divisible" offense under this Court's taxonomy. Under Articles 105 and 106, murder is divided principally into first and second degree murder,[9] and first degree murder, in turn, is then further divided into three categories. All have different sets of elements:

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[8] Questions arising in this case concerning the application of the plain error rule, by virtue of how the case was addressed in the court of appeals, are addressed under Point 2 of this petition.

[9] This is so even though the Supreme Court of Puerto Rico has repeatedly stated, as a matter of Commonwealth law, that "murder" under Article 105 is but "one crime," albeit divided into degrees. *E.g.*, *Pueblo v. Roche*, 195 D.P.R. 791, 797, 2016 WL 3920341 (P.R. 2016). The different degrees and types of murder (including "manslaughter" under Art. 108) have in common the intentional (as set forth in Article 105 and defined in Art. 23) killing of another person, but have different elements and carry different penalties under Articles 106–108.

Article 105. – Murder.- Murder is to kill another human being with intent.[10]

Article 106. – Degrees of Murder.- First degree murder is constituted by:

(a) Any murder committed by means of poison, stalking or torture, or with premeditation.

(b) Any murder committed as a natural consequence of the attempt or consummation of aggravated arson, sexual assault, robbery, aggravated burglary, kidnapping, child abduction, serious damage or destruction, poisoning of bodies of water for public use, mayhem, escape, and intentional abuse or abandonment of a minor.

(c) The murder of a law enforcement officer, school police, municipal guard or police officer, marshal, prosecutor, solicitor for minors' affairs, special family solicitors for child abuse, judge or custody officer in the performance of his duty, committed while carrying out, attempting or concealing a felony.

Any other intentional killing of a human being constitutes second degree murder.

Finally, a "murder" (any intentional killing, per Article 105, including one that is "premeditated" under Article 106(a)), is labeled in Article 108 as an "attenuated murder" (*asesinato atenuato*, translated officially as "manslaughter") if it arises from "sudden heat of passion or rage." Such killings, under the 2004 Puerto Rico Code, are punished less severely, although still classified as a kind of "murder."[11]

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[10] Although rendered officially in English simply as "with intent," the Supreme Court of Puerto Rico has held that the true meaning of the final phrase is "with intent to kill." See *Pueblo v. Roche*, 195 D.P.R. 791, 795, 2016 WL 3920341 (P.R. 2016) (quoting Art. 105 in Spanish as requiring not just "dar muerte a un ser humano" (that is, "to kill a human being") "with intent," but more specifically with the "intención de causársela," meaning, "intent to cause *that*," *i.e.*, death). The official English-language versions of this and the other Puerto Rico decisions cited in this petition have not yet been released.

[11] This unusual classification of homicide offenses differs markedly from the more traditional structure (modeled on Pennsylvania's 1794 statutory reforms) that Puerto Rico had from 1902 to 2004, including under the immediate pre-2004 Code of 1974; see *Concepción Guerra*, 194 D.P.R. at 300, 306; and was replaced in turn, in 2014, by Model Penal Code-based language and structure. See *United States v. Báez-Martínez*, — F.3d —, 2020 WL 633219, *6 n.8 (1st Cir., Feb. 11, 2020).

The extraordinary scope of "intentional" killings penalized as "murder" under Puerto Rico law is illuminated by examining the Penal Code's broad definition of "intent," which is written into every "murder" charge through Article 105:

> **Article 23. – Intent.** The crime is committed with intent:
>
> (a) when the corresponding act has been performed with a conduct voluntarily geared toward accomplishing it[;]
>
> (b) the corresponding act is a natural consequence of the voluntary conduct of the author; or
>
> (c) when the subject has wanted his/her conduct conscious of the fact that it implied a considerable and illegal risk of producing the criminal act produced.

Although the meaning is far from pellucid, "the corresponding act" (the Spanish word, "*hecho*," can also mean "fact," which might be a better translation), as used in Article 23, appears to refer to the *result or consequences* of intentional conduct, while "conduct" appears to mean *the criminal act* itself.

What is clear from a reading of the entire suite of statutes, however, is that "to kill another human being with intent" (the test that all murder, including premeditated first degree murder under Art. 106(a), must satisfy under Article 105) does not require an actual, *subjective* intent to kill. Conduct that results in death is also deemed "intentional" under the Puerto Rico Code (and thus punishable as murder, including first degree murder) if a jury finds that the death of another was "a natural consequence" of the defendant's voluntary acts (regardless of subjective intent), Art. 23(b)[12]; as well as in cases where the defendant acts with elevated recklessness, that

[12] This kind of definitional provision takes the place of the traditional presumption, which this Court has held may create constitutional problems. See *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Ulster County Court v. Allen*, 442 U.S. 140 (1979).

is, with awareness of "a considerable and illegal risk" of causing the death of another, but without an actual intent to kill or even necessarily to injure or otherwise harm. Art. 23(c). Neither of these states of mind necessarily establishes generic common law "malice aforethought, express or implied," which is the state of mind that distinguishes "murder" from other homicide offenses (and from lawful, justified killings) in traditional, non-statutory legal vocabulary, both today and in 1984 when VICAR was created. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 7.1(a)-(b), at 181–84 (1986); 1 AMER. LAW INST., MODEL PENAL CODE AND COMMENTARIES, part II, § 210.2, at 21–28 (1980).

The associated penalty provisions underline even further the extraordinary scope of "murder" as defined in the Puerto Rico Code. Section 107 cross-references the penalties for first and second degree felonies in identifying the punishment that applies upon conviction for first or second degree murder. But Article 108 of the Penal Code, as already noted, goes even further, defining "manslaughter" not as a separate and less serious offense within a broader category of criminal homicides, as in American law generally, see 2 LAFAVE, *supra*, § 7.9, at 251–52, but as a mitigated subdivision of murder ("*Asesinato atenuado*": literally, attenuated or mitigated *murder*), that is, of intentional killings under Article 105.[13]

The unusual structure and scope of Puerto Rico murder law under the 2004 Code gives rise to two issues under this Court's case law, when an attempt is made, as here, to use that body of law, through VICAR, to support a conviction under 18

[13] *Compare* Article 109, which (in contrast with Articles 105–108, all of which refer to aspects of "murder") defines and penalizes a separate offense of negligent "homicide." The full pertinent text of Articles 108 and 109 is included in the Statutes Involved, *ante*.

U.S.C. § 924(j) (or § 924(h)) or to support a conviction directly under the RICO or VICAR statute. First, the question arises whether "murder" in Puerto Rico corresponds with the elements of "generic" "murder" as referenced in 18 U.S.C. § 1959(a) itself. See *Shular v. United States*, 589 U.S. — (Feb. 26, 2020), slip op. at 2–3, 7 (contrasting "generic" analysis of traditional crimes with ACCA's use of "serious drug offense"). Second, the convictions cannot stand if any of the covered conduct (that is, in this case, the least serious conduct covered by first degree premeditated murder under Article 106(a)) is outside this Court's categorical explication of what constitutes a "crime of violence" under § 924(c)(3). This Court should grant the petition to address these questions.

Although the issues arise in this case (for lack of objection to the jury instructions) through a lens of "plain error," that posture does not impair the suitability of the case as a vehicle for deciding the first question presented here, and is at the heart of the second. *Cf. United States v. Davila*, 569 U.S. 597 (2013) (deciding important question of scope of review in criminal case, then remanding for consideration of whether plain error rule applied); *Fowler v. United States*, 563 U.S. 668 (2011) (deciding important question of federal statutory construction and then remanding for application of plain error scrutiny); *Gonzalez v. United States*, 553 U.S. 242 (2008) (finding no error and thus pretermitting other "plain error" questions); *Nguyen v. United States*, 539 U.S. 69 (2003) (deciding important question of federal criminal appellate jurisdiction notwithstanding absence of objection below).

a. *It is "clear or obvious" and "not subject to reasonable dispute," that "first degree murder" under the 2004 Puerto Rico Penal Code was not categorically "murder" within the meaning of VICAR, 18 U.S.C. § 1959(a).*

The first two requirements of the plain error rule demand a showing that the trial court committed error, and that the error was "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). A defendant violates the federal statute at issue here if, in order to enhance his position in a "racketeering enterprise," he (*inter alia*) "murders, kidnaps, maims, assaults with a dangerous weapon, [or] commits assault resulting in serious bodily injury against any individual," and that criminal conduct is "in violation of the laws of any State ...." 18 U.S.C. § 1959(a) ("VICAR"). When a federal criminal statute incorporates as an element of the instant offense one or more traditional categories of criminal conduct in this way, the government must not only prove to the jury that the defendant in fact violated the state law, but also that the cited state offense coincides with a generic definition of offenses of that kind, as understood at the time of enactment of the federal statute. See, *e.g.*, *Mathis*, 579 U.S. —, 136 S.Ct. at 2251–52 (burglary as of ACCA's 1986 adoption); *Skilling v. United States*, 561 U.S. 358 (2010) (general understanding of "honest services fraud" as of 1988); *Neder v. United States*, 527 U.S. 1, 22 (1999) ("fraud" as understood in 1872); *Taylor v. United States*, 495 U.S. 575, 594–95, 598–99 (1990) ("burglary" as generally understood in 1986); and *Perrin v. United States*, 444 U.S. 37 (1979) ("bribery" as of 1961); *United States v. Nardello*, 393 U.S. 286 (1969) ("extortion" as of 1961); *Gilbert v. United States*, 370 U.S. 650 (1962) ("forgery" as of 1823).

The cited Puerto Rico statute underlying this case defines "murder" as "to kill another human being with intent." Art. 105. "Intent," in turn, is defined in Article 23 (also cited in the indictment) as including not only "conduct voluntarily geared toward accomplishing" the act in question, Art. 23(a), but also "when the act is a natural consequence of the voluntary conduct of the author," Art. 23(b), regardless of conscious or subjective intent to kill, and even "when the subject has wanted his/her conduct conscious of the fact that it implied a considerable and illegal risk of producing the criminal act," Art. 23(c) (sic), that is, with the state of mind commonly viewed as criminal recklessness. Notably, traditional "malice" is not required, not even "implied malice," that is, "a depraved heart." A killing that resulted from a voluntary act done with one of the latter two forms of "intent" would not qualify as murder in most American jurisdictions, but rather as involuntary manslaughter. As of 1980, according to the official ALI commentaries, fewer than 20 states had adopted "recklessness" as a sufficient basis for a murder conviction (as the Model Penal Code had recommended), while an equal number had rejected it. ALI, *supra*, § 210.2, at 26 & n.62 ("a surprising number" of jurisdictions do not allow a conviction for murder "based upon extreme recklessness").

Even under a modified categorical approach – limiting analysis of the current case to what Puerto Rico's 2004 Code called "first degree murder," as defined in Article 106(a) – any killing with "intent" as thus broadly defined, if committed "with premeditation" (that is, at least a moment's forethought before deciding to act; *Concepción Guerra*, *supra*), is included. The extraordinarily expansive definition of "intent" under Article 23(b) and 23(c) incorporated into all Puerto Rican murder

charges includes reckless disregard of the risk of death. It is therefore "plain" (that is, clear after careful examination) that Puerto Rico "murder" cannot be used to support a conviction under any federal statute, such as RICO or VICAR, that incorporates state criminal law by reference to the general type of crime called "murder," such as § 1959(a), nor under any statute that depends on incorporating such violations, such as 18 U.S.C. §§ 924(h) and 924(j).

b. *It is "clear or obvious" and "not subject to reasonable dispute," that "first degree murder" under the 2004 Puerto Rico Penal Code was not categorically a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).*

In addition to its failure to fit into the categorical meaning of "murder" under § 1959(a), the crime of "murder" under the 2004 Penal Code of Puerto Rico also fails to qualify as a "crime of violence," as that expression is used in § 924(c)(3). Yet both are required to support the § 924(j) convictions here. There are three respects in which a "murder" under the pertinent Puerto Rico laws fails to qualify as a "crime of violence" under § 924(c)(3).

Under a proper application of the "force clause," premeditated "first degree murder" as defined under the 2004 Penal Code of Puerto Rico in Articles 105, 106(a) and 23, does not qualify, because the crime can be committed in many ways that do not require "the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). See *Stokeling v. United States*, 586 U.S. —, 139 S.Ct. 544 (2019); *United States v. Descamps*, 570 U.S. 254 (2013); *Johnson v. United States*, 559 U.S. 133 (2010). Once Article 23 is incorporated to explicate the meaning of "with intent" in Article 105, there are any number of ways under the language of the Penal Code, that a person could "murder" another in

violation of the cited Puerto Rico laws without actually applying "force capable of causing physical pain or injury," as required by this Court's case law on "force." See *Stokeling*, 139 S.Ct. at 553–54, quoting *Johnson*, 559 U.S. at 140.

Relatedly, the Puerto Rico murder statute does not require that "physical force" be applied "against the person or property of another." 18 U.S.C. § 924(c)(3)(A). *See* LAFAVE, *supra*, § 7.2(c), at 196 (giving several examples of murder committed without the application of physical force, including "opening, on a cold winter day, a window next to the bed of a helpless sick person," "perjur[ing] an innocent man into the electric chair," and "shouting 'boo' at a person leaning precariously over the ... balustrade atop the Empire State Building"; also noting omissions to act, such as by not rescuing the victim, where there is a duty to do so).

And finally, because reckless murder is covered (*see* subpoint 1.a., *ante*), first degree murder under the 2004 Puerto Rico Code cannot be categorically considered a "crime of violence." A crime committed recklessly is not included. See *Begay v. United States*, 553 U.S. 137, 146 (2008) ("intentional or purposeful conduct" is the touchstone). The courts of appeals have "uniformly held that recklessness is not sufficient" to constitute the use of force, as required for a "crime of violence." *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014). See *Borden v. United States*, No. 19-5410 (granting cert to consider this issue, 3/2/20); *Walker v. United States*, No. 19-373, *dismissed due to death of petitioner*, Jan. 27, 2020; *see* Point 1.d., *post*.

c. *The Circuits are divided on the correct analysis in cases of this kind.*

The refusal of the court below to find plain error in this case is inconsistent with the approach to and disposition of similar cases in other circuits. In *United*

States v. Begay, 934 F.3d 1033, 1037–41 (9th Cir. 2019), the Ninth Circuit held that federal second degree murder under 18 U.S.C. § 1111 is not categorically a "crime of violence," as required by § 924(c)(3)(A), because it can be committed recklessly and not only through purposeful conduct. Similarly, in *United States v. Walker*, 934 F.3d 375 (4th Cir. 2019), the court of appeals held, on plain error review, that federal kidnapping did not qualify categorically as a "crime of violence," because if committed through "inveigling" it does not require use or threat of violence, nor does the "holding" element. See also *United States v. Lewis*, 907 F.3d 891 (5th Cir. 2018) (holding, on plain error review, that Hobbs Act conspiracy to commit robbery was not a "crime of violence" because the offense of conspiracy is committed by agreement alone); *United States v. Jones*, 935 F.3d 266 (5th Cir. 2019) (per curiam) (holding, again on plain error review, that RICO conspiracy was not a crime of violence and that a general verdict on a § 924(c) count was invalidated notwithstanding an alternate drug-conviction basis). Compare *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018) (Hobbs Act robbery is categorically a "crime of violence," requiring either force or threat of force against person or property); *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc) (voluntary manslaughter is "crime of violence" even if use of force is indirect; overruling many prior panel decisions); *United States v. Steward*, 880 F.3d 983 (8th Cir. 2018) (voluntary manslaughter qualifies as "crime of violence" under Sentencing Guidelines "crime of violence" definition, which includes enumerated offenses); *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017) (applying broad use of "force" to cover all murders).

Granting the instant petition would bring clarity to the courts of appeals in handling the many cases which present permutations of the "crime of violence" problem, many of them in a plain error context.

d. *The petition should at least be held for decision and then disposed of in accordance with the decision in* Borden *(No. 19-5410), on which certiorari was granted on March 2, 2020.*

In No. 19-373, *Walker v. United States*, this Court granted certiorari in a case out of the Sixth Circuit to decide the question, "Whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a 'violent felony' under the Armed Career Criminal Act." After briefs on the petitioners' side were filed, the writ was dismissed on January 27, 2020, due to Mr. Walker's untimely death. On March 2, 2020, the Court granted certiorari in *Borden v. United States,* No. 19-5410, to restore that question to its docket for decision in the coming Term.

The question in *Walker* and *Borden* arose under the "force clause" aspect of the "violent felony" definition in ACCA, that is, 18 U.S.C. § 924(e)(2)(B). The present case presents virtually the same issue: whether a criminal offense that can be committed with a *mens rea* of recklessness, such as first degree murder under the 2004 Penal Code of Puerto Rico, can qualify as a "crime of violence" under the materially identical 18 U.S.C. § 924(c)(3)(A), so as to trigger mandatory consecutive sentencing or other penalty enhancements. The present case squarely and starkly presents that issue, as it arises under 18 U.S.C. §§ 924(j) and 1959(a), generating multiple life sentences.

* * *

For all of these reasons, the Court should grant this petition to consider the petitioners' challenge to their convictions (and resulting life sentences) that depend on a verdict that they engaged in a "crime of violence" or committed any other federal offense by committing "murder" under the 2004 Puerto Rico Penal Code.

2. The decision of the Court below that the petitioners cannot satisfy the "plain error" standard if their position is not supported by on-point case law (and unless it was argued twice) is contrary to the decisions of other Circuits and of this Court.

As argued under Point 1, certiorari should be granted to address the merits of petitioners' underlying appellate issue – the legality of their convictions and life sentences under 18 U.S.C. §§ 924(j) and 1959(a). But this petition should be granted to address a second issue as well, which is an important question of federal appellate practice and procedure regarding the "plain error" rule. This Court has had frequent occasion to address aspects of this Rule, but has never explored what it means for a question of federal statutory construction to be "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). The Court below, in conflict with other Circuits, refused to address the merits of petitioners' "crime of violence" issue because they could not cite on-point case law establishing that they were right. The court below also faulted the petitioners for not arguing all the prongs of a plain error analysis with respect to the "residual clause" argument and then again with respect to the "elements clause" argument. Since precedential case law is not a *sine qua non* of statutory construction, and because the petitioners on appeal were challenging only one error (the trial court's "crime of violence" conclusion) as being plain and reversible, not two, petitioners' case offers a good

vehicle to address the important questions of what it takes to make an error "plain" and whether the "plain error" rule applies to errors or to arguments advanced to establish those errors.

Rule 52(b) provides that, notwithstanding general issue preservation rules, such as Fed.R.Crim.P. 51(b) and Fed.R.App.P. 28(a)(5) & (a)(8), a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention." In other words, what the appellant must show to be "plain" (under this Court's four-part test, is an "error."

> 'First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain – that is to say, clear or obvious. Third, the error must have affected substantial rights.' *Molina-Martinez* [*v. United States*, 578 U.S. —, 136 S.Ct. 1338, 1343 (2016)] ... Once those three conditions have been met, 'the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.' [*Id.* (internal citations omitted)]

Rosales-Mireles v. United States, 585 U.S. —, 138 S.Ct. 1897, 1904–05 (2018) (summarizing test originating with *United States v. Olano*, 507 U.S. 725 (1993)). This Court has had more occasions to apply and explicate the third and final prongs of the plain error test, than of the second. See, *e.g.*, *Rosales-Mireles* (fourth, discretionary prong); *Molina-Martinez* (third, prejudice prong); *United States v. Marcus*, 560 U.S. 258 (2010) (discussing what it means for an error in jury instructions to "affect substantial rights" in the absence of conventional prejudice, as well as impact on fairness of proceedings); *Puckett*, 556 U.S. at 139–43 (rejecting arguments that third and fourth prongs do not apply to government's unobjected-to breach of plea agreement); *United States v. Dominguez Benitez*, 542 U.S. 74, 80–82 (2004) (prejudice

prong); *United States v. Cotton*, 535 U.S. 625, 632–34 (2002) (effect on reputation of the courts and integrity of the proceedings). This case presents an important application of the second aspect of the Rule, what it means for an error to be "plain."

The controlling passage of the opinion of the court below with respect to the "crime of violence" issue reads:

> Under a brief subheading titled 'Defendants Meet the Plain Error Standard,' appellants explain why they should get plain-error relief since a violation of Puerto Rico's murder statute cannot be a crime of violence under the *residual clause* — a point well taken, especially given the Supreme Court's hot-off-the-presses *Davis* decision. But (and it's a very big but) they do not explain why reliance on the *force clause* here is plain error — for example, they never say how any error (if error there was) is 'plain,' *i.e.*, 'an "indisputable" error ..., "given controlling precedent."' ... [I]t is for them, not us, to 'develop[ ] sustained argument out of ... legal precedents.' ... But what our appellants have done — making no effort to satisfy *every* part of the plain error test on the force-clause question (despite having the burden of proving plain error) — 'is hardly a serious treatment of a complex issue.' ... Which dooms their crime-of-violence claim — for as legal sophisticates know, a party's 'failure to attempt to meet the four-part burden under plain error review constitutes waiver.'

Appx. A, 933 F.3d at 55–56 (citations to earlier First Circuit cases omitted). This disposition of petitioners' serious questions – which ultimately go to whether they are legally guilty of federal offenses for which they were sentenced to life imprisonment – cannot be reconciled with this Court's cases nor with analogous authority in other Circuits. Indeed, the court below was at least doubly wrong: it is not necessary to argue all four prongs of "plain error" with respect to each argument advanced in an appellate brief designed to show that the trial court committed a particular error; and it is not required to show, in order that an error be deemed "plain," that the appellant's proposed statutory construction is "indisputable" under "controlling precedent."

Questions of statutory construction are properly resolved by analysis of statutory language and structure, not by reading case law. As the late, esteemed Chief Judge of the Third Circuit, Edward R. Becker, wrote for that court, "Neither the absence of circuit precedent nor the lack of consideration of the issue by another court prevents the clearly erroneous application of statutory law from being plain error." *United States v. Evans*, 155 F.3d 245, 251–52 (3d Cir. 1998) (condition of supervised release found to be unauthorized by statute, after lengthy analysis including review of prior related statutes). See also, *e.g.*, *United States v. Husmann*, 765 F.3d 169, 177 (3d Cir. 2014) (concluding after full analysis that proven conduct did not satisfy statutory language, properly construed); *cf. Fowler*, *supra* (by implication). And the conclusion as to whether the correct construction is "clear or obvious, rather than subject to reasonable dispute," *Puckett*, 556 U.S. at 135, is necessarily made *after* engaging in such analysis, not by glancing casually at the statute. The First Circuit's escalation of "not subject to reasonable dispute" into "indisputable" appears to elevate the standard beyond this Court's intended meaning. If it were otherwise, no serious question worthy of this Court's consideration could ever fit in the category of "plain error." Yet this Court can and does sometimes decide cases in a plain error posture where the substantive issue on the merits is argued seriously by both sides.

This Court has devoted little space to exploring this second ("clear or obvious") prong of the plain error test. Twice, it has established the date as of which an error must be shown to be clear, that is, as of the time the appeal is decided, regardless of whether the law was seemingly settled to the contrary at the time of trial. See *Henderson v. United States*, 568 U.S. 266 (2013); *Johnson v. United States*, 520 U.S.

461 (1997). *Henderson* iterates "that lower court decisions that are questionable, but not *plainly* wrong ... fall outside the Rule's scope." 568 U.S. at 278. Those cases, however, do not further explore what it may mean for an error to be "clear or obvious" or not "subject to reasonable dispute," in the great majority of cases where there is no single precedent that is indisputably on point.[14] *Olano* itself sheds no further light on the subject, *see* 507 U.S. at 734, and the only cases it cites are hardly more helpful. See *United States v. Frady*, 456 U.S. 152, 163 (1982) (suggesting that an error is "plain" when "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance"). Again, that dramatic formulation is more of a conclusion than a standard.

As demonstrated under Point 1 of this petition, a full explanation of why first degree murder under Puerto Rico's 2004 Penal Code is not "murder" or a "crime of violence" under the applicable statutes takes some pages of careful exposition and does not follow from any single on-point judicial precedent. Yet at the end of that process, the correct conclusion is clear. To explore and reject the unduly elevated test articulated and applied by the court below, this petition should be granted.

The other aspect of the First Circuit's rationale, contending that the petitioners, as appellants below, did not argue the "elements clause" issue as plain error, only the "residual clause" aspect, is likewise off the mark. To demonstrate in their appeal that Judge Fusté's unelaborated jury instruction on "crime of violence" was erroneous, the petitioners had to – and did – argue that "murder" as defined under

[14] In *Johnson*, for example, that single controlling precedent was *United States v. Gaudin*, 515 U.S. 506 (1995). In *Henderson*, it was *Tapia v. United States*, 564 U.S. 319 (2011).

the Puerto Rico Code qualified under neither of the federal clauses. *See* CA1 Aplt.Br. (Lanza), pts. II.A–B (residual clause), pt. II.C. (force clause); *see also* Lanza CA1 Reply, at 26–32 (force clause).[15] In other words, to show that one error had occurred and was "plain," they had to advance (and win) two arguments. The appellants' argument on appeal therefore ended with an explication of why the error they had demonstrated satisfied Rule 52(b)'s test for "plain error." Aplt.Br. (Lanza), at 46–51 (pt. II.D. (mislabeled, due to editing error, as a second "B")). The court below nevertheless held that this extensive briefing (vindicated while the appeal was pending, as to the "residual clause") was insufficient to preserve for appeal the argument that the trial court's "crime of violence" instruction amounted to "plain error" under the "force clause."

Point II of Lanza's brief targeted one and only one "error" – the trial court's jury instruction – not two. Neither the terms of Rule 52(b) nor any of this Court's many cases suggest that each and every *argument* advanced to show that an error occurred and was "plain" must be separately subjected to the four-part test. Here, the petitioners demonstrated at length, under subparts A through C of the argument in the Lanza opening brief, as supplemented in the Lanza Reply Brief, that the district court's conclusory instruction on "crime of violence" was wrong (that is, a legal error) and clearly so (under the law as it existed at the time of appellate review). They showed this (that is, the first and second prongs of the *Olano* test) separately under

[15] Lanza's argument on this issue was adopted in the court below by petitioners Rivera and Astacio pursuant to Fed.R.App.P. 28(i).

each of the two clauses of § 924(c)(3), because for each clause the argument is quite different, thus satisfying the first two prongs of the four-part plain error test.

The third and fourth prongs under Rule 52(b) – effect on substantial rights and impact on the reputation and integrity of the courts – on the other hand, apply no differently (and no less clearly) to the constitutional argument invalidating subsection (c)(3)(B) than to the statutory argument invalidating these petitioners' convictions insofar as they might rest on subsection (c)(3)(A). For this reason, a combined argument was properly presented with respect to both reasons, which was part D of Lanza's Argument II. The court below thus applied the plain error test in a novel and indefensible manner to the petitioners' detailed "plain error" briefing when it concluded that their presentation of the issue on appeal was fatally deficient. There is not, and should not be, any requirement that a criminal defendant continue to serve a legally invalid sentence because his lawyer did not argue twice – once for each legal reason offered – that the trial court's error was plain. Upon granting certiorari, and in the course of correcting the error of the court below with respect to what it takes for an error in statutory construct ion to be "plain," this Court should also reject the utterly fallacious conclusion that the petitioners' extensive and complete briefing of the two-pronged "crime of violence" issue somehow "waived" the "elements clause" aspect entirely.

To further explore the contours of the "plain error" rule, as well as to address the statutory issues presented under Point 1, the petition should be granted.

CONCLUSION

For the foregoing reasons, petitioners LUIS DANIEL RIVERA CARRASQUILLO, EDWIN BERNARD ASTACIO ESPINO, and RAMÓN LANZA VÁZQUEZ pray that this Court grant their petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the First Circuit affirming their convictions and life sentences.

Respectfully submitted,

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