No.

IN THE

SUPREME COURT OF THE UNITED STATES

Carlos M. Guerrero-Castro,
Petitioner,
v.
United States of America,
Respondent.

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

Raul S. Mariani-Franco
Counsel of Record

P.O. Box 9022864
San Juan, PR, 00902-2864
Tel.: (787) 620-0038
Fax: (787) 620-0039
Counsel of Record for Petitioner Carlos M. Guerrero-Castro

QUESTION PRESENTED

Whether a district court commits plain error by refusing to properly instruct the jury that the existence of an actual enterprise is always an essential element of the RICO conspiracy crime.

LIST OF PARTIES

Petitioner-Defendant is Carlos M. Guerrero-Castro.

Respondent, United States of America

On appeal, there were five appellants, all of whom are filing petitions for certiorari: Victor M. Rodriguez-Torres, Tarsis Guillermo Sánchez-Mora, Reinaldo Rodriguez-Martínez and Pedro Vigio-Aponte.

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Petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit dismissing the appeal in the instant case.

INTRODUCTION

When a federal criminal defendant is charged with a RICO conspiracy charge, a district court must properly instruct the jury with the relevant elements of such offense. Petitioner contends that one such elements is the actual existence of an enterprise engaged in, or the activities of which affect, interstate or foreign commerce. While such

matter would appear to have be laid to rest by this Court in *United States v. Turkette*, 452 U.S. 576, 583 (1981), the current state for the law in several circuits, including now the First Circuit Court of Appeals, is contrary to Petitioner's position. This petition addresses a circuit conflict over whether the existence of an actual enterprise is always an essential element of the RICO conspiracy crime.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit affirming the conviction and sentence of the Petitioner was handed down on September 18, 2019. The opinion is published at *United States v. Rodríguez-Torres*, 939 F.3d 16, 34, 37 (2019) and is attached as **Appendix A**.

JURISDICTIONAL GROUNDS

Petitioner requests review of the judgment of the First Circuit entered on September 18, 2019. Supreme Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition concerns the Racketeer Influenced and Corrupt Organization Act (RICO) statute, 18 U.S.C. §1962 (c) and (d). Also, provisions of Rule 52(b) Federal Rules of Criminal Procedure. Relevant statutory provisions attached as **Appendix B.**

STATEMENT OF THE CASE

The defendant-appellant was, along with other one hundred four (104) other defendants, the subject of a nine (9) count Indictment rendered by a District of Puerto Rico Grand Jury on July 17, 2015. District Court Dkt 3; App. 102- 195. The Indictment, in essence, charged defendant from belonging to a RICO drug conspiracy, known as "La Rompe ONU" (hereinafter "La Rompe"). La Rompe was allegedly born out of an internal conflict in another drug trafficking organization known as "La ONU". As per the government's allegation once La Rompe was formed it developed a turf war with La ONU in an attempt to take over competing drug points in different locations in Puerto Rico.

The government claimed at trial that Mr. Guerrero participated in La Rompe as an enforcer, drug point owner and armed seller. It also claimed that Mr. Guerrero participated in a drive by shooting that occurred on August 28, 2012 that resulted in the death of three persons. Dkt 3; App. 160. While the Jury acquitted Mr. Guerrero of the drive by shooting murder, and related weapons charge, it found Mr. Guerrero

guilty of the RICO conspiracy, drug conspiracy and a different drug conspiracy related firearm count.

i. <u>The absence of a correct RICO Enterprise instruction</u>:

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. *United States v. Rodríguez-Torres*, 939 F.3d 16, 34, 37 (2019). 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 read as follows:

> "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. At the end, compounding its mistake, the trial court summarized the RICO instruction by again emphasizing not what the government had to prove, but instead what it did not need to establish:

> "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 (Emphasis Added).

Throughout the jury charge, the district court repeatedly used the word "would" in conjunction with each of the RICO elements. For example, it stated: ("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).

In fact, the trial court repeatedly instructed the juries to ignore the need to establish the actual existence of an enterprise to find defendants guilty of the RICO conspiracy charge. While the error committed by the district court seems to be plain and prejudicial, the First Circuit Court declined review finding that no error was committed by the trial court.

REASONS FOR GRANTING THE WRIT

This petition presents a Circuit conflict on an urgent and recurring question regarding the proper evidentiary requirements to establish a RICO Conspiracy case: whether the existence of an actual enterprise is always an essential element of the RICO conspiracy crime. The First, Second, Third and Tenth Circuit Court of Appeals have contradictorily ruled both in favor and against such bright-line rule. All other Circuit Courts that have reached the question have unambiguously ruled that the government has to prove the existence of an actual enterprise as part

of a RICO Conspiracy case. Now in the opinion in this case the First Circuit has further muddled the issue by holding, contrary to prior opinions, that a jury instruction that specifically instruct the jury that 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 is correct. The unfairness for defendants to allow such incorrect interpretation of statutory law is manifest and detrimental to the proper functioning of the criminal justice system.

I. The Court of Appeals Are Sharply Split Over Whether The Government Has To Prove The Existence Of An Actual Enterprise As Part Of A RICO Conspiracy Case.

The district court in this case provided a jury instruction, that was submitted by the government, which clearly instructed the jury that it could convict Mr. Guerrero of a RICO Conspiracy without the need to find that the government had established beyond a reasonable doubt the existence of a RICO enterprise. This instruction, apparently adopted

from the Third Circuit pattern jury instruction, directs jurors that they need not decide whether an enterprise actually existed, to convict on a RICO conspiracy count. *See,* Model Crim. Jury Inst. Third Circuit §6.18.192D.1

However, this instruction is clearly at odds with this Honorable Court opinion in *United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, the Court explained that "[i]n order to secure a conviction under RICO, the Government must prove both the existence of a an 'enterprise' and the connected pattern of racketeering activity". *Id* at 583. *Turkette*, further dispels any doubt that the existence of an enterprise is one of the elements of the RICO conspiracy by advising that

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1 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.

"[t]he existence of an enterprise at all time remains a separate element which must be proved by the Government." *Id.* at 583.

If the precedents from this Court are so clear, how the First Circuit deviated from the norm? More so when until the opinion in this case, its precedents appeared to be perfectly aligned and following to the letter the holdings laid out by this Court in *Turkette?2* The answer to this question lies in the First Circuit following the incorrect suggestions provided by the government in their response brief.

As recounted by the First Circuit in the opinion in this case, the government claimed that neither this Court or the First Circuit have 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 requirement, has not explicitly decided the question." *Rodriguez-Torres* at 36. The First Circuit summarized the government's contention that the "prosecution

2 *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)).

can satisfy its burden by proving that the conspirators agreed to form an enterprise…" without more. *Id.3*

As we have explained above, both the government, as well as the First Circuit Court, are clearly mistaken as this Court has indeed required proof of an existing enterprise to satisfy the elements of a RICO conspiracy. *Turkette* and *Boyle v. United States,* 566 U.S. 938, 941-42 (2009). The incorrect First Circuit's opinion illustrates the urgent need for this Court's intervention to clarify the question at hand that impacts all RICO conspiracy cases being presently litigated across the United States.

Particularly as most other circuits have followed *Turkette* and *Boyle* to the letter and require the government to prove the existence of an enterprise as part of the RICO conspiracy jury instruction. The RICO conspiracy pattern jury instructions in the Seventh and Eighth Circuits

3 "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."

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.4 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 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

4 No pattern jury instructions on § 1962(d) were found for the First, Fourth, Fifth, Sixth, Ninth, Tenth or D.C. Circuits.

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).

On the other hand, circuits that have found that the government is not required to prove that the alleged enterprise was actually established, have confronted great difficulty in reaching such conclusion given that to reach such conclusion they have been forced to incorrectly extend this Court's opinion in *Salinas v. United States*, 522 U.S. 52 (1997).

A good example is the Second Circuit opinion in *United States v. Applins*, 637 F.3d 59,75 (2nd. Cir. 2011) where the court "conclude that *Salinas* counsels that the establishment of an enterprise is not an element of the RICO conspiracy offense", but also held that "defendants agreed that an enterprise would be established (and also that one was actually established)…." *Id.* at 77.

It is clear from the above, that review by this Court is required to clear the confusion and conflict that is present in the precedents from

multiple Court of Appeal that not only conflict with others, but even within their own circuit courts. That such conflict and confusion is based on the misinterpretation of this High Court's precedents only serves to highlight the need for guidance from this Court. Also, as the high rate of RICO conspiracy cases continues to expand and increase such guidance is of the outmost importance as it will impact hundreds of cases in the near future.

CONCLUSION

For the reasons expressed above, this Court should grant this Petition for Certiorari and provide the relief herein requested.

Respectfully submitted,

Raúl Mariani-Franco
P.O. Box 9022864
San Juan, PR, 00902-2864
Tel.: (787) 620-0038
Fax: (787) 620-0039
Counsel of Record for Petitioner Guerrero-Castro

Date: December 16, 2019

CERTIFICATE OF SERVICE

I, Raúl S. Mariani Franco, certify that on December 16, 2019, copies of the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI were served to each party to the above proceeding, or to that party's counsel, and on every other person required to be served, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above documents in the United States mail, properly addressed to them with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

James J. Drake
Drake Law LLC
P.O. Box 56
Auburn, ME 04212

Vivian Shevitz
46 Truesdale Lake Drive
South Salem, New York 10590

Richard Guerriero
Theodore M. Lothstein
Lothstein Guerriero PLLC
Chamberlain Block Building
39 Central Square, Suite 202
Keene, NH 03431

Lydia Lizarribar-Masini
G-14 O'Neill Street
Suite A
San Juan, PR 00918

In San Juan, Puerto Rico, December 16, 2019.

S/RAUL S. MARIANI FRANCO
RAUL S. MARIANI FRANCO, ESQ.

CERTIFICATION OF WORD COUNT AND FONT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3835 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 2019.

S/RAUL S. MARIANI FRANCO
RAUL S. MARIANI FRANCO, ESQ.