No. _____

**In The**
**Supreme Court of the United States**

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EDWIN OMAR ALMONTE-NUÑEZ,

*Petitioner,*

v.

UNITED STATES

*Respondent.*

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**On Petition For A 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

Did the district court adequately vet Mr. Almonte-Nuñez's dissatisfaction with his counsel? Was the denial of his request for substitution an abuse of discretion? Did the district court err by ruling that it lacked authority to appoint substitute counsel for resentencing?

Did the First Circuit violate the "party presentation" doctrine by excusing the Government from its prior waiver by *sua sponte* inviting supplemental briefing on whether 18 U.S.C. § 2112 is a crime of violence under the Force Clause of 18 U.S.C. § 924(c)(3)? Was the First Circuit correct that 18 U.S.C. § 2112 is a crime of violence under the Force Clause of 18 U.S.C. § 924(c)(3)?

Did the district court violate Mr. Almonte-Nuñez's due process rights by relying on the PSR's description of the Puerto Rico offenses and refusing Mr. Almonte-Nuñez's request for a remand to gather evidence in support of his double jeopardy claim? Did the Government waive its right to speculate about the nature and type of convictions Mr. Almonte-Nuñez received in the Puerto Rico proceeding when it objected to Mr. Almonte-Nuñez's request for remand? Was plain error review appropriate for Mr. Almonte-Nuñez's double jeopardy argument even though *Sanchez Valle* issued while his case was on direct appeal?

## PARTIES TO THE PROCEEDING

Petitioner, Edwin Almonte-Nuñez, was the appellant in the United States Court of Appeals for the First Circuit. Respondent, the United States, was the appellee.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Edwin Almonte-Nuñez, respectfully petitions this Court for a writ of certiorari to review the opinion of the First Circuit Court of Appeals.

## DECISIONS BELOW

Petitioner, Edwin Almonte-Nuñez, pled guilty to violating various United States laws in the United States District Court for the District of Puerto Rico at San Juan. He appealed his sentence, and the First Circuit reversed and remanded for resentencing. *United States v. Almonte-Nuñez*, 771 F.3d 84 (1st Cir. 2014). After resentencing, the district court entered an amended judgment and sentence on August 21, 2015. (App.26-31). Mr. Almonte-Nuñez once again appealed and the First Circuit once again affirmed. *United States v. Almonte-Nuñez*, 963 F.3d 58 (1st Cir. 2020). (App.1-25).

## BASIS FOR JURISDICTION

The First Circuit issued its opinion affirming the district court's amended judgment and sentence on June 18, 2020. (App.1). This timely petition follows. Jurisdiction lies in this Honorable Court. *See* 28 U.S.C. § 1254(1).

## PROVISIONS INVOLVED

1. 18 U.S.C. § 2112 (robbing an individual of a United States passport);

2. 18 U.S.C. § 924(c)(1)(A)(ii) (brandishing a firearm during a crime of violence);

3. 18 U.S.C. § 922(g)(1) (being a convicted felon in possession of a firearm);

4. 18 U.S.C. § 924(c)(3)

> (A) [a felony that] has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the "Force Clause"], or
>
> (B) [a felony] 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 [the "Residual Clause"].

## STATEMENT OF THE CASE

### I. Introduction

The Government charged Mr. Almonte-Nuñez with three crimes in a Superseding Indictment:

> COUNT ONE: Robbery of United States property (passport), in violation of 18 U.S.C. § 2112;
>
> COUNT TWO: Brandishing a firearm in the course of the robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 2;
>
> COUNT THREE: Being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(a)(2).

He entered into a plea agreement (the "Agreement") with the Government and pled guilty to each count. (App.32-45). The district court imposed 150-month sentences for Counts 1 and 3, to run concurrently to one another. The court accepted the suggested 84-month sentence on Count 2, running it consecutive to the 150-month sentence for Counts 1 and 3, as required by 18 U.S.C. § 924(c)(1)(A). *United States v. Almonte-Nuñez*, 771 F.3d 84 (1st Cir. 2014).

Mr. Almonte-Nuñez appealed his sentence, arguing the 150-month term on Count 3 exceeded the 10-year maximum sentence allowable for a violation of 18 §

U.S.C. 922(g). On appeal, Mr. Almonte-Nuñez's previous appointed counsel was forced to argue the error was plain because trial counsel failed to object at sentencing. The First Circuit agreed that appellate counsel established plain error, reversed Mr. Almonte-Nuñez's sentence on Count 3, and remanded for resentencing. *Id.* at 92-93.

## II. Resentencing.

At resentencing, Mr. Almonte-Nuñez appeared with an interpreter and the same attorney who failed to object to Mr. Almonte-Nuñez's illegal sentence during the first sentencing proceeding. According to his PSR, which was "verified with medical evaluation records," Mr. Almonte-Nuñez suffered from mental deficiency, "mild retardation," and "marked delay." (Doc. 124 at 29). He has the communication skills of a 3 year-old, the socialization skills of a 1 year-old, and his "daily living abilities were that of a" 6 year-old. *Id.* He "barely can read and cannot write." He does not speak English. By the time he was 24 years-old, he had attempted suicide three times. *Id.*[1]

As with the first sentencing, his attorney filed no objections to the PSI report, and raised no objections before, during, or after the resentencing. But counsel did inform the district court at the resentencing hearing that Mr. Almonte-Nuñez "has had a lot of concerns" that trial counsel did not understand. (App.52). Counsel explained his belief that Mr. Almonte-Nuñez's concerns stemmed from Mr.

[1] Despite these facts' inclusion in the PSR used in both sentencings attended by trial counsel, none of them were mentioned during either sentencing as mitigating factors or for any other purpose.

Almonte-Nuñez's conversations with his appellate counsel—the one who caught trial counsel's error and convinced the First Circuit to reverse his original sentence. (App.48-52).

Although trial counsel alerted the court that Mr. Almonte-Nuñez had "a lot of concerns," trial counsel only mentioned one of them to the trial court, and the trial court did not ask about any others. Trial counsel told the court that, as trial counsel understood it, Mr. Almonte-Nuñez heard from his appellate counsel that on resentencing Mr. Almonte-Nuñez should be sentenced only to time-served. (App.48).

But trial counsel never conferred with appellate counsel, and told the trial court he was "not sure what [Mr. Almonte-Nuñez's] conversation with his appellate lawyer would have been." *Id.* Still, according to trial counsel, Mr. Almonte-Nuñez must have been misinformed by appellate counsel, and the time-served concern was meritless. *Id.* Trial counsel never mentioned to the district court that Mr. Almonte-Nuñez communicated at the level of a 3 year-old and had mental issues that might have warranted additional inquiry regarding the nature of his confusion.

The district court asked Mr. Almonte-Nuñez if he wanted to say anything. Mr. Almonte-Nuñez said: "Yes. I don't feel I am being adequately represented with this counsel." (App.50). The court simply said, "[a]ll right" and announced his sentence. (App.51-52).

At the end of the resentencing hearing, the district court *sua sponte* returned to the time-served issue because he did not understand the concern. (App.52). Trial counsel explained that Mr. Almonte-Nuñez was concerned because "the victim in

the case was a relative of a prominent FBI authority" and Mr. Almonte-Nuñez "was sentenced in state court for very similar charges and felt strongly that his federal sentence should be concurrent." (App.52).[2]

Trial counsel did not consult with his client during the hearing to assess why Mr. Almonte-Nuñez "felt strongly" that his federal and Puerto Rico sentences should run concurrently. Instead, trial counsel equated Mr. Almonte-Nuñez's concern about being sentenced for the same actions in federal court and in Puerto Rico with Mr. Almonte-Nuñez's purported belief he was entitled to time served based on appellate counsel's view of the case. (App.52). Trial counsel then once again reiterated to the district court that Mr. Almonte-Nuñez's understanding was misguided because there was "nothing in the First Circuit's opinion that would leave one to believe that." (App.52).

The record does not establish why trial counsel would have equated Mr. Almonte-Nuñez's concern about the interrelatedness of the Puerto Rico and federal sentences with a concern about time-served. Although Mr. Almonte-Nuñez had been charged, convicted, and sentenced in Puerto Rico for the same acts that engendered his federal conviction and sentence, he never served any time in a Puerto Rico correctional facility and had only been incarcerated in federal institutions. In fact, from the time of his arrest, FBI and ATF spearheaded the investigation and interrogation of Mr. Almonte-Nuñez and his codefendant,

[2] Prior to his federal indictment, Mr. Almonte-Nuñez was charged and sentenced by the Commonwealth of Puerto Rico for the same robbery that resulted in his federal charges, although he has remained in federal custody since the date of the incident and has not served any portion of his Puerto Rico sentence.

presumably because the victim was a family member of an FBI agent. (Doc. 124 at p. 8).

Unfortunately, his trial counsel did not appear to know that. The district court asked whether Mr. Almonte-Nuñez's concern was that he should have received time-served for any sentence he served in Puerto Rico for the Puerto Rico conviction. (App.52). Instead of explaining that Mr. Almonte-Nuñez had been in federal custody since the day of his apprehension, trial counsel simply responded that time served in Puerto Rico on the Puerto Rico charges "shouldn't" act as a credit against his federal sentence. (App.52). Of course, this characterization of Mr. Almonte-Nuñez's concern made no sense because Mr. Almonte-Nuñez never served time in a Commonwealth facility on the sentence he received on the Puerto Rico conviction for the same acts that led to his federal prosecution.

Trial counsel's statement also made no sense because Mr. Almonte-Nuñez's plea agreement specifically provided that his Puerto Rico sentence would run concurrently to his federal sentence, so even if Mr. Almonte-Nuñez had served time in a Puerto Rico facility on the Puerto Rico sentence, it would have acted as a credit against his federal sentence. (App.38). But the opposite scenario was not necessarily true. The Agreement provides it is only binding on the U.S. Attorney's Office for the District of Puerto Rico, and "does not bind any other federal district, state, or local authorities." (App.40).

Thus, counsel's lack of knowledge concerning the basics of the Agreement and the interplay between his federal and Puerto Rico convictions must have alarmed

Mr. Almonte-Nuñez. But his main issue seemed to be counsel's past performance during the first sentencing, where counsel failed to object to a sentence that exceeded the statutory maximum. After his first complaint about counsel fell on deaf ears and the court announced the sentence, counsel made clear to the court that he was "not disagreeing" with anything the court had done. (App.53).

Instead, explained counsel, he only brought up the "time served" issue in response to the court's invitation for a statement from Mr. Almonte-Nuñez because Mr. Almonte-Nuñez was "not the most articulate person" and counsel wanted "the Court to have the benefit of knowing what he expressed to me." (App.53). And once again, counsel stressed that he did not "think there's any legal argument to be made for why it should be credit for time served." *Id.*

The district court responded: "Well, I don't know either. There's nothing there. And I'm concerned that if that was not made in the [first] appeal, that is lost." *Id.* The district court did not ask Mr. Almonte-Nuñez anything about the source of his confusion or try to ascertain whether the concern appellate counsel relayed to Mr. Almonte-Nuñez was something legitimate, rather than a "time served" non sequitur that, for good reason, no one could understand.

The district court concluded the hearing by asking if Mr. Almonte-Nuñez had anything else to add. Mr. Almonte-Nuñez's response: "I don't feel that I'm being adequately represented with this attorney. When I was sentenced the first time,

the circuit wrote and said that he[3] did not count the points for the state cases." (App.54). Again, the court did not inquire about the nature of Mr. Almonte-Nuñez's discontent, and simply stated, "anything further?" App.54. Mr. Almonte-Nuñez responded: "That's it. If you can change counsel, that would be better for me." App.54. The court responded: "The Court of Appeals may designate another lawyer, just as they did in this case. That's their decision, not mine." App.54.

On August 21, 2015, the district court entered an amended judgment and sentence. (App.26-31). Mr. Almonte-Nuñez received 150 months on Count 1, 84 months on Count 2, and 120 months on Count 3. The district court ran the sentences for Counts 1 and 3 concurrently. The district court ran the 84-month sentence on Count 2 consecutive to the sentences imposed on Counts 1 and 3, for a total term of imprisonment of 234 months (19.5 years).

## III. Proceedings before the First Circuit.

### A. The first round of briefs

In his Opening Brief, Mr. Almonte-Nuñez argued the Court erred by rejecting his request for substitute counsel without adequately inquiring about the basis for Mr. Almonte-Nuñez's dissatisfaction with his counsel. And once again, trial counsel failed to raise an argument at resentencing that would have provided a lower

[3] The First Circuit substituted "[district court]" in the place of "he" in its Opinion when it quoted Mr. Almonte-Nuñez's basis for requesting new counsel. (App.9) Reasonable minds could certainly disagree about who Mr. Almonte Nuñez was referring to, but given his general point was clearly intended to convey his displeasure with counsel, it seems more likely his gripe was directed to his attorney. And either way, as explained below, any ambiguity on the point warranted inquiry from the district court.

sentence for Mr. Almonte-Nuñez. At resentencing, counsel did not present argument under *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), which was released two months before Mr. Almonte-Nuñez's resentencing. As a result, Mr. Almonte-Nuñez once again faced the crucible of plain error review on appeal.

Mr. Almonte-Nuñez's second argument was that his sentence on Count 2 should be vacated because a violation of 18 U.S.C. § 2112 cannot constitute a "crime of violence" under 18 U.S.C. § 924(c)(3) after the Supreme Court's decision in *Johnson*. Mr. Almonte-Nuñez argued (1) that *Johnson* knocked out § 924(c)(3)'s Residual Clause because it was vague for the same reasons the Supreme Court held the Residual Clause of the ACCA unconstitutionally vague (Brief at 20-23), and (2) that the Force Clause did not apply to 18 U.S.C. § 2112 for a variety of reasons. (Brief at 11-20).

The Government acknowledged the circuit split over *Johnson*'s application to § 924(c)(3), maintained that the First Circuit and other courts were correct not to extend *Johnson* beyond the ACCA, and left it there. (Gov't Brief at 18-20). The Government likewise offered no response to Mr. Almonte-Nuñez's extensive argument that § 2112 could not qualify as a crime of violence under the Force Clause § 924(c)(3). The Government acknowledged its decision not to address the Force Clause argument in its Brief and opted to rely solely on the Residual Clause, despite the split in authority. *Id.*

### B. Supplemental briefing after *Sanchez-Valle*

#### 1. The First Circuit grants leave for Mr. Almonte-Nuñez to file a Supplemental Brief addressing *Sanchez-Valle* because everyone agreed below that Mr. Almonte-Nuñez was sentenced for the same criminal acts in federal court and in a separate Puerto Rico proceeding.

At the time Mr. Almonte-Nuñez filed his Opening Brief, the law in the First Circuit was that under the "dual-sovereignty" doctrine, separate prosecutions by the federal government and Puerto Rico for the same acts do not violate the Fifth Amendment. *See, e.g., United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987) (holding that the United States and Puerto Rico are dual sovereigns for double jeopardy purposes).

However, after Mr. Almonte-Nuñez filed his Opening Brief, this Court decided *Commonwealth of Puerto Rico v. Sánchez Valle*, ––– U.S. –––, 136 S. Ct. 1863, 195 L. Ed. 2d 179 (2016). In *Sánchez Valle*, the Supreme Court held that the United States and Puerto Rico are not separate sovereigns, and that as a result, Puerto Rico and the United States cannot "successively prosecute a single defendant for the same criminal conduct." *Sánchez Valle*, 136 S. Ct. at 1868. Thus, the First Circuit's *Lopez Andino* no longer controlled. And because Mr. Almonte-Nuñez had been prosecuted and sentenced in the U.S. and in Puerto Rico for the "same criminal conduct," he requested leave to file a Supplemental Brief in light of *Sánchez Valle*. The Government did not oppose his request.

The First Circuit granted his request to file a Supplemental Brief, as well as his request for sufficient time to coordinate a strategy with Puerto Rico counsel.

Counsel explained that since discovery of the *Sanchez Valle* holding, he had been trying unsuccessfully to contact Mr. Almonte-Nuñez's attorney in Puerto Rico to discuss whether his Puerto Rico sentence has been challenged under *Sanchez Valle*. Counsel further explained that he did not feel comfortable requesting that Mr. Almonte-Nuñez's federal sentence be vacated without fully understanding the implications of doing so on Mr. Almonte-Nuñez's Puerto Rico sentence. Moreover, if Mr. Almonte-Nuñez's sentence in Puerto Rico had already been challenged (or was going to be challenged) under *Sanchez Valle*, it may have been unnecessary for the First Circuit to address the issue.

**2. Mr. Almonte-Nuñez requests relinquishment of jurisdiction to the district court for the appointment of Spanish-speaking counsel and fact gathering about the Puerto Rico proceedings because the district court record appeared insufficient to conduct an elements-based double jeopardy test.**

As the Supplemental Brief due date approached, counsel explained in a request to extend the due date that he needed time to speak with Mr. Almonte-Nuñez's Puerto Rico attorneys due to counsel's lack of familiarity with Puerto Rico law and procedure. Counsel explained, however, that not only did his requests for information go unrequited, a more pressing issue had become immediately apparent: the lack of information in the district court record regarding the Puerto Rico proceedings.

Despite the pivotal role the Puerto Rico sentences played in the federal plea negotiation process and during the federal sentencing proceedings in this case, there is no evidence or documentation in the district court record from the parallel

Puerto Rico case. Worse still, counsel explained, the district court record provides conflicting information on the most basic aspects of the Puerto Rico case.

While the PSR contained general information about the parallel Puerto Rico prosecution, Mr. Almonte-Nuñez believed the record lacked sufficient information about the Puerto Rico convictions to conduct an elements-based double jeopardy analysis. Most importantly, the PSR does not contain specific references to the provisions of the Puerto Rico criminal code Mr. Almonte-Nuñez was prosecuted under in the prior Puerto Rico proceeding. Yet, argued Mr. Almonte-Nuñez, the district court, counsel for the Government, and counsel for Mr. Almonte-Nuñez were all in agreement throughout the federal proceedings that the federal sentence and the Puerto Rico sentence were based on the same acts, which took place on one night.

Thus, on April 4, 2017, Mr. Almonte-Nuñez moved the First Circuit to relinquish jurisdiction to the district court, arguing the lack of specific evidence regarding the parallel Puerto Rico proceedings in the district court record precluded an "informed argument under *Sanchez Valle* based on record evidence." Moreover, Mr. Almonte-Nuñez requested the appointment of Spanish-speaking counsel on remand to assist undersigned counsel because the Puerto Rico records were in Spanish and undersigned, court-appointed counsel had no prior exposure to Puerto Rico law and procedure.

The Government opposed the remand request on April 7, 2017, arguing that the *Sanchez Valle* argument was barred by law of the case. Alternatively, the

Government argued Mr. Almonte-Nuñez could present his *Sanchez Valle* argument in a habeas proceeding, which would allow him to "appropriately resolve" the "problems" thwarting review of his claim on direct appeal, such as the "lack of basic information in the district court record regarding the Puerto Rico proceedings." The Government never argued there was sufficient information in the record to resolve the *Sanchez Valle* argument on the record before the First Circuit.

The First Circuit denied the request in a July 31, 2017 order, ruling that "[m]uch of the information that appellant seeks about the Puerto Rico convictions is provided by" the PSR, "at least enough for him to further develop the *Sanchez Valle* claim here, and for the government to address the issue in its brief."

In his Supplemental Brief, Mr. Almonte-Nuñez argued his double jeopardy claim should be reviewed de novo because it presents a pure question of law, and that based on the record below, Mr. Almonte-Nuñez's dual convictions for the same criminal conduct violated the holding in *Sanchez Valle*. He noted that the question in *Sánchez-Valle* was whether "Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct," and that the answer from the Supreme Court was: "We hold they may not." *Sánchez Valle*, 136 S. Ct. at 1868. Mr. Almonte-Nuñez also noted the Supreme Court did not conduct an elements analysis anywhere in the *Sánchez Valle* opinion.

In support of his argument under *Sánchez Valle*, Mr. Almonte-Nuñez noted that in the plea agreement, Mr. Almonte-Nuñez and the Government "agree[d] that the sentence imposed in this case, is to run concurrent to the sentence imposed by

the Commonwealth of Puerto Rico case related to the same home invasion and robbery." (App.38). According to Mr. Almonte-Nuñez's PSR, the Puerto Rico sentence was for the "same incident/acts defendant is being charged for at the federal level." (Doc. 124 at 20). Accordingly, the PSR ascribes no criminal history points to Mr. Almonte-Nuñez for the related Puerto Rico sentence. *Id.* Likewise, Almonte-Nuñez's amended judgment and sentence provides that his federal sentence runs concurrent with the sentence imposed by the Commonwealth of Puerto Rico in related cases KLA2012G0038 to 39, KIC2012G0006, and KBD2012G0031. (App.27).

Thus, argued Mr. Almonte-Nuñez, the record reflects that Mr. Almonte-Nuñez, as well as the Government, understood that the federal sentence and the Puerto Rico sentence arose from the same criminal conduct. Moreover, during the change of plea hearing, the district court asked Mr. Almonte-Nuñez about his understanding of the Plea Agreement. Mr. Almonte-Nuñez responded: "The agreement is that the cases here will run with the State cases, and that I'll stay in State prison." (Doc. 155 at 20). The district court replied: "And, what it seems to me, from the way you're answering my questions, is that you are not that concerned with the sentence here because whatever it is should run concurrent. Is that your understanding?" (Doc. 155 at 20). Mr. Almonte-Nuñez confirmed that was his understanding. (Doc. 155 at 20).

Likewise, when the district court asked the Government during the change of plea hearing about the interplay between the federal and Puerto Rico sentences, the

Government explained: "Yes, Your Honor, the recommendation is as to the related case at the State level, the related case, the one that is related to the same home invasion and robbery." (Doc. 155 at 21). In response, the district court asked: "Okay, but these three counts are related to the State case?" The Government replied: "That is correct, Your Honor." (Doc. 155 at 21). In sum, throughout the proceedings below, the Government, Mr. Almonte-Nuñez, and the district court, acknowledged that the "same criminal conduct" that gave rise to Mr. Almonte-Nuñez's Puerto Rico sentence was the basis for his federal sentence.

In response, the Government argued the *Sánchez-Valle* argument should be reviewed for plain error, and that Mr. Almonte-Nuñez did not sufficiently develop his double jeopardy argument because he failed to present argument on the "elements" analysis espoused in *Blockburger v. United States*. Specifically, the Government argued that Mr. Almonte-Nuñez's claim fails under an elements analysis because a "review of [the Puerto Rico and federal] charges" "illustrates that each requires an element of proof that the other does not." (AB at 25).

In his Reply Brief, Mr. Almonte-Nuñez argued that the elements analysis the Government characterized as mandatory under *Sánchez Valle* appears nowhere in the *Sánchez Valle* opinion itself. The *Sánchez Valle* court held that successive prosecutions in Puerto Rico and the United States for the "same criminal conduct" violated the Double Jeopardy Clause, and Mr. Almonte-Nuñez maintained that the Government could not fault Mr. Almonte-Nuñez for failing to address a test that the *Sánchez Valle* court did not address, or even reference in passing. Mr. Almonte-

Nuñez contended that the Government was attempting to rewrite the holding of *Sánchez Valle*, and that Mr. Almonte-Nuñez properly established entitlement to relief under *Sánchez Valle* by tracking the only analysis employed by the *Sánchez Valle* court.

More importantly, argued Mr. Almonte-Nuñez, was that after the Government objected to a remand, the Government was relying on information outside the record on appeal and outside the district court record to conduct its elements analysis. For example, the only information related to the Puerto Rico proceeding is a section of the PSR labelled "Relevant Conduct: Same incident/acts defendant is being charged for at the federal level," and it refers to Puerto Rico statutes generically ("Violation of PR Weapons Act: Use of a firearm without a state license" and "Violation of PR Weapons Act: Shoot or Aim a firearm") (Doc. 124 at 20).

Mr. Almonte-Nuñez argued these general descriptions of behavior prohibited by the Puerto Rico Weapons Act by no means guaranteed that Mr. Almonte-Nuñez was convicted under the specific subsections of the Puerto Rico Weapons Act the Government used for its elements analysis in the Answer Brief. Moreover, the PSR specifically notes "official court documents" still had "not been received" when the PSR was prepared, and no evidence from the Puerto Rico proceeding is in the record. (Doc. 124 at 21). Mr. Almonte-Nuñez also argued that the Government's opposition to Mr. Mr. Almonte-Nuñez's request to relinquish jurisdiction to the district court for fact-gathering and appointment of Spanish-speaking counsel

should have been construed as a waiver of the right to rely on any information other than the cryptic references contained in the PSR.

## III. The Supreme Court decides *Davis* and the First Circuit requests additional briefing.

On September 17, 2019, the First Circuit *sua sponte* requested briefing from both sides on the impact of *United States v. Davis*, 139 S.Ct. 2319 (2019), and "any other recent precedent the parties deem relevant." Mr. Almonte-Nuñez argued *Davis* proved the point he had argued in his Opening Brief—that *Johnson* should be extended to the Residual Clause of § 924(c)(3).

The Government, on the other hand, acknowledged it backed the wrong horse in its Brief when it sided with the circuits that held *Johnson* should not be extended beyond the ACCA's Residual Clause. (Gov't Supp. Brief at 4). But then—after affirmatively declining to press the argument in its Brief years earlier—the Government argued for the first time that 18 U.S.C. § 2112 is a crime of violence under the Force Clause of 18 U.S.C. § 924(c)(3). Mr. Almonte-Nuñez moved to strike the Government's Supplemental Brief, arguing waiver on the Force Clause issue and general non-responsiveness to the Court's *sua sponte* invitation for briefing on *Davis*. The First Circuit denied the motion to strike, but sent the issue of waiver for the merits panel to decide.

## IV. The First Circuit affirms.

The First Circuit held that Mr. Almonte-Nuñez's request for new counsel was too late and that his only explanation was the meritless "time served" issue, which the trial court properly found was waived for failure to raise the argument in the

first appeal. (App.8-10). According to the First Circuit, the district court's inquiry regarding the basis of Mr. Almonte-Nuñez's dissatisfaction was adequate. *Id.* at 11.

The First Circuit also held that 18 U.S.C. § 2112 qualifies as a crime of violence under the Force Clause of § 924(c)(3). The Court did not address, however, Mr. Almonte-Nuñez's argument that the Government waived that argument by knowingly deciding not to address it in its primary brief. (App.14).

The First Circuit also rejected Mr. Almonte-Nuñez's *Sanchez Valle* argument and held that plain error review was appropriate. *Id.* at 18. According to the Court, the PSR was sufficiently clear regarding the nature of the Puerto Rico offenses to conduct an elements test. *Id.* at 17. Furthermore, the Court found that the Puerto Rico offenses and federal offenses had different elements and therefore held there was no double jeopardy problem. *Id.*

## REASON FOR GRANTING THE WRIT

### I. This Court should remind lower courts of the importance of vetting a party's request for substitution of counsel thoroughly, particularly when the record before the court establishes legitimate reasons for a party's dissatisfaction.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." It is well-settled that this right to effective assistance of counsel attaches at all critical stages of trial, *United States v. Wade*, 388 U.S. 218 (1967), including sentencing, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), and resentencing. *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (holding that defendants have a Sixth Amendment right to counsel at resentencing and rejecting argument that defendant was not prejudiced by counsel's failure to

adequately represent the defendant at resentencing simply because the sentencing judge was familiar with the case and based his resentencing entirely upon the first sentencing hearing).

Further, it is black-letter law in every federal Circuit that when a defendant requests substitute counsel, courts must conduct some sort of inquiry to assess the basis for the defendant's dissatisfaction. *See Martel v. Clair*, 132 S.Ct. 1276, 1288 (2012) (noting that all Circuits agree "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer."); *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990) ("It is hornbook law that '[w]hen an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for defendant's dissatisfaction …'") (quoting 2 W. LaFave & J. Israel, Criminal Procedure § 11.4, p. 36 (1984)).

Thus, when Mr. Almonte-Nuñez twice expressed his dissatisfaction with counsel and requested a new attorney, the district court should have inquired about the basis for his dissatisfaction. Instead, the court merely accepted counsel's nonsensical explanation regarding a non-existent time-served issue that Mr. Almonte-Nuñez never even mentioned. If ever there was a case compelling reversal under the rule that requires judicial inquiry in response to a request for substitution of court-appointed counsel, this is that case.

Mr. Almonte-Nuñez has the mental capacity of an 8 year-old, communication skills commensurate with the abilities of a 3 year-old, and the socialization skills of

a 1 year-old. He "barely can read and cannot write." (A2.30). He does not speak English. Moreover, Mr. Almonte-Nuñez was represented at resentencing by the same counsel who failed to object to a sentence entered at his first sentencing that exceeded the statutory maximum. That failure initially subjected his illegal sentence argument to plain error review on appeal, a test Mr. Almonte-Nuñez was lucky to pass. And history repeated itself.

At resentencing, counsel did not present argument under *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), which was released two months before Mr. Almonte-Nuñez's resentencing. As a result, Mr. Almonte-Nuñez once again faced the crucible of plain error review in this appeal. Mr. Almonte-Nuñez had legitimate reasons for wanting a different attorney. This Court should remind lower courts to be cautious when a party requests substitute counsel, especially when there are legitimate reasons for the request. This Court should also reiterate that lower courts have the authority to grant substitution of counsel requests at any critical stage of the proceedings.

## II. This case provides a textbook example of the waste and inequity that can result when a court relinquishes its role as neutral arbiter and abandons the principle of party presentation.

This Court recently explained the importance of the principle of party presentation to our legal system. In *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), this Court emphasized that the role of a court is to field the arguments advanced by able counsel and rule on them as they come:

> In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U.S. 237, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008), "in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.*, at 243, 128 S.Ct. 2559. In criminal cases, departures from the party presentation principle have usually occurred "to protect a pro se litigant's rights." But as a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.*, at 386, 124 S.Ct. 786 (Scalia, J., concurring in part and concurring in judgment).
>
> In short: "[C]ourts are essentially passive instruments of government." *United States v. Samuels*, 808 F.2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid.*

*Sineneng-Smith*, 140 S.Ct. 1575, 1579.

This case should either be used as another opportunity to press the importance of the party presentation doctrine or should be reversed summarily based on *Sineneng-Smith*. Mr. Almonte-Nuñez spent 9 pages of his Opening Brief arguing that 18 U.S.C. § 2112 cannot constitute a "crime of violence" under 18 U.S.C. § 924(c)(3) after the Supreme Court's decision in *Johnson*. When the Opening Brief was prepared, there was virtually no case law addressing the interplay between 18 U.S.C. § 2112 and the Force Clause of 18 U.S.C. § 924(c)(3). Thus, it took considerable effort to concoct a creative argument that would stand on its own. And for that argument to work, another shoe had to drop: this Court had to resolve the circuit split on the applicability of *Johnson* to the Residual Clause of § 924(c)(3). And it happened when this Court decided *Davis*.

The Government knew of all these possibilities. It recognized the circuit split on the Residual Clause issue and took the path of least resistance for understandable reasons. But it also knew of the risk of avoiding the Force Clause argument, and the Government assumed that risk when it declined to respond to Mr. Almonte-Nuñez's comprehensive argument altogether.

Over 3 years passed from the time Mr. Almonte-Nuñez crafted his argument through this Court's decision in *Davis*. And even after *Davis* issued, the Government did request leave to amend its brief, or supplement its argument. Instead, the Court stepped in and *sua sponte* asked the parties to address *Davis*'s impact on this case. But Mr. Almonte-Nuñez had already addressed what he needed to, and the Court's invitation was, in essence, a lifeboat for the Government. None of this is meant to be sanctimonious, but undersigned counsel is court-appointed and with the Government on the other side, taxpayers will end up funding an incredible amount of work that could have been handled far more efficiently, in a way that would have brought about a speedier resolution to the case.

The Government waived its argument on the Force Clause and the First Circuit should have affirmed. Instead, 3 years after the Government made a deliberate strategic choice, the Court rescued the Government without even being asked for relief, and then did not even discuss waiver in its opinion. To make matters worse, the Court applied plain error review to defeat the unopposed Force Clause argument advanced in the Opening Brief. This too was error and it was

brought to the Court's attention in Mr. Almonte-Nuñez's motion to strike the Government's supplemental brief. (Mtn. to Strike at 3) (citing *Henderson v. United States*, 568 U.S. 266 (2013) ("It has been long-settled that an error that may not have been "plain" at the time of district court proceedings due to an unsettled question of law can become "plain" if the question is resolved conclusively while an appeal is pending.").

To be clear, while the panel may have erred, it undoubtedly made its decisions with the laudable goal of ensuring it reaching the right result after input from both sides. But when reaching the right result requires rescuing a party from a strategic choice to the detriment of the other side, the desire for perfection must yield to fairness and preservation of an adversarial legal system that ensures predictability and efficiency. This Court should hold the Government to its choice and remind courts that reversing three years of contentious litigation to save a party from its own decision is bad for the system and contrary to this Court's long-standing precedent.

## III. The PSR's description of the Puerto Rico crimes were insufficient to determine whether *Sanchez Valle* applies in Mr. Almonte-Nuñez's case. The consequences are dire for him and denying the limited remand for fact-finding and Spanish-speaking counsel violated his right to due process.

The record is full of indications that belie the First Circuit's conclusion that Mr. Almonte-Nuñez did not make out a prima facie case of double jeopardy. Everyone agreed below that the same acts and events precipitated the dual prosecutions which were banned in *Sanchez Valle*.

The Government's elements analysis depended on information outside the record on appeal and outside the district court record. The Government relied on specific statutory violations of Puerto Rico law that are not mentioned anywhere in the record. And the district court endorsed the Government's approach. Given that it was undisputed during the plea negotiations that Mr. Almonte-Nuñez's Puerto Rico sentences arose from the same acts that gave rise to his federal sentence, it appears highly likely that one of the dual sentences should be vacated. Given the constitutional rights at stake, the limited information in the record, the lack of Spanish-speaking counsel, and the underdeveloped state of this very new double jeopardy analysis unique to Puerto Rico, relinquishing jurisdiction to the district court was not a "big ask."

But the Government opposed Mr. Almonte-Nuñez's Motion to Relinquish Jurisdiction and encouraged the onset of a new, years-long, protracted habeas proceeding instead of dealing with the issue efficiently. The First Circuit's endorsement of the Government's approach violated Mr. Almonte-Nuñez's due process rights.

The information contained on pages 20-21 of Mr. Almonte-Nuñez's presentence report was sufficient to make the argument presented in Mr. Almonte-Nuñez's Supplemental Brief. But it is insufficient to perform the elements analysis. On pages 23-25 of the Government's Answer Brief, the Government offered a half-baked elements analysis using specific Puerto Rico firearm statutes it assumes the PSR is referring to on pages 20-21. But the Puerto Rico statutes implicated by the

acts that led to the federal sentences at issue in this case are not specified by statute number in the PSR. The PSR refers to Puerto Rico statutes generically on page 20 ("Violation of PR Weapons Act: Use of a firearm without a state license" and "Violation of PR Weapons Act: Shoot or Aim a firearm"), but these general descriptions of behavior prohibited by the Puerto Rico Weapons Act by no means guarantee that Mr. Almonte-Nuñez was convicted under the specific subsections of the Puerto Rico Weapons Act the Government uses in its analysis in the Answer Brief.

Far from it. The Government assumes that Mr. Almonte-Nuñez was convicted and sentenced for a violation of "Article 5.04 if [sic] the Puerto Rico Weapons law," and cites to 25 L.P.R.A. § 458e in support of its elements analysis. The PSR does not identify either of these Puerto Rico laws by statute number, and the plain language of 25 L.P.R.A. § 458e suggests it has no bearing on the facts of Mr. Almonte-Nuñez's case. It provides the sentencing scheme for a "person who has or owns, but is not carrying a firearm without a license to do so." 25 L.P.R.A. § 458e. Clearly, the Government's position has never been that Mr. Almonte-Nuñez had or owned, but was not carrying, an unlicensed firearm when he committed the acts underlying his federal and Puerto Rico sentences.

Even more dubious is the Government's argument concerning Article 5.15 of the Puerto Rico Weapons Act and 25 L.P.R.A. § 458n[4]. Again, neither statute is

[4] It is telling that the First Circuit referred to 25 L.P.R.A. § 458c, while the Government referred to § 458e throughout the briefing. The Court and the Government were interpreting the same paragraph in the PSR.

referenced by number in the PSR. And again, it appears somewhere between unlikely and impossible that Mr. Almonte-Nuñez was actually convicted or sentenced under these statutes in Puerto Rico. Section 458n is applicable where a person either "willfully fires" a weapon, 25 L.P.R.A. § 458n(a)(1), or "intentionally, although without malice aforethought, points a weapon towards a person, even though he/she causes no harm whatsoever to any person," 25 L.P.R.A. § 458n(a)(2). Mr. Almonte-Nuñez has never been accused of firing a weapon, and the notion that subsection 2 applies is completely contradicted by the factual basis for Almonte-Nuñez's federal guilty plea.

Moreover, the PSR indicates Mr. Almonte-Nuñez received a 1-year sentence for his "Violation of PR Weapons Act: Shoot or Aim a Firearm," which was changed to 2 years, due to aggravating circumstances. PSR at 20. But the plain language of 25 L.P.R.A § 458n suggests that such a sentence is not available under 25 L.P.R.A § 458n. Section 458n provides for "a penalty of imprisonment for a fixed term of five (5) years," which can only be reduced if "mitigating circumstances" are present. Thus, the Government's assumption that the reference in the PSR to a "Violation of PR Weapons Act: Shoot or Aim a Firearm," necessarily refers to 25 L.P.R.A § 458n, appears to be less than certain.

The Government referred to information outside the record on appeal and outside the district court record to buttress its argument. But page 21 of the PSR indicates that "official court documents" related to the companion Puerto Rico proceedings "still have not been received." Aside from the cryptic information

contained in the PSR, there is no information about the Puerto Rico charges, convictions, or sentences contained in the district court record or the record on appeal. There are no charging documents, translated or otherwise. There is no plea agreement or plea colloquy from the Puerto Rico proceedings, translated or in Spanish. There are no sentencing documents in the record.

Nothing from the proceedings below or on appeal would suggest that the Government has obtained any official court documents from the Puerto Rico proceedings. As a result, the Government's attempt to gap-fill based on assumptions about the Puerto Rico case should be viewed as an attempt to remedy a failure of proof. It should also be rejected as a violation of the well-settled prohibition on referring to matters outside the appellate record.

If the Puerto Rico record of Mr. Almonte-Nuñez's companion convictions contains the information referred to in the Answer Brief, the Government should have asked to supplement the record on appeal, or should have agreed to Mr. Almonte-Nuñez's request to relinquish jurisdiction. The Government should not be permitted to oppose additional evidence gathering at the district court level, and then take advantage of the lack of information in the record by using unfounded assumptions to fill in the gaps. Finally, the Government's failure to supplement the record on appeal, combined with its opposition to Mr. Almonte-Nuñez's request to relinquish jurisdiction, should be construed as a waiver of any right the Government may have had to present additional evidence on remand. Worse still, the statutory violations the Government assumes the PSR is referencing appear to

be inapplicable to the circumstances that led to Mr. Almonte-Nuñez's federal and Puerto Rico sentences.

## CONCLUSION

For the foregoing reasons, this Court should grant Mr. Almonte-Nuñez's petition and reverse the First Circuit's opinion.

Respectfully submitted on this 16th day of November, 2020,

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