No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JOSE ANTONIO MARTINEZ

Petitioner,

against

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

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ISSUE PRESENTED FOR REVIEW

Whether substantive RICO is a "crime of violence" under 18 U.S.C. §924(c)?

PARTIES TO PROCEEDINGS

The Petitioner in this Court is Jose Antonio Martinez. The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Petitioner, Jose Antonio Martinez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, wherein the Second Circuit acknowledged that under *Davis* the petitioner's argument that substantive RICO is not a "crime of violence" is plausible, but that under present case law it did not meet

the plain error standard. The Second Circuit agreed with the petitioner that under *Davis* a RICO conspiracy is not a crime of violence.

OPINION BELOW

A copy of the Opinion of the United States Court of Appeals for the Second Circuit, dated March 16, 2021, has been published at *United States v. Martinez*, 991 F.3d 347 (2d Cir. 2021). The Opinion is reproduced in Appendix A, *infra*.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit as set forth in the Opinion in *United States v. Martinez*, 991 F.3d 347 (2d Cir. 2021) is dated and was entered on March 16, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court for the Eastern District of New York had jurisdiction of this case pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in part, the construction of the Fifth and Sixth Amendments of the United States Constitution, 18 U.S.C. §924(c) and 18 U.S.C. §1962. The pertinent texts of the Constitution and Statutes are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

Jose Antonio Martinez was charged in the District Court for the Eastern District with RICO conspiracy, substantive RICO, and discharging a firearm during a crime of violence in violation of 18 U.S.C. §§ 924(c), 1962(c) and (d), 1963 and 3551. The charges involved his association with the MS-13, an enterprise that engaged in a pattern of racketeering activity, conspired to distribute and possess with intent to distribute cocaine, conspired to murder members of the Vatos Locos gang, and intentionally murdered and individual named John Halley. This Court had not yet decided *Johnson v. United States*, 576 U.S. 591 (2015) while Martinez's case was pending in the district court and Martinez did not therefore challenge the constitutionality of § 924(c) while in the district court. Martinez pleaded guilty to all charges and was sentenced to a term of 240 months incarceration. The Judgment of Conviction was filed on April 23, 2015. A timely Notice of Appeal was filed on April 28, 2015.

On appeal to the United States Court of Appeals for the Second Circuit, Martinez contended that his 240-month sentence was substantively unreasonable. This Court's opinion in *Johnson* was issued on June 26, 2015. Based on *Johnson*, the petitioner moved for permission to file a supplemental brief challenging his conviction under §924(c) and the Court granted the motion. On May 9, 2018, the Second Circuit decided *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018) in which

the court held that *Johnson* did not apply to a case involving a *Hobbs* robbery conviction as the predicate offense for a Section 924(c) conviction.

On September 16, 2016, the petitioner filed a supplemental brief in which he argued that his conviction under 18 U.S.C. §924(c) should be reversed under *Johnson* while acknowledging that the court's had decided *Hill* wherein it had held that the risk-of-force clause in 18 U.S.C. §924(c)(3)(B) was not unconstitutionally vague. Petitioner nonetheless argued there could be a conflict in the circuit courts of appeal on this issue and that this court might ultimately decide the issue.

On February 4, 2019, the Second Circuit ordered the parties file further supplemental briefs addressing the impact of the court's decision in *Barrett* on the petitioner's appeal. In the second supplemental brief, the petitioner argued that *Barrett* impacted the voluntariness of Martinez's plea in that district court did not advise him of the true nature of the §924(c) charge against him and therefore the district court had not obtained a valid waiver of his right to a jury trial.

On September 13, 2019, the Second Circuit ordered the parties to file supplemental letter briefs addressing the impact of this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019) on the appeal. In the supplemental letter brief, the petitioner argued that substantive RICO and RICO conspiracy are not "crimes of violence" under §924(c)conviction, reasoning that Martinez's conviction could not be sustained under the residual clause of §924(c)(3)(B). Petitioner addressed the

impact of *Davis* on the analysis of whether a predicate offense qualifies as a crime of violence under the elements clause of §924(c)(3)(A). As in *Davis*, the petitioner applied the categorical approach and argued that a conspiracy to commit a crime of violence is not a crime of violence under the elements clause of §924(c)(3)(A).

The petitioner further argued that substantive RICO is not a crime of violence under the elements clause of §924(c)(3)(A) based on the generic elements of substantive RICO and arguing that some elements do not involve the use of force under the elements clause.

On March 16, 2021, the Second Circuit affirmed Martinez's conviction and sentence. The court agreed that under *Davis* a RICO conspiracy is not a crime of violence. As to the question of whether substantive RICO is a "crime of violence," the court applied the plain error standard because the issue was not first raised by trial counsel in the district court. The court acknowledged that the argument that substantive RICO is not a "crime of violence" is plausible, but that under present case law the error is not "clear and obvious." Therefore, the plain error standard was not met.

The Second Circuit agreed that the categorical approach applied to determine whether substantive RICO or a RICO conspiracy are crimes of violence. The issue is whether the "the offense of conviction *necessarily*, by its statutory definition, 'has as an *element*'" the actual use of physical force against another person. The court

acknowledged that it had applied the categorical approach to RICO prior to *Davis* and held: "where the government proves (1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as 'crimes of violence' under §924(c), a §1962 conviction serves as a predicate for a conviction under §924(c)." *United States v. Iverzaj*, 568 F.3d 88 (2d Cir. 2009). But the court held that its decision in *Iverzaj* did not necessarily determine the issue of whether "a substantive RICO crime will be a crime of violence *only* where *at least two* predicate acts qualify as crimes of violence." The court said that if *Iverzaj* so stated, it was dictum.

But the court also recognized that the precedent of the Supreme Court decided after *Iverzaj* "have certainly called into question, if not the premises directly underlying *Iverzaj*, many of the principles and precedents that formed the legal background against which the case was decided." For example, the court observed that RICO is not "neatly divisible" into subsections having as elements either physical force or non-physical force against others.

The court held that the plain error standard applied because Martinez did not raise the issue of whether substantive RICO is a crime until his case was on appeal. But the court also stated that the first two requirements of the plain error standard—"plain" and "error"—is established at the time of the appeal and not at the time that the case was in the district court.

The court said "RICO is a unusual statute that encompasses within its terms not only a wide variety of conduct but a wide variety of specifically defined criminal acts whose separate elements are defined by state and federal statutes incorporated by reference into RICO's defined elements." The court said "[t]he Supreme Court has never addressed how the categorical or modified categorical approach applies to such a statute." Nor had the Second Circuit done so. The court concluded that the error was not "clear and obvious" and therefore the plain error standard was not met.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Opinion of the Second Circuit conflicts with the decisions of this Court in *United States v. Booker*, 543 U.S. 220 (2005); *Gall v. United States*, 552 U.S. 38 (2007) and *Rita v. United States*, 551 U.S. 338, 356 (2007). This case also involves important questions of first impression and public importance.

Martinez pleaded guilty to a three count Superseding Information. Count One charged the substantive crime of RICO based on three racketeering acts: (1) conspiracy to distribute narcotics; (2) conspiracy to murder; and (3) murder. Count Two charged that he conspired with others to violate RICO. Count Three charged that Martinez used or carried firearms "in relation to one or more crimes of violence, to wit: the crimes charged in Counts One and Two."

As recognized by this Court in *Davis*, the predicate offenses for the §924(c) conviction for Count Three must qualify as "crimes of violence" under either the residual clause or the elements clause of §924(c)(3). As discussed below, the predicate offenses do not qualify as crimes of violence.

A. The issue of whether RICO is a crime of violence after *Davis* meets the plain error standard

Martinez contends that the Second Circuit erred when it held that that the issue of whether RICO is a crime of violence after *Davis* does not meet the plain error standard. As recognized by the Second Circuit, the issue of whether there was "error" and the error is "plain" is established at the time of appeal, not at the time that the district court ruled. *Henderson v. United States*, 568 U.S. 266, 279 (2013). Also, under Second Circuit precedent, "errors of constitutional magnitude will be noticed more freely under the plain error rule than less serious errors." *United States v. Torres*, 901 F.3d 205, 228 (2d Cir. 1990).

As stated by this Court, the term "plain" is "synonymous with 'clear' or, equivalently, 'obvious.' " *United States v. Olano*, 507 U.S. 725, 734 (1993). An error is "plain" if it is "not subject to reasonable dispute." *See Puckett v. United States*, 556 U.S. 129, 135 (2009). As recognized by the Second Circuit, an error is plain where there is "binding precedent" "mandating" reversal. *See United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001). Conversely, an error is not plain

"absent Supreme Court or Second Circuit authority, where other circuits to address the issue are split." *United States v. Whab*, 355 F.3d 155, 158 n. 1 (2d Cir. 2004).

As discussed below, the issue of whether RICO is a crime of violence after *Davis* meets the plain error standard in that the application of *Davis* to the statute is clear an obvious. *Davis* is the binding Supreme Court precedent. When applying the categorical approach to the RICO statute, it is clear that the statute is not a crime of violence in that it contains undisputed elements that do not involve the use of physical force against another person.

B. Martinez's conviction for violation of §924(c) cannot be sustained under the residual clause of §924(c)(3)(B)

The residual clause of §924(c)(3)(B) states that a "crime of violence" is 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." This Court in *Davis* held that the (1) residual clause is unconstitutionally vague under due process and separations of powers principles, and (2) the presumption of constitutionality cannot be applied to save the residual clause through a case-specific approach rather than a categorical approach.

In reaching its decision, this Court did not depend on an analysis of the underlying predicate offense—conspiracy to commit Hobbs Act robbery—to determine whether §924(c)(3)(B) is unconstitutionally vague. Rather, this Court rested its decision in large part on the statutory interpretation of the word "offense"

in the prefatory language of §924(c)(3). Based on its interpretation, this Court held that the residual clause in "§924(c)(3)(B) is unconstitutionally vague" and that "a vague law is no law at all." 139 S. Ct. at 2323, 2336. This Court "treat[ed] the law as a nullity and invite[d] Congress to try again." *Id*.

This Court's decision in *Davis* is binding on the issue of whether Martinez's conviction under §924(c) may be sustained under the residual clause of §924(c)(3)(B). It is irrelevant that the predicate offense in *Davis* was a Hobbs Act robbery conspiracy and the predicate offenses in this case are RICO and RICO conspiracy.

C. Impact of *Davis* on the analysis of whether a predicate offense qualifies as a crime of violence under the elements clause of §924(c)(3)(A)

This Court's decision in *Davis* primarily concerned the residual clause. But this Court in *Davis* also discussed the elements clause of §924(c)(3)(A). The elements clause of §924(c)(3)(A) states that a "crime of violence" is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." As stated above, a critical part of this Court's decision in *Davis* concerned the statutory interpretation of the word "offense" in the prefatory clause of §924(c)(3). The word modifies both the elements clause in §924(c)(3)(A) and the residual clause in §924(c)(3)(B). Importantly, this Court first interpreted the word "offense" as applied to the elements clause, and then analyzed whether the residual clause should have the same meaning.

This Court in *Davis* made clear that a court must examine the "generic" crime to determine whether a predicate offense is a crime of violence under either clause. In considering the word "offense," this Court said that in ordinary speech the word can have at least two meanings: (1) it can refer to the "generic crime" or (2) it can refer to "the specific acts in which an offender engaged on a specific occasion." 139 S. Ct. at 2328. This Court in *Davis* said "everyone agrees that, in connection with the elements clause, the term "offense" carries the first, 'generic' meaning." *Id*. This Court further reasoned that the term did not have a "split personality" in §924(c)(3) and therefore it had the same "generic" meaning for the residual clause.

In *Davis*, this Court determined the generic meaning of §924(c)(3)(B) by solely examining the language of the statute. To determine whether a predicate offense qualifies as a crime of violence under the elements clause of §924(c)(3)(A), a court must likewise employ the categorical approach. It must look to the statute of the charged crime to examine its "elements." It may not consider the "specific conduct" underlying the charged offense.

D. The categorical approach

As established prior to *Davis*, the categorical approach requires a court to "look only to the statutory definitions—*i.e.*, the elements—of a defendant's [] offense, and not to the particular facts underlying [the offense]," to determine whether the offense qualifies as a "crime of violence." *Descamps v. United States*,

570 U.S. 254, 260-61 (2013). "'Elements' are the 'constituent parts' of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (citations omitted). Importantly, "only the minimum criminal conduct necessary for conviction under a particular statute is relevant." *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). If the "most innocent" or "minimum criminal" conduct does not constitute a "crime of violence," then the offense categorically fails to qualify as a "crime of violence." *See Id*.

E. A *conspiracy* to commit a crime of violence is not a crime of violence under the elements clause of §924(c)(3)(A)

Count Three relied in part on the RICO conspiracy charged in Count Two as a predicate offense supporting Martinez's §924(c) conviction. Count Three also relied on Count One charging substantive RICO. Two out of the three racketeering acts in Count One are conspiracies (conspiracy to distribute narcotic drugs and RICO conspiracy).

The "most innocent" or "minimal criminal" conduct necessary to commit a conspiracy does not require a defendant to use, attempt to use, or threaten to use physical force against the person or property of another as required by the elements clause. *See* 18 U.S.C. 924(c)(3)(A). For example, if individuals agree and conspire

to commit a robbery but are arrested prior to committing the robbery, the elements of conspiracy have nonetheless been met without an act of violence.

This Court in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) confirmed that a conspiracy to commit a crime of violence is not a crime of violence under the elements clause of §924(c)(3)(A). This Court said a "conspiracy's elements are met as soon as the participants have made the agreement." *Dimaya*, 138 S. Ct. at 1219. *See also, United States v. Jimenez Ricio*, 538 U.S. 270, 274 (2003) (The "essence of a conspiracy is 'an agreement to commit an unlawful act"). Therefore, a conspiracy to commit a crime of violence is not a crime of violence under the elements clause of §924(c)(3)(A). Martinez's conviction for Count Three cannot be sustained under the elements clause.

F. Substantive RICO is not a crime of violence under the elements clause of §924(c)(3)(A)

Count Three also relied on the violation of substantive RICO charged in Count One as a predicate offense supporting the §924(c) conviction. Martinez contends that Count One is categorically not a crime of violence under the elements clause for several alternative reasons.

(1) The generic elements of RICO

Section 1963(c) of Title 18 of the United States Code makes it unlawful "for any person employed by or associated with any enterprise…to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through

a pattern of racketeering activity." 18 U.S.C. §1962(c). The term "enterprise" encompasses both legitimate and illegitimate enterprises. *United States v. Turkette*, 452 U.S. 576 (1981). A RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id*. at 583.

An individual charged with RICO must conduct or participate in the conduct of an "enterprise's affairs through a pattern of racketeering activity." See *United States v. Payne*, 591 F. 3d 46, 64 (2d Cir. 2010). To show that a series of acts constitutes a "pattern" of racketeering activity, the government must prove that (1) the defendant committed at least two predicate acts of racketeering within 10 years of one another; (2) that the racketeering predicates are "related"; and (3) that the predicates amount to or pose a threat of continued racketeering activity. *H. J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 236-39 (1989).

18 U.S.C. §1961(1) defines the element "racketeering activity" as encompassing both violent and non-violent conduct. Among the non-violent conduct, "racketeering activities" include gambling, bribery, dealing in obscene matter, counterfeiting, embezzlement from pension and welfare funds, extortionate credit transactions, various forms of fraud including mail and wire fraud, obstruction

of justice, theft of trade secrets, money laundering, criminal infringement of a copyright, and trafficking in contraband cigarettes. See 18 U.S.C. §1961(1).

Based on the foregoing definition of "racketeering acts," the minimum criminal conduct necessary to commit RICO does not require "the use, attempted use, or threatened use of physical force against the person or property of another." See 18 U.S.C. §924(c)(3)(A). Therefore, substantive RICO is categorically not a crime of violence under the elements clause of §924(c)(3)(A).

(2) Count One is not a crime of violence under §924(c)(3)(A) because two of the three racketeering acts listed in Count One were conspiracies

To prove the element of a "pattern of racketeering activity," the government must show at least two racketeering acts related to the continued criminal activity. *H.J. Inc., et. al, v. Northwestern Bell Telephone et. al.,* 492 U.S. 229 (1989). Similarly, for a §1962 conviction to serve as a predicate offense for a conviction under §924(c), the government must prove "(1) the commission of at least two acts of racketeering and (2) at least two of the acts qualify as 'crimes of violence' under §924(c)." *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009).

Count One charged a violation of the substantive crime of RICO based on three racketeering acts: (1) *conspiracy* to distribute narcotics; (2) *conspiracy* to murder; and (3) murder. Given that two of the three racketeering acts are conspiracies, Count One does not qualify as a crime of violence under the elements clause of §924(c)(3). The two conspiracies listed as racketeering acts do not qualify

as crimes of violence under *Davis*. There remains only one racketeering act (murder) that qualifies as a crime of violence. A single racketeering act is insufficient to sustain a §924(c) conviction. *See Id*.

(3) The racketeering acts listed in the Superseding Information set forth "case-specific conduct" that may not be considered under Davis

The racketeering acts in Count One state "case-specific" conduct alleged against Martinez. Under *Davis*, a court may only consider the statutory generic elements of the crime charged to determine whether the predicate offense is a crime of violence.

G. *Davis* impact the voluntariness of Martinez's guilty plea

Martinez did not go to trial. Rather, he pleaded guilty to the Superseding Information. Based on *Davis*, his plea was not knowing, intelligent, and voluntary because he was unaware that the predicate offenses in Count Three were not crimes of violence. During the entry of his plea, the district court also did not inform and advise Martinez of the true nature of this charge against him for the same reason.

"[I]f a defendant's guilty plea is not equally voluntary and knowing, it is obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). "Procedurally, pleas are governed by Rule 11 of the Federal Rules of Criminal Procedure." *United States v. Johnson*, 850 F. 3d 515, 521 (2d Cir. 2017). Rule 11 provides that the court "must inform the defendant of, and determine that the defendant understands," among other things, the "nature of

each charge to which he is pleading guilty." *Id*. FRCP 11(b)(1)(C). The court must also "determine that the plea is voluntary." Fed. R. Crim. P. 11(b)(2), (3).

In *Bousley v. United States*, 523 U.S. 614 (1998), this Court dealt with an identical situation to the present appeal. The defendant in *Bousley* pleaded guilty prior to the Supreme Court's holding in *Bailey v. United States*, 516 U.S. 137 (1995) (interpreting §924(c) to exclude mere possession of a firearm). The defendant argued in light of *Bailey* that both his counsel and the district court failed at the time he entered his plea to correctly understand and inform him of "the essential elements of the crime with which he was charged." *Id*. at 618. The defendant therefore sought to vacate his plea because it was not knowing and intelligent, in that "he was misinformed . . . as to the nature of the charged crime." 523 U.S. at 616.

This Court said in *Bousley* it had "long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id*. at 618. This Court said that if the defendant's contention proved to be true, then his "plea would be . . . constitutionally invalid." *Id*. at 618-19.

H. The failure to correctly inform Martinez of the nature of the charge is not harmless

"Harmless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.' . . . because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be

– would violate the jury-trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original; citations omitted). When "there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of [harmless-error] review is simply absent. . . . There is no *object,* so to speak, upon which harmless-error scrutiny can operate." *Id*. at 280. It is not enough that an appellate court may conclude "that a jury *would surely have found* petitioner guilty beyond a reasonable doubt." *Id*. The Sixth Amendment right to a jury trial "requires more than appellate speculation about a hypothetical jury's action." *Id*.

While Rule 11(h) states that a "variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights," a "defendant's right to be informed of the nature of the charges is so vital and fundamental that it cannot be said that its omission did not affect his substantial rights and the fairness, integrity, or public reputation of judicial proceedings." *United States v. Pena*, 314 F.3d 1152, 1158 (9th Cir. 2003). *See also United States v. Pineda-Buenaventura*, 622 F.3d 761, 772-73 (7th Cir. 2010); *United States v. McCreary-Redd*, 475 F.3d 718, 726 (6th Cir. 2007); *United States v. Camacho*, 233 F.3d 1308, 1314 (11th Cir. 2000); *United States v. Hekimain*, 975 F.2d 1098, 1100 (5th Cir. 1992).

I. Remedy

A "defendant whose plea has been accepted in [material] violation of Rule 11 should be afforded the opportunity to plead anew." *McCarthy*, 394 U.S. at 472.

Therefore, the remedy is to vacate Martinez's convictions and let Martinez decide, if the government presses its case against him, whether to replead or go to trial.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

DATED: June 7, 2021

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