No. 21-6098

IN THE SUPREME COURT OF THE UNITED STATES

HECTOR ENAMORADO, AKA VIDA LOCA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

DANIEL J. KANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether certain statements by a co-defendant's attorney during closing argument violated petitioner's rights under the Confrontation Clause of the Sixth Amendment.

2. Whether the court of appeals erred in rejecting petitioner's argument that the trial evidence was insufficient to establish a conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. 1962(d), which was premised on the government's alleged failure to establish that petitioner knowingly agreed to facilitate the activities of those who operated or managed a criminal enterprise.

3. Whether petitioner is entitled to plain-error relief on the theory that, in instructing the jury as to the racketeering acts underlying the charged RICO conspiracy, the district court was required to instruct the jury as to the elements of both first- and second-degree murder under Massachusetts law.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.):

United States v. Reyes-Velasquez, No. 16-2498 (June 28, 2017)

United States v. Andrade, No. 18-2166 (July 23, 2019)

United States v. Leoner-Aguirre, No. 18-1333 (Sept. 20, 2019)

United States v. Lopez, No. 18-1418 (Apr. 30, 2020)

United States v. Gonzalez, No. 19-1351 (Nov. 17, 2020)

United States v. Guzman, No. 20-1486 (Dec. 23, 2020)

United States v. Sandoval et al., No. 18-1993 (June 8, 2021)

United States v. Perez-Vasquez, No. 18-1687 (Aug. 20, 2021)

United States v. Solis-Vasquez, No. 19-1027 (Aug. 20, 2021)

United States v. Martinez, No. 19-1850 (Oct. 20, 2021)

Supreme Court of the United States:

Leoner-Aguirre v. United States, No. 19-6820 (Jan. 13, 2020)

Lopez v. United States, No. 20-5244 (Oct. 5, 2020)

Gonzalez v. United States, No. 20-7049 (Mar. 22, 2021)

Larios v. United States, No. 21-6182 (Jan. 10, 2022)

Guzman v. United States, No. 21-6225 (Jan. 10, 2022)

Martinez v. United States, No. 21-6268 (Jan. 10, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 6 F.4th 180.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2021. The petition for a writ of certiorari was filed on October 25, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of

conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d). Judgment 1. The district court sentenced petitioner to life imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1a-49a.

1. Petitioner is a member of La Mara Salvatrucha, commonly known as MS-13. Pet. App. 4a-5a. MS-13 is a transnational gang, headquartered in El Salvador, that is organized into regional subgroups called "programs" and local subgroups called "cliques." Id. at 4a. The gang's primary mission is to kill rival gang members -- particularly those in the 18th Street gang -- and members are required to aid fellow members upon request. Ibid.

On December 14, 2014, petitioner saw Javier Ortiz and several associates in an apartment in Chelsea, Massachusetts. Pet. App. 8a. Petitioner recognized them as members of the 18th Street gang who had beaten him the night before. Ibid. Petitioner called a fellow MS-13 member, Noe Salvador Pérez-Vásquez; explained that he had encountered members of the 18th Street gang; and asked Pérez-Vásquez to bring a clique-owned gun to the Chelsea apartment. Id. at 5a, 8a-9a. Pérez-Vásquez relayed the message to three other MS-13 members and, together with one of the other members, brought the gun to petitioner. Id. at 9a.

Petitioner met Pérez-Vásquez and the other gang member outside the Chelsea apartment. Pet. App. 9a. Petitioner took the gun from Pérez-Vásquez, told the third gang member to stand watch,

and entered the apartment. Ibid. Petitioner walked over to Ortiz and shot him three times in the back. Ibid. Petitioner then shot another visitor in the apartment. Ibid. Ortiz later died from his injuries. Ibid.

Petitioner was identified by two eyewitnesses, and police arrested him as he attempted to flee the state. Pet. App. 9a-10a. In an interview with law enforcement, petitioner admitted that he was a member of MS-13 and that his nickname was "Vida Loca." Id. at 10a. He stated that, on the day before Ortiz's murder, he had gotten into an altercation with members of the 18th Street gang. Id. at 10a-11a. Although he claimed to have forgotten what happened on the night of the murder, he said that if he had returned to the Chelsea apartment, he would have done so for revenge. Id. at 11a.

2. A federal grand jury in the District of Massachusetts charged petitioner, Pérez-Vásquez, and the third gang member with RICO conspiracy, in violation of 18 U.S.C. 1962(d). Pet. App. 11a; see ibid. (noting additional charges against Pérez-Vásquez). The defendants proceeded to a 19-day jury trial. Id. at 12a. During closing arguments, Pérez-Vásquez's attorney stated that Pérez-Vásquez was a member of MS-13, that MS-13 was a criminal enterprise, and that Pérez-Vásquez had brought a gun to "Vida Loca." Id. at 15a. He argued, however, that the jury could not find Pérez-Vásquez guilty of the RICO conspiracy if it found that Pérez-Vásquez "didn't share the intent that [petitioner] had at

the time he discharged that weapon into Mr. Javier Ortiz." Id. at 15a. Petitioner's counsel moved for a mistrial, arguing that a "co-defendant has just become a witness against [petitioner] without notice," in violation of Bruton v. United States, 391 U.S. 123 (1968). Pet. App. 15a. The district court denied the motion. Ibid.

Because the indictment in this case identified "murder" under Massachusetts law as one of the racketeering activities underlying the RICO conspiracy, Fifth Superseding Indictment 18, the district court informed the parties that it would instruct the jury as to the elements of second-degree murder, Pet. App. 16a, 42a. No defendant objected, and the district court gave the instruction. Id. at 16a, 86a-92a; see 4/17/2018 Trial Tr. 5-7.

The jury found petitioner guilty. Pet. App. 16a. In a special verdict, the jury also found that petitioner had murdered Ortiz as part of the charged conspiracy. Ibid. At sentencing, the district court calculated petitioner's advisory Sentencing Guidelines range based on its finding that petitioner had committed first-degree murder. Id. at 17a. Petitioner objected, arguing that the jury had found only that he was guilty of second-degree murder, and that the evidence was insufficient to establish first-degree murder. Ibid. The court overruled the objection, explaining that the degree of the murder was a "matter of guideline interpretation" and that the evidence of first-degree murder was overwhelming. Id. at 17a, 43a; see Sentencing Tr. 8, 11. The

district court sentenced petitioner to life imprisonment. Pet. App. 17a.

3. The court of appeals affirmed. Pet. App. 1a-49a.

As relevant here, petitioner argued first that the government's evidence at trial had been insufficient to establish that he knowingly joined a conspiracy to commit acts of racketeering other than the Ortiz murder; that he was a member of a "clique" that was a part of the MS-13 conspiracy; and that he shot Ortiz in furtherance of the conspiracy. Pet. App. 20a. The court of appeals rejected the first two assertions of insufficiency, based on the evidence that petitioner had admitted being a member of MS-13; that other members understood him to be a member of an MS-13 "clique," including because he had introduced himself as such; and that MS-13's mission was to kill rivals. Id. at 20a-21a. The court then rejected petitioner's final assertion of insufficiency, explaining that multiple MS-13 members had identified Ortiz as a member of the 18th Street gang; that the murder was committed with an MS-13 weapon and with the assistance of MS-13 members; and that the murder served the conspiracy's purpose of killing rival gang members. Id. at 21a.

Second, petitioner argued that he was entitled to a mistrial on the theory that Pérez-Vásquez's attorney's closing argument was "effectively a confession" that "unconstitutionally prejudiced" petitioner "in violation of Bruton." Pet. App. 36a. The court of appeals found no "manifest abuse of discretion" in the district

court's denial of a mistrial. Ibid. (citation omitted). The court determined that Pérez-Vásquez's counsel's statements did not implicate Bruton, because a reasonable jury would not have interpreted counsel's argument as a confession by Pérez-Vásquez naming petitioner as a participant in the crime. Id. at 37a. The court of appeals additionally observed that the district court had instructed the jury that "lawyers are not witnesses" and their closing arguments "[are] not evidence," and that petitioner had not sought any "curative instruction" directed at the alleged Confrontation Clause violation. Ibid. (brackets omitted).

Third, petitioner argued that the district court had erred by instructing the jury only as to second-degree murder and thereafter applying a guidelines enhancement based on a finding that he had committed first-degree murder. Pet. App. 42a. The court of appeals observed that the district court had explained to the parties and the jury that the difference between first-degree and second-degree murder was irrelevant in this case, as a jury finding on either predicate would have given rise to the same statutory penalties. Ibid. The court of appeals further observed that the district court had properly described the elements of second-degree murder. Ibid. And the court of appeals then determined that any instructional error did not prejudice petitioner because the jury's finding that petitioner had participated in second-degree murder was not inconsistent with the district court's

finding -- based on "overwhelming" evidence -- that petitioner had committed first-degree murder. Id. at 43a; see id. at 46a.

ARGUMENT

Petitioner contends (Pet. 8-36) that Pérez-Vásquez's attorney's closing argument violated his rights under the Confrontation Clause; that the evidence at trial was insufficient to establish a requisite knowing agreement specifically to facilitate the activities of those who operated or managed the criminal enterprise; and that the district court erred by instructing the jury as to the elements of second-degree murder, rather than first-degree murder, as a RICO-conspiracy predicate. The court of appeals correctly rejected petitioner's first and third claims, and although petitioner did not raise his second claim below, it likewise lacks merit. The court's factbound decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner principally contends (Pet. 8-24) that Pérez-Vásquez's attorney, during closing argument, presented the jury with what amounted to a confession by Pérez-Vásquez himself that incriminated petitioner, and thereby violated petitioner's Sixth Amendment right to confront the witnesses against him under Bruton v. United States, 391 U.S. 123 (1968). Petitioner further asserts (Pet. 15-21) that the lower courts are divided as to whether remarks by counsel may violate the Confrontation Clause. Neither contention has merit.

a. The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. "Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." Richardson v. Marsh, 481 U.S. 200, 206 (1987). In Bruton, however, this Court held that a defendant's confrontation rights were violated when a nontestifying co-defendant's confession directly incriminating the defendant was introduced at their joint trial, even though the trial judge had instructed the jury to consider the confession only against the co-defendant. 391 U.S. at 126, 135-137. The Court reasoned that although juries normally are trusted to adhere to limiting instructions, a jury could not be expected to follow an instruction to disregard a confession that facially and "powerfully" incriminates a co-defendant. Id. at 126, 135.

Here, the court of appeals correctly determined that Pérez-Vásquez's attorney's closing argument did not implicate Bruton. As the court explained, "[t]he challenged statements were made to convince the jury that Pérez-Vásquez was not guilty for lack of intent." Pet. App. 37a. A reasonable jury would not have considered such statements -- which, under the jury instructions, were not to be interpreted as evidence -- to be a "confession" by Pérez-Vásquez, let alone a statement "that a different defendant,

[petitioner], was guilty of RICO conspiracy." Ibid. Although some of counsel's statements may have tended to incriminate petitioner, see id. at 78a, mutually antagonistic defenses are not per se prejudicial, and limiting instructions like the one given here, see id. at 37a, "often will suffice to cure any risk of prejudice," Zafiro v. United States, 506 U.S. 534, 539 (1993) (citing Richardson, 481 U.S. at 211).

Contrary to petitioner's assertion (Pet. 23), this case does not "directly implicate[ ]" whether Bruton may apply to remarks of counsel. The court of appeals did not directly address, or categorically "reject[ ]," the "possibility that an opening or closing argument could produce a Bruton violation," Pet. 19, but instead determined that the statements in this particular case did not amount to a confession against petitioner, Pet. App. 36a-38a. Although the court of appeals cited language from two Third Circuit decisions suggesting that arguments of counsel cannot violate Bruton, it cited them to support its observation that the jury here was properly instructed that statements in closing arguments are not evidence. Id. at 37a (citing United States v. Quintero, 38 F.3d 1317, 1342 (3d Cir. 1994), cert. denied, 513 U.S. 1195 (1995), and United States v. Sandini, 888 F.2d 300, 311 (3d Cir. 1989), cert. denied, 494 U.S. 1089 (1990)). It is far from clear that those citations, in that context, would bind a future circuit panel to categorically disregard any possibility that arguments of counsel might create a Bruton issue in some circumstances.

In any event, even if the issue were squarely presented here, it would not warrant further review. Bruton and its progeny have "reviewed a number of cases in which one defendant's confession has been introduced into evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant." Lilly v. Virginia, 527 U.S. 116, 128 (1999) (emphasis added). That limitation traces to Bruton's roots in the Confrontation Clause, see 391 U.S. at 126-128, which prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination," Davis v. Washington, 547 U.S. 813, 821 (2006) (quoting Crawford v. Washington, 541 U.S. 36, 53-54 (2004)) (emphasis added); see Crawford, 541 U.S. at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.") (emphasis added). "Bruton is directed toward preserving a defendant's right to cross-examination, and thus has nothing to do with arguments of counsel based on their interpretation of the evidence." Sandini, 888 F.2d at 311.

Juries, including the one here, are routinely instructed that opening statements and closing arguments are not evidence. Thus, this Court held in Frazier v. Cupp, 394 U.S. 731 (1969), that Bruton was not violated when an accomplice's statement was

mentioned by the prosecutor during opening statements but the jury was told that the opening statement should not be considered as evidence. See id. at 735-736. The Court reasoned that, although it may be "unreasonable to assume that a jury can disregard a coconspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial." Id. at 736.[1]

In arguing otherwise, petitioner relies (Pet. 12-13) on this Court's statement in Frazier that "[i]t may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be

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[1] See also, e.g., United States v. Persfull, 660 F.3d 286, 297 (7th Cir. 2011) (finding that a limiting instruction was "sufficient to safeguard any possible infringement of [the defendant's] constitutional rights" in a prosecutor's opening statement), cert. denied, 566 U.S. 1034 (2012); United States v. Lopez, 649 F.3d 1222, 1237 (11th Cir. 2011) (explaining that co-defendant's attorney "was not a witness, and the statements he made in his closing arguments were neither testimony nor any other kind of evidence"); United States v. Wilson, 605 F.3d 985, 1017 (D.C. Cir.) (per curiam) (finding no Bruton violation because "[t]he opening statement and closing argument made by [co-defendant's] counsel * * * neither were admitted into evidence nor were they testimony"), cert. denied, 562 U.S. 1116, and 562 U.S. 1117 (2010); Hicks v. Straub, 377 F.3d 538, 554 (6th Cir. 2004) (noting that an opening statement is not evidence), cert. denied, 544 U.S. 928 (2005); United States v. Arambula-Ruiz, 987 F.2d 599, 606-607 (9th Cir. 1993) (finding no Bruton violation when witness did not answer question and thus the challenged statement was never admitted as evidence); Guzzardo v. Bengston, 643 F.2d 1300, 1303 (7th Cir.) ("The jury was instructed that it was to consider only the evidence introduced at trial, and that the remarks of counsel were not evidence."), cert. denied, 452 U.S. 941 (1981).

unavoidable." 394 U.S. at 736. But that dictum does not imply that an attorney's remarks in an opening or closing statement, untethered to any admitted evidence, could violate Bruton. Rather, in context, the opinion in Frazier simply reserves the question whether certain statements by an attorney might theoretically overwhelm even the effect of a limiting instruction. Cf. Richardson, 481 U.S. at 211 (remanding for a determination whether the prosecutor's effort in closing argument "to undo the effect of the limiting instruction" warranted habeas relief). But the Court did not hold that an attorney's statement alone -- outside the context of any reference to trial evidence that itself would create Confrontation Clause concerns -- may violate Bruton. The latter proposition has never been adopted by this Court.

b. Petitioner has not identified any court of appeals decision adopting that proposition or that otherwise conflicts with the decision below in this case. Petitioner asserts (Pet. 15-17) that three courts of appeals and one state court of last resort have "acknowledged that remarks by counsel are properly analyzed under Bruton." But nearly all of the decisions on which he relied have, like the decision below, rejected a claim of Bruton error. And none held that remarks of counsel like those here -- untethered to any admitted evidence -- can violate Bruton.

Petitioner cites (Pet. 15) United States v. Sacco, 563 F.2d 552 (2d Cir. 1977), cert. denied, 434 U.S. 1039 (1978), in which the Second Circuit rejected a Bruton claim that was premised on a

pro se co-defendant's summation. See id. at 556. The court found Bruton inapplicable because the statements at issue were neither "clearly inculpatory" nor "vitally important to the government's case." Ibid. (citation and internal quotation marks omitted). The court did not address whether Bruton would also be inapplicable for the additional reason that the statements at issue arose in a closing argument. And more recently, the Second Circuit has suggested that a remark by an attorney in an opening statement might not violate Bruton where it is untethered to admitted evidence. See United States v. Plaza, 826 Fed. Appx. 60, 64-65 (2020) (summary order) (rejecting argument that government's opening statement violated Bruton because "no evidence was introduced at the time of the prosecutor's statements"), cert. denied, 142 S. Ct. 504 (2021).

Similarly, in United States v. Espinosa, 771 F.2d 1382 (10th Cir.), cert. denied, 474 U.S. 1023 (1985), the Tenth Circuit rejected a Bruton claim based on a pro se co-defendant's opening statement, reasoning that "Bruton is not controlling" where the statements at issue were not "'powerfully incriminating'" and the district court "carefully instructed the jury" that opening statements were not evidence. Id. at 1398-1400 (citation omitted). The Tenth Circuit expressly distinguished comments of counsel from statements "admitted into evidence," as well as statements made by a pro se defendant in opening or closing, which are "closer to 'testimony.'" Id. at 1398-1399. And the court favorably cited a

series of cases holding that jury instructions had eliminated any prejudice resulting from comments of counsel during opening and closing statements. See id. at 1400 n.22.

Petitioner also cites (Pet. 17) Commonwealth v. Cannon, 22 A.3d 210, 219-221 (2011), in which the Supreme Court of Pennsylvania rejected a Bruton claim premised on a prosecutor's opening statement because, among other things, the prosecutor's remarks did not "directly inculpate" the defendant and the district court had instructed the jury that comments of counsel are not evidence. Id. at 219; see id. at 219-221. In doing so, the court remarked in dicta that "a Bruton violation may arise when a prosecutor discloses to the jury that [a] co-defendant's statement has been redacted and unequivocally identifies the defendant as the individual whose name was removed." Id. at 219. But even assuming that the Pennsylvania Supreme Court would find that such a disclosure violated Bruton, it does not follow that the court would necessarily find a Bruton error where, as here, an attorney's statement was untethered to any admitted evidence.

Those issues are analytically distinct. Even those courts that, according to petitioner, "categorically reject[ ]" the possibility that attorney remarks may violate Bruton, Pet. 17, have indicated that statements exposing redactions may constitute reversible error. See United States v. Vega Molina, 407 F.3d 511, 521-522 (1st Cir.), cert. denied, 546 U.S. 919 (2005); Brown v. Superintendent Greene SCI, 834 F.3d 506, 516-520 (3d Cir. 2016),

cert. denied, 137 S. Ct. 1581 (2017); United States v. Schwartz, 541 F.3d 1331, 1353 (11th Cir. 2008), cert. denied, 556 U.S. 1130, and 556 U.S. 1174 (2009).[2]

c. Even if the question presented otherwise warranted further review, this case would not be a suitable vehicle in which to address it. Even if it were possible for closing argument by defense counsel to in itself violate Bruton, petitioner did not request any curative instruction, which suggested that "that the jury did not need to be cautioned," Pet. App. 37a, because the particular closing argument here was not presented to the jury as the functional equivalent of admitting a co-defendant's confession into evidence.

Furthermore, any error arising from Pérez-Vásquez's attorney's closing argument was harmless. See Harrington v. California, 395 U.S. 250, 254 (1969) (observing that a Bruton violation is subject to harmless-error review). Petitioner asserts (Pet. 5) that his "principal defense" at trial "was that he was not Vida Loca (a name by which the shooter was identified),

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[2] Petitioner also cites (Pet. 15-16) United States v. Long, 900 F.2d 1270 (8th Cir. 1990), in which the Eighth Circuit determined that a redacted confession violated Bruton where a co-defendant's counsel during cross-examination of a government witness "led the jury straight to the conclusion" that the redactions referred to the defendant. Id. at 1280. But even if a colloquy between an attorney and a witness might make a redaction so "obvious" that admission of the confession violates Bruton, Gray v. Maryland, 523 U.S. 185, 193 (1998), it does not follow that remarks like those at issue here in an attorney's opening or closing statement -- which are not evidence -- can themselves violate Bruton.

that he was not an MS-13 member, and that evidence to the contrary relied on unreliable sources." But as the court of appeals observed, petitioner himself admitted both that he was Vida Loca and that he was a member of MS-13. Pet. App. 10a; see id. at 20a (citing "testimony from multiple witnesses" that petitioner was a member of MS-13).

2. Petitioner next contends (Pet. 24-31) that the government's trial evidence was insufficient to support his conviction, on the theory that the government did not establish a required agreement to facilitate the activities of those who managed or operated the MS-13 enterprise. That claim, raised for the first time in this Court, lacks merit.

In Reves v. Ernst & Young, 507 U.S. 170 (1993), this Court held that liability for a substantive RICO offense under 18 U.S.C. 1962(c) requires proof that the defendant participated in the operation or management of a criminal enterprise. See 507 U.S. at 177-185. A few years later, however, this Court addressed the offense at issue in this case -- a Section 1962(d) conspiracy to violate Section 1962(c) -- and held that such a conspiracy "may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." Salinas v. United States, 522 U.S. 52, 63 (1997). Instead, the Court explained, it is sufficient that the conspirator "adopt the goal of furthering or facilitating the criminal endeavor." Id. at 65. Accordingly, every court of appeals to consider the question since Salinas has

agreed that a conviction under Section 1962(d) does not require proof that the defendant operated or managed a criminal enterprise. See, e.g., United States v. Rosenthal, 805 F.3d 523, 532 (5th Cir. 2015); United States v. Mouzone, 687 F.3d 207, 217-218 (4th Cir. 2012) (collecting cases), cert. denied, 568 U.S. 1110 (2013).

Petitioner appears to recognize (Pet. 25-27) that consensus, but he nevertheless urges this Court to hold that liability under Section 1962(d) requires proof of a "knowing agreement to facilitate the activities of those who are operating or managing the RICO enterprise." Pet. 28. Petitioner does not identify any conflict in the courts of appeals as to this requirement, and it is not obvious how that framing differs in practice from this Court's articulation of the relevant requirement: that the conspirator "adopt the goal of furthering or facilitating" an endeavor that, "if completed, would satisfy all of the elements of a substantive criminal offense." Salinas, 522 U.S. at 65. But to the extent petitioner suggests (Pet. 28-29) that Section 1962(d) requires proof that the defendant agreed to participate in the operation or management of the enterprise, Salinas itself refutes that proposition. See 522 U.S. at 65 (explaining that the defendant need not "agree[ ] to undertake all of the acts necessary for the crime's completion").

In any event, this case would be an unsuitable vehicle in which to address the question whether a conviction for conspiracy to violate RICO under Section 1962(d) requires evidence that the

defendant had a role in "directing" the entire criminal enterprise. Pet. 28. As an initial matter, petitioner did not raise this argument in the court of appeals, and instead claimed only that the evidence was insufficient to establish his agreement to participate in MS-13's racketeering activities. Pet. App. 20a; see Pet. C.A. Br. 75. The court of appeals therefore did not address the argument that petitioner asserts in this Court. See Pet. App. 20a-21a. This Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were not pressed or passed upon in the decision below, see United States v. Williams, 504 U.S. 36, 41 (1992). Petitioner provides no reason to deviate from that rule here.

Furthermore, even if petitioner had raised this claim, the evidence at trial established that petitioner himself operated the activities of the MS-13 RICO enterprise. The Court's decision in Reves makes clear that even "lower rung participants" may "'operate[ ]'" an enterprise. 507 U.S. at 184. And petitioner did so here, by personally orchestrating (and carrying out) the murder of a rival gang member, with the aid of MS-13 associates, thereby effectuating a "primary mission" of the racketeering enterprise. Pet. App. 4a; see id. at 20a-21a. That act, coupled with the evidence that petitioner had admitted being an MS-13 member and attending MS-13 gatherings, see id. at 20a-21a, amply

supported a finding that petitioner knowingly agreed to facilitate the operation of the enterprise.

3. Finally, petitioner contends (Pet. 31-36) that the district court erred by not including a jury instruction on the elements of first-degree murder under Massachusetts law. Because petitioner failed to request any such instruction in the district court, that contention is subject to plain-error review. See Fed. R. Crim. P. 52(b); Pet. App. 41a. Plain-error relief requires the defendant to show (1) an "error"; (2) that is "plain"; (3) that affected his "substantial rights," meaning there is "a reasonable probability that, but for the error the outcome of the proceeding would have been different." Greer v. United States, 141 S. Ct. 2090, 2096 (2021) (citation omitted). In addition, the appellate court must conclude "that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" Id. at 2096-2097 (citation omitted). The court of appeals correctly found no plain error here. Pet. App. 42a-43a, 46a.

Section 1962 criminalizes conducting the affairs of an enterprise through a pattern of racketeering activity. See 18 U.S.C. 1962(c). Ordinarily, the maximum term of imprisonment for such an offense -- including a conspiracy to violate Section 1962(c) -- is 20 years. 18 U.S.C. 1963(a). But where "the violation is based on a racketeering activity for which the maximum

penalty includes life imprisonment," the maximum term of imprisonment becomes life imprisonment. Ibid.

The indictment in this case identified "murder" under Massachusetts General Laws, Chapter 265, Section 1, as one of the racketeering activities underlying the RICO conspiracy in which petitioner participated. Fifth Superseding Indictment 18; see 18 U.S.C. 1961(1) (defining "racketeering activity" to include "any act * * * involving murder * * * which is chargeable under State law and punishable by imprisonment for more than one year"). Under Massachusetts law, both first- and second-degree murder carry a maximum term of life imprisonment. See Mass. Gen. Laws ch. 265, § 2 (2014). Accordingly, as the district court explained to the parties, "the distinction between first-degree and second-degree murder [wa]s not relevant" in determining the statutory penalties for petitioner's RICO offense. Pet. App. 42a. The district court therefore instructed the jury -- without objection -- only as to the elements of second-degree murder. Id. at 16a, 42a, 86a-92a.

Petitioner appears to contend (Pet. 36) that the Sixth Amendment required the district court to instruct the jury as to the elements of both first-degree murder and second-degree murder. Although petitioner is correct (Pet. 35) that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), whether

petitioner committed first- or second-degree murder was not such a fact in this case. Rather, the jury's finding that petitioner participated in second-degree murder sufficed to increase the statutory maximum for his RICO offense. Petitioner therefore cannot identify any error, much less plain error, in the district court's instructions.

Nor, in any event, could petitioner establish any of the other plain-error elements. As the court of appeals explained, the jury's finding that petitioner participated in second-degree murder did not preclude the district court's subsequent finding, for purposes of calculating petitioner's advisory Sentencing Guidelines range, that petitioner had committed first-degree murder. Pet. App. 43a; see United States v. Booker, 543 U.S. 220, 233 (2005) (opinion of Stevens, J.); id. at 245-246 (opinion of Breyer, J.). Petitioner therefore cannot show either a "reasonable probability that, but for the [alleged] error, the outcome of the proceeding would have been different," or that the alleged error "had a serious effect on the fairness, integrity or public reputation of judicial proceedings." Greer, 141 S. Ct. at 2096-2097 (citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

DANIEL J. KANE
Attorney

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