No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LUIS SOLIS-VASQUEZ,
Petitioner

v.

United States of America,
Respondent

On Petition for a Writ of Certiorari to
the United States Court of Appeals for
The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether state law RICO predicates are elements of a RICO offense that must be found by the jury.
2. Whether aggravated RICO conspiracy is properly classified as a "crime of violence" under 18 U.S.C. § 16(a) and the Mandatory Victim Restitution Act. (18 U.S.C. § 3663(A)).

PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Luis Solís-Vásquez.

Respondent is the United States of America.

In addition to Luis Solís-Vásquez and the United States of America, Noe Salvador Pérez-Vásquez and Hector Enamorado were parties in the court of appeals.

RELATED CASES

United States v. Solis-Vásquez, No. 15-CR-10338-FDS, U.S. District Court for the District of Massachusetts. Judgment entered on July 16, 2019.

United States v. Solis-Vásquez, Nos. 19-1027, 19-1745, U.S. Court of Appeals for the First Circuit. The court issued written opinions on July 26, 2021 and August 20, 2021, and judgment entered on August 20, 2021.

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PETITION FOR WRIT OF CERTIORARI

Luis Solís-Vásquez petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals appear at Appendix 1a-49a and 50a-62a to the petition and are reported at *United States v. Pérez-Vásquez*, 6 F.4th 180 (1st Cir. 2021) and *United States v. Solís-Vásquez*, 10 F.4th 59 (1st Cir. 2021).

JURISDICTION

The judgment of the court of appeals upholding the petitioner's conviction and the restitution award was entered on August 20, 2021. This petition is filed within ninety days of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, provides, in relevant part:

18 U.S.C. § 1961:

(1) ''racketeering activity'' means (A) any act or threat involving murder ...

18 U.S.C. 1962:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1963(a):

Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both...

The Mandatory Victim Restitution Act, 18 U.S.C. § 3663(A) provides, in relevant part:

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense— (A) that is— (i) a crime of violence, as defined in section 16 ...

Section 16, Title 18 United States Code, defines "crime of violence" as:

(a)an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and 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.

18 U.S.C. §16

STATEMENT OF THE CASE

Petitioner Solís-Vásquez was indicted along with over 50 other individuals in connection with the activities of La Mara Salvatrucha or the MS-13 street gang. A Fifth Superseding Indictment, handed down on May 15, 2017, charged Solís-Vásquez, along with 43 other individuals, with conspiracy to conduct enterprise affairs through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d). Solís-Vásquez was also accused of murder in connection with the conspiracy, under theories of both first- and second-degree murder under Massachusetts law. This aspect of the charge exposed him to a statutory maximum of life imprisonment, rather than 20 years, pursuant to 18 U.S.C. § 1963(a).

Solís-Vásquez was convicted after trial, along with two co-defendants, Hector Enamorado and Noe Salvador Pérez-Vásquez, on April 23, 2018. All three defendants were convicted of the RICO conspiracy charge; the jury also made the additional finding that they committed or knowingly participated in committing the December 14, 2014 murder of Javier Ortiz.

The evidence at trial established that co-defendant Enamorado was present at a gathering in an apartment when he saw Ortiz, an individual with whom he recently had had an altercation. He called co-defendant Pérez-Vásquez, who was with Solís-Vásquez and others at an MS-13 hangout some distance away. Enamorado requested Pérez-Vásquez bring him a gun so that he could confront

Ortiz. Pérez-Vásquez delivered a gun to Enamorado; Solís-Vásquez, himself armed, entered the apartment with Enamorado. Although instructed by Enamorado to remain by the door, he proceeded directly to the back porch. Enamorado subsequently shot and killed Ortiz inside the apartment. Before fleeing, he also shot Saul Rivera, an innocent bystander, once in the chest, injuring but not killing him.

At trial, the jury instructions included an instruction on murder, one of the RICO predicate offenses. The court told the jury that "[m]urder may be committed in the first degree or the second degree" but informed the jury that "[i]n this case, the distinction between first-degree and second-degree is not relevant." This is because both degrees of murder carried a potential sentence of life imprisonment. The court therefore instructed the jury only on second-degree murder, using malice as the mental state, and not—as would be required for first- degree murder—premeditation or extreme atrocity or cruelty.

At sentencing, the district court sentenced Solís-Vásquez to 35 years' imprisonment, varying downward from a guideline recommendation of life imprisonment to account for what it viewed as his lesser role in the murder of Ortiz. At a subsequent hearing pursuant to the Mandatory Victims Restitution Act, the district court ordered the three defendants to pay restitution jointly and severally but found Solís-Vásquez responsible for only half of the victim's losses.

Solís-Vásquez opposed restitution on the alternate grounds that he did not directly cause the victim's losses, something a plain language interpretation of the statute required, and that the shooting of Rivera was outside the scope of the conspiracy. He did not object on the grounds that the offense of conviction was not a "crime of violence" and so did not trigger the MVRA.

Solís-Vásquez appealed the conviction, sentence and the restitution award on various grounds, and joined in certain arguments of his co-appellants. As pertinent here, Solís-Vásquez joined in co-defendant Enamorado's challenge to the district court's decision to instruct the jury only on the elements of second degree murder, despite the fact that under Massachusetts law, the degree of murder is the exclusive province of the jury. Solís-Vásquez also pressed his appeal of the restitution award, adding for the first time the argument that, as it was well-established that RICO conspiracy was not a "crime of violence" under the categorical analytical approach, it had been error for the district court to issue any order at all under the MVRA.

The court of appeals rejected the challenge to the trial court's decision to instruct the jury only on second-degree murder, accepting the district court's reasoning that it was unnecessary to do so, as a verdict under either theory raised the statutory maximum to life. In a separate opinion, the court of appeals rejected Solís-Vásquez's challenge to the restitution award, opining, *inter alia*, that it was

not clear for the purposes of plain error review that a RICO conspiracy conviction with a statutory-maximum raising special finding was not a crime of violence.

REASONS FOR GRANTING THE PETITION

I. This Court should hold that state-law RICO predicates are elements that must be found by the jury

RICO includes in its definition of prohibited racketeering activity only acts prohibited by enumerated federal statutes or "any act or threat involving murder . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1). The indictment here alleged that the killing of Ortiz was first-degree murder *or* second-degree murder. The Massachusetts murder statute instructs that "[t]he degree of murder shall be found by the jury." Mass. Gen. Laws ch. 265, § 1 (2021). The district court, however, instructed the jury using only the second-degree standard and on the basis of those instructions, the jury made a special finding that each defendant was guilty of murdering Ortiz. At sentencing, the court concluded that the degree of murder was "a matter of guideline interpretation for the Court, not something that the jury would find." App. 17a. Although the jury had only found second-degree murder, the court

applied the first-degree murder guideline, which increased the base guideline offense level for each defendant. *See* App. 16a-17a.

The Sixth Amendment right to trial "by an impartial jury" and due process together "require[] that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (plurality opinion). "It is difficult to see . . . how the defendant could be properly convicted" under RICO "if the conduct found by the jury did not include all the elements of the state offense since RICO requires that the defendant have committed predicate acts 'chargeable under state law.'" *United States v. Carrillo*, 229 F.3d 177, 183-84 (2d Cir. 2000). Courts of appeals are nonetheless divided on whether the juries must be instructed regarding the underlying elements of the specific state law offense. The Second Circuit has suggested that to give "the jury sufficient instruction and the defendant adequate protection in all circumstances," instructing on underlying elements is the better practice, and a failure to do so "can prejudice the defendant." *Carrillo*, 229 F.3d at 185. As the court of appeals explained, "even assuming evidence from which a jury *could* find a violation of state law, if the defendant's acts as found by the jury did not include all the essential elements of the state law offense, by definition, no state offense would have been found." *Id.* at 183. Failure to properly charge the jury would prevent the trial court and an appellate court from knowing "what were the factual determinations on which the

jury based its verdict." *Id.* at 184. For instance, "if the evidence included testimony to the effect that the defendant acted with the intent to kill, but the jury rejected that evidence," then . . . we doubt the [RICO] conviction could stand because the defendant's actions, *according to the jury's findings*, would not constitute murder." *Id.*

The Ninth Circuit concurred, noting in the context of Violent Crime in Aid of Racketeering Act (VICAR), that the failure to provide a state-law definition for murder would prevent a reviewing court from "knowing what the jury found the defendant's state of mind to be." *United States v. Adkins*, 883 F.3d 1207, 1211 (9th Cir. 2018); *see also United States v. Arrington*, 409 F. App'x 190, 195 (10th Cir. 2010) ("Under [(VICAR)], the government must satisfy each element of the predicate offense under state or federal law.").

The First Circuit has declined to decide whether state offenses that are RICO predicates are to be defined, "generally or by element." *United States v. Marino*, 277 F.3d 11, 31 (1st Cir. 2002).

Older appellate decisions suggested that the underlying state law predicate is not an element of the RICO offense. *See, e.g., United States v. Watchmaker*, 761 F.2d 1459, 1469 (11th Cir. 1985) ("the state statute is not relied upon to specify the terms of the offense"); *United States v. Bagaric*, 706 F.2d 42, 62-63 (2d Cir. 1983)) ("[s]tate offenses are included by generic designation" (citation omitted));

United States v. Salinas, 564 F.2d 688, 690 (5th Cir. 1977) ("Courts construing the racketeering statutes have found that the references to state law serve a definitional purpose"); *United States v. Frumento*, 563 F.2d 1083, 1087 n.8 (3d Cir. 1977) ("Section 1961 requires, in our view, only that the conduct on which the federal charge is based be typical of the serious crime dealt with by the state statute, not that the particular defendant be 'chargeable under State law,' at the time of the federal indictment"); *but see Carrillo*, 229 F.3d at 182-86 (criticizing *Bagaric* without formally overruling). These decisions fail to recognize the risk described in *Carrillo* and *Adkins* regarding whether the jury has made the requisite findings.

These decisions also pre-date much of this Court's Sixth Amendment jurisprudence regarding the jury's fact-finding role. In *Richardson v. United States*, this Court held that the "series of violations" required to establishing a "continuing criminal enterprise" under 21 U.S.C. § 848, requires jury "unanimity in respect to each individual violation." 526 U.S. 813, 815-16 (1999). The Second Circuit has assumed that *Richardson* applies to RICO, meaning that for a substantive RICO violation, the jury must be "unanimous as to each of two predicate acts," such that in "the absence of unanimity . . . , as with any other element, . . . the jury may not convict." *United States v. Gotti*, 451 F.3d 133, 137-38 (2d Cir. 2006); *see also United States v. Carr*, 424 F.3d 213, 224 (2d Cir. 2005) ("And the jury must find

that the prosecution proved each one of those two or more specifically alleged predicate acts beyond a reasonable doubt.").

In *Alleyne v. United States* and *Apprendi v. New Jersey*, this Court further concluded that the Sixth Amendment and due process require that facts that alter statutory sentencing ranges be found by a jury, and not a judge. *See Alleyne*, 570 U.S. 99, 103 (2013) (concluding that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."); *Apprendi*, 530 U.S. 466, 490 (2000) ("any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Alleyne and *Apprendi* emphasized that "any fact that influences judicial discretion" need not be found by a jury. *Alleyne*, 570 U.S. at 116; *see also Apprendi*, 530 U.S. at 481. But they did not state the converse and suggest that any fact that does not alter the statutory sentencing range need *not* be found by a jury. *Cf. Richardson*, 526 U.S. at 817-23 (analyzing whether statutory requirement is element that requires factfinding without discussing sentencing). Thus, while in *United States v. Gonzalez*, 981 F.3d 11, 16-17 (1st Cir. 2020), the First Circuit rejected the view that the degree of murder underlying a RICO charge needed to be found by a jury because the degree of murder does not affect the statutory

sentencing range, that analysis does not end the inquiry into whether the elements of the predicate acts are elements of the RICO offense.

Reading *Carrillo* and this Court's Sixth Amendment jurisprudence together, this Court should hold that the Sixth Amendment and due process require that a jury be instructed on and make findings on the underlying elements that form the predicate acts for RICO offenses, and that the trial court therefore erred in failing to so instruct the jury—and in treating the degree of murder as a sentencing factor within his discretion—in this case.

II. The First Circuit's Implicit Holding that Petitioner's Conviction of RICO Conspiracy was a "Crime of Violence" is a Serious Error which Warrants Correction by this Court

For the first time on appeal, Solís-Vásquez argued that it was error for the district court to rule that a conviction for RICO conspiracy was a crime of violence sufficient to trigger the MVRA. The district court ordered restitution under the Mandatory Victim Restitution Act ("MVRA"), which requires the district court to order restitution where the defendant is found guilty of a "crime of violence." 18 U.S.C. §3663A(c)(1). In particular, the statute provides that it applies in cases where the "offense" is a "crime of violence, as defined in section 16." Id.

Section 16 of Title 18 defines crime of violence in this way:

> an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and 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.

18 U.S.C. §16

The latter clause, the so-called "residual" clause, was struck by the Supreme Court as unconstitutionally vague in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). Therefore, to qualify as a crime of violence under §3663A(c)(1), an offense must qualify under subpart (a), the so-called "elements" clause. See *United States v. Davis*, 139 S. Ct. 2319, 2324, 204 L. Ed. 2d 757 (2019).

A conviction under 18 U.S.C. §1962(d) is not a "crime of violence" under this definition. Analysis of whether a offense qualifies as a crime of violence under the elements clause is performed using the "categorical approach." *United States v. Davis*, 139 S. Ct. at 2324. The inquiry asks whether the offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." "'[P]hysical force' means violent force – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). The use of force must be intentional, not just reckless or negligent. *See United States v. Fish*, 758 F.3d 1, 9-10 & n.4 (1st Cir. 2014); *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015). The categorical approach requires an assessment of "the elements of the statute of conviction, not ... the facts of each defendant's conduct." *Taylor v. United States*, 495 U.S. 575, 601 (1990) (ACCA context); *see also, United States v. Castro-Vazquez*, 802 F. 3d 28, 35 (1st Cir.

2015) (career offender). The court asks whether "conduct criminalized by the statute, including the most innocent conduct, qualifies as a crime of violence." *Fish*, 758 at 5 (emphasis added) (internal quotation marks and citation omitted).

Under this standard, a conviction for conspiracy to violate the RICO statute cannot constitute a "crime of violence" under the elements clause because the offense comprehends a large swathe of both violent and non-violent conduct. *United States v. Davis*, 139 S. Ct. 2319, 2325, n. 2 204 L. Ed. 2d 757 (2019) (*abrogating United States v. Douglas*, 907 F.3d 1, 11–16 (1st Cir. 2018).).

While the government conceded at oral argument that a conviction of RICO conspiracy is categorically not a crime of violence[1], it argued that a RICO conspiracy conviction that encompassed a predicate act which was itself a crime of violence and that resulted in a special finding so as to raise the statutory maximum to life (so called "aggravated RICO conspiracy") was a crime of violence under this Court's precedents.

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[1] It has made the concession in other cases. *See e.g., United States v. Jones*, 935 F.3d 266, 271 (5th Cir. 2019) (holding on plain error review that "it was error to permit the jury to convict Appellants under § 924 based on RICO conspiracy as a crime of violence.") *See also United States v. Green*, 981 F.3d 945, 952 (11th Cir. 2020) (noting government's concession at oral argument, and holding that as "the elements of a RICO conspiracy focus on the agreement to commit a crime, which does not "necessitate[ ] the existence of a threat or attempt to use force." ... RICO conspiracy does not qualify as a crime of violence under § 924(c)(3)." (citations omitted).

The First Circuit essentially accepted this reasoning in holding that the petitioner had not met his burden to establish that any the error was "plain." But this reasoning was faulty and requires correction by this Court.

The same reasoning that applies to unenhanced RICO conspiracy conviction per force applies to an aggravated RICO conspiracy conviction, for two reasons. First, contrary to the government's contention, after *Apprendi* there is in fact no statutory or constitutional *requirement* that the statutory maximum increasing offense occurred, only that such an offense be proven to have been an object of the racketeering conspiracy. *Accord United States v. Green*, 981 F.3d 945, 952 (11th Cir. 2020) (describing elements of aggravated RICO conspiracy: (1) "objectively manifest[ing], through words or actions, an agreement to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes" (2) "for which the maximum penalty includes life imprisonment."). Second, even if the offense is considered to be a divisible offense, the unanimous finding required to trigger the heightened penalty is *any* enumerated crime with a statutory maximum of life, many of which are nonviolent offenses. Neither the government nor the First Circuit cited support for its contention that the aggravated offense is "divisible by predicate crime."

While this case arises in the context of the MVRA, the holding that an aggravated RICO conspiracy conviction is a crime of violence will have dramatic

effects in other contexts, particularly in the triggering of mandatory minimum sentences under 18 U.S.C. § 924(c) as well as similar enhancements under the sentencing guidelines. The Court should rectify the court of appeals' error and make clear that no RICO conspiracy conviction can be a crime of violence under its precedents.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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