No. _____

In The
Supreme Court of the United States

CARLOS GOTAY-GUZMAN,

Petitioner,

v.

UNITED STATES

Respondent.

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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April 7, 2022

QUESTIONS PRESENTED

According to his PSR, pursuant to USSG § 4A1.1(b), Mr. Gotay-Guzman earned 2 criminal history points due to a 6-month sentence he received in Puerto Rico for two prior misdemeanor convictions. Mr. Gotay-Guzman argued to the First Circuit that under the plain error standard he was not eligible for the 2-point assessment based on the language of Application Note 2 to § 4A1.1(b). Application Note 2 provides that "[c]ertain prior sentences are not counted or are counted only under certain conditions," and that a "sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted." USSG § 4A1.1(b), Cmt., n.2.

In a summary opinion, the First Circuit stated in a single paragraph that Mr. Gotay-Guzman could not meet the plain error standard because his argument was one of first impression, and absent clear and binding precedent, the First Circuit held there could be no plain error. In addition, the First Circuit rejected his argument based on a prior First Circuit decision involving a different guideline and standard that rejected an argument that convictions from Puerto Rico courts "cannot be counted in amassing [a defendant's] criminal history score."

Did the First Circuit err when it held Mr. Gotay-Guzman could not establish plain error regarding the assessment of 2 criminal history points for his Puerto Rico convictions?

PARTIES TO THE PROCEEDING

Petitioner, Carlos Gotay-Guzman, 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, Carlos Gotay-Guzman, respectfully petitions this Court for a writ of certiorari to review the opinion of the First Circuit Court of Appeals.

DECISIONS BELOW

Mr. Gotay-Guzman entered into a plea agreement with the Government and pled guilty to (1) conspiracy to distribute controlled substances within 1,000 feet of public housing, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 860, and (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 924(c)(1)(A). The district court sentenced Mr. Gotay-Guzman to 165 months incarceration on the conspiracy count, followed by a consecutive term of 60 months on the firearm count. (A.3). The district court entered judgment on November 5, 2015. (A.3).

On September 9, 2016, Mr. Gotay-Guzman filed a pro se habeas petition pursuant to 28 U.S.C. §2255, alleging ineffective assistance of trial counsel for failure to file a notice of appeal. (Case No. 16-2662). On May 30, 2020, the district court granted Mr. Gotay-Guzman's habeas petition and reinstated his right to a direct appeal of his judgment and sentence. The First Circuit issued a written summary affirmance on December 8, 2021. (A.1-2).

BASIS FOR JURISDICTION

On December 8, 2021, the First Circuit issued a written opinion affirming the district court's sentencing order. (A1-2). On February 24, 2022, this Court granted Mr. Gotay-Guzman's request to extend the time to file this petition through April 7,

2022. (App. No. 21A441). This timely petition follows. Jurisdiction lies in this Honorable Court. *See* 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

1. USSG § 4A1.1(b):

> The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
> (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
> …

2. USSG § 4A1.1(b), Cmt., n.2:

> Two points are added for each prior sentence of imprisonment of at least sixty days not counted in § 4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "prior sentence" is defined at § 4A1.2(a). The term "sentence of imprisonment" is defined at § 4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see § 4A1.2(k).
>
> Certain prior sentences are not counted or are counted only under certain conditions:
> …
> A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. See § 4A1.2(h), (i), (j), and the Commentary to § 4A1.2.
> …

3. USSG § 4A1.2(h):

> Sentences resulting from foreign convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

STATEMENT OF THE CASE

I. Plea agreement and sentencing

The Government indicted Mr. Gotay-Guzman on the following 6 counts:

> 1. Conspiracy to distribute various controlled substances within 1,000 feet of public housing , in violation of 21 U.S.C. §§ 841(a)(1), 846, and 860;
>
> 2. Aiding and abetting the possession/distribution of heroin within 1,000 feet of public housing, in violation of 21 U.S.C. §§ 841(a)(1), 860, and 18 U.S.C. § 2;
>
> 3. Aiding and abetting the possession/distribution of cocaine base within 1,000 feet of public housing, in violation of 21 U.S.C. §§ 841(a)(1), 860, and 18 U.S.C. § 2;
>
> 4. Aiding and abetting the possession/distribution of cocaine within 1,000 feet of public housing, in violation of 21 U.S.C. §§ 841(a)(1), 860, and 18 U.S.C. § 2;
>
> 5 Aiding and abetting the possession/distribution of marijuana within 1,000 feet of public housing, in violation of 21 U.S.C. §§ 841(a)(1), 860, and 18 U.S.C. § 2;
>
> 6. Possession of a firearm in furtherance of a drug trafficking crime, in violation of 924(c)(1)(A).

(Doc. 3).

Mr. Gotay-Guzman entered into a plea agreement with the Government to plead guilty to Count One (charging a conspiracy to possess controlled substances with intent to distribute) and Count Six (charging the illegal possession of a weapon in furtherance of a drug trafficking crime) of the indictment. Both counts carried mandatory minimum penalties of 10 and 5 years, respectively, to run consecutively as provided by statute. *See* 21 U.S.C. 841(a)(1), 846 and 18 U.S.C. § 924 (c)(1)(A)(i).

In the plea agreement, the parties stipulated to a sentencing guideline calculation that provided for a base offense level of 30, because the stipulated drug quantity was that of "at least 5 kilograms, but less than 15 kilograms of cocaine" pursuant to USSG §§ 2D1.1(c)(2) and 2D1.1(1)(5). Further, Mr. Gotay-Guzman's supervisory role was stipulated, as was a corresponding 3-point enhancement under USSG §3B1.1(c). Because the offense took place within a protected location, 2 additional points were added pursuant to USSG § 2D1.2(a)(1). Mr. Gotay-Guzman accepted responsibility and received a 3-point subtraction. All in all, the parties stipulated to an adjusted offense level ("AOL") of 32 in the plea agreement.

While no criminal history category was stipulated in the plea agreement, during the Rule 11 hearing it was further stipulated by the parties that if the probation officer was to finally determine a "Criminal History II," due to some misdemeanor convictions, defendant could argue overrepresentation of the Criminal History. Finally, the plea agreement provided that the Government was to request "a sentence within the applicable guideline range," and Mr. Gotay-Guzman could argue for a "sentence at the lower end of the applicable guideline range."

The district court sentenced Mr. Gotay-Guzman on November 5, 2015. Prior to sentencing, counsel for Mr. Gotay-Guzman did not file an objection to the pre-sentence report ("PSR"). At sentencing, counsel began by acknowledging that contrary to the parties' stipulation, Probation allocated a 4-point—rather than 3-point—enhancement due to Mr. Gotay-Guzman's role in the offense. Counsel for Mr. Gotay-Guzman claimed there was no factual basis to formally object to the 4-

point enhancement, but urged the sentencing court to adhere to the parties' stipulation within the plea agreement. (A.3-6).

Defense counsel then argued that while the Criminal History Category had been determined as a CHC II, due to a previous misdemeanor conviction, the Court had the discretion to impose a sentence not harsher than necessary. At the very least, defense counsel argued, the court should only assess 3 points for Mr. Gotay-Guzman's supervisory role as stipulated in the plea agreement, rather than add 4 points, as suggested by Probation. (A.16-22). Defense counsel ultimately requested a sentence within a range of 121 to 151 months of imprisonment for Count I, and recommended a total sentence of 15 years and one month: 121 months as to Count I and 66 months as to Count VI. *Id.* The Government recommended a sentence within a range of 138 to 168 months for Count I, given defendant's CHC of II, and argued for a sentence at the upper level of the applicable guideline range: 168 months of imprisonment as to Count I and 60 months as to Count VI, for a total 228 months. (A.27-30).

The sentencing court ruled that Probation correctly determined an AOL of 33 and a CHC II, and the sentencing court determined that the applicable imprisonment range for Count I was from 151 to 188 months. (A.35). Initially, the sentencing court announced a sentence of 170 months on Count I, followed by a consecutive 60 months on Count VI. Both parties alerted the sentencing court that pursuant to the plea agreement and under the guideline range, the maximum sentence for Count I was 168 months. *Id.* at 45.

The court informed Mr. Gotay-Guzman of his right to appeal the judgment of conviction and sentence. In response, Mr. Gotay-Guzman's counsel requested that the court impose a sentence of 151 months (middle range under AOL 32) as to Count I, which would result in a waiver of appeal pursuant to the plea agreement. *Id.* at 53. The sentencing court reconsidered and while imposing sentence stated: (as to Count I) a sentence of "165, rather than 170. And then of course I will recognize, if he wants to, to take the matter on appeal. And I warn him what his rights are as to that." *Id.* at 54.

II. Plea agreement and sentencing

On appeal, Mr. Gotay-Guzman argued two main points in his brief. First, that he was not subject to the appeal waiver in his plea agreement because he was not sentenced pursuant to the guideline range stipulated to by the parties. And second, that he was not eligible for a CHC II. Specifically, Mr. Gotay-Guzman argued that his Puerto Rico sentence stemmed from a "foreign" conviction, and foreign convictions are specifically excluded from consideration under the plain language of USSG § 4A1.1(b). Mr. Gotay-Guzman acknowledged that this issue was not raised by trial counsel and was thus subject to plain error review.

The Government moved for summary disposition of the appeal on August 2, 2021. The Government did not argue for dismissal based on the appeal waiver in the plea agreement and did not respond to Mr. Gotay-Guzman's argument that he was not bound by it. Instead, the Government focused exclusively on Mr. Gotay-Guzman's argument that he was not eligible for the 2-point enhancement under

USSG § 4A1.1(b), The Government acknowledged that whether a Puerto Rico conviction qualifies as a foreign conviction under the Guidelines was an issue of first impression in the First Circuit. But according to the Government, the absence of a decision from the First Circuit precluded Mr. Gotay-Guzman from establishing plain error. In addition, the Government argued that the Supreme Court's recent decision in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1836 (2016), supported the Government's position that Mr. Gotay-Guzman's Puerto Rico misdemeanor conviction was not a "foreign" conviction for purposes of assessing criminal history points.

The First Circuit granted the Government's motion for summary disposition, stayed further briefing, and took the case under review. In its summary opinion, the First Circuit stated in a single paragraph that Mr. Gotay-Guzman could not meet the plain error standard based on the following 3 citations and parentheticals:

> United States v. Grullon, 996 F.3d 21, 32–33 (1st Cir. 2021) (absent clear and binding precedent, "there can be no plain error"); United States v. Arsenault, 833 F.3d 24, 29 (2016) (plain error standard of review); United States v. Torres–Rosa, 209 F.3d 4, 8 (1st Cir. 2000) (on plain error review, rejecting argument that convictions from Puerto Rico courts "cannot be counted in amassing [a defendant's] criminal history score").

(A.1). Without further explanation, the First Circuit announced it was granting the Government's summary disposition request. (A.1-2).

REASON FOR GRANTING THE WRIT

I. Courts across the country are struggling to square Puerto Rico's unique status with statutory language that covers a wide variety of federal statutory schemes, from taxation to federal jurisdiction. This case provides an opportunity to give lower courts much–needed guidance regarding Puerto Rico's status generally, but particularly in the context of the Sentencing Guidelines, where the confusion is at its height.

Much ink has been spilled about the confusion over Puerto Rico's status and how it impacts the interpretation of various federal statutes. *See, e.g.*, Joseph Blocher & Mitu Gulati, Puerto Rico and the Right of Accession, 43 Yale J. Int'l L. 229 (2018). This Court recently grappled with the difficulties inherent in classifying Puerto Rico's status in *Puerto Rico v. Sanchez Valle*, —— U.S. ——, 136 S. Ct. 1863, 1876, 195 L.Ed.2d 179 (2016) (holding that the United States and Puerto Rico "are not separate sovereigns" for double jeopardy purposes). And while *Sanchez Valle* provided clarity for purposes of double jeopardy, more is needed.

This case shows why. According to his PSR, pursuant to USSG § 4A1.1(b), Mr. Gotay-Guzman earned 2 criminal history points due to a 6-month sentence he received in Puerto Rico for two prior misdemeanor convictions. Mr. Guzman argued to the First Circuit that he was not eligible for the 2-point assessment based on the language of Application Note 2 to § 4A1.1(b). Application Note 2 provides that "[c]ertain prior sentences are not counted or are counted only under certain conditions," and that a "sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted." USSG § 4A1.1(b), Cmt., n.2. And the Supreme Court has made clear that commentary "interpret[ing] or explain[ing] a [G]uideline is authoritative unless it violates the Constitution or a

federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993).

In addition, Application Note 2 specifically cites to USSG § 4A1.2(h). USSG § 4A1.2 is titled "Definitions and Instructions for Computing Criminal History." Subsection (h) is titled "Foreign Sentences," and provides, "[s]entences resulting from foreign convictions are not counted," unless a court is considering an upward departure due to an inadequate criminal history score. The term "foreign conviction" is not defined. Nor is "foreign sentence." But subsection (o) in the same list contains the definition for "Felony Offense," a term that applies to a different criminal history enhancer that has nothing to do with USSG § 4A1.1(b), the enhancer at issue in Mr. Gotay-Guzman's case. And "Felony Offense" is defined as "any federal, state, or local offense punishable by death or a term of imprisonment" exceeding one year.

Against that backdrop, Mr. Gotay-Guzman argued the Puerto Rico sentence for his prior misdemeanors should not have been included in his criminal history calculation because the Puerto Rico sentence was a "sentence for a foreign conviction." Puerto Rico is an unincorporated territory of the United States. *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 53 (1st Cir. 2003). Puerto Rico belongs to, but is not part of the United States, a category considered "foreign ... in a domestic sense." *United States v. Lebrón–Cáceres*, 157 F.Supp.3d 80, 88 & n.11 (D.P.R. 2016) (discussing Puerto Rico's territorial status) (quoting *Downes v. Bidwell*, 182 U.S. 244, 287 (1901)). Accordingly, "... Congress can, pursuant to the plenary powers

conferred by the Territorial Clause [U.S. Const. art. IV, § 3, cl. 2], legislate as to Puerto Rico in a manner different from the rest of the United States." *U.S. v. Rivera-Torres*, 826 F.2d 151, 154 (1st Cir. 1987).

Moreover, "foreign" means "of, relating to, or involving another country." Black's Law Dictionary (11th ed. 2019). Mr. Gotay-Guzman's priors are not federal convictions from the United States. Nor are they convictions from one of the 50 states. They are foreign convictions, meaning they are convictions from a judicial system in another place with its own laws and procedures. Although there is a "body of case law recognizing that Congress has accorded the Commonwealth of Puerto Rico 'the degree of autonomy and independence normally associated with States of the Union,'" *United States v. Torres-Rosa*, 209 F.3d 4, 8 (1st Cir. 2000), Congress has not formally incorporated Puerto Rico as a state, or otherwise indicated that Puerto Rico is not a country unto itself.

The First Circuit's summary opinion in this case is a perfect example of how the text of statutes is being routinely ignored in the face of widespread confusion over Puerto Rico's status. The question Mr. Gotay-Guzman posed was whether his Puerto Rico sentence was a "foreign" one. The First Circuit's opinion did not mention the word "foreign" or discuss how Puerto Rico's complicated status played into the inquiry.

Instead, it relied on three cases to reject Mr. Gotay-Guzman's argument: *United States v. Grullon*, 996 F.3d 21, 32–33 (1st Cir. 2021), *United States v. Arsenault*, 833 F.3d 24, 29 (2016), and *United States v. Torres–Rosa*, 209 F.3d 4, 8

(1st Cir. 2000). The first two—*Grullon* and *Arsenault*—have nothing to do with the facts or law involved in Mr. Gotay-Guzman's argument other than setting out the standard for plain error review. The citation to third case, however, provides important insight into a larger problem. Here is the parenthetical used in the opinion to explain *Torres–Rosa*, and presumably its impact on Mr. Gotay-Guzman's argument: (on plain error review, rejecting argument that convictions from Puerto Rico courts "cannot be counted in amassing [a defendant's] criminal history score").

The First Circuit's use of *Torres–Rosa* in this case should concern this Court for two reasons. First, the question in *Torres–Rosa* was whether Puerto Rico convictions should count as prior violent felonies for purposes of assessing whether a defendant is a "career offender" under USSG § 4B1.1(a) and § 4B1.2(a), guidelines that have nothing to do with Mr. Gotay-Guzman's case. And to determine whether prior violent felonies count for purposes of a career offender enhancement, USSG § 4B1.1(a) refers specifically to prior convictions "under federal or state law." Clearly, Mr. Gotay-Guzman's prior Puerto Rico convictions were not "federal or state law" convictions. So why did the First Circuit rely on *Torres–Rosa* to reject Mr. Gotay-Guzman's argument?

The answer is the second reason the First Circuit's use of *Torres–Rosa* in this case should concern this Court. It is also the more important reason, because it implicates a serious issue occurring in the First Circuit that is taking hold elsewhere. The issue is that Puerto Rico's confusing status and relationship to the United States is leading to blatant departures from the plain language of the

sentencing guidelines and a host of other statutes covering a wide array of civil and criminal matters.

Consider the Ninth Circuit's decision in *United States v. Cirino*, 419 F. 3d 1001 (9th Cir. 2005), which discusses and adopts the reasoning of the First Circuit in *Torres–Rosa*. The question in *Cirino* was the same as the one in *Torres–Rosa*: whether Puerto Rico convictions should count as prior violent felonies for purposes of assessing whether a defendant is a "career offender" under USSG § 4B1.1(a) and § 4B1.2(a) (2002). Mr. Cirino maintained his violent felonies committed in Puerto Rico were not part of the calculus because the pertinent language in USSG § 4B1.1(a) only referred to prior convictions "under federal or state law." *Id.* at 1002. Naturally, Mr. Cirino argued that because his Puerto Rico convictions were not for federal or state law violations, the priors did not count.

The Ninth Circuit disagreed. Incredibly, the *Cirino* Court did not discuss, much less stop its analysis, with the plain language of the statute, which would have excluded Puerto Rico categorically because Puerto Rico is not a state. That Puerto Rico is by definition not a state is not up for debate. Puerto Rico is an unincorporated territory of the United States. *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 53 (1st Cir. 2003). It should go without saying, but Puerto Rico's lack of statehood is stated explicitly in various statutes, one of which is 18 U.S.C. § 922(C), which provides:

> [N]othing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply

> if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States.

Id.

But rather than stopping its analysis at the text of USSG § 4B1.1(a), which only concerns prior convictions "under federal or state law," the *Cirino* Court looked elsewhere for answers. The Court noted that the Ninth Circuit had not previously addressed whether a Puerto Rico prior conviction qualified under USSG § 4B1.1(a), so it looked to the First Circuit for guidance:

> The issue of whether Puerto Rican convictions may be counted as predicate convictions for purposes of determining career offender status is a novel one in the Ninth Circuit. However, two cases from the First Circuit, which has appellate jurisdiction over cases from the District of Puerto Rico, strongly suggest that Puerto Rican convictions may be taken into account. *See United States v. Torres-Rosa*, 209 F.3d 4 (2000)[1]; *United States v. Morales-Diaz*, 925 F.2d 535 (1991). In both cases, the defendants raised the issue for the first time on appeal. The First Circuit thus reviewed the sentences for plain error. *Torres-Rosa*, 209 F.3d at 8; *Morales-Diaz*, 925 F.2d at 540. We nevertheless find the First Circuit's reasoning in these cases persuasive. In rejecting the notion that Puerto Rican convictions should not be counted as prior felony offenses, the First Circuit stated:
>
> > [The defendant in *Morales-Diaz*] "simply asserts the syllogism that (1) to qualify under the career offender guideline, the prior felony offenses must be state or federal offenses; (2) Puerto Rico is not a state; and (3) therefore his Puerto Rico conviction is not a prior felony offense under the career offender guideline." We found [in *Morales-Diaz*] that this syllogism "completely ignores the body of case law recognizing that Congress *1004 has accorded the Commonwealth of Puerto Rico 'the degree of autonomy and independence normally associated with States of the Union. ....' " Accordingly, we concluded that, because the appellant had not shown "that the Sentencing Commission

[1] *Again, Torres Rosa* was one of the three cases cited in the First Circuit's summary opinion disposing of Mr. Gotay-Guzman's appeal, even though Mr. Gotay-Guzman's argument was whether a Puerto Rico conviction was a "foreign" conviction and had nothing to do with the career offender enhancement at issue in *Torres Rosa*.

> meant to exclude felony convictions in Puerto Rico Commonwealth Courts for enhancement purposes," no plain error inhered.
>
> *Torres-Rosa*, 209 F.3d at 8 (citing *Morales-Diaz*, 925 F.2d at 540) (citations omitted) (second alteration in original); cf. *United States v. Acosta-Martinez*, 252 F.3d 13, 17-20 (1st Cir.2001) (acknowledging that Puerto Rico is technically not a state, yet holding that the Federal Death Penalty Act applied to crimes committed in Puerto Rico). The First Circuit also routinely has upheld career offender sentences supported by Puerto Rican convictions. *United States v. Colon-Torres*, 382 F.3d 76, 81 n. 5 (1st Cir.2004) (career offender sentence imposed based on three Puerto Rican convictions, without the "state" issue presented); *United States v. De Jesus Mateo*, 373 F.3d 70, 73-74 (1st Cir.2004) (same).

Cirino, 419 F. 3d at 1004.

The *Cirino* Court expanded its review of the First Circuit's treatment of Puerto Rico as a state, explaining:

> Indeed, the First Circuit has treated Puerto Rico as a "state" in numerous other contexts. *See, e.g., Fred v. Roque*, 916 F.2d 37, 38-39 (1st Cir.1990) ("state" for purposes of sovereign immunity); *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir.1987) ("state" for purposes of double jeopardy)[2]; *Cordova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36, 38 (1st Cir.1981) ("state" for purposes of Sherman Act); see also *Mangual v. Rotger-Sabat*, 317 F.3d 45, 53 n. 2 (1st Cir.2003) (residents of Puerto Rico are protected by the First Amendment). Congress, too, has determined that Puerto Rico is to be treated as a "state" for purposes of diversity jurisdiction. 28 U.S.C. § 1332(e); *see also U.S.I. Properties Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 499-500 (1st Cir. 2000) (as with states, diversity jurisdiction does not exist when Puerto Rico itself is a party). Finally, the Supreme Court has held that the test for federal preemption of Puerto Rican statutes is the same as that for state statutes. *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988).

Cirino, 419 F. 3d at 1004.

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[2] Of course, *Lopez Andino* was overruled by *Sanchez-Valle*.

Although the *Cirino* Court should have ended the inquiry by simply stating Puerto Rico is not a state, in a twist of irony, the *Cirino* Court identified the critical aspect of Mr. Gotay-Guzman's case the First Circuit missed. To wit, the *Cirino* Court noted that the guidelines incorporate the definitions and instructions for computing criminal histories provided in § 4A1.2, and specifically noted that "§ 4A1.2(o), like § 4B1.2(a), states that a felony offense includes 'any federal, state, or local offense punishable by ... a term of imprisonment exceeding one year,' while Guideline § 4A1.2(h) expressly excludes 'foreign convictions.'" *Cirino*, 419 F.3d at 1003. That discrepancy was dispositive in Mr. Gotay-Guzman's case. But instead of assessing the guideline at issue and the operative language, the First Circuit relied on *Torres–Rosa*, a case that was wrongly decided and had nothing to do with Mr. Gotay-Guzman's case.

The analysis should have gone the way it did in *United States v. Diaz*, 712 F.2d 36, 39–40 (2d Cir. 1983). The *Diaz* decision is useful because it underscores the breadth of the problem caused by the confusion over Puerto Rico's status, and also provides an answer. If the text is meant to draw a parallel between the states and Puerto Rico, it will do so explicitly.

> We do note, however, that in numerous other statutes when Congress has intended the term state to apply to Puerto Rico, it has done so explicitly and expressly. *See, e.g.*, 15 U.S.C. § 1171(b) (1976) (transportation of gambling devices); 16 U.S.C. § 3371(h) (transportation of illegally taken wildlife); 18 U.S.C. § 891(8) (1976) (extortionate credit transactions); 18 U.S.C. § 921(a)(2) (jurisdictional requirement for firearms violation); 18 U.S.C. § 1953(d)(1) (1976) (interstate transportation of wagering paraphernalia); 18 U.S.C. § 1955(b)(3) (1976) (illegal gambling); 18 U.S.C. § 1961(2) (1976) (racketeering influenced and corrupt organizations); 28 U.S.C. §

1332(d) (1976) (defining "state" for purposes of diversity jurisdiction). Significantly, too, in *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970), the Supreme Court refused to include Puerto Rico within the term "state" for purposes of a direct appeal under 28 U.S.C. § 1254(2).

Congress's language in 18 U.S.C. § 922(a)(2)(C) also reveals its intent on this issue. Section 922 is a firearms statute that parallels parts of § 1202. The two sections were adopted simultaneously as part of Pub.L. No. 90-351. Section 922 appears in Title IV, and § 1202 appears in Title VII. In § 922(a)(2) Congress made it unlawful for a dealer to ship a firearm in interstate commerce to anyone other than licensed importers, manufacturers, dealers, or collectors, with certain exceptions. One of the exceptions, § 922(a)(2)(C), reveals that Congress did not in this context view Puerto Rico as a state, for Congress provided:

> (C) nothing in this paragraph shall be construed as applying in any manner in * * * the Commonwealth of Puerto Rico * * * differently than it would apply if * * * the Commonwealth of Puerto Rico * * * were in fact a State of the United States (emphasis added).

In short, we have a statute whose plain language omits Puerto Rico from its coverage; we have no useful legislative history on the point; we have express recognition in another, simultaneously adopted firearms statute that Congress did not consider Puerto Rico to be a state; and we have several instances in other statutes where, when Congress did wish to include Puerto Rico as a "state", it employed clear, simple language to signal its intent. In these circumstances we conclude that Congress did not intend a conviction in a Puerto Rican commonwealth court to serve as a predicate to culpability under § 1202(a)(1).

Even if we were not fully satisfied as to Congress's intent, we would be unwilling judicially to add Puerto Rican commonwealth courts to the terms of § 1202(a)(1). Rather, we would defer to the rule of construction-applied to this very statute in a variety of contexts, see, e.g., *United States v. Bass*, 404 U.S. at 347, 92 S.Ct. at 522; *United States v. Marino*, 682 F.2d 449, 454 (3rd Cir.1982); *United States v. Burton*, 629 F.2d 975, 978 (4th Cir.1980), cert. denied, 450 U.S. 968, 101 S.Ct. 1487, 67 L.Ed.2d 618 (1981)-which requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. at 347, 92 S.Ct. at 522, quoting *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28

L.Ed.2d 493 (1971). *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952) ("... when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite"). See also *Callanan v. United States*, 364 U.S. 587, 602, 81 S.Ct. 321, 329, 5 L.Ed.2d 312 (1961) (Stewart, J., dissenting).

Underlying this rule of lenity are important constitutional principles that require Congress to define criminal activity with specificity.

> This practice [of resolving questions concerning the ambit of a criminal statute in favor of lenity] reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "'plainly and unmistakably'" proscribed. *United States v. Gradwell*, 243 U.S. 476, 485 [37 S.Ct. 407, 410, 61 L.Ed. 85] (1917). (other citations omitted).

Dunn v. United States, 442 U.S. 100, 113, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743 (1979).

Since Congress did not speak with "special clarity" as to whether § 1202 applies to felons convicted in Puerto Rican commonwealth courts, we "must decline to impose punishment" on Angel Diaz. The judgment of conviction is therefore reversed, and the action is remanded to the district court with a direction to dismiss the indictment with prejudice.

Diaz, 712 F.2d at 39–40.

For the same reasons the *Diaz* Court decided not to characterize Puerto Rico as a state absent a clear indication from Congress, the First Circuit should have declined to classify a Puerto Rico conviction as anything other than a foreign conviction. As the *Diaz* Court explained, Congress has repeatedly used clear

language to classify Puerto Rico as a state when appropriate, and the absence of a clear indication from Congress that Puerto Rico convictions are subject to enhancement under USSG § 4A1.1(b) should lead to the conclusion that Congress did not intend to include them.

This Court should exercise its discretion to review this case and adopt a similar rule. Puerto Rico's status and relationship with the United States is complicated, factually, emotionally, and legally. But most of that confusion can be resolved by traditional maxims of statutory interpretation, and the federal courts need a reminder that Congress usually means what is says and says what it means, even when it comes to Puerto Rico. For instance, Puerto Rico is not a state, and the number of decisions that say otherwise should be corrected.

As this Court recently stated: "Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020). Mr. Gotay-Guzman is a perfect example of how far the confusion over Puerto Rico can lead a court astray if it does not heed the language of the operative text. This Court should provide guidance.

II. This Court should hold that the plain error analysis is different when it comes to statutes and rules. Simply because a court has not interpreted a statute, or has interpreted it the wrong way, does not make an error any less plain.

The Government and the First Circuit took the position in this case that Mr. Gotay-Guzman could not establish plain error due to the absence of clear and binding precedent. That is the prevailing rule, but some courts have noted a flaw with that approach when it comes to statutes and rules: "We have declared that 'absent precedent from either the Supreme Court or this court ..., [an] asserted error ... falls far short of plain error.' Nonetheless, '[s]ome legal norms are absolutely clear (for example, because of the clarity of a statutory provision or court rule); in such cases, a trial court's failure to follow a clear legal norm may constitute plain error, without regard to whether the applicable statute or rule previously had been the subject of judicial construction.'" *United States v. Merlos*, 8 F.3d 48, 51 (D.C.Cir.1993).

Justice Scalia noted the issue as well, albeit in dissent:

> For a trial-court error is plain not only when it becomes so in retrospect, after the law has subsequently been clarified; but also when the court disregards the pre-existing "'clarity of a statutory provision or court rule.'" *United States v. Perry*, 479 F. 3d 885, 893, n. 8 (C.A.D.C. 2007). This Court recognized as much in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), where the Government "essentially concede [d]," and this Court accepted, that the District Court's interpretation of Federal Rule of Criminal Procedure 24(c) was plainly erroneous, even though the appellate court had yet to say so, because the text of the rule was so clear. Id., at 737, 113 S.Ct. 1770.

Henderson v. United States, 568 U.S. 266, 288 (2013) (Scalia, J. dissenting); *see also United States v. Tann*, 577 F.3d 533, 537 (3d Cir. 2009) ("Although our holding

regarding the allowable unit of prosecution under § 922(g) is a matter of first impression for this Court, we find that the District Court's error is plain.").

The Government and the First Circuit in this case rejected Mr. Gotay-Guzman's argument under the plain error standard because he raised an issue of first impression. But Mr. Gotay-Guzman did not need a decision to explain why he was not subject to enhancement for a foreign conviction. It was clear in the language of the guidelines. This Court should exercise discretion over this case and hold that establishing plain error can be accomplished by showing that clear language from a rule or statute was misconstrued or ignored.

CONCLUSION

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

Respectfully submitted on this 7th day of April, 2022.

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