NO. ___

In the Supreme Court of the United States

JOSE RAMON ANDINO MORALES, a/k/a Gladiola,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

DAVID RAMOS-PAGÁN
Counsel for Petitioner
Court Appointed – CJA Panel
U.S. Supreme Court Bar 264,449
Urb. El Valle, 372 Calle del Yagrumo
Caguas, PR 00727-3234
Tel: (787)423-3114
Email: somar2000us@yahoo.com

QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct for which a jury has acquitted the defendant.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

United States District Court (District of Puerto Rico.):

United States v. Andino-Morales, No. 3:16-cr-00282-047(TSH) (November 21, 2019)

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

United States v. Andino-Morales, No. 19-2253 (July 11, 2023)

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

PETITION FOR A WRIT OF CERTIORARI

Jose Ramon Andino-Morales (hereinafter "Andino") respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, rendered and entered in case number 19-2253 in that court on July 11, 2023, *United States v. Jose R. Andino-Morales*, 19-2253 (1st Cir. 2023), which affirmed the judgment and commitment of the United States District Court for the District of Puerto Rico.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the First Circuit, which affirmed the judgment and commitment of the United States District Court, District of Puerto Rico, is contained in the Appendix 1a.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on July 11, 2023. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions:

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

STATEMENT OF THE CASE

A federal grand jury indicted Mr. Andino for charges under the RICO Act, Murder for Hire, and Conspiracy to distribute controlled substances.

Mr. Andino proceeded to trial. Ultimately, a jury found him guilty as to the RICO violation and NOT guilty as to murder for hire and for conspiracy to distribute

drugs. Mr. Andino appealed asserting that the district court erroneously relied on acquitted conduct when it sentenced him to 180 months, when his sentence should have been within the guideline range of 46 – 57 months. (App. 22a, 28a).

The First Circuit Court of Appeals affirmed the decision below. *United States v. Andino-Morales*, Appeal No. 19-2253 (1st Cir. 2023).

This case concerns the constitutionality of a common sentencing practice that has long troubled jurists: whether sentencing judges can enhance a defendant's sentence based on conduct of which the jury acquitted him. This Court has never squarely addressed the question.

In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), a divided Court in a summary disposition held that use of acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. But lower courts—including the First Circuit in this case, (App. 6a), have long misinterpreted *Watts* to foreclose all constitutional challenges to the use of acquitted conduct at sentencing, including under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury.

The issue has divided the lower courts and prompted calls for this Court's review. E.g., *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.); *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). This case perfectly illustrates how

acquitted-conduct sentencing "guts the role of the jury in preserving individual liberty and preventing oppression by the government," *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring), because the facts at issue involve not just traditional "facts enhancing the crime of conviction, like the presence of a gun or the vulnerability of a victim. Rather, they are facts comprising [a] different crime [] ***." *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005). Indeed, this case involves what may be the most serious offense known to the law: murder and drug conspiracy.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court called "absurd" the idea "that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it." Id. at 306. And Justice Breyer, while dissenting from decisions holding that the Constitution requires jury factfinding in sentencing, acknowledged that a constitutional violation could arise in what he called "egregious" situations, such as when a judge greatly increases a defendant's sentence based on its own finding that the defendant had committed murder. *Apprendi v. New Jersey*, 530 U.S. 466, 562 (2000) (Breyer, J., dissenting); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (writing that a judge "sentenc[ing] an individual for murder though convicted only of making an illegal lane change" is "the kind of problem that the Due Process Clause is well suited to cure").

That is exactly what happened here. A jury convicted petitioner Andino under the RICO Act, mainly for being a member of a prison group ("Los Netas"), where some

of its members sold drugs and committed murder for hire. But the jury acquitted petitioner of such offenses — murder for hire and drug conspiracy. Although the jury plainly credited the defense's theory that Andino had no part in the murder of another prisoner and was not involved in selling drugs inside the prison compound, because sentencing enhancements are subject to judicial factfinding under a lower preponderance-of-the-evidence standard, the sentencing judge nevertheless enhanced petitioner's sentence for drug distribution, more than tripling his sentence from a range of 46-57 months to a sentence of 180 months. Unless this Court resolves this issue, tens of thousands of criminal defendants will continue to be sentenced using sentencing practices that are impossible to square with the Constitution.

Several state supreme courts apply a different constitutional rule than their regional federal courts, making a defendant's constitutional protections turn on the happenstance of which jurisdiction charges him. And for the many jurisdictions in which relief is unavailable, this state of affairs will continue to put defendants in the untenable position of having to continue to preserve an issue on which only this Court can grant relief, substantially burdening courts, prosecutors, and defense counsel. As Justice Scalia (joined by Justices Thomas and Ginsburg) wrote in 2014, "[t]his has gone on long enough."

REASONS FOR GRANTING THE PETITION

I. The Constitutionality of Considering Acquitted Conduct At Sentencing Is An Important And Recurring Question That Only This Court Can Resolve

This Court has never squarely addressed whether a sentencing judge's consideration of acquitted conduct to enhance a defendant's sentence violates the Due Process Clause of the Fifth Amendment or the Sixth Amendment's guarantee of trial by jury. In *Watts*, a divided Court held in a summary disposition that considering acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. 519 U.S. at 154. This Court later emphasized that *Watts* "presented a very narrow question regarding the interaction of the U.S. Sentencing Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. Thus, the *Watts* Court did not have occasion to consider whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbid the use of acquitted conduct at sentencing. Yet for decades, "[n]umerous courts of appeals"—including the First Circuit below, App. 3a-4a—have "assume[d] that *Watts* controls the outcome of both the Fifth and Sixth Amendment challenges to the use of acquitted conduct," *United States v. White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en banc) (Merritt, J., dissenting, joined by five others).

A. Distinguished Jurists Have Long Criticized Acquitted-Conduct Sentencing

From the very outset, members of this Court questioned the holding in Watts, as well as its summary disposition of such an important issue. Justice Stevens decried

the idea "that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved" as "repugnant" to the Constitution. *Watts*, 519 U.S. at 170 (Stevens, J., dissenting). And Justice Kennedy criticized the Court for failing to clearly "confront [] the distinction between uncharged conduct and [acquitted] conduct," which he called a "question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system" and which "ought to be confronted by a reasoned course of argument, not by shrugging it off." Id. at 170 (Kennedy, J., dissenting). "At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." Ibid.

In *Jones v. United States*, petitioners convicted by a jury of distributing small amounts of crack cocaine, but acquitted of conspiring to distribute drugs, challenged the constitutionality of the sentencing judge imposing sentencing enhancements based on the acquitted conduct. Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the Court's denial of certiorari, explaining that "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (quotation marks omitted). Accordingly, "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge." Id. at 949 (citation and quotation marks omitted). The group observed that "the Courts of Appeals have uniformly taken our continuing silence to

suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." Ibid. The dissenters protested that "[t]his has gone on long enough," and urged the Court to "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment." Id. at 950.

Since then, the criticisms of acquitted-conduct sentencing and related practices have steadily grown. Following *Jones*, then Judge Gorsuch questioned the lawfulness of imposing sentences based on judge-found facts, writing that "[i]t is far from certain whether the Constitution allows" "a district judge [to] *** increase a defendant's sentence *** based on facts the judge finds without the aid of a jury." *United States v. Sabillon Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.)).

Then Judge Kavanaugh has repeatedly criticized acquitted conduct sentencing. In *United States v. Bell*, where the sentencing judge increased the defendant's sentence by more than 300% based on acquitted conduct, then-Judge Kavanaugh wrote that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc). He observed that "resolving that concern as a constitutional matter would likely require" Supreme Court review. Id. at 927. Similarly, in *United States v. Brown*, where the defendant was acquitted on most counts but "then sentenced in essence as if he had been

convicted on all of the counts," 892 F.3d at 415 (Kavanaugh, J., dissenting in part), then Judge Kavanaugh called acquitted-conduct sentencing "unsound," and noted "good reasons to be concerned about [it]," ibid.; see also *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (noting "[t]he oddity *** that courts are still using acquitted conduct to increase sentences" after *Booker* held that "the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved to a jury beyond a reasonable doubt").

3. Numerous other federal appeals court judges have written that using acquitted conduct to calculate a criminal defendant's sentence is unconstitutional. Judge Millett has repeatedly expressed the view that "allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee" because "it considers facts of which the jury expressly disapproved." *Bell*, 808 F.3d at 929-930 (Millett, J., concurring in the denial of rehearing en banc) (quotation marks omitted); see also id. at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) ("shar[ing] Judge Millett's overarching concern"). Judge Millett has written that the practice "guts the role of the jury in preserving individual liberty and preventing oppression by the government." *Brown*, 892 F.3d at 408 (Millett, J., concurring). Judge Millett has observed that "only the Supreme Court can resolve the contradictions in the current state of the law," and urged the Court "to take up this important, frequently recurring, and troubling contradiction in sentencing law." *Bell*,

808 F.3d at 932 (Millett, J., concurring in the denial of rehearing en banc). Judge Bright has likewise argued "that the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional" under both the Due Process Clause of the Fifth Amendment and the Sixth Amendment. *Canania*, 532 F.3d at 776 (Bright, J., concurring). In his "strongly held view," acquitted conduct sentencing "violates the Due Process Clause of the Fifth Amendment" because it "undermines the notice requirement that is at the heart of any criminal proceeding." Id. at 776-777. And it violates the Sixth Amendment jury-trial guarantee because it creates a "sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second before a judge." Id. at 776. Judge Bright has "urge[d] the Supreme Court to re-examine [the] *** continued use forthwith" of "'acquitted conduct' to fashion a sentence." Id. at 777. Similarly, Judge Fletcher has called acquitted conduct sentencing a practice that "defies logic" and that plainly violates the Fifth and Sixth Amendments because it "allows the jury's role to be circumvented by the prosecutor and usurped by the judge." *United States v. Mercado*, 474 F.3d 654, 658, 664 (9th Cir. 2007) (Fletcher, J., dissenting). Numerous other federal judges have reached the same conclusion. See, e.g., *White*, 551 F.3d at 392 (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment").

B. State Courts Are Split Regarding The Constitutionality Of The Practice

There is a much wider range of opinion among state courts. Since long before Watts, state courts have been divided on whether the federal constitution permits consideration of acquitted conduct at sentencing. Unsurprisingly, some states have held that the Constitution permits sentencing courts to consider acquitted conduct. E.g., *State v. Witmer*, 10 A.3d 728, 733 (Me. 2011) (identifying California, Colorado, Florida, Missouri, Ohio, and Wisconsin). But even where state law would ordinarily permit trial judges to consider other misconduct in imposing a sentence, "many" state supreme courts construe the federal constitution to "make an exception for acquitted conduct—conduct that formed the basis for a charge resulting in an acquittal at trial." Nora V. Demleitner et al., Sentencing Law and Policy 290 (3d ed. 2013). The New Hampshire Supreme Court, for example, has concluded that considering acquitted conduct at sentencing violates due process because it denies to the defendant the "full benefit" of the presumption of innocence "when a sentencing court may have used charges that have resulted in acquittals to punish the defendant." *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987) (citing *United States v. Tucker*, 404 U.S. 443 (1972), and *Coffin v. United States*, 156 U.S. 432, 453 (1895)); see also *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999) (reaffirming Cote post-Watts). Likewise, the North Carolina Supreme Court has held "that due process and fundamental fairness" preclude a sentencing judge from using acquitted conduct to calculate a defendant's sentence, holding that it violates the presumption of innocence. *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988); see also *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997) ("In

aggravation of the sentence, the State may prove the defendant's commission of another crime, despite the lack of conviction, so long as there has not been a previous acquittal." (quotation marks omitted)). Although federal courts have treated *Watts* as the last word on acquitted-conduct sentencing, several state supreme courts have construed *Watts* narrowly, consistent with this Court's description of it in *Booker*. For example, the Michigan Supreme Court has held that sentencing based on acquitted conduct violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *People v. Beck*, 939 N.W.2d 213, 225-226 (Mich. 2019). There, a jury convicted the defendant of firearm counts, but acquitted him of other charges, including a murder charge. Id. at 216-217. At sentencing, however, the judge found by a preponderance of the evidence that the defendant "actually was the person who perpetrated the killing," and accordingly imposed a significant sentence enhancement. Id. at 217. The Michigan Supreme Court held that the sentence violated the Due Process Clause of the Fourteenth Amendment: "[W]hen a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance of-the-evidence standard without violating due process." *Beck*, 939 N.W.2d at 225. The Michigan Supreme Court "f[ou]nd *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process" because "*Watts* addressed only a double-jeopardy challenge." Id. at 224. The court wrote: While we recognize that our holding today

represents a minority position, one final consideration informs our conclusion: the volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense. **** This ends here. Unlike many of those judges and commentators, we do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on acquitted conduct at sentencing is barred by the Fourteenth Amendment. Id. at 225-226. The New Jersey Supreme Court canvassed both federal and state constitutional law, emphasizing the criticisms of members of this Court and other federal appellate judges, before holding as a matter of state law that, "once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. *** Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial." *State v. Melvin*, 258 A.3d 1075, 1086, 1089, 1093-1094 (N.J. 2021). The New Jersey Supreme Court "agree[d] with the Michigan Supreme Court that *Watts* is not dispositive of the due process" issue because, "[a]s clarified in *Booker, Watts* was cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy." Id. at 1090. Thus, several state supreme courts applying federal law have adopted rules about acquitted-conduct sentencing at odds with the corresponding regional federal court of appeals. This Court has recognized that such splits are particularly intolerable, because the rule of decision turns on the happenstance of whether a matter is brought in federal or state court. See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (granting review

to resolve "conflict between" state supreme court and regional court of appeals regarding constitutionality of state action).

C. This Court's Intervention Is Necessary, in the alternative, at a Minimum, the Petition Should Be Held Pending the Sentencing Commission's decision.

During its last term, the Supreme Court was asked to hear the case of *McClinton v. United States*, 21-1557 and four other cases to resolve whether enhancing a sentence on the basis of "acquitted conduct"—the conduct underlying an alleged criminal offense that the jury has acquitted the defendant of committing—is consistent with the Due Process Clause of the Fifth Amendment and the right to a jury trial under the Sixth Amendment.

However, the Supreme Court denied review with several Justices explaining that they were waiting for the U.S. Sentencing Commission to act. The Commission is currently studying the use of acquitted conduct for purposes of the U.S. Sentencing Guidelines and has indicated that it intends to vote next year on corresponding changes to the Guidelines.

The Supreme Court should not wait for the Commission to act, because its proposals place only minor restrictions on the practice, and most acquitted-conduct sentences are imposed in state courts beyond the reach of the Commission. Moreover, the Sentencing Commission lacks authority to place restrictions on acquitted-conduct sentencing, because 18 U.S.C. §3661 bars the imposition of restrictions on the information about the background and conduct of defendants that courts can consider.

Without this Court's intervention, this division of authority will continue to persist. Just as the *Jones* dissenters warned, the federal courts of appeals continue to "take[] [this Court's] continuing silence to suggest that the Constitution does permit" acquitted-conduct sentencing. See 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). Not only has every federal court of appeals with criminal jurisdiction foreclosed these claims, see ibid.—every court of appeals has been asked to reconsider the issue en banc, and each has refused. No other mechanism will resolve the issue. Justice Breyer suggested in *Watts* that the Sentencing Commission could "revisit this matter in the future." 519 U.S. at 159 (Breyer, J., concurring).

The Sentencing Commission has lacked a quorum for more than three years and thus cannot act. But even when it had a quorum, the Commission's silence on the issue during the quarter century since *Watts* speaks volumes. Nor do "federal district judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct" "in the absence of a change of course by the Supreme Court, or action by Congress or the Sentencing Commission." *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). In *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008) (per curiam), for example, the district court "refus[ed] to consider acquitted conduct *** in determining [a defendant's] sentence." Id. at 299. The government appealed and the Fourth Circuit reversed, holding that the district court "committed significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process." Id. at 301. The Second Circuit reached the same conclusion in *United States v. Vaughn*, 430

F.3d 518 (2005), where it vacated the district court's sentence and ordered the district court "to consider all facts relevant to sentencing it determines to have been established by a preponderance of the evidence as it did pre-Booker, even those relating to acquitted conduct." Id. at 527.

Numerous respected jurists have called on this Court to definitively resolve this question, see, e.g., *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *Jones*, 574 U.S. at 948 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.); *Canania*, 532 F.3d at 777 (Bright, J., concurring); *United States v. Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring specially). As Judge Millett wrote:

> I agree with Justices Scalia, Thomas, and Ginsburg *** that the circuit case law's incursion on the Sixth Amendment has gone on long enough. For multiple reasons, the time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent ***.

Bell, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc) (citations and quotation marks omitted).

In the alternative, should the Sentencing Commission decide not to take action this year concerning the acquitted conduct amendment, the Court should vacate and remand this case for further consideration and rule against Watts, finding that the fifth and sixth amendment are violated when acquitted conduct is considered for sentencing purposes.

II. The Decision Below Is Wrong

A. Watts Did Not Resolve Whether the Due Process Clause Or Sixth Amendment Jury-Trial Right Prohibits Consideration of Acquitted Conduct At Sentencing.

The First Circuit relied on Watts to affirm petitioner's sentence. App. A-6a. However, *Watts* did not pass on the issue at hand. As this Court has explained, Watts presented a "very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause," and did not consider whether a judge's "sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment" or the implications of acquitted-conduct sentencing for the Due Process Clause. *Booker*, 543 U.S. at 240 & n.4. Lower courts' reliance on *Watts* to resolve different constitutional arguments is therefore "misplaced." *Mercado*, 474 F.3d at 661 (Fletcher, J., dissenting); accord, e.g., *White*, 551 F.3d at 392 (Merritt, J., dissenting, joined by five others) ("reliance on Watts as authority for enhancements based on acquitted conduct is obviously a mistake"); *Melvin*, 258 A.3d at 1090 ("Watts is not dispositive of the due process challenge presently before this Court"); *Beck*, 939 N.W.2d at 224 ("find[ing] Watts unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process" because "*Watts* addressed only a double-jeopardy challenge"). This Court should be particularly reluctant to read Watts broadly because the Court decided the case by summary disposition and "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. Justice Kennedy dissented in Watts on this basis. *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). Giving *Watts* a "very narrow" reading is likewise warranted, *Booker*, 543 U.S. at 240 n.4, because a broader reading is hard to square with the Court's more recent sentencing precedents. In the quarter century since *Watts*, this Court has issued numerous decisions emphasizing the essential importance of jury factfinding

under the Sixth Amendment in determining sentences. See, e.g., *Apprendi*, 530 U.S. 466 (jury must find all facts affecting statutory maximum); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury must find aggravating factors permitting death penalty); *Blakely*, 542 U.S. 296 (jury must find all facts essential to sentence); *Booker*, 543 U.S. 220 (Sentencing Guidelines are subject to Sixth Amendment); *Cunningham v. California*, 549 U.S. 270 (2007) (jury must find facts exposing defendant to longer sentence*); S. Union Co. v. United States*, 567 U.S. 343 (2012) (jury must find facts permitting imposition of criminal fine); *Alleyne v. United States*, 570 U.S. 99 (2013) (jury must find facts increasing mandatory minimum); *Hurst v. Florida*, 577 U.S. 92 (2016) (jury must make critical findings needed for imposition of death sentence); *United States v. Haymond*, 139 S. Ct. 2369 (2019) (judge cannot make findings to increase sentence during supervised release term). From those cases, "[i]t unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element [of the crime] that must be either admitted by the defendant or found by the jury. It may not be found by a judge." *Jones*, 574 U.S. at 949 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.). Many of those decisions have emphasized that the jury trial right works "in conjunction with the Due Process Clause" because a court's authority to sentence a defendant fundamentally flows from jury findings regarding facts essential to punishment, which are elements of the offense. *Alleyne*, 570 U.S. at 104; accord *Hurst*, 577 U.S. at 97-98. These cases have thus "emphasized the central role of the jury in the criminal justice system." *United States v. Lasley*, 832 F.3d 910,

921 (8th Cir. 2016) (Bright, J., dissenting). This series of cases provides a compelling reason to at least limit *Watts* to the Double Jeopardy context, if not to overrule it entirely. See *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("*Watts* *** has no bearing on this case in light of the Court's more recent and relevant rulings in *Apprendi v. New Jersey, Ring v. Arizona, Blakely,* and *Booker*." (citations omitted)). Indeed, *Booker's* narrow reading of *Watts* was likely necessary to avoid having to overrule the case. Cf. *Melvin*, 258 A.3d at 1089; *Beck*, 939 N.W.2d at 224. *Watts* must yield when in conflict with this large body of law that has since developed. As a summary disposition, *Watts's* reasoning was slight. And this Court has long recognized that it is "less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998); *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) ("A summary disposition does not enjoy the full precedential value of a case argued on the merits ***.").

B. The Sixth Amendment Prohibits Courts from Relying on Acquitted Conduct at Sentencing

The Sixth Amendment's jury-trial right is one of the most "fundamental reservation[s] of power in our constitutional structure." *Blakely*, 542 U.S. at 305-306. It not only gives citizens a voice in the courtroom but also guarantees them "control in the judiciary." Id. at 306. And by giving citizens a voice, it "safeguard[s] a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). Accordingly, the right to a trial by jury is a right "of surpassing importance," *Apprendi*, 530 U.S. at 476, and "occupies a central position in our system of justice." *Batson*, 476 U.S. at 86. The Sixth Amendment right-

to-jury trial grew out of "several centuries" of Anglo-American common-law tradition, under which the right to trial by jury was an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Historically, juries acted as the conscience of the community not only through "flat-out acquittals," but also "indirectly check[ing]" the "severity of sentences" by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones v. United States*, 526 U.S. 227, 245 (1999); see also Matthew P. Harrington, The Law-Finding Function of the American Jury, 1999 Wis. L. Rev. 377, 393-394 (1999). For example, "juries w[ould] often *** bring in larceny to be under the value of twelvepence," and its lower valuation would thereby avoid a mandatory death sentence. 4 William Blackstone, Commentaries on the Laws of England *238-239 (1769). It was therefore common for eighteenth-century jurors to, for example, "down value from grand to petty larceny" based on their determination that "the goods were of relatively small amount." John H. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chi. L. Rev. 1, 54-55 (1983); see, e.g., *State v. Bennet*, 5 S.C.L. 515 (S.C. 1815). Through partial acquittals, juries determined not only guilt but also the defendant's sentence. See Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 70-71 (2003). The common law system "left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the 'judge was meant simply to impose [the prescribed] sentence.'" *Alleyne*, 570 U.S. at 108 (quoting Langbein,

supra, at 36-37; citing 3 William Blackstone, Commentaries on the Laws of England *396 (1768)). Consistent with this history, in the decades since *Watts*, this Court has again focused on the importance of jury factfinding in sentencing. Beginning with *Apprendi*, this Court's sentencing cases have "carrie[d] out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict," because "[w]ithout that restriction, the jury would not exercise the control that the Framers intended." *Blakeley*, 542 U.S. at 306. Accordingly, "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (citations and quotation marks omitted). "It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge." Id. at 949. When courts consider acquitted conduct as a basis for enhancing a defendant's sentence, it undermines the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co.*, 567 U.S. at 350. Traditionally, "[a]n acquittal is accorded special weight." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). "[I]ts finality is unassailable," "[e]ven if the verdict is based upon an egregiously erroneous foundation." *Yeager v. United States*, 557 U.S. 110, 122-123 (2009) (quotation marks omitted). "[I]f [jurors] acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its

rigor ***." *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775-776 (2d Cir. 1942) (L. Hand, J.). But acquitted-conduct sentencing affords the government a "second bite at the apple," in which "the Government almost always wins by needing only to prove its (lost) case to a judge by a preponderance of the evidence." *Canania*, 532 F.3d at 776 (Bright, J., concurring). This "diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment." *Mercado*, 474 F.3d at 658 (Fletcher, J., dissenting). Moreover, "[m]any judges and commentators" have observed that "using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system," *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J., for the court), undermining public perceptions of the importance of jury service and discouraging jurors from taking their duties seriously, see *Canania*, 532 F.3d at 778 & n.4 (quoting letter from juror to judge calling imposition of sentence based on conduct of which jury had acquitted the defendant a "tragedy" that denigrates "our contribution as jurors"). Only this Court can end this abridgement of the fundamental right to a jury trial and restore the jury's role as the "circuit breaker in the State's machinery of justice." *Blakely*, 542 U.S. at 306-307.

C. The Fifth Amendment Prohibits Courts from Relying On Acquitted Conduct At Sentencing

This Court has held that the Due Process Clause works in conjunction with the Sixth Amendment to guarantee fair sentencing procedures. Just as "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge," *Jones*, 574 U.S. at 948 (Scalia, J.,

dissenting from denial of cert.) (citation and quotation marks omitted), due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970). The beyond-a-reasonable-doubt "standard provides concrete substance for the presumption of innocence." *Ibid*. Considering acquitted conduct at sentencing offends the Due Process Clause in several related ways. To begin with, the Clause does not permit courts to treat acquitted conduct as a sentencing factor that can be imposed based on facts found by a preponderance of the evidence, thereby eliminating the core procedural protection of proof beyond a reasonable doubt. Several courts have held that revisiting facts the jury rejected under a preponderance standard deprives the accused of the full benefit of the presumption of innocence. See *Beck*, 939 N.W.2d at 225 ("conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process"); *Marley*, 364 S.E.2d at 139; *Cote*, 530 A.2d at 785. Even *Apprendi* skeptics acknowledge that basing enhancements that drastically increase sentences on findings made by a preponderance could cause "unusual and serious procedural unfairness" that could give rise to due process violations. 530 U.S. at 562-563 (Breyer, J., dissenting). In his *Apprendi* dissent, Justice Breyer posited an "egregious" hypothetical in which a prosecutor charges and convicts a defendant for embezzlement, and then "ask[s] the judge to impose maximum and consecutive sentences because the embezzler murdered his employer." Id. at 562. Justice Breyer acknowledged that the unfairness of such a ploy could be

remedied by "use of a 'reasonable doubt' standard *** and invocation of the Due Process Clause." Id. at 562-563; accord *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (similar).

This case, in which petitioner's sentence was more than tripled based on drugs and a murder of which the jury acquitted him, obviously implicates the concerns Justice Breyer identified. A court's reliance on acquitted conduct also implicates due process concerns because it increases the risk of inaccurate sentencing. Even when a defendant has previously been convicted of a crime, this Court has cautioned that reliance on facts underlying those prior convictions may raise concerns about "unfairness" and lead to "error." *Mathis v. United States*, 579 U.S. 500, 501 (2016). Those same accuracy concerns obviously apply when the court relies on facts underlying prior jury acquittals, i.e., facts that the jury determined the prosecution had failed to prove. See *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948) (saying of person whose sentence was enhanced because of acquitted conduct, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result *** is inconsistent with due process of law, and such a conviction cannot stand." (emphasis added)). Lastly, some jurists have written that the consideration of acquitted conduct undermines "the notice requirement that is at the heart of any criminal proceeding." *Canania*, 532 F.3d at 777 (Bright, J., concurring). If the court is permitted to consider acquitted conduct during sentencing, "a defendant can never reasonably know what his possible punishment will be"; after all, "[i]t is not unreasonable for a defendant to expect that conduct underlying a

charge of which he's been acquitted to play no determinative role in his sentencing." Ibid.

III. This Case Presents an Ideal Vehicle to Resolve the Question Presented

This case presents an excellent vehicle for the Court to consider whether the Fifth or Sixth Amendments prohibit consideration of acquitted conduct at sentencing. 1. The record in this case is straightforward and there are no relevant factual disputes. Petitioner's sentence was indisputably based on conduct of which he was acquitted. The acquitted conduct at issue "constituted entirely free-standing offenses under the applicable law" that was "named in the indictment as a complete criminal charge," *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring), and the jury unequivocally marked on the verdict form that petitioner was not guilty.

This case also provides an excellent vehicle because, absent consideration of the acquitted conduct, petitioner's sentence would plainly be unreasonable, because the resulting enhancement more than tripled the otherwise applicable Guidelines range from 46 to 57 months to a sentence of 180 months' imprisonment. App.12a.

If the court's reliance on acquitted conduct was impermissible, such a large variance would be unreasonable and require resentencing. See *Gall v. United States*, 552 U.S. 38, 51 (2007). Thus, the issue here is outcome determinative.

Petitioner challenged acquitted-conduct sentencing at every step of the litigation, and both courts addressed and rejected his claim.

At the sentencing hearing, the government recommended that Petitioner receive a prison sentence of 20 years after determining that his base offense level was 43 under the United States Sentencing Guidelines ("USSG"). App. 5a, 23a.

In order to adopt that base offense level and follow the government's recommendation, the District Court needed to conclude that Andino "participated in the murder of Montañez" and apply § 2A1.1 of the Guidelines, even though the jury had acquitted Andino of the VICAR offense that was premised on the murder of Montañez. Section 2A1.1 of the Guidelines "applies in cases of premeditated killing," as well as "when death results from the commission of certain felonies, e.g., murder in aid of racketeering." USSG § 2A1.1(a). App. 6a.

The court "recognize[d] that the jury acquitted Mr. Andino of the count related to the death of Mr. Montanez. But the court concluded that the acquittal did not prevent the court from considering the murder in sentencing because "the jury finding was beyond a reasonable doubt, but the government's burden in a sentencing hearing, is by a preponderance of the evidence.

In Blakely, the Court termed "absurd" the idea "that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it," a result that "[n]ot even *Apprendi's* critics would advocate." *Blakely*, 542 U.S. at 306-307. And even while dissenting in *Apprendi* and *Blakely*, Justice Breyer twice acknowledged that under "egregious" circumstances, a constitutional violation could arise when conduct found by a preponderance so increases a sentence as "to be a tail which wags the dog of the substantive offense."

Apprendi, 530 U.S. at 563 (Breyer, J., dissenting) (quotation marks omitted). Both times Justice Breyer chose the same crime to illustrate his example: murder. Id. at 562; accord Blakely, 542 U.S. at 344 (Breyer, J., dissenting).

This case presents the issue of acquitted-conduct sentencing particularly starkly. The sentencing judge more than tripled petitioner's sentence based on its finding that petitioner had participated with other inmates in the hired killing of Mr. Mario Montanez, also an inmate at the state correctional facility they were housed in. Also, the testimony of other inmates who testified during trial that the Petitioner sold drugs in the prison. The District Court plainly ignored the jury verdict who by proof beyond a reasonable doubt found Petitioner not guilty on both these counts.

This case thus presents a compelling illustration of how acquitted conduct sentencing eliminates the jury's role "as circuit breaker in the State's machinery of justice" and instead "relegate[s]" the jury to "a mere preliminary" role of deciding which minor offense will serve as the predicate for "the crime the State actually seeks to punish." *Blakely*, 542 U.S. at 306-307. In sum, this case presents an ideal opportunity for this Court to address the growing concerns about a persistent practice that has long troubled federal jurists. As Justices Scalia, Thomas, and Ginsburg wrote nearly a decade ago: "This has gone on long enough." Jones, 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). The Court "should grant certiorari to put an end to the unbroken string of cases disregarding" the Constitution and this Court's precedents. Id. at 950.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari.

Respectfully submitted,

DAVID RAMOS-PAGAN
CJA Court Appointed for Petitioner

By: **s/*DAVID RAMOS-PAGAN***
San Juan, Puerto Rico

September 26, 2023

APPENDIX

TABLE OF APPENDICES

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Appendix A

United States Court of Appeals
For the First Circuit

No. 19-2253

UNITED STATES OF AMERICA,

Appellee,

v.

JOSÉ R. ANDINO-MORALES,

Defendant, Appellant.

No. 19-2262

UNITED STATES OF AMERICA,

Appellee,

v.

JOSÉ D. FOLCH-COLÓN,

Defendant, Appellant.

No. 20-1274

UNITED STATES OF AMERICA,

Appellee,

v.

ANIBAL MIRANDA-MONTAÑEZ,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Timothy S. Hillman, U.S. District Judge]

Appendix A

Before

Barron, Chief Judge,
Thompson, Circuit Judge,
and Burroughs, District Judge.*

David Ramos-Pagan, for appellant José R. Andino-Morales.
Laura Maldonado-Rodríguez, for appellant José D. Folch-Colón.
Victor A. Ramos-Rodríguez, for appellant Anibal Miranda-Montañez.
Francisco A. Besosa-Martínez, Assistant United States Attorney, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

July 11, 2023

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* Of the District of Massachusetts, sitting by designation.

Appendix A

BARRON, Chief Judge. These consolidated appeals arise out of the federal investigation into the criminal activities of La Asociación ÑETA ("ÑETA"), an organization whose members allegedly trafficked contraband and carried out murders-for-hire throughout several prisons in Puerto Rico. The three appellants in this case -- José R. Andino-Morales ("Andino"), José J. Folch-Colón ("Folch"), and Anibal Miranda-Montañez ("Miranda") -- were convicted in the United States District Court for the District of Puerto Rico of conspiring to participate in ÑETA through a pattern of racketeering activity ("RICO") in violation of 18 U.S.C. § 1962(d). Folch and Miranda were also convicted of conspiracy to possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846, and of committing a violent crime in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) and (2), otherwise known as a "VICAR" offense. Folch and Miranda were each sentenced to multiple, concurrent terms of life imprisonment, while Andino was sentenced to a term of imprisonment of fifteen years.

All three appellants argue that the evidence is insufficient to support one or more of their convictions. Folch and Miranda also bring challenges to the District Court's jury instructions. Folch additionally contends that an improper statement by the prosecution warranted a mistrial. Finally, Andino

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challenges his sentence as procedurally unreasonable. We affirm across the board.

I.

Several decades ago, incarcerated persons in Puerto Rico founded ÑETA, also known as "La Asociación Pro Derechos y Rehabilitación del Confinado." The stated purpose of the organization at the time was to advocate for the rights of inmates in the Puerto Rico prison system. But, following a criminal investigation into ÑETA's activities, federal authorities in 2016 returned an indictment in the District of Puerto Rico alleging that ÑETA had evolved into "a criminal organization whose members and associates engaged in drug distribution and acts of violence, including murder."

The indictment charged fifty individuals, including the three appellants, whom the indictment alleged were ÑETA members, with various offenses. The government charged all three appellants with RICO conspiracy in violation of 18 U.S.C. § 1962(d) (Count One), and conspiracy to possess with the intent to distribute controlled substances in violation of 21 U.S.C. § 846 (Count Two). The government also charged Andino with committing a VICAR offense in violation of 18 U.S.C. § 1959(a)(1)-(2) (Count Three), and Folch and Miranda with committing a VICAR offense in violation of 18 U.S.C. § 1959(a)(1)-(2) (Count Four). The appellants were also

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D.

There remains only Andino's challenge to his sentence, which takes aim solely at its procedural reasonableness. See United States v. Politano, 522 F.3d 69, 72 (1st Cir. 2008) (citing Gall v. United States, 552 U.S. 38, 51 (2007)). The first aspect of the challenge concerns the District Court's consideration of conduct of which Andino had been acquitted and takes aim at the District Court's supposed reliance on findings relating both to the murder of Montañez and to his alleged involvement in drug trafficking on behalf of ÑETA. The second aspect of the challenge concerns the District Court's explanation -- or lack thereof -- for the chosen sentence. The challenge is without merit.

1.

The government recommended below that Andino receive a prison sentence of 20 years after determining that Andino's base offense level was 43 under the United States Sentencing Guidelines ("USSG").[5] The government does not dispute that to adopt that base offense level and follow the recommendation, the District Court needed to conclude that Andino "participated in the murder of Montañez" and apply § 2A1.1 of the Guidelines, even though the

[5] As the government explained in its sentencing memorandum, the recommended Guidelines range for a base offense level of 43 is a life sentence, but the statutory maximum for Andino's conviction was 20 years of imprisonment.

jury had acquitted Andino of the VICAR offense that was premised on the murder of Montañez (Count III). Section 2A1.1 of the Guidelines "applies in cases of premeditated killing," as well as "when death results from the commission of certain felonies . . . e.g., murder in aid of racketeering." USSG § 2A1.1(a).

Andino argues that, accordingly, the record shows that the District Court premised the sentence on acquitted conduct in applying that guideline to his case. He then contends -- as he did below -- that it was error for the District Court to do so because the record does not suffice to show by a preponderance of the evidence that he engaged in that conduct. See United States v. Watts, 519 U.S. 148, 157 (1997).

As the government explains, "the relevant federal sentencing statute requires a reviewing court not only to 'accept' a district court's 'findings of fact' (unless 'clearly erroneous'), but also to 'give due deference to the district court's application of the guidelines to the facts." Buford v. United States, 532 U.S. 59, 63 (2001) (quoting 18 U.S.C. § 3742(e)). And, "the argument for deference peaks when," as here, "the sentencing judge has presided over a lengthy trial and is steeped in the facts of the case." United States v. Sepulveda, 15 F.3d 1161, 1200 (1st Cir. 1993).

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Andino argues that the record shows that text messages and a call log from another inmate's cell phone that allegedly link Andino to the murder refer to him only as "Indio," a purported reference to his nickname "Indio Gladiola." Yet, he argues, the evidence also shows that there was another ÑETA member whose nickname was "Indio Muriel," and that no evidence was presented to show that the "Indio" referred to in those communications was in fact Andino. He then goes on to argue that the only other evidence regarding his participation in the murder amounts to testimony of "witnesses who heard from others that 'Indio' had participated in the murder," such that "the only other evidence corroborating these statements" would be the disputed communications. That being so, he contends, the District Court erred in finding by a preponderance that he participated in the murder and so erred in applying the guideline in question.

Andino is wrong, however, that "the only other evidence" linking him to the murder was the testimony of "witnesses who heard from others that 'Indio' had participated in the murder." Indeed, one witness testified that he had heard that "Indio Gladiola" had participated in the murder. Another witness testified, after confirming that the "Indio Gladiola that [he was] referring to" was "Jose Andino Morales," that Andino was among the group of inmates whom the witness personally confronted as the group was on

its way to commit the murder, and that Andino later expressed regret to him for Andino's role in the murder.

Andino makes no other argument for how the cell phone-related evidence is necessary to support the District Court's conclusion. Nor does he explain how the testimony that refers to him as more than just "Indio" does not independently suffice to support that conclusion. Thus, given the deference due to the District Court in assessing the record, we cannot conclude that the District Court erred in finding by a preponderance of the evidence that Andino participated in the murder of Montañez.

Andino also argued below, and he argues again on appeal, that the District Court erred by considering drug-related conduct in its sentencing determination even though the jury acquitted Andino of the drug conspiracy under Count Two and, in its special findings for his RICO conspiracy conviction under Count One, did not hold him responsible for any quantities of drugs. In so contending, Andino argues that the evidence regarding his involvement in drug trafficking does not suffice to meet the preponderance standard necessary to permit the District Court to consider this acquitted conduct.

It is not entirely clear how, according to Andino, the District Court's sentencing determination may be understood to have rested on a finding that he engaged in the drug-related

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conduct. But, even assuming that the District Court considered Andino's drug-related conduct at sentencing, the challenge fails, given the presence in the record of the same drug-related evidence that we recounted in affirming Andino's RICO conspiracy conviction.

Andino also argues that the District Court could not consider his acquitted drug-related conduct at all in this circumstance because the jury made "special findings" that Andino was not responsible for any quantities of drugs, as opposed to simply a "general verdict" of acquittal. But, Andino cites no support for the contention that a district court may consider acquitted conduct only when dealing with a "general verdict" and not "special findings." We therefore reject this aspect of Andino's sentencing challenge as well.

2.

Andino separately challenges his sentence on the ground that the District Court erred by failing to "state in open court the reasons for its imposition of the particular sentence." Because Andino did not raise this objection below, our review is only for plain error, which means that Andino must show: "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected [his] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial

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proceedings." United States v. Romero, 896 F.3d 90, 92 (1st Cir. 2018) (quoting United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001)). Yet, Andino has failed on appeal "to even attempt to explain how the plain error standard has been satisfied." United States v. Severino-Pacheo, 911 F.3d 14, 20 (1st Cir. 2018). He has therefore "waived any appellate argument concerning the procedural reasonableness of his sentence" on this basis. Id. (citing United States v. Pabon, 819 F.3d 26, 33-34 (1st Cir. 2016)).

IV.

The judgment of the District Court is **affirmed**.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

Appendix B

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA
v.
Jose Ramon ANDINO-MORALES

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:16-CR-0282-047 (TSH)

USM Number: 46634-069

David Ramos-Pagan, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One (1) on April 12, 2019

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1962(d) and 1963(a)	Racketeer Influenced and Corrupt Organizations Act.	5/9/2016	One (1)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) Two (2) and Three (3)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/21/2019
Date of Imposition of Judgment

S/ TIMOTHY S. HILLMAN
Signature of Judge

Timothy S. Hillman, U.S. District Judge
Name and Title of Judge

11/21/2019
Date

Appendix B

DEFENDANT: Jose Ramon ANDINO-MORALES
CASE NUMBER: 3:16-CR-0282-047 (TSH)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One Hundred and Eighty (180) months. Credit shall be given for any days spent in federal custody in connection with the offenses for which sentence has been imposed.

☑ The court makes the following orders and recommendations to the Bureau of Prisons:

It was recommended that this defendant be allowed to serve the term of imprisonment at Ft. Dix, NJ.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT: Jose Ramon ANDINO-MORALES
CASE NUMBER: 3:16-CR-0282-047 (TSH)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Five (5) years under the following terms and conditions:

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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DEFENDANT: Jose Ramon ANDINO-MORALES
CASE NUMBER: 3:16-CR-0282-047 (TSH)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Jose Ramon ANDINO-MORALES
CASE NUMBER: 3:16-CR-0282-047 (TSH)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in transitional and reentry support services, including cognitive behavioral treatment services, under the guidance and supervision of the probation officer. The defendant shall remain in the services until satisfactorily discharged by the service provider with the approval of the probation officer.

2. The defendant shall participate in an approved substance abuse monitoring and/or treatment services program. The defendant shall refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release; thereafter, submit to random drug testing, no less than three (3) samples during the supervision period and not to exceed 104 samples per year accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court. If deemed necessary, the treatment will be arranged by the officer in consultation with the treatment provider. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the Probation Officer based on the ability to pay or availability of third party payment.

3. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

4. The defendant shall cooperate in the collection of a DNA sample as directed by the Probation Officer, pursuant to the Revised DNA Collection Requirements, and 18 U.S.C. §3563(a)(9).

5. The defendant shall submit to a search of his person, property, house, residence, vehicles, papers, computer, other electronic communication or data storage devices or media, and effects (as defined in 18 U.S.C. § 1030(e)(1)), to search at any time, with our without a warrant, by the probation officer, and if necessary, with the assistance of any other law enforcement officer (in the lawful discharge of the supervision functions of the probation officer) with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The probation officer may seize any electronic device which will be subject to further forensic investigation/analyses. Failure to submit to such a search and seizure, may be grounds for revocation. The defendant shall warn any other residents or occupants that their premises may be subject to search pursuant to this condition.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Appendix B

DEFENDANT: Jose Ramon ANDINO-MORALES
CASE NUMBER: 3:16-CR-0282-047 (TSH)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

Appendix B

DEFENDANT: Jose Ramon ANDINO-MORALES
CASE NUMBER: 3:16-CR-0282-047 (TSH)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
Forfeiture is ordered as to Counts One pursuant to Title 18, U.S.C. §1963 and Title 21, U.S.C. §853.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Appendix C

UNITED STATES DISTRICT COURT

DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

Docket No. 16-282

JOSE R. ANDINO MORALES,

San Juan, Puerto Rico
November 21, 2019

Defendant.

SENTENCING HEARING

BEFORE THE HONORABLE JUDGE TIMOTHY S. HILLMAN,

UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Government: Mr. Victor Acevedo Hernandez, AUSA

For the Defendant: Mr. David Ramos Pagan, Esq.

Proceedings recorded by stenography. Transcript produced by CAT.

I N D E X

PAGE

WITNESSES:

None offered.

EXHIBITS:

None offered.

San Juan, Puerto Rico

November 21, 2019

At or about 9:24 AM

* * *

COURTROOM DEPUTY: Criminal case 16-282, *United States of America versus Jose Andino Morales*. Case called for sentence. On behalf of the government, Assistant U.S. Attorney Victor Acevedo. Appearing on behalf of defendant, Attorney David Ramos Pagan.

Defendant is present. Does defendant need the interpreter?

MR. RAMOS PAGAN: Your Honor, he understands the English language and he doesn't need the services of an interpreter, translator.

Good morning, Your Honor.

THE COURT: Good morning. Give me just one minute, please.

MR. RAMOS PAGAN: Sure.

THE COURT: Okay. Good morning. Mr. Acevedo, for the United States.

MR. ACEVEDO HERNANDEZ: Yes, Your Honor. Good morning.

THE COURT: And Mr. Ramos Pagan, for the defendant.

MR. RAMOS PAGAN: That's right, Your Honor.

THE COURT: Good morning again.

MR. RAMOS PAGAN: David Ramos on behalf of Mr. Jose Andino Morales. We are ready to proceed.

THE COURT: Thank you.

All right. So in preparation for, excuse me, Mr. Andino Morales' sentencing, I have read and reviewed the presentence investigative report prepared by Ms. Aparicio. I'm unaware of any other materials.

Are you, Mr. Acevedo?

MR. ACEVEDO HERNANDEZ: We filed a sentencing memo, Your Honor.

THE COURT: All right. I did see that.

Other than that, you are aware of any other materials?

MR. ACEVEDO HERNANDEZ: No, Your Honor.

THE COURT: Mr. Ramos, you?

MR. RAMOS PAGAN: Our sentencing memorandum, also.

THE COURT: Yes. I saw those.

MR. RAMOS PAGAN: Other than that, I have no knowledge of any others.

THE COURT: Thank you.

So just to set the table, Mr. Andino Morales presents with a base offense level of 43, to which there are no adjustments, and he has a criminal history score of 11, which makes his Criminal History V.

Do you agree with that assessment?

MR. ACEVEDO HERNANDEZ: Yes, Your Honor.

THE COURT: And do you?

MR. RAMOS PAGAN: No, Your Honor.

As to the base offense level of 43, we strongly object to that, as we stated in our sentencing memorandum. We -- after reading and reviewing the original Presentence Report, the amended one, as well as the addendum that was filed this past week, we understand that the interpretation given to it by the Probation Office was based on case law and law, but we submit that considering acquitted conduct for purposes of sentencing, although there is case law in favor of it, we would -- for purposes of appeal, we would object to it on concerns of violations to due process, as well as to the Sixth Amendment of the Constitution, Your Honor.

And we understand that the base offense level in this case should be at level 19, instead of the 43 that is being recommended in the Presentence Investigation Report. That is our position.

THE COURT: Thank you. And your position is so noted.

All right. So Mr. Andino, what I'm going to do is I'm going to hear from the United States first with respect to the sentence they're going to recommend that I impose. And then I will hear from Mr. Ramos. And then, after Attorney Ramos speaks, if you would like to say something, that would

be the time I would hear from you.

You don't have to say anything, but if you did, I just wanted to let you know when it would be so you could kind of prepare that. Okay?

Mr. Acevedo, please.

MR. ACEVEDO HERNANDEZ: Your Honor, in this case, the United States is recommending a guideline sentence, which in this case, because there is a statutory maximum of 20 years, is 20 years. If not, it would be a guideline sentence of life.

Our recommendation is based on the fact that the nature and circumstances of the offense, by a preponderance of the evidence, the same reflects that the defendant here participated in murder. This is just -- this is supported by the testimony of two cooperating witnesses and a cell phone seized, in addition to other evidence. But more so, when you look at his prior history and characteristics, this is a defendant that has had continuous brushes with the law.

In 1996, 1999, and 2012, he was convicted for pretty serious offenses. We're talking about robbery, weapon charges. And when you have someone that has had that history, and now you have evidence of him involved in murder while in prison, and being a member of a gang, and also actually selling drugs for the gang, we would submit that a guideline sentence is justified under the 3553(a) factors.

So that would be our submission, Your Honor.

MR. RAMOS PAGAN: Again, Your Honor, we strongly object to the -- what the government has just proposed. As the Court is aware, he was acquitted of the murder and conspiracy in aid of murder. And although the case law, which was -- in *United States versus Watson*, it says that it was mentioned by the Supreme Court that, a jury cannot be said to have necessarily rejected any facts when it returns a general -- general verdict of not guilty.

However, we submit that the verdict rendered in Mr. Andino's case was more than a general verdict. It was a verdict with specific findings, both as to the drug amounts and as to the murder, Your Honor. We're talking about a government witness, Miguel Angel Alvarez, who, in his own words, he stated, upon being cross-examined by brother counsel, Juan Matos, he stated that he would not do anything unless the government approved of it. And we see that what was -- what he was inferring was that he would tailor his testimony in order to benefit himself, in order to gain something in his favor, which is a reduced sentence, Your Honor.

As to Mr. Andino's 3553 factors, Your Honor, we understand, and we will not deny the fact that he has a criminal history, which in the Presentence Report was calculated at a level five. We understand that, Your Honor,

and we accept that, that that's how it is.

However, Your Honor, given Mr. Andino's childhood, traumatic childhood, given what we mentioned about his mother -- he lost his mother at a very young age. He later went to live with his father and grandfather, which was an environment full of violence. And then at the age of 18, he went out into life to fend for himself with what he learned in that environment, Your Honor.

And he has been in jail in the prison system at various times, and he paid his time, Your Honor. He paid time for it. And in 2014, he was released on extended pass, because he displayed good conduct during his last sentence at the state correctional facility, Your Honor.

We understand that after that, he was picked up while he was already freed from the prison system to answer for this case, and he went to trial. We saw the results. And, Your Honor, we would submit that -- one more thing, Your Honor. While he was at MDC, he had displayed good conduct. And while he was trans -- when he was transferred to I believe it was in Mississippi --

THE DEFENDANT: Atlanta. I was transferred there to --

MR. RAMOS PAGAN: Okay. In the United States, he helped serve the Bureau personnel as a translator. He was already displaying conduct, displaying positive changes in his

life, being a productive citizen. And that is his goal. That is his aim when he exits the prison system, to return to the street, be a good grandfather to his grandchild, share with his children, and get a job.

He wishes to continue building his skills as a translator, which what I -- I was discussing a while ago with the translator about a program called Wordreference.com, where Mr. Andino would benefit from that and become -- hone his skills to continue serving as a translator.

Therefore, Your Honor, we submit that given his characteristics, that the Court would give him -- grant him for benefit -- for the purposes of the sentencing hearing, a sentence considering what the result of the verdict was, and that it not give weight to the acquitted conduct that was -- for which he was absolved, Your Honor.

THE COURT: Thank you, Mr. Ramos.

MR. RAMOS PAGAN: Thank you. Yes.

THE COURT: Mr. Andino, do you wish to say anything before I impose sentence on you?

THE DEFENDANT: Yes, sir.

THE COURT: Please.

THE DEFENDANT: Sir, I cannot deny I had some brushes with the law, Your Honor, but since some years ago, I've been trying to -- trying to, you know, straighten my life. I'm already 42 years old, and I'm already a grandfather. I just

wish to go back to my family, to my daughters, to my grandsons, and, you know, I'm -- and make a good life, be a good example for them, you know.

But I've been trying so hard, you know. And, you know, this thing happened, this indictment happened. And, you know, I was already in my house trying to, you know, to make a good living and to be a good example. And this caught me by surprise, but for something I really -- I went to trial because I'm really innocent, you know.

But as soon as you walk in the state prison, you need to -- you have to be in one of the groups that are there. You have to be. That's like I would say compulsory. You need to be with one of the groups, or you have to be with the rapists, or all of the abusive people in the security area, so nobody wants to be there unless they have those type of troubles.

So I went to the Ñeta group, but I wasn't part of it. I never sold drugs in prison. I'm against drugs. If you look at my record, you will never see a positive, a positive test or whatever, because I don't like drugs. I don't deal with drugs. And I will never kill nobody unless it would have been, you know, my life or my family's life, somebody who make -- who might harm my family or me, you know.

I don't know what else to say, sir. You know, I really don't have anything else to say, sir. I just want you to consider that I really want to be with my family, and I --

and I really -- I'm really innocent of what I was accused and which I went to trial for.

And thank God I won, you know, the baddest part of the trial. I understood, as you know, with the conspiracy, you know, I can -- I have nothing else to say, sir.

Thank you for listening to me.

THE COURT: Thank you, Mr. Andino.

THE DEFENDANT: Si.

(Whereupon a discussion was held off the record with the Court and probation officer.)

THE COURT: All right. Mr. Andino Morales, pursuant to the Sentencing Reform Act, it is the judgment of this Court that you be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months.

Upon release from confinement, you shall be placed on supervised release for a term of five years, under the following terms and conditions. You shall not commit another federal, state, or local crime.

You are not to possess -- unlawfully possess a controlled substance.

You are to refrain from possessing a firearm, destructive device or dangerous weapon.

You are to participate in transitional and/or re-entry support services, as designated by the Probation Office, and remain in those services until satisfactorily

discharged.

You shall provide the Probation Office access to the any financial information that may be needed.

You are to cooperate in the collection of a DNA sample as directed by the Probation Office pursuant to the statute.

You are to submit your person, property, home, vehicles, papers, computers, and any other electronic communication or storage devices to a search by the United States Probation Office at reasonable times and in a reasonable manner.

You shall participate in an approved substance abuse monitoring and/or treatment program, and shall refrain from the unlawful use of controlled substances.

You shall submit to drug tests within 15 days of release, and to random drug testing thereafter, not to exceed 104 samples per year.

I impose no fine, as I find you have no financial ability to pay a fine. And I impose a financial -- a monetary assessment in the amount of 100 dollars.

You have a right to appeal your sentence since you were found guilty after a plea of not guilty and then trial. Your Notice of Appeal shall be filed with the District Court within 14 days from the date when judgment is entered.

You have a right to apply to appeal -- you have a

right to apply for leave to appeal in forma pauperis if you are unable to pay the costs of appeal.

If you are represented by Court appointed counsel, he will continue to represent you through your appeal, if any, unless a substitute counsel is later appointed.

You will be given credit to your sentence for any days spent in federal custody in connection with the offense for which your sentence has been imposed.

I direct that the transcript of the sentencing proceedings be forwarded to the Sentencing Commission, U.S. Bureau of Prisons, as well as the Probation Office within 30 days.

Mr. Acevedo, anything further?

MR. ACEVEDO HERNANDEZ: None from the United States, Your Honor.

THE COURT: And Mr. Ramos?

MR. RAMOS PAGAN: Yes, Your Honor.

For purposes of appeal, Your Honor, we humbly and respectfully object to the sentence, for the reasons we already expressed, in addition to the right to due process, as well as the Sixth Amendment concerning any acquitted conduct that was taken into consideration for -- in crafting this sentence.

And also, Your Honor, for -- we would renew our -- the arguments that we expressed in our Rule 29 motion for

purposes of appeal.

Thank you, Your Honor.

One more thing, Your Honor. A recommendation that -- we request a recommendation that he serve the remaining of his sentence in prison -- prison sentence at Fort Dix in New Jersey, Your Honor.

THE COURT: I will make that recommendation. If it helps, I hope you get it. And it's only a recommendation. I don't have the ability to do that.

So listen, I know this is a bad day, okay? But frankly, you have a lot going for you. You have people here that support you. That's important. And more importantly, you have a plan, and that's good.

I cannot tell you how badly we all need interpreters. So I hope that works out for you. If there's anything I can do, just let your lawyer know and I will see what I can do. Okay?

THE DEFENDANT: Very good, sir.

THE COURT: Okay. Good luck.

THE DEFENDANT: Thank you.

MR. RAMOS PAGAN: We thank you, Your Honor. And we really appreciate and it was an honor litigating before Your Honor.

THE COURT: Same here. Same here, Counsel. Thank you. Thank you.

Appendix C

COURT SECURITY OFFICER: All rise.

(Whereupon proceedings concluded.)

* * *

U.S. DISTRICT COURT)

DISTRICT OF PUERTO RICO)

I certify that this transcript consisting of 16 pages is a true and accurate transcription to the best of my ability of the proceedings in this case before the Honorable United States District Court Judge Timothy S. Hillman on November 21, 2019.

S/ Amy Walker

Amy Walker, CSR 3799

Official Court Reporter

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES of AMERICA **v.** **JOSE R. ANDINO-MORALES,** **a/k/a "Gladiola," [47],** **Defendant.**	**Criminal No.** **16-00282-TSH**

Received & filed
April 12, 2019 5:35pm

VERDICT FORM

COUNT ONE: As to Count One charging violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), we the jury unanimously find the Defendant Jose Andino-Morales:

_____ Not Guilty X Guilty

COUNT TWO: As to Count Two charging Conspiracy to Possess with Intent to Distribute a Controlled Substance, we the jury unanimously find the Defendant Jose Andino-Morales:

X Not Guilty _____ Guilty

Appendix D

Only make the following findings if you have found the Defendant Jose Andino-Morales Guilty as to COUNT ONE (RICO Violation) and/or Count TWO (Conspiracy to Possess with Intent to Distribute and to Distribute a Controlled Substance), otherwise proceed to Count Three.

We, the jury, unanimously make the following findings as to Defendant Jose Andino-Morales:

How much heroin did the conspiracy involve? (Select One)

_____ One (1) kilogram or more
_____ Less than one (1) kilogram
_____ Less than on hundred (100) grams
__X__ None

How much cocaine did the conspiracy involve? (Select One)

_____ Five (5) kilograms or more
_____ Less than five (5) kilograms
_____ Less than five hundred (500) grams
__X__ None

How much marijuana did the conspiracy involve? (Select One)

_____ One-Hundred (100) kilograms or more
_____ Less than One-Hundred (100) kilograms
_____ Less than fifty (50) kilograms
__X__ None

COUNT THREE: As to Count Three, commission of a Violent Crime in aid of RICO Activity, we, the jury, unanimously find that the Defendant Jose Andino-Morales as part of the racketeering conspiracy, committed or knowingly participated in committing the murder of Mario Montanez-Gomez a/k/a "Emme" on or about August 27, 2014:

__X__ No _____ Yes

Your deliberations are complete. Please notify the court security officer in writing that you have reached a verdict.

FOREPERSON: [redacted] DATE: April 17, 2019