

No. \_\_\_\_\_

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IN THE  
Supreme Court of the United States

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JOSÉ FOLCH-COLÓN,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

If by procuring and paying for the commission of murder, Petitioner aided and abetted a crime of violence in aid of racketeering (VICAR) as defined in 18 U.S.C. §§ 2 and 1959(a), absent evidence of payment to the enterprise and without need to prove the motive element.

## **PARTIES**

José Folch-Colón, petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellant below.

## **RELATED PROCEEDINGS**

The following proceedings are directly related to this case.

- *United States v. Folch-Colón*, No. 19-2262 (1st Cir. July 11, 2023).
- *United States v. Folch-Colón*, No. 3:16-cr-282-TSH.

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**OPINIONS BELOW**

José Folch-Colón [hereinafter “Folch” or “Petitioner”] respectfully petitions for a writ of certiorari to review the judgment of the First Circuit, issued July 11, 2023. App. 1a-30a.

**JURISDICTION**

The First Circuit entered judgment on July 11, 2023. The time to file a petition expired on October 9, 2023<sup>1</sup>, a federal legal holiday listed in Title 5 U.S.C. § 6103,

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<sup>1</sup> Columbus Day

therefore, the petition for a writ of certiorari must be filed by October 10, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

Title 18 U.S.C. § 1959(a) provides:

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do.

Title 18 U.S.C. § 2(a) and (b) provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

### **STATEMENT**

The First Circuit's decision finds the government presented sufficient evidence to prove aiding and abetting a violent crime in aid of racketeering because the Petitioner paid for a murder for purely personal reasons and then participated in a call to request satisfaction of his contract. In finding the evidence sufficient, the First

Circuit did not point to the Petitioner “aiding racketeering,” leaving his participation to be proven by his procuring and paying for the murder to be carried out.

The question presented is whether by procuring and paying for the commission of murder, Petitioner aided and abetted a crime of violence in aid of racketeering (VICAR) as defined in 18 U.S.C. § 1959(a), absent evidence of payment to the enterprise and without need to prove the motive element, that is, that the murder was carried out for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.

The First Circuit’s decision conflicts with the Second Circuit’s opinion in *United States v. Thai*, 29 F.3d 785 (2d Cir. 1994), where the Second Circuit found that a evidence of a violent act motivated by purely mercenary reasons is insufficient to violate 18 U.S.C. § 1959(a).

Because evidence against the Petitioner was insufficient to prove he engaged in a violent act in aid of racketeering, the petition for a writ of certiorari should be granted.

#### **A. The Opinion’s Factual Background**

“La Asociación Pro Derechos y Rehabilitación del Confinado”,<sup>2</sup> identifying themselves as “los NETA”,<sup>3</sup> was organized many decades ago with the stated

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<sup>2</sup> Association for the rights and rehabilitation of inmates.

<sup>3</sup> Cannot be translated.

purpose of advocating for the rights of inmates in the Puerto Rico prison system. But, following a criminal investigation into NETA's activities, federal authorities in 2016 returned an indictment in the District of Puerto Rico alleging that NETA had evolved into a criminal organization whose members and associates engaged in drug distribution and acts of violence, including murder. App. 4a.<sup>4</sup>

Folch helped coordinate NETA's drug and cell phone trafficking activities in the "Green Monster" prison by serving as an "advisor" for the chapter leadership at that facility. App. 6a.

Folch sought authorization from the maximum leadership of the NETA to kill an inmate named Alexis Rodríguez-Rodríguez ("Rodríguez") at the Ponce Main prison and paid for the murder. App. 6a, 20a, 21a.

## **B. Other Portions of the Record**

The trial record cited by the petitioner before the Court of Appeals is necessary to supplement the background cited by the appellate court.<sup>5</sup> The Petitioner paid Millan with drugs for personal use to murder Rodríguez. App. 52b. Millan became unavailable due to an administrative violation that moved him to another unit. App. 53b. As a result of his transfer, Millan orders Gonzalez Gerena, the government's

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<sup>4</sup> Appendix pages are designated App. and the page number of the appendix, and a letter **a** for Appendix A and **b** for Appendix B.

<sup>5</sup> Rule 14(j)(vi) of the Supreme Court Rules.

main witness, to commit the murder. App. 53b. González Gerena testified Folch had paid for the murder of Rodríguez because he, Rodríguez, had threatened to kill Folch’s father, mother, and family, upon his release from prison, over a dispute between drug points on the street. App. 53b, 85b. The Petitioner paid the participants in Rodriguez’s murder directly. App. 85b, 88b. Gonzalez Gerena admitted in cross-examination that the reason for the murder had nothing to do with the NETA. App. 88b. Telephone calls between leadership members of the NETA prove the murder was not authorized by the enterprise. App. 54b-55b.

### **C. The First Circuit’s Affirmance of Folch’s VICAR conviction**

The Court of Appeals found the evidence established that Folch paid Millán for the murder of Rodríguez, which constitutes causing the crime of murder. App. 20a. When the analysis turned to the commission of a crime of violence “in aid of racketeering”, the Court of Appeals concluded that “for purposes of aiding and abetting law, the intent requirement is satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense. (internal quotations omitted) citing *Rosemond v. United States*, 572 U.S. 65, 77 (2014). The First Circuit concluded that “full knowledge must include knowledge that those who committed the murder of Rodríguez did so for the purpose of gaining entrance to or maintaining or increasing position in NETA.” App. 20-21.

To explain how, by procuring and paying for Rodriguez's murder, the Petitioner aided and abetted gaining entrance to or maintaining or increasing position in the NETA, the Court of Appeals explained that "Folch convinced the Maximum Leadership, namely Millán, to have members of murder Rodríguez, and that he paid Millán to do it." App. 21a. The First Circuit added that Petitioner and the member of the Maximum Leadership "together called one of the NETA members who murdered Rodríguez -- Jose González-Gerena -- when there was a delay in carrying out the murder. González himself testified that, on that call, Millán scolded him for the delay in doing what Millán had told him to do and commanded González to do that as soon as possible." App. 21a. From this, the Court of Appeals concludes that "a rational juror [could] find beyond a reasonable doubt that Folch understood that Millán ordered González to carry out the murder in Millán's capacity as a member of the Maximum Leadership, and that, on the phone call, Millán leveraged that authority to demand that González carry out the order." App. 21a. This evidence, concludes the Court of Appeals, is sufficient to support the conclusion that the Petitioner "not only actively participated in the criminal venture to murder Rodríguez, but also had full knowledge that the murder of Rodríguez was committed in aid of racketeering." App. 21a.

## REASONS FOR GRANTING THE PETITION

Evidence against the petitioner was contrary to his conviction of Title 18 U.S.C. § 1959(a) [hereinafter referred to as VICAR] that penalizes whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering commits one of the listed violent crimes. The question presented to this court is whether the Petitioner's procurement and payment for murder, one of the listed violent offenses, is aiding and abetting the VICAR offense itself, without need to prove the motive element against him.

To aid and abet is to provide "knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime."

*Rosemond v. United States*, 572 U.S. at 71 citing *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 181 (1994). The crime being aided here is the murder for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering.

The First Circuit has defined the motive requirement in VICAR as a general one, satisfied by proof either that the crime was committed in furtherance of someone's membership in the enterprise or because it was expected of someone by reason of their membership. *United States v. Brando*, 539 F.3d 44, 56 (1st Cir.

2008). The evidence presented does not prove that the Petitioner, while procuring and paying for murder, intended to aid and abet the commission of the that murder to improve someone's standing in the enterprise or because it was expected of someone as part of the enterprise or both. *United States v. Brandaو*, 539 F.3d at 56. The Petitioner had to be understood to render some assistance "by words, acts, encouragement, support, or presence even if that aid relates to only one (or some) of a crime's phases or elements." *Rosemond v. United States*, 572 U.S. at 73, citing *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993).

The issue here is purely factual, and the facts cited by First Circuit, supplemented by the district court's record, prove the evidence presented by the government insufficient to convict the Petitioner of the aiding and abetting the VICAR charge. See *Brandaو, Id.*, and *United States v. Thai*, 29 F.3d 785 (2d Cir. 1994).

Petitioner's payment to Millan was personal. Millan consumed his eight lines of heroin, the payment for his participation. Gonzalez Gerena requested his own payment from the Petitioner, not the NETA. The same witness, Gonzalez Gerena, admitted on cross-examination the reason for the murder had nothing to do with La Asociación Neta. The evidence is insufficient as shown by several cases cited below.

In *Thai* the bombing of a restaurant was found to be motivated by purely mercenary reasons. *United States v. Thai*, 29 F.3d at 817-818. The *Thai* court explained:

We do not see in this testimony any implication of a motive of the sort envisioned by § 1959. There was no evidence, for example, that the bombing was to be a response to any threat to the BTK organization or to Thai's position as BTK's leader, nor any evidence that he thought that as a leader he would be expected to bomb the restaurant. And though Thai paid the expenses of gang members, any suggestion that he undertook to bomb the Pho Bang to obtain money in order to carry out that responsibility would be entirely speculative, since the government concedes that there was no evidence as to Thai's intended use of the money.

*United States v. Thai*, 29 F.3d at 818.

In *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004), the Second Circuit found that Polito “whose principal ties to that organization were in his capacity as a gambling and loansharking customer,” did not advance his position in the RICO structure by participating in two murders, even when he moved between crews of the criminal organization. *United States v. Bruno*, 383 F.3d at 84.

In *United States v. Bingham*, 653 F.3d 983 (9th Cir. 2011) the appellant sent a message in code to murder and prepare for war with another gang. *United States v. Bingham*, 653 F.3d at 991-992.

In *United States v. Diaz*, 176 F.3d 52 (2d Cir. 1999) appellants Antuna and Cruz, members of the Latin Kings gang, murdered a suspected informant and a

potential witness to protect the interest of the gang. *United States v. Diaz*, 176 F.3d at 95.

In *United States v. Delgado*, 972 F.3d 63 (2d Cir. 2020), appellant Anastasio challenged his conviction to aiding and abetting the murder of rival gang members. The Second Circuit found that Anastasio was present during a discussion of actions, mainly murders, to be undertaken in retaliation against the rival gang. *United States v. Delgado*, 972 F.3d at 74.

The First Circuit points to the Petitioner's participation in the call between Millan and Gonzalez Gerena as proof of his aiding and abetting the murder in furtherance of promoting membership in the enterprise or because it was expected of them by reason of their membership. But to aid and abet the commission of a crime "a defendant must not just in some sort associate himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). The "something" that the government had to prove was to promote his cohort's membership in the enterprise or their efforts to perform duties that were expected of them. The cited call shows the Petitioner to be a customer requesting satisfaction for the murder that he paid for. This Court has held that "an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime." *Rosemond v. United States*, 572 U.S. at 75.

The Court of Appeals found that these requirements were satisfied because it was sufficient to prove that the Petitioner understood both, that the perpetrator was using his position to further the transaction and that the perpetrator was being paid to do so from the proceeds of the transaction. App. 21a. The problem with this conclusion is that the evidence presented at trial showed the payment was not made to the RICO organization but to the individuals themselves. Payment that they solicited and received without intervention of the enterprise. The fact that the individuals were members of the RICO organization is insufficient to prove Petitioner aided and abetted “gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering.”

In support of its conclusion the Court of Appeals cites *United States v. Gaw*, 817 F.3d 1 (1st Cir. 2016). In *Gaw*, the Court of Appeals upheld the conviction of aiding and abetting honest services mail fraud by assisting an employee of the motor vehicle registration office in the transaction. *Gaw*, a government employee himself, got paid for his role in assisting the fraudulent transactions and had knowledge of the detail of the transactions themselves. In *Gaw*, the Court of Appeals said that a defendant is liable when the government proves that: “1) the substantive offense was actually committed [by someone]; 2) the defendant assisted in the commission of that crime or caused it to be committed; and 3) the defendant intended to assist in the commission of that crime or to cause it to be committed.” *United States v. Gaw*,

817 F.3d at 7. In the context of VICAR, under *Gaw* the evidence would have been sufficient if the government would have proven that the Petitioner assisted or caused and intended to assist or caused for someone to gain entrance to or maintaining or increasing position in an enterprise engaged in racketeering. Pointing to the murder alone is insufficient. The testimony during trial points to the Petitioner's concern for his family's safety upon Rodriguez' imminent release from prison. App. 53b, 85b. He paid Millan, not the enterprise, with drugs that Millan used. App. 52b. Once Millan became unavailable, he ordered Gonzalez Gerena, who requested the Petitioner for his own payment to carry out the murder. App. 53b. The call cited by the Court of Appeals happens after the order is given because of a delay in carrying out the order. App. 4a.

This Court in *Rosemond* explained that aiding and abetting was the “division of labor between two (or more) confederates” where liability is proven by assistance to a single element of the offense charged. *Rosemond v. United States*, 572 U.S. at 74-73. The Court of Appeals fails to point to what element, gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering, of section 1959 was Petitioner assisting to.

## **CONCLUSION**

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 10, 2023