No. 24-

IN THE

Supreme Court of the United States

CHRISTOPHER LONDONIO, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

BRIAN A. JACOBS
MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9000
bjacobs@maglaw.com

Attorneys for Petitioner Terrance Caldwell

CLARA S. KALHOUS
Counsel of Record
CLARA S. KALHOUS, ESQ.
116 Pinehurst Avenue #H13
New York, NY 10033
(347) 415-9523
clara.kalhous@gmail.com

Attorney for Petitioner Christopher Londonio

January 23, 2025

335975

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether a crime that requires proof of bodily injury or death but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force, thereby qualifying as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

This question is raised *Delligatti v. United States*, No. 23-825, a case currently pending before this Court on which argument was heard on November 12, 2024.

II. Whether murder in aid of racketeering ("VICAR murder"), in violation of 18 U.S.C. § 1959(a)(1), is an indivisible offense requiring a categorical analysis based on the generic federal definition of murder (18 U.S.C. § 1111(a)) or a divisible offense to which the modified categorical approach applies for crime of violence predicate analysis under 18 U.S.C. § 924(c)(3)(A).

The Congressional Record is clear that Congress intended the generic definition of murder to apply to prosecutions under 18 U.S.C. § 1959. Yet, the circuits are split on the application of § 1959 as a crime of violence predicate. Some circuits, including the Sixth, perform a categorical analysis, looking to the generic federal definition of murder. Others, including the First and Second, perform a modified categorical analysis, looking to the elements of the charged state offense predicate. Courts in the Tenth Circuit say that a conviction under § 1959 must satisfy both the federal and the state definition of the charged crime. The Ninth Circuit has applied both the generic federal definition and the state offense

predicate, in different opinions. The Fourth Circuit has disclaimed application of the categorical approach altogether. The Court's guidance is urgently needed to ensure uniformity in the application of federal law.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Christopher Londonio and Terrance Caldwell. Respondents United States of America, Matthew Madonna, and Steven Crea, Sr.

Codefendants Matthew Madonna and Steven Crea, Sr., stood trial with Londonio and Caldwell and appealed their convictions and sentence in the Second Circuit.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. Londonio, 17-Cr-089-1 (CS)
Judgment entered Jul. 30, 2020

United States v. Londonio (Caldwell), 17-Cr-089-2 (CS)
Judgment entered Jul. 30, 2020

United States v. Londonio (Madonna), 17-Cr-089-3 (CS)
Judgment entered Jul. 30, 2020

United States v. Londonio (Crea, Sr.), 17-Cr-089-4 (CS)
Judgment entered Sept. 1, 2020

United States Court of Appeals (2d Cir):

United States v. Londonio, et al., 20-2479-cr (L)
Judgment entered Aug. 13, 2024; rehearing denied Oct. 25, 2024

United States v. Londonio (Caldwell), 20-2714-cr (Con)
Judgment entered Aug. 13, 2024; rehearing denied Oct. 25, 2024

United States v. Londonio (Madonna), 20-2722-cr (Con)
Judgment entered Aug. 13, 2024

United States v. Londonio (Crea, Sr.), 20-2980-cr (Con)
Judgment entered Aug. 13, 2024; rehearing denied Dec. 11, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Sentencing Guidelines

PETITION FOR A WRIT OF CERTIORARI

Christopher Londonio and Terrance Caldwell ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *United States v. Londonio, et al.*, 20-2479-cr (L), 2024 WL 3770712 (August 13, 2024) (Summary Order), is not reported in the Federal Reporter but is appended hereto as Petitioner's Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 13, 2024. (Appendix A at 1a-21a). Petitioners' timely motion for panel reconsideration and rehearing *en banc* was denied without opinion on October 25, 2024. (Appendix B at 22a). The motion for panel reconsideration and rehearing *en banc* of Steven Crea, Sr., was denied without opinion on December 11, 2024. (Appendix C at 23a). This petition is timely filed within the 90-day statutory time limitation. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in

relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime— (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." 18 U.S.C. § 924(c)(1)(A).

A "'crime of violence' means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

"A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall . . . if the killing is murder . . . be punished by death or by imprisonment for any term of years or for life; . . ." 18 U.S.C. § 924(j)(1).

"Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, . . . any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished . . . . (1) for murder, by death or life imprisonment, or a fine under this title, or both; . . ." 18 U.S.C. § 1959(a)(1).

"Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful,

deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree." 18 U.S.C. § 1111(a).

STATEMENT OF THE CASE

1. On November 15, 2019, after a six-week trial, a jury in the Southern District of New York convicted Londonio of, *inter alia*, Murder in Aid of Racketeering Activity in violation of 18 U.S.C. § 1959(a)(1), New York Penal Law §§ 125.25 and 20 (murder of Michael Meldish); and Use of a Firearm Resulting in Death in violation of 18 U.S.C. § 924(j)(1), predicated on the Meldish murder. 3a at fn.2.

As is relevant here, the district court (Seibel, J.) imposed a sentence of life imprisonment on the murder and a consecutive sentence of life imprisonment on the § 924(j) conviction. 3a. Londonio is serving that sentence.

2. The jury also convicted Caldwell of Murder in Aid of Racketeering Activity, in violation of 18 U.S.C. § 1959(a)(1), New York Penal Law §§ 125.25 and 20.00) (murder of Michael Meldish), and Use of a Firearm Resulting in Death in violation of 18 U.S.C. § 924(j)(1)) predicated on the Meldish murder.

The district court imposed a sentence of life imprisonment on the murder and a consecutive sentence of life imprisonment on the § 924(j) conviction. Caldwell is servicing that sentence.

3. On direct appeal to the Second Circuit, Petitioners argued in relevant part that their convictions under § 924(j) must be vacated because murder in aid of racketeering is not a qualifying crime of violence predicate under 18 U.S.C. § 924(c)(3)(A).

The Second Circuit dismissed their argument in a footnote, writing:

> Londonio also argues that his conviction on Count Seven must be vacated because it is predicated on an offense—murder in aid of racketeering activity—that is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). That argument is foreclosed by *Stone v. United States*, 37 F.4th 825, 832–33 (2d Cir.), *cert. denied*, 143 S. Ct. 396 (2022). In *Stone*, we held that murder in aid of racketeering based on a completed violation of N.Y. Penal Law § 125.25(1) is categorically a crime of violence. *See id.*; *United States v. Laurent,* 33 F.4th 63, 89 (2d Cir. 2022) (same). Londonio's argument therefore fails.

20a at n.8.

4. On November 12, 2024, this Court heard argument in *Delligatti v. United States*, No. 23-825, which asks this Court to decide whether Salvatore Delligatti's conviction of attempted murder in aid of racketeering predicated on attempted second-degree murder under New York Penal Law § 125.25(1) satisfies the elements of 18 U.S.C. § 924(c)(3)(A), insofar as the state offense may be committed not by affirmative acts alone, but also by omissions. *See Delligatti v. United States*, No. 23-825, Petition for Certiorari of Salvatore Delligatti.

In Delligatti's case, as in Petitioners', the Second Circuit held "that Delligatti's substantive VICAR conviction for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5)—itself predicated, in this case, on attempted murder in violation of New York law – is a valid predicate crime of violence under section 924(c)." *United States v. Pastore*, 83 F.4th 113, 119 (2d Cir. 2023), *cert. granted sub nom. Delligatti v. United States*, 144 S. Ct. 2603 (2024). Applying the modified categorical approach, the Second Circuit examined the elements of New York Penal Law § 125.25(1), "which states that a 'person is guilty of murder in the second degree' when he has 'intent to cause the death of another person, [and] he cause the death of such person or of a third person." *Id.*, at 120 (quoting N.Y. Pen.L. 125.25(1)). The Second Circuit wrote:

> There is no question that intentionally causing the death of another person involves the use of force. *See United States v. Castleman*, 572 U.S. 157, 169, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014)("[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force."); *[United States v.] Scott*, 990 F.3d [94] at 98–99, 110 [(2d Cir. 2021) (en banc)] holding that first-degree manslaughter under N.Y. Penal Law § 125.20(1), "a homicide crime second only to murder [under section 125.25] in its severity," is categorically a crime of violence because it requires intent to cause "serious physical injury" and results in the death of another); *Stone v. United States*, 37 F.4th 825, 833 (2d Cir. 2022) (holding that murder in the second degree under N.Y. Penal Law § 125.25(1) is categorically a crime of violence).

Pastore, 83 F.4th at 20 (2d Cir. 2023).

Petitioning this Court for certiorari, Delligatti argued that an acknowledged split in the circuits "on the question of whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force" required this Court's

resolution. *Delligatti v. United States*, No. 23-825, Petition for Certiorari of Salvatore Delligatti at p. 14.

5. This Court agreed, granting certiorari on that question -- "Whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force." The case has been fully briefed and argued. *See Delligatti v. United States*, No. 23-825.

Because resolution of *Delligatti* will clarify the legal principles applicable to Petitioners' cases, Petitioners join *Delligatti* on this issue and asks that the Court consolidate their cases with *Delligatti* for consideration or alternatively hold their cases pending resolution of *Delligatti*.

6. In addition, Petitioners ask this Court to resolve the question whether, for purposes of the "crime of violence" analysis, courts should look to the generic federal definition of murder set forth in 18 U.S.C. § 1111(a) or to the elements of the underlying state predicate offense.

The Congressional Record makes clear that "Congress intended section 1959 to apply uniformly across the United States as a federal crime." Teresa Wallbaum, *Novel Legal Issues in Gang Prosecutions*, 68 DOJ J. Fed. L. & Prac. 99, 105 (2020) (quoting *United States v. Le*, 316 F. Supp. 2d 355, 360 (E.D. Va. 2004)) (footnotes omitted). Yet, despite Congress' clear intent, district courts, circuit courts, and United States Attorney's Offices around the country have taken conflicting positions on the interpretation of § 1959. *See Sorto v. United States*, No. CR 08-167-

4 (RJL), 2022 WL 558193, at *3 n7 (D.D.C. Feb. 24, 2022). Instruction from this Court to apply the generic definition of murder in 18 U.S.C. § 1111(a) to the VICAR analysis in accordance with this Court's precedents would make clear, in all cases, that VICAR murder is not a crime of violence because generic murder in the second degree may be committed recklessly, and an offense committed with a *mens rea* of recklessness is not a "violent felony." *See Borden v. United States*, 593 U.S., 420, 141 S. Ct. 1817, 1821, 210 L. Ed. 2d 63 (2021) (an offense committed with a *mens rea* of recklessness is not a "violent felony"). *See also United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) (noting near unanimity among Courts of Appeals that "recklessness is not sufficient" to "constitute a 'use' of force").

REASONS FOR GRANTING THE PETITION

I. Summary of the Argument[1]

In *United States v. Taylor*, 596 U.S. 845 (2022), this Court instructed that deciding whether an offense is a § 924(c) predicate is a "straightforward job: Look at the elements." *Id*. at 860. "The only relevant question is whether the federal felony at issue always requires the government to prove" (*Taylor*, 596 U.S. at 850), "the use, attempted use, or threatened use of physical force against the person or property of another"(18 U.S.C. § 924(c)(3)(A)). "[P]hysical force" is "violent force," "strong physical force" "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

[1] Petitioners have relied on the Petition for Certiorari and Brief of Petitioner filed in *Delligatti*, No. 23-825, in formulating the Summary of the Argument and the Argument relating to Point II(A) herein.

As the briefing in *Delligatti* notes, the majority of the circuits to have considered this question have concluded – erroneously – that this Court's decision in *United States v. Castleman*, 572 U.S. 157 (2014) compels an affirmative answer. *See Delligatti*, 23-825, Petition for Certiorari of Salvatore Delligatti at 15-16. But this is wrong. *Castleman* considered a state assault statute. *See* 572 U.S. at 168 (quoting Tenn. Code Ann. § 39-13-111(b)). In the context of this crime of commission, not omission, this Court said, "intentional causation of bodily injury necessarily involves the use of physical force." *Castleman*, 572 U.S. at 169. The eight circuits relying on this sentence in *Castleman* to find that a crime of omission, i.e., a failure to act resulting in death, necessarily has as an element the use of force, have misread these words, taking them out of the context of the elements-based analysis that § 924(c)(3)(A) requires. *See United States v. Báez-Martínez*, 950 F.3d 119, 130-33 (1st Cir. 2020); *United States v. Scott*, 990 F.3d 94, 112-13 (2d Cir. 2021) (en banc); *United States v. Rumley*, 952 F.3d 538, 549-51 (4th Cir. 2020)[2]; *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *United States v. Jennings*, 860 F.3d 450, 460-61 (7th Cir. 2017); *United States v. Peeples*, 879 F.3d 282, 286-87 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017); *United States v. Sanchez*, 940 F.3d 526, 535-36 (11th Cir. 2019).

In contrast, a minority of the circuits have concluded that a failure to act does not involve the use of force. *See United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018)

[2] But see *United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (An offense requiring "physical injury . . . does not require the use of physical force" if it reaches "neglecting to act," which does not "require[] the use of physical force.")

(a crime that can be committed through inaction does not "include an element of 'physical force'"); *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017) (an offense is "not categorically a crime of violence" if it "may be committed by both acts and omissions."); *United States v. Trevino-Trevino*, 178 F. App'x 701, 703 (9th Cir. 2006) ("one cannot use, attempt to use or threaten to use force against another in failing to do something.").

The minority's view is correct. The use-of-force clause applies only where a crime "has as an element the use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(c)(3)(A). But where an offense can be committed by "total inaction," the defendant may "exert no physical force at all on the victim." *United States v. Harris*, 88 F.4th 458, 464 (6th Cir. 2022) (Jordan, J., concurring in the denial of rehearing en banc). Even an offense resulting in serious bodily injury or death, therefore, does not necessarily involve the use of physical force. Because the elements of § 924(c)(3)(A) are not satisfied by a crime of omission or inaction, and because the New York law that served as the predicate for their conviction may be committed by inaction, Petitioners' § 924(j) convictions must be vacated. Petitioners join *Delligatti* on this issue in full and asks the Court to hold this petition for the forthcoming "crime of violence" ruling in *Delligatti v. United States*, No. 23-825.

This Court should also grant certiorari to settle the question whether the generic federal definition of murder in 18 U.S.C. § 1111(a) or the various state-specific definitions apply to the "crime of violence" analysis for VICAR murder. "Because the VICAR statute does not define its offenses, courts have employed two

methodologies to determine whether a VICAR conviction satisfies the elements clause." *Sorto v. United States*, No. CR 08-167-4 (RJL), 2022 WL 558193, at *3 n7 (D.D.C. Feb. 24, 2022). "Some have applied the categorical approach to the state-crime predicate underlying the VICAR conviction, reasoning that the jury necessarily found that the defendant violated this predicate to return the VICAR conviction." *Sorto*, 2022 WL 558193, at *3 n7 (referencing, *e.g.*, *United States v. Toki*, 23 F.4th 1277, 1280–81 (10th Cir. 2022); *Moore v. United States*, No. 16-3715-PR, 2021 WL 5264270, at *2 (2d Cir. Nov. 12, 2021); *United States v. Mejia-Quintanilla*, 859 F. App'x 834, 836 (9th Cir. 2021); *United States v. Mathis*, 932 F.3d 242, 264–65 (4th Cir. 2019); *accord Hall v. United States*, No. 3:20-CV-00646, 2021 WL 119638, at *8–*10 (M.D. Tenn. Jan. 13, 2021) (collecting cases)).

"[O]thers have applied the categorical approach to the VICAR conviction itself, relying on the generic federal elements of the offenses enumerated in the VICAR statute." *Sorto*, 2022 WL 558193, at *3 n7 (referencing, *e.g.*, *Manners v. United States*, 947 F.3d 377, 379–82 (6th Cir. 2020); *Kinard v. United States*, No. 3:21-CV-00161-GCM, 2021 WL 5099596, at *4–*5 (W.D.N.C. Nov. 2, 2021); *Thomas v. United States*, No. 2:11-CR-58, 2021 WL 3493493, at *6 (E.D. Va. Aug. 9, 2021); *Cousins v. United States*, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016)).

Although the D.C. District Court held that, "These approaches are not mutually exclusive, and both are consistent with the VICAR statute" (*Sorto*, 2022 WL 558193, at *3 n7 [referencing, *cf. In re Thomas*, 988 F.3d 783, 791–92 (4th Cir. 2021)]), this conclusion is wrong.

Congress intended the relevant predicate crime for VICAR murder to be the generic federal offense. *See* 129 CONG. REC. S1, 22,906 (daily ed. Aug. 4, 1983) (emphasis added) ("While section [1959] proscribes murder, . . . in violation of federal or State law, it is intended to apply to th[is] crime[] in a *generic sense*, whether or not a particular State has chosen those precise terms . . . ."). Generic murder, which (in the second degree) can be committed recklessly is not a "crime of violence." *See Borden*, 141 S.Ct. at 1821; *United States v. Begay*, 934 F.3d 1033 (9th Cir.2019) (federal second-degree murder, which "may be committed recklessly - - with a depraved heart mental state -- and need not be committed willfully or intentionally," is not a § 924(c)(3)(A) crime of violence); *see also United States v. Wood*, 207 F.3d 1222, 1229 (10th Cir.2000) ("Second-degree murder involves reckless and wanton disregard for human life that is extreme in nature . . . ."). This Court's guidance clarifying that the generic federal definition applies to the word "murder" in 18 U.S.C. § 1959(a)(1) is needed to ensure uniformity in the application of federal law. *See Jerome v. United States*, 318 U.S. 101, 104 (1943) ("[T]he application of federal legislation is nationwide.").

II. Argument

A. The Second Circuit Is Wrong, But Not Alone, in Holding that a Failure to Act Constitutes the Employment of Physical Force.[3]

In *Taylor*, this Court instructed that deciding whether an offense is a § 924(c) predicate is a "straightforward job: Look at the elements." *Id*. at 860. "The only relevant question is whether the federal felony at issue always requires the government to prove" (*Taylor*, 596 U.S. at 850), the "use, attempted use, or threatened use of physical force against the person or property of another" (18 U.S.C. § 924(c)(3)(A)).

"The word 'use' in the statute must be given its ordinary or natural meaning," *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quotation marks omitted), which is "'to convert to one's service' or 'to employ,'" *Smith v. United States*, 508 U.S. 223, 229 (1993) (quoting Webster's New International Dictionary 2806 (2d ed. 1950)) (brackets omitted). To use someone or something, "requires a volitional act." *Borden*, 593 U.S. at 443 (plurality op.); *see also Voisine v. United States*, 579 U.S. 686, 693 (2016) ("volitional conduct"). The use of force is the "active[] employ[ment of] physical force." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). "[T]he person applying [the] force" at issue is the relevant "actor." *Voisine*, 579 U.S. at 693.

[3] Petitioners gratefully acknowledge that they have relied in substantial part on the Petition for Certiorari and Brief of Petitioner filed in *Delligatti*, No. 23-825, the arguments of which they adopt in full, in formulating the Argument relating to this Point.

A person who commits an offense by failing to take action has not "use[d]" force in this ordinary sense. Such an offender, by definition, engages in no "act" and is not an actor. Nor has he or she "cause[d]" force to be applied in a plain-language sense: The relevant force has been unleashed into the world by someone or something else; the nonfeasant offender has merely failed to stop it. *See Burrage v. United States*, 571 U.S. 204, 211 (2014) (defining "actual causality" to mean "the harm would not have occurred in the absence of—that is, but for—the defendant's conduct") (quotation marks omitted).

"Physical force" is "violent force," "strong physical force" "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. It is "force necessary to overcome a victim's physical resistance." *Stokeling v. United States*, 586 U.S. 73, 83 (2019). And it must be used "against the person or property of another." 18 U.S.C. § 924(c)(3)(A). As a plurality of the Court recently explained in *Borden*, 593 U.S. at 443 (plurality op.), "the 'against another' phrase" provides a "critical" textual clue regarding the clause's reach. 593 U.S. at 428 (quoting *Leocal*, 543 U.S. at 9). When paired with "use of physical force," it indicates that the offender "directed force at another." *Id.* at 431-32 (emphasis added); see *id*. at 436-37 ("the 'against' phrase is most naturally read" as "requir[ing] that force be directed at . . . an object").

Active employment requires action. Indeed, since the elements clause also applies to crimes involving the "attempted use" or "threatened use" of force—crimes that require the defendant to take "specific actions against specific persons or their

property," *Taylor*, 596 U.S. at 856 — the actual use of force cannot be accomplished by remaining motionless.

Yet, the New York statute at issue, Penal Law § 125.25(1), permits conviction based on the failure to act. In New York, second-degree murder under N.Y. Penal Law § 125.25(1), can be committed by "failure to perform a legally imposed duty," such as "withholding medical care" from a sick dependent. *People v. Steinberg*, 595 N.E.2d 845, 847-48 (N.Y. 1992); *People v. Best*, 609 N.Y.S. 2d 478, 480 (N.Y. App. Div. 1994) (upholding conviction of mother who "fail[ed] to seek medical attention for [her] boy").

In relying on *Castleman*'s holding that, "[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force," to uphold the use of a conviction predicated on New York offenses that may be committed by omission and designating those offenses as qualifying crimes of violence, therefore, the Second Circuit erred. *See*, *e.g.*, *Scott*, 990 F.3d at 98 at 98–99, 110 (holding that first-degree manslaughter under N.Y. Penal Law § 125.20(1), "a homicide crime second only to murder [under section 125.25] in its severity," is categorically a crime of violence because it requires intent to cause "serious physical injury" and results in the death of another); *Stone v. United States*, 37 F.4th 825, 833 (2d Cir. 2022) (holding that murder in the second degree under N.Y. Penal Law § 125.25(1) is categorically a crime of violence). Those circuits that have agreed with the Second in relying on *Castleman*'s misdemeanor-specific formulation to uphold "crime of

violence" predicates based on inaction[4] have likewise erred, based on *Castleman*'s plain language.

Castleman's statement that "[i]t is impossible to cause bodily injury without applying force in the common-law sense," 572 U.S. at 170 (emphasis added), even if it applied here, would not justify adopting the Second Circuit's (or the circuit majority's) view. The physical force required under Section 924 is not "force in the common-law sense," as *Castleman* itself confirms. *Ibid.*

In *Castleman*, the Court considered a ban on the possession of a firearm by anyone convicted of a "misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), which was defined to include crimes involving "the use or attempted use of physical force," *id.*; 18 U.S.C. § 921(a)(33)(A)(ii). In that context, where Congress had tied the provision to "misdemeanor" offenses—and to "domestic violence" misdemeanors in particular—the Court found it appropriate to treat "'physical force'" as "a common-law term of art [that] should be given its established common-law meaning." *Castleman*, 572 U.S. at 163 (quoting *Johnson*, 559 U.S. at 139). And at common law, "the element of force in the crime of battery was satisfied by even the slightest offensive touching." *Ibid.* (quoting *Johnson*, 559 U.S. at 139). The

[4] *See United States v. Báez-Martínez*, 950 F.3d 119, 130-33 (1st Cir. 2020); *United States v. Scott*, 990 F.3d 94, 112-13 (2d Cir. 2021) (en banc); *United States v. Rumley*, 952 F.3d 538, 549-51 (4th Cir. 2020); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *United States v. Jennings*, 860 F.3d 450, 460-61 (7th Cir. 2017); *United States v. Peeples*, 879 F.3d 282, 286-87 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017); *United States v. Sanchez*, 940 F.3d 526, 535-36 (11th Cir. 2019).

Court accordingly "incorporate[d] that misdemeanor-specific meaning of 'force' in defining a 'misdemeanor crime of domestic violence.'" *Id.* at 164.

At the same time, the Court recognized that this misdemeanor-specific interpretation of physical force was not appropriate "[i]n defining a violent felony" under Section 924, where "the phrase 'physical force' must mean violent force." *Id.* at 163 (quoting *Johnson*, 559 U.S. at 140) (cleaned up). The Court therefore left untouched *Johnson*'s holding that violent force under Section 924 is "force capable of causing physical pain or injury to another person." 559 U.S. at 140; see *ibid.* ("a substantial degree of force"). And the Court expressly "d[id] not reach" the question of whether "the causation of bodily injury necessarily entails violent force." *Castleman*, 572 U.S. at 167.

Castleman's statement about the connection between bodily injury and common-law force thus does not bear on the question at issue here. *See Mayo*, 901 F.3d at 230 (*Castleman* "does not support" "conflat[ing] an act of omission with the use of force"). Even if allowing a patient to starve were enough to satisfy the "misdemeanor-specific meaning of 'force'" at issue in *Castleman*, 572 U.S. at 164, it would not constitute the use of "violent force" under *Johnson*, 559 U.S. at 140. However reprehensible and legally culpable the caretaker's failure to act may be, it certainly would not involve "a substantial degree of force," as required under Section 924. *Ibid.* (emphasis added); see id. at 142 ("force strong enough to constitute 'power'").

At oral argument in *Delligatti* on November 12, 2024, this Court considered numerous examples of injurious or deadly outcomes caused by inaction – examples in which the petitioner urged the Court to hew to the understanding of "use" as "active employment" advanced in this Court's precedents. The outcome of *Delligatti* will provide further guidance on the question raised herein.

This Court often "grants the petition for a writ of certiorari, vacates the decision below, and remands for reconsideration by the lower court" when it "believe[s] that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision." *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016) (Alito, J., dissenting). Because *Delligatti* will decide the outcome of this point of Petitioners' arguments, a similar outcome is warranted here.

B. The Court Should Resolve a Circuit Split on Whether the State or the Generic Federal Definition of "Murder" Applies When Analyzing the Elements of Convictions Under 18 U.S.C. ¶ 1959(a)(1).

As *Taylor* instructed, the elements of an offense determine whether it is a § 924(c) predicate. The only question is "whether the 'least culpable' conduct that could satisfy the offense elements in a hypothetical case would 'necessarily involve[]' the 'use, attempted use, or threatened use of physical force against the person or property of another.'" *Delligatti v. United States*, No. 23-825, Brief for the United States, 2024 WL 4374209, at *6 (citations omitted). In the VICAR context, the elements of "murder" must, therefore, be analyzed. But the circuits are torn on the

question of which definition of "murder," state, federal, or both, should be used for this analysis.

1. The Congressional Record Makes Clear that the Generic Federal Definition of Murder – Which Encompasses Reckless Conduct – Should Be Applied.

The Congressional Record makes clear that the VICAR statute was intended primarily to facilitate prosecution of crimes by illegal enterprises operating across state lines:

> [T]he need for Federal jurisdiction is clear, in view of the Federal Government's strong interest, as recognized in existing statutes, in suppressing the activities of organized criminal enterprises, and the fact that the FBI's experience and network of informants and intelligence with respect to such enterprises will often facilitate a successful Federal investigation where local authorities might be stymied.

H.R.Rep. No. 98–1030, at 305, *reprinted in* 1984 U.S.S.C.A.N. 3182, 3484. Thus,

> While section [1959] proscribes murder, kidnaping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, it is intended to apply to these crimes in a *generic sense*, whether or not a particular State has chosen those precise terms for such crimes.

129 CONG. REC. S1, 22,906 (daily ed. Aug. 4, 1983) (emphasis added).

Thus, "Congress intended section 1959 to apply uniformly across the United States as a federal crime. The predicate requirement was included simply to avoid criminalizing new conduct. Requiring the state predicate to categorically match the enumerated offense would limit the application of section 1959 'to the drafting whims of fifty state legislatures, a result plainly not intended by Congress.'" Teresa Wallbaum, *Novel Legal Issues in Gang Prosecutions*, 68 DOJ J. Fed. L. & Prac. 99,

105-06 (2020) (quoting *United States. v. Le*, 316 F. Supp. 2d 355, 360 (E.D. Va. 2004)) (footnotes omitted).

2. Courts Across the Country Have Disregarded Congress' Intent.

Despite Congress' clear intent, district courts, circuit courts, and United States Attorney's Offices around the country have taken conflicting positions on the interpretation of § 1959. *See Sorto v. United States*, No. CR 08-167-4 (RJL), 2022 WL 558193, at *3 n7 (D.D.C. Feb. 24, 2022) (noting the differing approaches and collecting cases). The result is an uneven application of federal law in the circuits.

In the Second Circuit, the analysis of federal VICAR murder turns on the application of state law, using a modified categorical analysis. *See*, *e.g.*, 20a at n.8 (concluding that New York second-degree intentional murder is a categorical crime of violence because it must be committed with the intent to cause serious physical injury). In its analysis, the Second Circuit begins with the underlying state predicate in the indictment, yet looks to the language of the jury charge to determine the state predicate offense of which the defendant was convicted. *See*, *e.g.*, *United States v. Davis*, 74 F.4th 50, 54-55 (2d Cir. 2023) (holding, notwithstanding the indictment's allegations that Davis had violated 18 U.S.C. §§ 1959(a)(1) and (2) by "knowingly murder[ing] [the victim]" in violation of New York Penal Law sections including § 125.25 by causing her death "with intent to cause the death of another person" and by "recklessly engag[ing] in conduct which created a grave risk of death to another person, and thereby caus[ing] the death of [the victim]" "under circumstances evincing a depraved indifference to human life," that

the jury charge, which included only an instruction on intentional murder under New York law, determined the elements of the offense of conviction). The First Circuit looks to the state offense as well. See *United States v. Báez-Martínez*, 950 F.3d 119, 127–28 (1st Cir. 2020) (discussing Puerto Rican law).

Other courts have required that the defendant's conduct satisfy *both* the federal and state law definitions of the charged offense. *See*, *e.g.*, *United States v. Martinez*, 545 F. Supp. 3d 1079, 1081 (D.N.M. 2021)("Establishing that Martinez violated VICAR murder in violation of New Mexico law requires the United States to prove: (i) that Martinez' conduct constitutes generic murder; and (ii) that Martinez' conduct also violated New Mexico law."); *United States v. DeLeon*, 318 F. Supp. 3d 1272, 1276 (D.N.M. 2018) (concluding that "no matter whether [defendant] conspired [to commit assault resulting in serious bodily injury in violation of the state statute,] he only violated VICAR if also he conspired to commit assault resulting in serious bodily injury, in a generic sense").

The Ninth Circuit has, in different cases, looked both to the federal definition of second degree murder in 18 U.S.C. § 1111(a) and to the state law predicate. *Compare United States v. Begay*, 33 F.4th 1081 (9th Cir.), *cert. denied*, 143 S. Ct. 340, 214 L. Ed. 2d 153 (2022); *United States v. Vederoff*, 914 F.3d 1238, 1246–47 (9th Cir. 2019) (adopting the generic definition of murder in order to apply the categorical approach in an appeal challenging the career offender sentencing enhancement under U.S.S.G. § 4B1.2(a)); *with United States v. Elmore*, 118 F.4th 1193, 1200 (9th Cir. 2024) (looking to the elements of California murder based on

the language of the indictment and stating that, "Although we have recognized that, in limited circumstances, the federal generic definition of the offense may be substituted for the state-law definition, , , , we have never addressed whether generic murder is an independent element of VICAR murder, such that it should be charged or instructed. And we need not consider that question today.").

The Eleventh Circuit takes yet another approach, placing discretion for the analysis in the hands of the Government by looking to the offense as charged. *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343 (11th Cir. 2022) ("the indictment alleged that Alvarado-Linares's VICAR charges were based on violations of the Georgia malice murder statute and attempted murder statute, and the trial court told the jury to consider whether Alvarado-Linares committed those crimes as defined by state law. The modified categorical approach requires us to ask whether a crime, as charged and instructed, has 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.' 18 U.S.C. § 924(c)(3)(A).").

Other courts have disclaimed application of the categorical approach entirely. In *United States v. Keene*, 955 F.3d 391, 398–99 (4th Cir. 2020), the Fourth Circuit concluded that, "Reading the language of the VICAR statute under which the defendants were charged, we conclude that Congress intended for individuals to be convicted of VICAR assault with a dangerous weapon by engaging in conduct that violated both that enumerated federal offense as well as a state law offense,

regardless whether the two offenses are a categorical 'match.'" Indeed, the Fourth Circuit explained:

> Nothing in [section 1959's] language suggests that the categorical approach should be used to compare the enumerated federal offense of assault with a dangerous weapon with the state offense of Virginia brandishing. In fact, the most natural reading of the statute does not require any comparison whatsoever between the two offenses. By using the verb "assaults" in the present tense, the language requires that a defendant's presently charged conduct constitute an assault under federal law, while simultaneously also violating a state law. The VICAR statute includes no language suggesting that *all* violations of a state law also must qualify as the enumerated federal offense, a result that would be required under the categorical approach.
> ...
>
> This unambiguous statutory language precludes application of a formalistic, overinclusive categorical approach, and instead holds defendants accountable for their actual conduct as presented to a jury.

Keene, 955 F.3d at 397-98. *See also United States v. Elmore*, 624 F. Supp. 3d 1123, 1142 (N.D. Cal. 2022) ("the best reading of the VICAR murder statute is that it requires the defendant to 'murder[ ]' (for present purposes, an act falling within the generic meaning) and it requires that this murder be 'in violation of the laws of any State or the United States.' And when assessing whether the murder is in violation of the relevant law, it requires evaluating whether the defendant's conduct violated the law, not whether the law itself is a categorical match for anything."); *United States v. Rivas Gomez*, 2021 WL 431409, at *3 (E.D. Cal. Feb. 8, 2021) (concluding that "state law predicates may be prosecuted under VICAR, even if the state statute is broader than the generic definition of the underlying crime, so long as the conduct in question also satisfies VICAR's generic definition of the charged offense.").

3. The Government Has Argued Both Sides of the Question.

Meanwhile, the Government has taken advantage of courts' confusion to argue both sides of the split. *Compare*, *e.g.*, *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343–44 (11th Cir. 2022) (Government says look to the generic definition) *and Battle v. United States*, No. 3:14-CV-01805, 2021 WL 1611917, at *8 (M.D. Tenn. Apr. 26, 2021), *aff'd*, No. 21-5457, 2023 WL 2487342 (6th Cir. Mar. 14, 2023), *cert. denied*, 143 S. Ct. 2621 (2023) ("The Government, and certain other courts, have taken the approach that, in analyzing whether murder in aid of racketeering under 18 U.S.C. § 1959 constitutes a 'crime of violence,' a court is to consider the elements of 'generic' murder, rather than murder as defined by Tennessee law.") *and United States v. Gill*, No. CR JKB-07-0149, 2023 WL 349844, at *9 (D. Md. Jan. 20, 2023) ("The Government counters that, '[i]n assessing whether a predicate VICAR offense constitutes a 'crime of violence,' several courts within this Circuit have analyzed the generic, federal definition of the crime at issue, rather than the underlying state predicate offense(s).' . . . It further avers that "this approach is consistent with the language of § 924(c), which requires the predicate offense to be evaluated under federal law." . . . Therefore, according to the Government, "the underlying federal crime for [Gill's] VICAR murder offense is federal premediated first-degree murder, in violation of 18 U.S.C. § 1111." (*Id.*)"), *with Davis*, 74 F.4th at 54) (noting the Government's position that the Court should analyze Davis' conviction according to the elements of the state law offense of conviction) *and with United States v. Rivas Gomez*, 2021 WL 431409, at *2–4 (E.D.

Cal. Feb. 8, 2021) ("[T]he government argues, in essence, that a plain reading of the VICAR statute and consideration of other relevant factors mean that a VICAR prosecution for a state law predicate first requires proof that the defendant violated the generic definition of the charged crime and then also requires proof that the same conduct constitutes a violation of the particular state statute.").

In short, the circuits are confused about the appropriate framework for analysis of whether VICAR murder under 18 U.S.C. § 1959(a)(1) qualifies as a crime of violence predicate for a § 924 offense, the Government is taking advantage of the circuits' confusion to advocate both sides of the issue, and the resulting uneven and varied application of federal law is having a disparate impact on defendants nationwide. This Court's guidance to resolve these differing approaches is urgently required.

4. If the Generic Definition Were Applied, It Would Be Clear that Generic Murder, Which Can Be Committed Recklessly, Is Not a "Crime of Violence."

Looking to "the elements" of 18 U.S.C. § 1111(a), as *Taylor* instructs (596 U.S. at 860), it is clear that a person may be convicted of generic federal murder without employment of the "use, attempted use, or threatened use of physical force against the person or property of another" (18 U.S.C. § 924(c)(3)(A)). Generic federal murder can be committed recklessly. *See* 18 U.S.C. § 1111(a) (any murder committed without premeditation "is murder in the second degree."); *Wood*, 207

F.3d at 1229 ("Second-degree murder involves reckless and wanton disregard for human life that is extreme in nature . . . .").

A conviction for reckless murder does not satisfy § 924(c)(3)(A)'s requirement of intent. *See Castleman*, 572 U.S. at 169 n.8 (noting near unanimity among Courts of Appeals that "recklessness is not sufficient" to "constitute a 'use' of force"); *Borden*, 141 S.Ct. at 1821 (an offense committed with a *mens rea* of recklessness is not a "violent felony"); *Begay*, 934 F.3d 1033 (federal second-degree murder, which "may be committed recklessly - - with a depraved heart mental state -- and need not be committed willfully or intentionally," is not a § 924(c)(3)(A) crime of violence).

5. The Circuit Split Results in an Uneven Application of Federal Law.

In Petitioners' cases, the Second Circuit held that second-degree murder under New York Penal Law § 125.25 is categorically a crime of violence. 20a at n8. But if Petitioners had been charged in California or in Maryland, their second-degree murder convictions would not have been adequate predicate crimes of violence for a § 924 conviction. In *United States v. Mejia-Quintanilla*, 857 F. App'x 956, (Mem)–957 (9th Cir.), *amended*, 859 F. App'x 834 (9th Cir. 2021), *opinion withdrawn and superseded on reh'g*, No. 17-15899, 2022 WL 3278992 (9th Cir. Aug. 11, 2022)[5], *cert. denied*, 143 S. Ct. 1094, 215 L. Ed. 2d 402 (2023), the Ninth Circuit held that murder under the California Penal Code is not a crime of violence because

[5] The superseding opinion finds Mejia-Quintanilla's appeal barred by the appeal waiver in his plea agreement but does not disturb the logic of its prior conclusion concerning California's murder statute.

it may be committed recklessly. *Id.* ("Under recent case law, murder in violation of section 187 of the California Penal Code is not a crime of violence for purposes of 18 U.S.C. § 924(c). This is because a conviction for an offense with a mens rea of recklessness does not constitute a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), *see United States v. Begay*, 934 F.3d 1033, 1041 (9th Cir. 2019); *see also Borden v. United States*, 593 U.S. 420, 141 S. Ct. 1817, 1834, 210 L.Ed.2d 63 (2021), and section 187 of the California Penal Code permits conviction if a defendant is found to have a mens rea of recklessness. Cal. Penal Code § 188(a) (murder conviction under section 187 may be based on 'express' or 'implied' malice)").

Similarly, in *United States v. Gill*, No. CR JKB-07-0149, 2023 WL 349844, at *12 (D. Md. Jan. 20, 2023), the court concluded that second-degree murder under Maryland law is not categorically a crime of violence because the Maryland murder statute is indivisible and because "felony murder, 'the most innocent conduct criminalized by' Maryland's murder statutes, 'requires only the mens rea necessary to attempt or complete the underlying felony (i.e., arson, escape, etc.).' . . . Under Maryland law, 'a felony murder committed in the course of certain enumerated felonies ... is murder in the first degree, notwithstanding the fact that the killing may have been reckless or merely accidental.' . . . 'That mens rea is not more than recklessness and thus, does not satisfy *Borden*.'" (citations omitted).

Thus, if Petitioners had been convicted in Maryland or in California of the same federal VICAR murder, with a state law second-degree murder predicate, they

could not have been convicted for the use of a firearm causing death in violation of 18 U.S.C. § 924(j) because the second-degree murder offenses would not have been acceptable crime of violence predicates. Yet, because they were prosecuted in New York, they are serving additional life sentences for the use of a firearm causing death in violation of New York's second-degree murder statute. To avoid this inequitable application of federal law, the Court should grant certiorari and clarify that the generic, federal definition of murder should be applied in the VICAR crime of violence analysis.

6. To the Extent Differing Approaches Are Compatible with the Statutory Text, the Rule of Lenity Compels Application of the Generic Offense Definitions.

Lenity, a rule "'perhaps not much less old than' the task of statutory 'construction itself,'" says "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)). *See also United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) ("[A]mbiguous criminal laws [should] be interpreted in favor of the defendants subjected to them."); *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (the rule of lenity applies to sentencing statutes as well as to offense elements).

There is no real ambiguity here – Congress has made clear that it intended the generic federal offense definitions to be applied to the listed offenses in § 1959. And, if the circuits followed Congress's intent by applying the federal definition,

lenity would compel the conclusion that generic murder, which encompasses reckless conduct, is not a crime of violence predicate. *See Borden*, 141 S. Ct. at 1821 (an offense committed with a *mens rea* of recklessness is not a "violent felony"); *Castleman*, 572 U.S. at 169 n.8 (noting near unanimity among Courts of Appeals that "recklessness is not sufficient" to "constitute a 'use' of force").

The "time-honored" rule of lenity, *United States v. Kozminski*, 487 U.S. 931, 952 (1988), should be applied here. Lenity is founded on three tenets that have "long been part of our tradition." *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

First, the rule of lenity enforces the requirement of "fair warning," in "language that the common world will understand," of "what the law intends to do if a certain line is passed." *Bass*, 404 U.S. at 348 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). To ensure the warning is fair, "the line should be clear." *Id.*; *see also United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[The] rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.").

Second, the rule "minimize[s] the risk of selective or arbitrary enforcement" of criminal laws and penalties. *Kozminski*, 487 U.S. at 952. It does so by "fostering uniformity in the interpretation of criminal statutes." *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). Thus, the rule "generate[s] greater objectivity and predictability" in applying criminal laws. Eskridge, *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-679 (1999). This is likewise a fundamental goal of the judicial function more

generally. *See Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility ... is to ensure the integrity and uniformity of federal law.").

Third, the rule holds that because the "seriousness of criminal penalties" often represents the "moral condemnation" of the community, "legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. This policy embodies "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id*. (quoting Friendly, *Mr. Justice Frankfurter and the Reading of Statutes,* in *Benchmarks* 196, 209 (1967)); *see also Davis*, 139 S. Ct. at 2333 ("'[T]he power of punishment is vested in the legislative, not in the judicial department.'" (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95)). Accordingly, the rule "maintain[s] the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952; *see Santos*, 553 U.S. at 514 (plurality opinion) (The rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.").

As noted above, courts are engaged in making criminal law in Congress' stead by interpreting 18 U.S.C. § 1959 to require analysis of more than just the generic version of the offenses set forth therein. These decisions are contrary to clearly expressed Congressional intent. More importantly, they have the effect of broadening the application of § 924(j) and (c) to reach conduct that is outside the scope of the Congressional directive. To "maintain the proper balance between

Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952, to "minimize the risk of selective or arbitrary enforcement" of federal criminal laws and penalties, *Id*, and to "foster[] uniformity in the interpretation of criminal statutes." *Bryan*, 524 U.S. at 205 (Scalia, J., dissenting), the Court should hear Petitioners' case and should clarify that the generic federal definitions apply to the enumerated crimes within § 1959.

III. This Case Presents a Strong Vehicle to Address the Issues Identified Herein.

For Londonio's convictions in the Southern District of New York, he is serving three life sentences, only one of which would be affected by a decision in his favor in this case. Caldwell is serving two life sentences, only one of which would be affected by a decision in his favor. But the Court has already granted certiorari in a case – *Delligatti* – that is on all fours with the argument advanced in Point II(A) herein. For this reason, the Court should grant certiorari and hold Petitioners' cases pending the decision in *Delligatti*.

With respect to Point II(B), the issues raised herein are recurring and resolution of them will affect cases nationwide, while ensuring uniformity of application of the law in federal cases. "[T]he application of federal legislation is nationwide." *Jerome*, 318 U.S. at 104. The need for a common understanding of these provisions, which feature daily in federal jurisprudence, is clear. *See also, e.g., Becker v. Montgomery*, 532 U.S. 757, 762 (2001) ("We granted certiorari to assure the uniform interpretation of the governing Federal Rules."); *Logan v. United States*, 552 U.S. 23, 27 (2007) (In interpreting a federal criminal statue, "we noted

that our decision would ensure greater uniformity in federal sentences."); *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (noting the Court's "responsibility and authority to ensure the uniformity of federal law") (Roberts, C.J., dissenting); Sup. Ct. R. 10(a), 10(c) (Certiorari is warranted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or where it "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

Certiorari should be granted here because the circuits' varied approaches lead to conflicting applications of federal law, frustrating Congress' stated intent to facilitate cross-state prosecution of the crimes of illegal enterprises by using generic offense definitions. The circuits' varied approaches go beyond a simple split and result in a chaotic application of 18 U.S.C. § 1959. To stop the deepening circuit split and to prevent the uneven application of federal law, this Court should grant the petition and hear this case.

CONCLUSION

The petition for a writ of certiorari should be granted. Failing that, the petition should be held pending the opinion in *Delligatti v. United States*, No. 23-825.

Respectfully submitted,

/s/*Clara S. Kalhous*
Clara Kalhous,
Counsel of Record
116 Pinehurst Avenue #H13
New York, NY 10033
(347) 415-9523
clara.kalhous@gmail.com

Attorney for Petitioner
Christopher Londonio

/s/ Brian Jacobs
Brian A. Jacobs
MORVILLO ABRAMOWITZ
GRAND IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9000
bjacobs@maglaw.com

Attorneys for Petitioner
Terrance Caldwell

January 23, 2025

APPENDIX

TABLE OF APPENDICES

Page

20-2479-cr (L)
United States v. Londonio

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of August, two thousand twenty-four.

PRESENT:

JOSÉ A. CABRANES,
MARIA ARAÚJO KAHN,
Circuit Judges,
KATHERINE POLK FAILLA,
District Judge.[*]

UNITED STATES OF AMERICA,

Appellee,

v. 20-2479-cr (L); 20-2714 (CON)
20-2722 (CON); 20-2980 (CON)

CHRISTOPHER LONDONIO, TERRANCE CALDWELL,
MATTHEW MADONNA, STEVEN CREA, SR.,

[*] Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

Defendants-Appellants.*

FOR DEFENDANT-APPELLANT LONDONIO:	CLARA KALHOUS, New York, NY.
FOR DEFENDANT-APPELLANT CALDWELL:	BRIAN A. JACOBS (Daniel P. Gordon, *on the brief*), Morvillo Abramowitz Grand Iason & Anello P.C., New York, NY.
FOR DEFENDANT-APPELLANT MADONNA:	JOSHUA L. DRATEL, Law Offices of Dratel & Lewis, New York, NY (Andrew Patel, White Plains, NY, *on the brief*).
FOR DEFENDANT-APPELLANT CREA, SR.:	BRENDAN WHITE, White & White, New York, NY (Anthony DiPietro, Law Offices of Anthony DiPietro, White Plains, NY, *on the brief*).
FOR APPELLEE:	HAGAN SCOTTEN, Assistant United States Attorney (Alexandra N. Rothman, Celia V. Cohen, David Abramowicz, *on the brief*), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from July 30, 2020, judgments of the United States District Court for the Southern District of New York (Cathy Seibel, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the July 30, 2020, judgments of the district court are **AFFIRMED.**

---

* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Defendants-Appellants Christopher Londonio, Terrance Caldwell, Matthew Madonna, and Steven Crea, Sr. (collectively, "Defendants") appeal from judgments of conviction entered on July 30, 2020, after a jury found them guilty of various crimes related to their participation in the Lucchese[1] Family of La Cosa Nostra.[2] The district court sentenced all four Defendants principally to two consecutive terms of life imprisonment, with Caldwell receiving an additional, consecutive term of ten years' imprisonment.

Defendants raise—either jointly or independently—a myriad of challenges in appealing their convictions. Defendants jointly raise claims relating to the sufficiency of the evidence, the admission of co-conspirator statements, and the district court's denial of their motion for a new trial based on post-trial disclosures. With respect to pre-trial

[1] We note that the parties and this Court have at various times referred to the Family as the "Lucchese Family" or the "Luchese Family." *Compare United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999), Crea Br. at 3, Londonio Br. at 6, and Caldwell Br. at 1 ("Lucchese Family") *with United States v. Avellino*, 136 F.3d 249, 251 (2d Cir. 1998), Gov't Br. at 3, and Madonna Br. at 3 ("Luchese Family). Deferring to the spelling on the docket, we adopt "Lucchese Family" for purposes of this summary order.

[2] Specifically, the jury convicted all Defendants of conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d) (Count One); conspiracy to commit murder in aid of racketeering in violation of id. § 1959(a)(5) (Count Two); murder in aid of racketeering in violation of id. § 1959(a)(1) (Count Three); and use of a firearm resulting in death in furtherance of the murder charged in Count Three in violation of id. § 924(j)(1) (Count Seven). Londonio was also convicted of conspiracy to distribute narcotics in violation of 21 U.S.C. §§ 846, 841(b)(1)(C) (Count Six). Caldwell was also convicted of assault and attempted murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(3), (5) (Count Four), and use of a firearm, which was discharged, in furtherance of the assault and attempted murder charged in Count Four in violation of id. § 924(c)(1)(A)(iii) (Count Eight).

motions, Crea challenges the district court's denial of his motion for inspection of grand jury minutes. Londonio raises an ineffective assistance of counsel claim from the district court's denial of his request for an adjournment of trial because an attorney on his defense team, who died well before trial, was allegedly conflicted. Crea raises claims relating to the district court's denial of his mid-trial motion for severance. Madonna and Crea challenge the district court's jury instructions relating to *Pinkerton* liability. Finally, Madonna, Crea, and Londonio each raise claims of error relating to their respective sentences. We conclude that all of Defendants' challenges lack merit, and therefore affirm the judgments of the district court. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, which we recite only as necessary to explain our decision.

A. Sufficiency of the Evidence Claims

Defendants assert that there was insufficient evidence to convict them of the murder and attempted murder charges. "Although we review sufficiency of the evidence claims *de novo*, a defendant mounting such a challenge bears a heavy burden." *United States v. Harvey*, 746 F.3d 87, 89 (2d Cir. 2014) (per curiam) (internal quotation marks and citation omitted). "[W]e will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Bruno*, 383 F.3d 65, 82 (2d Cir. 2004) (quoting *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001)).

1. Murder of Michael Meldish

Defendants argue that there was insufficient evidence to support their convictions for Counts Two, Three, and Seven—the counts related to the murder of Michael Meldish. Madonna and Crea argue that there was insufficient evidence to show that they had any involvement in Meldish's murder. Londonio and Caldwell argue that a rational jury could not have concluded that Caldwell committed the murder to gain or maintain membership in the Lucchese Family, as is required for conviction.

Viewing the evidence as a whole, we conclude that a rational juror could have found that Madonna and Crea ordered the murder of Meldish, which was subsequently carried out by Londonio and Caldwell for the purpose of maintaining their positions in the Lucchese Family. *See id*. ("To convict a defendant of murder in aid of racketeering, the [g]overnment must prove that he committed the charged racketeering acts 'for the purpose of gaining entrance to or maintaining or increasing [his] position' in a racketeering enterprise." (quoting 18 U.S.C. § 1959(a))).

The government presented evidence showing, *inter alia*, that as boss and underboss of the Lucchese Family, Madonna and Crea, respectively, ordered, through a typical Mafia chain of command, Meldish's murder over Meldish's refusal to collect money he owed to Madonna. The evidence also showed that Londonio and Caldwell had long-time dealings with the Lucchese Family, the former as an associate and later a soldier, and the latter as an associate, and would be expected to carry out orders received

from the boss or underboss. Finally, ample physical evidence showed that Londonio and Caldwell were with Meldish the night that he was murdered, and that Caldwell was the triggerman for the shooting.

2. Attempted Murder of Enzo Stagno

Caldwell challenges his conviction of Counts Four and Eight—the counts related to the attempted murder of Enzo Stagno—arguing again that there was insufficient evidence that his motivation in doing so was in furtherance of the conspiracy. Evidence showed that the shooting of Stagno occurred as a result of a years-long dispute between the Lucchese Family and its rival, the Bonanno Family. Caldwell carried out the shooting with the assistance of two Lucchese Family associates. A jury could reasonably infer that Caldwell committed the Stagno shooting because he was expected to do so as an associate of the Lucchese Family.[3] *See United States v. Arrington*, 941 F.3d 24, 38 (2d Cir. 2019) ("While [defendant's] position was, to be sure, a low and peripheral one, any position is enough.").

B. Challenged Evidentiary Rulings

Defendants challenge several of the district court's evidentiary rulings. Such rulings are reviewed for abuse of discretion and will be reversed "only when the court has acted arbitrarily or irrationally." *United States v. Nektalov*, 461 F.3d 309, 318 (2d Cir.

[3] Caldwell's challenge to his conviction on Count One, engaging in a racketeering conspiracy, relies on the same arguments he advanced with respect to the Meldish murder and Stagno attempted murder charges and is therefore unavailing.

2006) (internal quotation marks omitted). "Alleged violations of the Confrontation Clause are reviewed *de novo*, subject to harmless error analysis." *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006). An erroneous evidentiary ruling does not warrant a new trial, however, if the error was harmless—that is, if we determine with "fair assurance that the jury's judgment was not substantially swayed by the error." *United States v. Paulino*, 445 F.3d 211, 219 (2d Cir. 2006) (internal quotation marks omitted); *see also* Fed. R. Crim. P. 52(a).

1. Admission of Co-Conspirator Statements

a. Londonio's Statements to Evangelista

While detained before trial, Londonio made various statements to a fellow inmate, David Evangelista, that implicated his co-Defendants in the Meldish murder. Evangelista testified, over Defendants' objections, to the content of those statements. Madonna, Crea, and Caldwell claim that the district court erred in admitting those statements.

After reviewing the trial transcripts and record, we find that Londonio's statements to Evangelista about the Meldish murder satisfied each element of Fed. R. Evid. 804(b)(3) as statements against interest and were thus properly admitted. We have repeatedly upheld the admission of statements about criminal conduct committed jointly by the declarant and a defendant, including statements about the motive for the crime or a particular defendant's role in the crime. *See United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007) (declarant's statement that murder victim "was killed because the 'Dude

owed' money" was properly admitted as a statement against interest). The evidence established that Londonio participated directly in a violent crime and made statements to Evangelista implicating himself, as well as Madonna and Crea, who ordered—but did not personally commit—that offense. The statements were sufficiently self-inculpatory.[4] *See United States v. Olivera*, 797 F. App'x 40, 42–44 (2d Cir. 2019) (summary order) (where declarant committed robbery that resulted in death of victim, there was no error in admitting statement that co-defendant ordered the robbery).

Londonio's statements to Evangelista were also corroborated by other testimony and exhibits introduced at trial. In addition to a plethora of physical evidence placing Londonio and Caldwell at the scene of the crime on the evening of the Meldish murder, other witnesses testified about the debt owed by Meldish to Madonna as well as Madonna and Crea's roles in ordering the murder. Furthermore, an expert on the Mafia testified to the chain of command in the Lucchese Family. *See United States v. Wexler*, 522 F.3d 194, 202–03 (2d Cir. 2008) (evidence found to be more trustworthy when corroborated by non-hearsay testimony and other evidence).

[4] Crea also argues that Londonio was available to testify, and thus his testimony, rather than Evangelista's testimony, should have been admitted. We agree with the district court that Londonio's mid-trial offer to testify was not made in good faith, given that he was unwilling to waive his Fifth Amendment rights unless he was tried separately, and prior to, his co-Defendants.

b. Londonio's Statements to Foti

During the trial, Joseph Foti testified about statements Londonio made regarding Meldish's debt to Madonna and the relationship between Meldish and Madonna—specifically, Madonna's reaction to a beating of Meldish by members of the Bonanno Family. Madonna challenges the admission of Londonio's statements, claiming that his knowledge of those events was not sufficiently established.

Even if we were to assume that the testimony was improperly admitted, any error was harmless because the same evidence was admitted through other witnesses. Jonathan Bash and Anthony Zoccolillo both testified about Meldish's debt to Madonna, and other witnesses testified that the relationship between Madonna and Meldish had become strained before Meldish's murder. *See Campaneria v. Reid*, 891 F.2d 1014, 1022 (2d Cir. 1989) (finding that where evidence is "entirely cumulative," its admission, even if erroneous, is harmless beyond a reasonable doubt).

c. Datello's Recorded Statements

Madonna contends that the district court erred by admitting, over Madonna's objection, recorded statements made by Joseph Datello explaining his need to sell drugs in order to repay a $200,000 debt to the Lucchese Family because Madonna and Crea had Meldish killed over his refusal to pay a debt. Datello's recorded statements were admitted as co-conspirator statements, under Fed. R. Evid. 801(d)(2)(E), made in furtherance of the charged racketeering conspiracy. The district court reasoned that

Datello and Madonna were co-conspirators insofar as Datello was engaging in drug transactions to get money to repay a debt he was responsible for "under the rules of the enterprise." Supp. App'x at 1754. Madonna argues that Datello's statements were not admissible as co-conspirator statements because there was no specific conspiracy between Datello and Madonna to engage in drug transactions in furtherance of the Lucchese Family enterprise.

We agree with the district court that Datello and Madonna were both part of the charged racketeering conspiracy, and that as a member of that conspiracy, Datello was expected to make payments to the Lucchese Family on his debt arising from that conspiracy. *See United States v. Russo*, 302 F.3d 37, 44 (2d Cir. 2002) ("[A] declarant's statement made in furtherance of a criminal act . . . is not admissible against the defendant under the co-conspirator exception unless the defendant was associated with the declarant in a conspiracy or joint venture having that criminal act as its objective."). As the district court aptly noted, "[i]t's the [Lucchese] Family norms that required Datello to make these payments and the Family has an interest in [(A)] not getting stiffed by people who owe it money, and [(B)] making people aware that bad things can happen if you don't pay." Supp. App'x at 1756. Datello's statements about the need to get money quickly to repay the debt he owed to the Lucchese Family were therefore properly admitted as co-conspirator statements.

d. Caldwell's Recorded Interview

During a New York City Police Department interview of Caldwell after the Meldish murder, the interviewing detective said he was "trying to get an explanation" for the evidence placing Caldwell at the scene of the crime, J. App'x at 1594–96, to which Caldwell responded, "I don't have one," *id*. at 1596. Londonio challenges the admission of that statement for the first time on appeal, so it is reviewed for plain error. *See United States v. Logan*, 419 F.3d 172, 177 (2d Cir. 2005).

Even assuming that the district court erred in admitting Caldwell's statement, Londonio's argument fails because he cannot show, as he must on plain-error review, "a reasonable probability that the error affected the outcome of the trial." *United States v. Marcus*, 560 U.S. 258, 262 (2010). Here, strong evidence—including phone records, cellphone and vehicle location data, video of Londonio's car following Meldish's car in the minutes before the murder, and Londonio's confessions to both Evangelista and Foti—established Londonio's guilt. On this record, Londonio cannot show that admission of Caldwell's statement affected his substantial rights and the outcome of the trial. *See Logan*, 419 F.3d at 177.

2. Other Evidentiary Issues

a. Alternative Suspect Evidence

During trial, the district court sustained objections to certain defense questions that sought to develop a theory that the FBI had failed to adequately investigate the

Bonanno Family for its potential role in the Meldish murder. Londonio argues that the district court abused its discretion by limiting cross-examination and in denying the defense's motion to compel testimony from an FBI Special Agent about alternative suspects.

The district court did not abuse its discretion in concluding that the proffered evidence regarding other alleged suspects was not sufficiently connected to the Meldish murder and was inadmissible hearsay. Further, the district court did not err in limiting the testimony of the FBI Special Agent after finding that the FBI thoroughly investigated the Meldish murder, including any Bonanno Family involvement, during the three years between the murder and the filing of charges against Londonio. *See Wade v. Mantello*, 333 F.3d 51, 61–62 (2d Cir. 2003) (explaining that merely showing another's motive and opportunity to commit the charged crime does not necessarily establish admissibility; the defendant must also "show a nexus between the crime charged and the asserted alternative perpetrator" (internal quotation marks omitted)).

b. Evidence of Crea's Involvement in Construction Rackets

At trial, the government introduced evidence of Crea's involvement in construction-related rackets from the late 1990s until 2008, primarily through the testimony of two witnesses. The first witness, Sean Richard, who worked with Datello and Crea in the late 1990s until 2000, testified about working on Mafia-backed construction projects that used falsely inflated change orders. He later cooperated with

state and federal authorities, which led to labor and racketeering charges against Datello and Crea. The second witness, Peter Palmisano, who worked as a project manager on one of Crea's large construction contracts in the Bronx from 2008 to 2014, testified about the intimidation he endured when he raised concerns about false invoices submitted on that project. Crea objects to the introduction of that evidence as prejudicial and improper propensity evidence.

The testimony about Crea's involvement in construction rackets was both relevant and admissible. Palmisano's testimony about vandalism, break-ins, and other acts was admitted as circumstantial evidence that the campaign of intimidation was designed to protect the contractor and ensure the flow of fraudulent proceeds to the Lucchese Family. Richard's testimony about the pre-2000 contracts was admitted as background information to explain the Lucchese Family's long-time control of the construction industry and Crea's influence over that business. Additionally, the district court provided clear limiting instructions[5] that sufficed to prevent any unfair prejudice arising from that challenged evidence. *See United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006) ("[T]he law recognizes a strong presumption that juries follow limiting instructions.").

[5] The limiting instruction relating to Richard's testimony was one requested by Crea and described by his counsel as "perfect." Supp. App'x at 997–98.

C. Pre-Trial Motion for Inspection of Grand Jury Minutes

Crea argues that the district court erred in denying his motion to dismiss an earlier indictment or inspect the grand jury minutes that resulted in that indictment claiming that, because the government made misrepresentations during bail hearings, those same misrepresentations must have been made to the grand jury. After carefully reviewing each of the alleged misrepresentations, the district court concluded that any errors by the government at the bail hearings were not intentional and cautioned the government not to make the same mistakes when it presented the case to a new grand jury. Because the government sought a new indictment before a new grand jury, the district court denied the request to dismiss the prior indictment with prejudice or to review the grand jury minutes.

We review the denial of a motion to dismiss an indictment for prosecutorial misconduct *de novo*, while deferring to a district court's factual findings unless clearly erroneous. *See United States v. Walters*, 910 F.3d 11, 22 (2d Cir. 2018). Whether an indictment should be dismissed with or without prejudice is reviewed for abuse of discretion. *See United States v. Giambrone*, 920 F.2d 176, 181 (2d Cir. 1990). Finally, we review a district court's decision whether to inspect grand jury minutes for abuse of discretion. *See Lawyers' Comm. for 9/11 Inquiry, Inc. v. Garland*, 43 F.4th 276, 285 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 573 (2023).

Because Crea was convicted after a jury trial, his claim that an earlier indictment against him should have been dismissed based on errors in the grand jury process is moot. *See United States v. Mechanik*, 475 U.S. 66, 72–73 (1986). Although Crea argues that "the circumstances here fall outside the rule announced in [*Mechanik*]," Crea Br. at 13, he does not offer any explanation for why that is so. As the Supreme Court noted, "isolated exceptions" to *Mechanik's* harmless-error rule apply where the "structural protections of the grand jury" are compromised by ills such as racial or gender discrimination in selecting grand jurors. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256–57 (1988). But attacks on the presentation of evidence to the grand jury are not exempt from the harmless-error rule. *See id*. Therefore, if any error was made by the district court in failing to inspect the grand jury minutes, we hold that such error was harmless.

D. Jury Instructions

Madonna and Crea argue that the district court erroneously instructed the jury that it could find them guilty on a *Pinkerton* theory of liability with respect to the Meldish murder charged in Count Three and the use of a firearm resulting in death charged in Count Seven. *See Pinkerton v. United States*, 328 U.S. 640, 646–48 (1946). The *Pinkerton* instruction "informs the jury that it may find a defendant guilty of a substantive offense that he did not personally commit if it was committed by a coconspirator in furtherance of the conspiracy, and if commission of that offense was a reasonably foreseeable

consequence of the conspiratorial agreement." *United States v. Gershman*, 31 F.4th 80, 99 (2d Cir. 2022) (internal quotation marks omitted), *cert denied*, 143 S. Ct. 816 (2023).

We review a preserved challenge to a jury instruction *de novo*, and we will reverse only if we identify "both error and ensuing prejudice." *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) (quoting *United States v. Quinones*, 511 F.3d 289, 313 (2d Cir. 2007)). Where a challenge is unpreserved, we review only for plain error. *See United States v. Nouri*, 711 F.3d 129, 138 (2d Cir. 2013).

We have reviewed the district court's *Pinkerton* instruction and find no error, plain or otherwise. There was ample evidence to support the government's theory that Madonna and Crea shared membership in a RICO conspiracy that condoned acts of murder with Londonio and Caldwell, the perpetrators of the Meldish murder. The district court correctly instructed the jury that to convict a Defendant of the Meldish murder on a *Pinkerton* theory, it needed to find, among other things, that the Defendant and the person or persons who actually committed the crime were members of a conspiracy at the time of the killing, "that the substantive crime was committed pursuant to the common plan and understanding [the jury] found to exist among the co-conspirators," and "that the defendant could reasonably have foreseen that the substantive crime [the jury was] considering might be committed by his co-conspirators." J. App'x at 1509–10. Because the record here supports the district court's issuance of the

instruction which clearly conveyed the concept of reasonable foreseeability that *Pinkerton* requires, there was no error.

E. Defendants' Rule 33 Motion for a New Trial

Defendants argue that the district court erred in denying their motion for new trial based on certain post-trial disclosures relating to two of the government's witnesses. After the trial, a cooperating witness, John Pennisi, participated in dozens of podcasts where he discussed his association with and activities in organized crime as a "made" member of the Lucchese Family. The government also disclosed a disc it had obtained, after the trial, from the Metropolitan Detention Center in Brooklyn containing recordings of a cooperating witness, Evangelista's, calls from prison. Defendants claim this evidence undermines the government's theory that the Meldish murder was committed by the Lucchese Family or required Madonna and Crea's approval and could have been used to impeach those witnesses.[6] We review the district court's denial of a Rule 33 motion for a new trial for abuse of discretion and the factual findings in support of its ruling for clear error. *See, e.g.*, *United States v. Rigas*, 583 F.3d 108, 125 (2d Cir. 2009).

[6] Separately, Londonio seeks a new trial based on claims of prosecutorial misconduct. After a thorough review of the record, we conclude that any alleged misconduct in the prosecutor's statements was cured by the instructions of the district court. *See United States v. Millar*, 79 F.3d 338, 343 (2d Cir. 1996) (finding that the district court's "instructions to the jury to disregard the prosecutor's comments were sufficiently curative to eliminate any possible prejudice").

The post-trial disclosures do not warrant a new trial because they do not undermine the government's theory of the case that the Meldish murder was sanctioned by the Lucchese Family. The jury heard and rejected the defense's theories that murders within La Cosa Nostra are not always orchestrated by the boss (so-called "sneak murders"), and that the Bonanno Family was responsible for the Meldish murder. Further, both witnesses were subject to extensive cross-examination, and any further impeachment based on information disclosed post-trial would have been cumulative. *See United States v. Persico*, 645 F.3d 85, 111 (2d Cir. 2011) ("[W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or is subject to extensive attack by reason of other evidence, the undisclosed evidence may properly be viewed as cumulative, and hence not material, and not worthy of a new trial."). There is no "reasonable probability" that the outcome of Defendants' trial would have been different had the post-trial disclosures come to light before trial. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 146 (2d Cir. 2008). For those reasons, we do not find that any of the purported new evidence warrants a new trial under Rule 33.[7]

[7] The district court correctly concluded there was no *Brady* violation with respect to either the podcasts created post-trial or the recorded prison calls which were not in the government's possession at the time of trial. *See Brady v. Maryland*, 373 U.S. 83 (1963).

F. Sentencing Challenges

Madonna, Crea, and Londonio each raise sentencing challenges.

1. Madonna's Sentencing Challenge

Madonna argues that his sentence should be vacated and remanded for re-sentencing because the mandatory sentence for Count Three, life without parole, violates the Eighth Amendment's prohibition on cruel and unusual punishment due to his age and deteriorating neurological condition. However, as Madonna concedes in his brief, binding precedent forecloses this argument. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("Petitioner asks us to extend this so-called individualized capital-sentencing doctrine to an individualized mandatory life in prison without parole sentencing doctrine. We refuse to do so." (internal quotation marks and citation omitted)). His argument therefore fails.

2. Crea's Sentencing Challenge

Crea argues that the district court erred in sentencing him to life imprisonment on Count One because the jury did not find that he participated in a pattern of racketeering activity that included acts of murder. The enhanced-penalty provision of Section 1963(a) does "not require proof that the murder that was among the objects of the conspiracy actually came to fruition in order for the maximum penalty to apply." *United States v. Capers*, 20 F.4th 105, 120 n.11 (2d Cir. 2021). The verdict form as to Count One included a special interrogatory, which the jury found, that asked the jury to determine whether "the

pattern of racketeering activity that Defendant Steven Crea agreed would be committed include[d] acts involving murder, including attempted murder, conspiracy to murder, or aiding and abetting murder." Supp. App'x 700. That finding was sufficient to trigger the enhanced-penalty provision. Even if the district court erred, the error did not affect Crea's substantial rights due to the life sentences imposed on Counts Three and Seven. *See United States v. Jackson*, 658 F.3d 145, 153 (2d Cir. 2011) (concluding that any error in imposing a 384 months sentence was harmless because the sentence ran concurrently with two sentences of 540 months).

3. Londonio's Sentencing Challenges

Londonio challenges the imposition of a consecutive life sentence for his Section 924(j) conviction on Count Seven.[8] At the time of the sentencing, this Court's precedent required a sentence for a Section 924(j) conviction to run consecutively to the sentence imposed on any other count of conviction. *See United States v. Barrett*, 937 F.3d 126, 129 n.2 (2d Cir. 2019). After Defendants' sentencing, however, the Supreme Court abrogated *Barrett* and held that Section 924(j) sentences need not run consecutively. *See Lora v. United States*, 599 U.S. 453, 464 (2023). Because Londonio did not object to the imposition

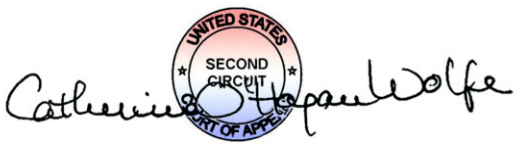
[8] Londonio also argues that his conviction on Count Seven must be vacated because it is predicated on an offense—murder in aid of racketeering activity—that is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). That argument is foreclosed by *Stone v. United States*, 37 F.4th 825, 832–33 (2d Cir.), *cert. denied*, 143 S. Ct. 396 (2022). In *Stone*, we held that murder in aid of racketeering based on a completed violation of N.Y. Penal Law § 125.25(1) is categorically a crime of violence. *See id.*; *United States v. Laurent*, 33 F.4th 63, 89 (2d Cir. 2022) (same). Londonio's argument therefore fails.

of a consecutive term on Count Seven before the district court, this Court's review is for plain error. *See Marcus*, 560 U.S. at 262. Londonio claims that because the district court imposed concurrent sentences on all other counts, it must have understood that it did not have the discretion to impose a concurrent sentence and, as such, the sentence is erroneous.

Even assuming the imposition of the consecutive life sentence was erroneous, that error does not meet the plain error standard and is harmless. Londonio was also sentenced to two additional concurrent life sentences on Counts One and Three, and so the imposition of an additional consecutive life sentence does not affect any of his substantial rights, thereby foreclosing a plain error challenge. *See, e.g., United States v. Vernace*, 811 F.3d 609, 620 (2d Cir. 2016); *see generally Kassir v. United States*, 3 F.4th 556, 561-64 (2d Cir. 2021) (discussing concurrent sentence doctrine).

We have considered Defendants' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgments of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand twenty-four.

United States of America,

Appellee,

v.

Christopher Londonio, Terrance Caldwell, Matthew Madonna, Steven Crea, Sr.,

Defendants - Appellants.

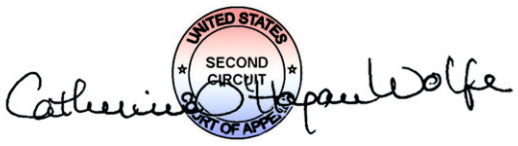
ORDER

Docket Nos: 20-2479 (Lead)
20-2714 (Con)
20-2722 (Con)
20-2980 (Con)

Appellants, Christopher Londonio and Terrance Caldwell, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of December, two thousand twenty-four.

United States of America,

Appellee,

v.

Christopher Londonio, Terrance Caldwell, Matthew Madonna, Steven Crea, Sr.,

Defendants - Appellants.

ORDER

Docket Nos: 20-2479 (Lead)
20-2714 (Con)
20-2722 (Con)
20-2980 (Con)

Appellant, Steven Crea, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk