No. 19-5489

IN THE SUPREME COURT OF THE UNITED STATES

AZIBO AQUART, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

CAPITAL CASE

QUESTION PRESENTED

Whether sufficient evidence supports the jury's finding that petitioner's murders were committed "for the purpose of * * * maintaining or increasing [his] position in an enterprise engaged in racketeering activity" under 18 U.S.C. 1959(a).

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

United States v. Aquart, No. 12-5086 (Dec. 20, 2018)

United States District Court (D. Conn.):

United States v. Aquart, No. 06-cr-160 (Dec. 18, 2012)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5489

AZIBO AQUART, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 912 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2018. A petition for rehearing was denied on March 7, 2019 (Pet. App. 61a). On May 21, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including August 4, 2019. The petition for a writ of

certiorari was filed on August 5, 2019 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); one count of conspiracy to traffic cocaine, in violation of 21 U.S.C. 841(a)(1), 846 and 21 U.S.C. 841(b)(1)(A)(iii) (2000); three counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); and three counts of murder in connection with a continuing criminal drug enterprise, in violation of 21 U.S.C. 848(e)(1)(A). Pet. App. 10a; Judgment 1-2. Following a penalty hearing, the jury unanimously determined that petitioner should receive a capital sentence for two of the counts of murder in aid of racketeering and two of the counts of murder in connection with a continuing criminal drug enterprise. Pet. App. 16a. The district court sentenced petitioner in accordance with that recommendation, and further imposed consecutive life sentences for the remaining murder and drug-conspiracy counts and a 120-month term of imprisonment on the count of conspiracy to commit murder in aid of racketeering. Ibid.. The court of appeals affirmed petitioner's convictions, but vacated his capital sentence and remanded for a new capital-sentencing proceeding. Id. at 1a-60a.

1. In 2004, petitioner operated a drug-distribution enterprise out of a Bridgeport, Connecticut apartment building. Pet. App. 11a. Petitioner or one of his lieutenants would deliver crack cocaine to dealers and collect drug proceeds from them in return. Ibid. Dealers who failed to account for their drug proceeds or who sold drugs from other sources faced violent retaliation, often from petitioner himself. Ibid.

In the summer of 2005, Tina Johnson and her boyfriend, James Reid, moved into the apartment building and started purchasing crack cocaine from one of petitioner's dealers. Pet. App. 11a. But Johnson subsequently contacted another supplier and began selling small crack-cocaine packets from that source out of her apartment, drawing customers away from petitioner's enterprise. Ibid. After petitioner learned of these activities, he confronted Johnson, telling her that she "better quit" and that he was "not playing." Ibid. (citation omitted). Johnson ignored petitioner's warning, even after one of petitioner's lieutenants confronted her brandishing a table leg. Ibid. Johnson said that if she could not sell crack in the building, then "nobody is selling" because Johnson would call the police and shut down petitioner's operation. Ibid. (citation omitted). When petitioner learned of Johnson's refusal, petitioner said he would "take care of it." Ibid. (citation omitted).

In late August 2005, petitioner recruited John Taylor and Efrain Johnson to help him with "something." Pet. App. 12a

(citation omitted). Several days later, petitioner, his brother Azikiwe Aquart, and Taylor purchased rolls of duct tape. Ibid. They then met Efrain Johnson, and petitioner explained to the group that people in the apartment building were "into his money business" and he wanted to "take them out or move them out . . . of the building." Ibid. (citation omitted). Azikiwe supplied facemasks and gloves, and Efrain Johnson produced two baseball bats. Ibid. They then went to the building with the intent to enter Tina Johnson's apartment, but aborted their efforts when they saw someone else knock on Tina Johnson's door and get no answer. Ibid.

They renewed their venture in the early morning hours on August 24, 2005, when petitioner, Azikiwe, Taylor, and Efrain Johnson met at the apartment building. Pet. App. 12a. Petitioner drew a gun, approached Tina Johnson's apartment, and kicked in the door. Ibid. Once inside, petitioner shouted for everyone to "get on the ground." Ibid. (citation omitted). Petitioner and Azikiwe located Tina Johnson and her boyfriend, Reid, in one bedroom. Ibid. Efrain Johnson encountered a third occupant, Basil Williams, in another bedroom. Ibid. Petitioner and Taylor moved a couch against the front door, and Taylor guarded the door. Ibid.; Gov't C.A. Br. 23. Petitioner and Azikiwe then bound Tina Johnson and Reid with duct tape, and bludgeoned them with the baseball bats. Pet. App. 12a. Taylor would later testify that petitioner

"bash[ed] [Tina Johnson] like he was . . . at a meat market." Ibid. (citation omitted).

Later that morning, Tina Johnson's adult son visited the apartment and discovered that Tina Johnson, Reid, and Williams had all been killed. Pet. App. 12a. Tina Johnson's son recounted that the bedrooms were covered with blood and that the living room looked like there had been "a war in there." Ibid. (citation omitted). The medical examiner concluded that each of the victims had suffered multiple skull fractures and died from blunt-force trauma. Id. at 13a. Their hands, feet, heads, and mouths had been wrapped tightly with duct tape. Ibid. Law enforcement subsequently identified Azikiwe's fingerprints on two plastic bags found in one of the bedrooms, and petitioner's fingerprints on a nearby piece of duct tape. Ibid. DNA analysis linked petitioner to a section of a latex glove found under the cushion of the couch that had been pushed up against the front door, and Efrain Johnson to a piece of duct tape cut from Tina Johnson's hands and wrists. Id. at 13a & n.2; Gov't C.A. Br. 35-38.

2. A federal grand jury returned an indictment charging petitioner with one count of conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); one count of conspiracy to traffic cocaine, in violation of 21 U.S.C. 841(a)(1), 846 and 21 U.S.C. 841(b)(1)(A)(iii) (2000); three counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); three counts of murder in connection with a continuing criminal drug

enterprise, in violation of 21 U.S.C. 848(e)(1)(A). Fourth Superseding Indictment 1-12.[1]

Section 1959(a), colloquially known as the violent crimes in aid of racketeering (VICAR) statute, provides in relevant part that "[w]hoever * * * 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 * * * shall be punished * * * by death or life imprisonment." 18 U.S.C. 1959(a)(1). It further provides that anyone who attempts or conspires to commit such a murder shall be punished "by imprisonment for not more than ten years or a fine under this title, or both." 18 U.S.C. 1959(a)(5). Here, the district court instructed the jury that, to convict on the VICAR murder counts and the VICAR conspiracy count, it had to find that "at least one of [petitioner's] purposes in committing murder was to maintain or increase his position in the racketeering enterprise." D. Ct. Doc. 834, at 30 (May 20, 2011). The jury found petitioner guilty on the charged counts, including the VICAR offenses. Pet. App. 10a.

At the penalty phase, the jury recommended that petitioner be sentenced to death for the two VICAR murder counts and for the two

[1] The grand jury also charged petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Fourth Superseding Indictment 12-13. The government later dismissed that charge. D. Ct. Doc. 1184 (Dec. 17, 2012).

drug-enterprise murder counts related to Tina Johnson's and Williams's deaths. Pet. App. 16a. The district court accepted that recommendation and imposed a capital sentence on those counts. Ibid. The court imposed consecutive life sentences for the remaining VICAR murder count and drug-enterprise murder count (related to Reid's death); another consecutive life sentence for the drug-conspiracy count; and a consecutive 120-month term of imprisonment on the VICAR conspiracy count. Ibid.

3. The court of appeals affirmed petitioner's convictions, but vacated his capital sentence and remanded for a new capital-sentencing proceeding. Pet. App. 1a-60a.[2]

a. The court of appeals rejected all of petitioner's challenges to the guilt-phase of trial. Although in this Court, petitioner criticizes (Pet. 4-8) the strength of the government's evidence proving his participation in the murders, in the court of appeals petitioner "d[id] not challenge the proof of either his participation in the charged murders or his leadership of the racketeering enterprise." Pet. App. 18a. Instead, he challenged the sufficiency of the evidence only with regard to whether he murdered the victims "for the purpose of * * * maintaining or increasing [his] position" in that enterprise, 18 U.S.C. 1959(a),

[2] As a result of the court of appeals' vacatur (and the issuance of the court of appeals' mandate), petitioner is not currently "under a death sentence that may be affected by the disposition of the petition." Sup. Ct. R. 14.1(a). The government, however, has treated the case as a capital case in conformance with the petition and this Court's docket.

and whether the crime had a nexus to interstate commerce. The court of appeals found the evidence sufficient to support his VICAR murder convictions. Pet. App. 17a-19a.

As relevant here, the court of appeals explained that the jury could find the purpose element satisfied based on evidence that "the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." Pet. App. 18a (quoting United States v. Dhinsa, 243 F.3d 635, 671 (2d Cir.), cert. denied, 534 U.S. 897 (2001)). The court noted that it had previously "affirmed VICAR convictions where violent crimes are 'committed or sanctioned by high ranking leaders of the enterprise for the purpose of protecting the enterprise's operations and furthering its objectives.'" Ibid. (quoting Dhinsa, 243 F.3d at 671). And it found sufficient evidence here that petitioner "orchestrated and participated in the charged VICAR crimes in order to 'protect[] the enterprise's operations and further[] its objectives.'" Id. at 19a (citation omitted; brackets in original). The court cited evidence that petitioner had "expressed frustration with Tina Johnson's sale of crack cocaine on what he perceived to be his enterprise's territory, and with her defiance of his orders to stop such sales." Id. at 18a. It also quoted testimony that petitioner told his confederates that he needed to get Tina Johnson out of "his money business,"

and that drug dealers who attempted to compete with him "had to die." Id. at 19a (citation omitted).

Petitioner argued that the court of appeals' precedents could not be squared with the text of Section 1959(a). Pet. App. 19a. But the court explained that it was "bound by that precedent and not inclined, in any event, to depart from it." Ibid. The court additionally observed that, in any event, the VICAR statute's "motive element would be satisfied even under [petitioner's] narrow reading of the statute," which focused on "'only a defendant's own personal position'" in the enterprise. Ibid. (citation omitted). The court found sufficient evidence that petitioner committed the murders "based on the threat posed to the enterprise" by Tina Johnson's drug sales, and that petitioner's "failure to do so would have undermined his position within that enterprise." Ibid. (quoting Dhinsa, 243 F.3d at 671).[3]

b. The court of appeals did, however, vacate petitioner's capital sentence and remand for a new sentencing hearing. Pet. App. 26a-57a. The court concluded that the government had intruded

---

[3] In addition, the court of appeals rejected petitioner's contention that Taylor had perjured himself by understating his expectations of the sentencing benefits he would receive by cooperating with the government. Pet. App. 19a-22a. The court explained that petitioner "offer[ed] little factual support for his claim of possible perjury." Id. at 22a. The court also rejected a similar perjury challenge to the testimony of Efrain Johnson's sister, Lashika Johnson, id. at 22a-24a, and petitioner's claim of prosecutorial misconduct during the government's summation of the evidence during the guilt phase, id. at 24a-26a.

on the jury's exclusive responsibility for determining witness credibility when a prosecutor, during the trial's penalty phase, asked an FBI agent during cross-examination why Efrain Johnson failed to receive a cooperation agreement. Id. at 27a-29a. It also concluded that the government had improperly commented during its penalty-phase closing argument that one of the defense's mitigation arguments -- that petitioner should not receive the death penalty because his associate Taylor would not receive that penalty -- was inconsistent with petitioner's guilt-phase contention that Taylor was not present for the murders. Id. at 36a. The court reasoned that capital defendants may present inconsistent theories between the guilt and penalty phases and that the government's comment impaired that right. Ibid. The court concluded that these two errors together "may have denied [petitioner] a fair penalty proceeding," and thus warranted vacatur of petitioner's capital sentence and a remand for a new penalty proceeding. Id. at 28a; see id. at 38a. The court rejected petitioner's other penalty-phase challenges, including his arguments regarding the constitutionality of the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq., and capital punishment generally. Pet. App. 38a-57a.

c. Judge Calabresi concurred in part and concurred in the result. Pet. App. 58a-60a. Judge Calabresi did not disagree with any of the panel's substantive conclusions. But he declined to join portions of the panel's opinion rejecting some of petitioner's

penalty-phase challenges, including constitutional claims, that he concluded were forfeited or otherwise not properly presented to the court of appeals in this case. Ibid.

ARGUMENT

Petitioner contends (Pet. 18-27) that the government presented insufficient evidence that his murders were committed "for the purpose of * * * maintaining or increasing [his] position in an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a). The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would not be a suitable vehicle for considering the scope of Section 1959(a)'s purpose requirement because, as the court of appeals observed, petitioner would not prevail even under his preferred interpretation of the statute. Further review is unwarranted.

1. As an initial matter, this Court's review is unwarranted at this time because the case is in an interlocutory posture. The court of appeals vacated petitioner's capital sentence and remanded for a new capital-sentencing proceeding. Pet. App. 58a. Those proceedings have not commenced. That posture "alone furnishe[s] sufficient ground for the denial of" the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition

for writ of certiorari); Eugene Gressman et al., Supreme Court Practice 281 n.63 (9th ed. 2007). Petitioner will have the opportunity to raise his current claim, together with any other claims that may arise from the resentencing, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioner provides no sound reason to depart in this case from the Court's usual practice of awaiting final judgment. Thus, even if further review were otherwise warranted, it would be premature.

2. In any event, the sole claim in the petition -- that the court of appeals erred in finding sufficient evidence of the purpose element to support his VICAR-murder convictions -- does not warrant this Court's review.

a. The VICAR statute imposes criminal penalties on an individual who, "for the purpose of * * * maintaining or increasing [his] position in an enterprise engaged in racketeering activity," commits any of several specified offenses, including murder and conspiracy to commit murder. 18 U.S.C. 1959(a). As the court of appeals has previously explained, Congress viewed the statute as a "means of proscribing murder and other violent crimes committed as an integral aspect of membership in such enterprises." United States v. Dhinsa, 243 F.3d 635, 671 (2d Cir.), cert. denied,

534 U.S. 897 (2001) (quoting United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992), cert. denied, 510 U.S. 856 (1993)). The plain terms of the statute thus "encompass[] violent crimes intended to preserve the defendant's position in the enterprise or to enhance his reputation and wealth within that enterprise," ibid. (emphases omitted). And a jury may therefore reasonably infer that a high ranking leader of a racketeering enterprise -- whose position, reputation, and wealth necessarily depend on his perceived and actual ability to preserve or improve the health and operation of the enterprise itself -- satisfies the purpose element when he commits "violent crimes * * * 'for the purpose of protecting the enterprise's operations and furthering its objectives,'" Pet. App. 18a (citation omitted).

The court of appeals found ample evidence supporting the jury's finding that petitioner -- the "undisputed leader" of his drug-distribution enterprise, Pet. 9 (citation omitted) -- murdered, and conspired to murder, Tina Johnson, Reid, and Williams "to maintain or increase his position," D. Ct. Doc. No. 834, at 30, in that enterprise. See Jackson v. Virginia, 443 U.S. 307, 319 (1979) (holding that evidence is sufficient if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt") (emphasis omitted). Petitioner had expressed frustration that Tina Johnson sold drugs in the same apartment building as him. Pet. App. 18a. He had

informed his murder accomplices to get her out of "his money business," id. at 19a (citation omitted), and he had told an associate that drug dealers who competed with him "had to die," ibid. (citation omitted). The jury could reasonably determine that, if competitors were permitted to siphon away petitioner's customers, he would steadily lose control over his distribution channels, his drug revenue, and, ultimately, the entire enterprise. And thus, when petitioner carried out his stated intention of killing the rival dealer and her associates, the jury could reasonably find that he acted with the purpose of "maintaining * * * [his] position in [the] enterprise." 18 U.S.C. 1959(a).

b. Contrary to petitioner's principal contention (Pet. 19-20), the legislative history of the VICAR statute does not suggest a crabbed reading of the statute that would call into question the court of appeals' sufficiency determination. The Senate Report explains that Congress intended inter alia to "proscribe[] murder and other violent crimes committed * * * as an integral aspect of membership in an enterprise engaged in racketeering." S. Rep. No. 225, 98th Cong., 1st Sess. 304 (1983). Petitioner identifies nothing in the legislative history -- or the statutory text -- suggesting that Congress intended to limit the VICAR statute to only those murders and violent crimes committed to defeat a direct and immediate threat to a defendant's personal position in the enterprise, as petitioner proposes (Pet. 15-17).

Petitioner's remaining contentions similarly lack merit. Application of Section 1959(a) to the facts here does not render the term "position" superfluous, cf. Pet. 20, but recognizes the reasonable inference that jurors may draw about the relationship between the position of high ranking leaders in an enterprise and the ongoing health and operations of the enterprise. It does not require a "liberal constru[ction]" (Pet. 23) of the statute's text to permit a reasonable inference that violent crimes committed to protect a racketeering enterprise and further its objectives are done for the purpose of maintaining a defendant's leadership of that enterprise. Nor does such application of the VICAR statute portend any "unjustifiable expansion" of criminal liability. Pet. 20. As petitioner acknowledges (Pet. 22-23), the court of appeals' approach has been in place since 1992. See Concepcion, 983 F.2d at 381. Yet petitioner identifies no examples of VICAR prosecutions that he claims were unjustified other than his own.

3. Petitioner acknowledges (Pet. 23) that every other court of appeals to have considered the question has taken a similar approach to the VICAR statute's purpose requirement. See, e.g., United States v. Dixon, 901 F.3d 1322, 1342-1343 (11th Cir. 2018), cert. denied, 139 S. Ct. 854, and 139 S. Ct. 1392 (2019); United States v. McGill, 815 F.3d 846, 933-934 (D.C. Cir. 2016) (per curiam), cert. denied, 138 S. Ct. 57, and 138 S. Ct. 58 (2017); United States v. Banks, 514 F.3d 959, 965-968 (9th Cir. 2008); United States v. Smith, 413 F.3d 1253, 1277-1278 (10th Cir. 2005),

cert. denied, 546 U.S. 1120 (2006), overruled on other grounds by Boyle v. United States, 556 U.S. 938 (2009); United States v. Tse, 135 F.3d 200, 206 (1st Cir. 1998); United States v. Fiel, 35 F.3d 997, 1004-1005 (4th Cir. 1994), cert. denied, 513 U.S. 1177 (1995). Petitioner asserts (Pet. 25-26) that his case is factually distinct from cases in which other courts of appeals have affirmed convictions under the VICAR statute, but he has not identified any decision of any court of appeals suggesting that it would not also affirm a conviction on the facts here.

4. In any event, this case would be a poor vehicle to address the meaning of the VICAR statute's purpose requirement because, as the court of appeals observed, "the motive element would be satisfied even under [petitioner's] narrow reading of the statute." Pet. App. 19a. Petitioner suggests (Pet. 15) that the VICAR statute demands evidence that the defendant committed murder for the purpose of maintaining or increasing his personal position within the enterprise against a direct and immediate threat, and he asserts that the record lacked evidence that Tina Johnson or anyone else posed such a threat. But that assertion disregards testimony that Tina Johnson informed petitioner's lieutenant that, if petitioner tried to stop her drug-dealing activities, she would call the police and shut down petitioner's operation. Pet. App. 11a. As the court of appeals observed, Tina Johnson's continued presence in the same apartment building as petitioner thus "undermined his position within th[e] enterprise" because she

credibly threatened to destroy that enterprise. Id. at 19a (quoting Dhinsa, 243 F.3d at 671). The evidence also showed, among other things, that petitioner had made retaliation an asserted and actual point of emphasis in his position as leader, id. at 11a, which would allow the jury to infer that he would have lost standing by allowing Tina Johnson to flout his authority. Because petitioner's sufficiency claim fails even under his proposed standard, review of the question presented would not be outcome determinative. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

OCTOBER 2019