

No. 19-8710

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM FRAZIER, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 9-19) that 18 U.S.C. 1959(a), known as the violent crimes in aid of racketeering (VICAR) statute, requires the government to prove that he had specific knowledge that the enterprise in which he sought to maintain or increase his position by committing assault with a dangerous weapon was engaged in racketeering activity. Petitioner previously raised that contention in a petition for a writ of certiorari, along with a vagueness challenge to his conviction under 18 U.S.C. 924(c). See Pet. at 7-17, Frazier v. United States (No. 17-8381) (Mar. 28, 2018). This Court granted the petition, vacated the judgment, and

remanded for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018), which found vagueness in a statutory provision that was nearly identical to the one at issue in petitioner's second claim. See 139 S. Ct. 319. For the reasons stated in our previous brief in opposition in this case, further review of petitioner's first claim, about the VICAR statute, remains unwarranted. See Br. in Opp. at 7-14, Frazier v. United States (No. 17-8381) (Aug. 24, 2018). The court of appeals correctly rejected petitioner's argument that Section 1959(a) contains his proposed mens rea element, and its decision does not conflict with any decision of this Court or of another court of appeals. See Pet. App. 14a-15a.

Petitioner asserts (Pet. 13, 15) that this Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), additionally supports his contention that the VICAR statute requires proof that a defendant knew that the enterprise was engaged in racketeering activity. He identifies no court of appeals that has adopted his reading of the statute on that, or any other, basis. In any event, as the court of appeals determined, petitioner's reliance on Rehaif is unavailing because, even if it supported his claim, any alleged error was harmless. Pet. App. 4a n.1 (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The court observed that petitioner "was the head of a local chapter of the enterprise," had "joined the enterprise soon after it had committed various acts of racketeering," and "was personally acquainted with the national

president, who ordered these acts." Ibid. Although petitioner contests (Pet. 18-19) whether the particular facts on which the court relied were sufficiently probative to render any alleged error harmless, that factbound dispute does not warrant this Court's review.

2. Petitioner separately contends (Pet. 20-21) that the Court should hold this case for Borden v. United States, cert. granted, No. 19-5410 (Mar. 2, 2020), in which the Court has granted review to address the question whether crimes that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" in the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). Petitioner was convicted of using or carrying a firearm during or in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 2a. The definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(A) is similar, but not identical, to the definition of a "violent felony" in the ACCA's elements clause. Compare 18 U.S.C. 924(c)(3)(A), with 18 U.S.C. 924(e)(2)(B)(i). Petitioner therefore contends (Pet. 20) that the decision in Borden may affect the validity of his Section 924(c) conviction.

Contrary to petitioner's contention, however, because his predicate crime of violence -- assault with a dangerous weapon under the VICAR statute -- could not have been committed with a mens rea of recklessness, no reason exists to hold this case for Borden. A federal VICAR offense does not exist independently of

the underlying state or federal VICAR predicate charged in a particular case. See 18 U.S.C. 1959(a) (premising liability on specific criminal acts "in violation of the laws of any State or the United States"). A violation of Section 1959(a) (3) requires proof that "a defendant's presently charged conduct constitute[s] an assault under federal law, while simultaneously also violating a state law." United States v. Keene, 955 F.3d 391, 397 (4th Cir. 2020); see id. at 398-399 ("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."). A conviction under the VICAR statute thus requires proof that the "predicate acts constitute state law crimes." United States v. Carrillo, 229 F.3d 177, 185 (2d Cir.), cert. denied, 531 U.S. 1026 (2000).

Petitioner's indictment shows that his offense qualified as assault with a dangerous weapon under Ohio's felonious assault statute, which makes it a crime to "knowingly" "[c]ause serious physical harm to another" or "[c]ause or attempt to cause physical harm to another \* \* \* by means of a deadly weapon or dangerous ordnance." Ohio Rev. Code Ann. § 2903.11(A)(1) and (2) (LexisNexis 2012); see Third Superseding Indictment 19-22. Because the commission of felonious assault under Ohio law requires knowing conduct, that offense does not implicate the question in Borden about crimes that can be committed with a mens rea of recklessness -- even if, as petitioner asserts (Pet. 20), some "other state-

law assault offenses" may require only recklessness. And because the particular state-law offense committed here was a necessary component of petitioner's federal offense of assault with a dangerous weapon in aid of racketeering, see 18 U.S.C. 1959(a), the latter offense likewise required proof of knowing conduct. Accordingly, the Court's resolution of the question presented in Borden will not affect the validity of petitioner's conviction, and holding the petition for Borden is not warranted.

That is true notwithstanding that the court of appeals took a different analytical path to the same result. It relied on the "generic" definition of assault with a dangerous weapon under 18 U.S.C. 1959(a)(3) -- into which petitioner's assault had to fit -- and on circuit precedent holding that assaults committed with a mens rea of recklessness can be categorical crimes of violence. Pet. App. 3a (citing United States v. Verwiebe, 874 F.3d 258 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018)). Although that circuit precedent could be affected by Borden, it was unnecessary to support the result in this case because petitioner's VICAR predicate in fact required knowing conduct.

The petition for a writ of certiorari should be denied.\*

Respectfully submitted.

JEFFREY B. WALL  
Acting Solicitor General

AUGUST 2020

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\* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.