No. 19-8710

In the
Supreme Court of the United States

WILLIAM FRAZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The government has not identified any case in which a court has ruled that a federal criminal statute is exempt from "standard rules of statutory interpretation." Nor has it identified any other circuit that interprets the VICAR statute, 18 U.S.C. § 1959(a), the way that the Sixth Circuit has. The Sixth Circuit's approach, moreover, is almost certainly incorrect. This Court has repeatedly held that a statutory *mens rea* requirement applies to each element of the offense, and the VICAR statute is no different.

The government is likewise mistaken when it contends that a ruling in *Borden* would have no effect on Frazier's § 924(c) conviction. The Government contends that the circumstances underlying the particular state-law predicate underlying his VICAR conviction must be plumbed in order to determine whether 18 U.S.C. § 1959(a)(3) is categorically violent. But the categorical approach requires analysis of the elements of § 1959(a)(3), not the particular manner in which § 1959(a)(3) was violated—and it is apparent that those elements may be satisfied through commission of a non-violent state-law predicate. Section 1959(a)(3) therefore is not a categorically violent offense.

I. No other court has held that "VICAR is not subject to standard rules of statutory interpretation."

Consistent with its response to Frazier's initial petition for writ of certiorari, the Government fails to identify any case in which a court has held that a criminal statute's generalized "remedial purpose" can overcome the statute's plain language. The Sixth Circuit's decision to exempt VICAR from the ordinary rules of statutory

interpretation is an outlier decision among the Circuits. The Government has identified no authority that demonstrates otherwise. As noted in Frazier's petition, the Circuits are in disarray about the elements of a VICAR offense, with disagreements over basic matters such as whether the prosecution must prove a "generic" federal offense in addition to conduct that amounts to a specific state-law crime. Guidance from this Court is necessary to resolve the inconsistency between the Circuits.

Although the Sixth Circuit stated in dicta that any error with respect to its omission of VICAR's *mens rea* requirement would be harmless, the Sixth Circuit arrived at that determination sua sponte and without the benefit of any briefing on the issue. The Government—until now—has never claimed that the error would be harmless. And for good reason: the omission of a statutory *mens rea* requirement is ground for reversal only if the error is "harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 583 (1986). The evidence at trial was unequivocal that Frazier did not participate in any of the alleged racketeering conduct, and there was no evidence that he knew anything about it. Pet. 17-19. A reasonable jury easily could conclude that Frazier did not have the *mens rea* that is required under a proper interpretation of the statute. The Sixth Circuit's footnote is no reason to deny certiorari in this case.

II. The petition should be held pending this Court's decision in *Borden*.

The question whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the elements clause of the

Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), is before this Court in *Borden v. United States*, No. 19-5410 (certiorari granted March 2, 2020).

The Government argues that *Borden* will make no difference because Frazier's VICAR predicate was Ohio felonious assault and the Ohio felonious assault statute requires proof that the defendant "knowingly" engaged in the relevant conduct. But the Government's argument that Frazier's particular state-law predicate involved "knowing" conduct does not demonstrate that § 1959(a)(3) is categorically violent. The question for purposes of the categorical approach is whether any and all convictions under § 1959(a)(3) require proof of "knowing" conduct, not whether the offense—as applied in Frazier's case—involved "knowing" conduct. *See Descamps v. United States*, 570 U.S. 254, 268 (2013) (under the categorical approach, a crime qualifies as a predicate offense either "in all cases or in none").

The Government has repeatedly argued that the terms of § 1959(a)(3) do not require any proof of a defendant's knowledge, and it is apparent that a defendant may be convicted under § 1959(a)(3) where a VICAR predicate does not require proof of knowledge, either. *See, e.g.*, *United States v. Rose*, 896 F.3d 104, 105 (1st Cir. 2018) (Rhode Island offense of assault with a dangerous weapon is not a violent felony under § 924(e) because it requires only recklessness); *United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017) (Massachusetts offenses of assault and battery with a dangerous weapon are not "violent felonies" for purposes of § 924(e) because they can be committed with a mens rea of recklessness). Because the

Government may win a conviction under § 1959(a)(3) even where the defendant does not engage in "knowing" conduct, the statute is not categorically violent. Contrary to the Government's argument, the particular circumstances of Frazier's case do not control the analysis.

The Government cites *United States v. Keene*, 955 F.3d 391 (4th Cir. 2020), as suggesting a contrary result, but the Government is mistaken. First, as the Government acknowledges, the Sixth Circuit's analysis in Frazier's case is not congruent with the Fourth Circuit's analysis in *Keene*. In *Keene*, the court ruled that § 1959(a)(3) requires proof that the defendant's conduct not only constituted "generic" assault under federal law (an argument that is inconsistent with the Government's previous position in Frazier's case) but also constituted a violation of a particular state-law predicate. *Id.* at 397. In Frazier's case, by contrast, the Sixth Circuit held that only the "generic offense of assault with a dangerous weapon" mattered to the categorical analysis, "not a specific federal or state law offense." Pet. App. 3a. Under the Sixth Circuit's approach, in other words, the elements of the underlying state-law offense do not become elements of the VICAR offense under § 1959(a)(3). Indeed, the Government never argued in its previous briefs that they did.

Second, *Keene* recognizes that a defendant may be convicted under § 1959(a)(3) for violating any number of relevant state-law predicates. That is the pith of Frazier's argument. If § 1959(a)(3) may be triggered through commission of any one of dozens of state-law predicate offenses, then § 1959(a)(3) is not

categorically violent unless each of those state-law predicate offenses is also categorically violent. If one of the applicable state-law predicates may be committed in a non-violent manner, then the Government could win a conviction under § 1959(a)(3) for non-violent conduct—meaning that § 1959(a)(3) is not categorically violent.

Thus, if this Court rules in *Borden* that a crime is not categorically violent under the materially identical language in § 924(e)(2)(B)(i) if it can be committed by a defendant with a *mens rea* of recklessness, then Frazier's § 924(c) conviction will need to be vacated, as well. If certiorari is not granted on the initial question presented in Frazier's petition, then Frazier's petition should be held pending a ruling in *Borden*.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Dated: August 26, 2020

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