

No. 19-8821

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSÉ SANTIAGO-ORTIZ, 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 SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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#### QUESTION PRESENTED

Whether sufficient evidence supports the jury's findings that the murder that petitioner committed was sufficiently related to an organized drug conspiracy to support convictions for murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); murder while engaged in a drug conspiracy, in violation of 21 U.S.C. 848(e)(1)(A) and 18 U.S.C. 2; and murder through the use of a firearm during and in relation to a drug conspiracy, in violation of 18 U.S.C. 924(j).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Santiago-Ortiz, No. 17-cr-149 (Dec. 20, 2018)

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

United States v. Santiago-Ortiz, No. 18-3830 (Dec. 18, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is not published in the Federal Reporter but is reprinted at 797 Fed. Appx. 34. The order of the district court (Pet. App. B1-B14) is not published in the Federal Supplement but is available at 2018 WL 4054859.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019. A petition for rehearing was denied on January 23, 2020 (Pet. App. C1). The petition for a writ of certiorari was filed

on June 22, 2020. 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 Southern District of New York, petitioner was convicted of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; murder while engaged in a drug conspiracy, in violation of 21 U.S.C. 848(e)(1)(A) and 18 U.S.C. 2; conspiracy to distribute, and possess with intent to distribute, at least one kilogram of heroin, in violation of 21 U.S.C. 841(b)(1)(A) (2006) and 846; murder through the use of a firearm during and in relation to a drug conspiracy, in violation of 18 U.S.C. 924(j); and using, carrying, and possessing a firearm during and in relation to a drug trafficking conspiracy, in violation of 18 U.S.C. 924(c) (2006) and 2. Judgment 1-2; see Pet. App. A2. The district court sentenced petitioner to life imprisonment, to be followed by five years of supervised release. Judgment 3-5; see Pet. App. A2. The court of appeals affirmed. Pet. App. A1-A11.

1. Beginning in 2010, petitioner oversaw a violent drug-trafficking organization that sold heroin, stamped with the word "Flow," in the Bronx. Pet. App. A4; Gov't C.A. Br. 4. Petitioner's organization distributed the heroin on street corners and in apartment-building lobbies, and transported significant quantities to Vermont where the heroin was sold at higher prices. Gov't C.A. Br. 5. Petitioner and other members of his organization regularly

possessed firearms, which they used to protect and defend their drug operation. Id. at 6.

Ramon Cruz supplied heroin to petitioner's organization and other dealers in the New York area. Gov't C.A. Br. 6. Petitioner and his brother, Jonathan Santiago, competed with those other dealers for control of the market. Ibid.; Pet. App. A4. Territorial disputes frequently emerged, resulting in violent assaults and shootings between petitioner and his rivals. Gov't C.A. Br. 6-7.

In March 2010, petitioner and Santiago got into a fight at a local pool hall with several individuals, including a man named Jerry Tide. Gov't C.A. Br. 8. At some point, Tide and his friends began throwing glass bottles at petitioner and Santiago -- one of which hit Santiago in the face, cutting his cheek. Ibid. Six months later, petitioner and Santiago again encountered Tide at the pool hall. Ibid. The two men left to arm themselves and returned with Cruz, their heroin supplier. Id. at 7-8, 10. When they returned, Santiago asked Tide if he "remember[ed] what [he] did to [Santiago's] face" and ordered petitioner to "handle him right now." Id. at 9 (citations omitted). Petitioner fired nine shots at Tide, killing him. Ibid.

At the time of Tide's murder, petitioner and Santiago "were getting to know" Cruz. Gov't C.A. Br. 10 (citation omitted). Cruz would later state that his own involvement in the events that night was to solidify the business connection. See Pet. App. A6. And

petitioner made clear to Cruz that if Cruz was "going to mess with us, he can't mess with [other dealers]." Gov't C.A. Br. 7 (citation omitted). "After the murder, Cruz 'consolidated the operation,' and made [petitioner] his sole distributor of Flow heroin in the area, vastly increasing the organization's profits." Pet. App. A4-A5 (citation omitted).

2. A federal grand jury returned an indictment charging petitioner with murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; murder while engaged in a drug conspiracy, in violation of 21 U.S.C. 848(e)(1)(A) and 18 U.S.C. 2; conspiracy to distribute, and possess with intent to distribute, at least one kilogram of heroin, in violation of 21 U.S.C. 841(b)(1)(A) (2006) and 846; murder through the use of a firearm during and in relation to a drug conspiracy, in violation of 18 U.S.C. 924(j); and using, carrying, and possessing a firearm during and in relation to a drug trafficking conspiracy, in violation of 18 U.S.C. 924(c) (2006) and 2. Pet. App. A2, B2. Following trial, the jury found petitioner guilty on all counts. Id. at B1-B2.

The district court denied petitioner's motion for a judgment of acquittal on the murder counts, rejecting his contention that "the murder of Jerry Tide was insufficiently related to the narcotics conspiracy" to satisfy the element of the relevant statutes "because [it] was motivated only by personal considerations." Pet. App. B5; see id. at B1-B14. The court recounted the trial evidence showing that petitioner and his

brother "competed with rival dealers for control of the territory and for the distribution of Flow heroin." Id. at B6. The court observed that petitioner "carried out the shooting at the urging of his brother, then the leading manager of their narcotics distribution business, and with the assistance of his drug distributor, Ramon Cruz." Id. at B13. It highlighted the testimony that "people were scared of" and "respected" petitioner after he shot Tide. Id. at B7 (citation omitted). And it emphasized that further testimony showed that "the amount of Flow heroin that [petitioner] sold increased" after Tide's murder, when Cruz "'consolidated the operation'" and made petitioner his "'primary distributor.'" Id. at B7-B8 (citation omitted).

The district court found that, based on that evidence, a "jury reasonably could have concluded that," although stemming from a personal dispute, the murder of Tide was carried out by petitioner "as 'a member of a criminal enterprise'" and that it both "preserve[d] and strengthen[ed] [petitioner's] own reputation and that of the enterprise.'" Pet. App. B11 (citations omitted). The court thus found sufficient evidence that petitioner "murdered Tide at least in part to increase or maintain his position in the Flow Heroin Organization" and that he did so "with a firearm that he used or carried in relation to the Organization." Id. at B9. It therefore determined that "[t]he evidence \* \* \* was sufficient to support the three homicide convictions." Ibid.



3. The court of appeals affirmed petitioner's convictions in an unpublished, summary order. Pet. App. A1-A11. As relevant here, the court determined that "the evidence was sufficient to support [petitioner's] conviction" on the three murder counts, rejecting petitioner's renewed contention "that Tide's murder was committed solely in retaliation for the slashing of his brother's face and bore no connection to the drug conspiracy." Id. at A4-A5; see id. at A3-A5. Like the district court, the court of appeals observed that, "[p]rior to Tide's murder, [petitioner] and his brother competed with rival drug dealers for control of the Flow heroin market." Id. at A4. The court explained that, on the day of the murder, petitioner approached Tide "with Cruz," who "then became a participant in and witness to the murder." Ibid. It emphasized that, after Tide's murder, "Cruz 'consolidated the operation,' and made [petitioner] his sole distributor of Flow heroin in the area." Ibid. (citation omitted). And it found that, based on that evidence, "a rational juror could have concluded that [petitioner] murdered Tide, at least in part, to earn Cruz's respect and establish his authority within the neighborhood, furthering the goals of the Flow heroin conspiracy." Id. at A5.

#### ARGUMENT

Petitioner renews (Pet. 9-18) his contention that the government presented insufficient evidence of a connection between Tide's murder and petitioner's drug-trafficking enterprise to support his convictions for murder in aid of racketeering, in

violation of 18 U.S.C. 1959(a)(1) and 2; murder while engaged in a drug conspiracy, in violation of 21 U.S.C. 848(e)(1)(A) and 18 U.S.C. 2; and murder through the use of a firearm during and in relation to a drug conspiracy, in violation of 18 U.S.C. 924(j). The lower courts correctly rejected that contention. The court of appeals' factbound, unpublished order does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner challenges the sufficiency of the evidence to support his convictions for murder under three different statutory provisions. Section 1959(a), colloquially known as the violent crimes in aid of racketeering (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. 18 U.S.C. 1959(a). Section 848 imposes criminal penalties for "intentionally kill[ing] or \* \* \* caus[ing] the intentional killing of an individual" while "engaging in or working in furtherance of a continuing criminal enterprise." 21 U.S.C. 848(e)(1)(A). And Section 924(j) imposes criminal penalties on "any person who, during and in relation to any crime of violence or drug trafficking crime \* \* \* uses or carries a firearm," 18 U.S.C. 924(c)(1)(A), and, "in the course of [committing such] a violation \* \* \* , causes the death of a person through the use of a firearm," 18 U.S.C. 924(j). Petitioner

argues (Pet. 8-9) that the government failed to establish a sufficient "nexus" between his acknowledged murder of Tide and his acknowledged participation in an organized drug conspiracy, because "the only reason he shot Tide was to exact revenge for his brother Jonathan [Santiago]."

Contrary to petitioner's suggestion, however, there was ample evidence that the Tide murder was not simply a personal matter, but an act calculated to benefit and enhance petitioner's drug operation and his place within it. The evidence established that respect on the street -- including respect from the organization's supplier, Cruz, and rival drug crews -- was integral to the Flow heroin organization's success. See Gov't C.A. Br. 4-7 (cataloging evidence). As the lower courts recognized, the organization used violence to build and maintain that respect, and petitioner used the Tide murder to secure his place at the organization's helm. Pet. App. A4-A5, B9-B13. He committed the murder with Cruz, the key supplier to the organization, waiting nearby. See Gov't Br. 4, 7-10.\* Petitioner made sure that his workers and associates knew about it, bragging about his role in the murder and his ability get away with it. See id. at 9-10. And the commission of the Tide murder earned petitioner the fear and respect of his supplier and rival dealers. See id. at 11-13. Witnesses testified

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\* Petitioner asserts (Pet. 8 n.5) that "Cruz was not a participant in or an eyewitness to the Tide shooting." Cruz admitted, however, that he drove petitioner and Santiago back to the pool hall to murder Tide and then, following the murder, drove them away. See Gov't C.A. Br. 10.

at trial that, after the murder, "[p]eople were scared of" petitioner, they "respected" him, and he took over the block and secured his position as Cruz's sole distributor of Flow heroin. Trial Tr. 169, 495. Cruz stated that with petitioner "on the street," the organization remained powerful, profitable, and largely untouched by rivals for years. Gov't C.A. Br. 21 (citation omitted).

The lower courts correctly found that evidence sufficient for a jury to determine that "[petitioner] murdered Tide, at least in part, to earn Cruz's respect and establish his authority within the neighborhood, furthering the goals of the Flow heroin conspiracy." Pet. App. A5; see id. at B9. Although petitioner disputes (Pet. 10) the inferences to be drawn from the evidence, this Court ordinarily does not ordinarily grant review of such fact-bound objections to the determination of the lower courts. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); see also Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)). Petitioner identifies no sound basis for departing from that practice here.

Other than petitioner's fact-bound assertion that the murders at issue were committed solely for personal reasons, he provides no basis to conclude that the particular "substantive nexus" standard that he proposes (Pet. 9) would have any effect on this case. Moreover, although petitioner argues (Pet. 9) that the Court should grant certiorari to "clarify" what evidence is required to support a conviction under "federal murder statutes that include, as an element, a substantive nexus between a charged murder and the defendant's involvement in a criminal organization," Sections 1959(a), 848, and 924(j) are distinct statutory provisions. Petitioner fails to meaningfully engage with the different texts, structures, and histories of those provisions. He provides no sound reason to conclude that any of the statutes -- much less all federal murder statutes with a "criminal organization-related motive element[]," Pet. 10 -- necessarily should be interpreted in the manner that he suggests. See Pet. 16-17.

2. Without distinguishing between the relevant statutes of conviction, petitioner contends (Pet. 10-12) the courts of appeals have adopted "[c]onflicting [s]tandards" for determining whether the government has established a sufficient connection between a murder and a defendant's involvement in a criminal organization under the "federal murder statutes." Pet. 10-11. But he fails to

identify any decision of any court of appeals indicating that it would have vacated any one of his three murder convictions on the facts presented here.

Petitioner contends that "[m]any" circuits have held that "a conviction under [a federal murder statute] must be supported by some proof regarding the defendant's subjective motivations." Pet. 10 (citing United States v. Jones, 873 F.3d 482 (5th Cir. 2017); United States v. Brandao, 539 F.3d 44 (1st Cir. 2008)). But the courts below correctly found such evidence here. See Pet. App. A5 ("Based on this evidence, a rational juror could have concluded that [petitioner] murdered Tide, at least in part, to earn Cruz's respect and establish his authority within the neighborhood, furthering the goals of the Flow heroin conspiracy."). Petitioner asserts that decisions from the Sixth and Ninth Circuits have declined to employ a presumption that "all acts of violence committed by members of criminal organizations \* \* \* are always motivated, at least in part, by their desire to maintain their status within the gang." Pet. 11 (quoting United States v. Banks, 514 F.3d 959, 968 (9th Cir. 2008); citing United States v. Hackett, 762 F.3d 493, 500 (6th Cir. 2014), cert. denied, 135 S. Ct. 1518 (2015)). Neither lower court in this case, however, employed such a presumption. Rather, each identified specific facts and circumstances that provided the jury a reasonable basis for finding that the specific murder in this case was motivated by petitioner's desire to further his position in his

criminal organization -- including the individuals involved, petitioner's own statements and those of his co-conspirators before and after the murder, and his advancement in the organization following the murder.

Petitioner argues (Pet. 12-16) that the Second Circuit's decision here conflicts with other Second Circuit precedent and that the Fourth Circuit has been similarly inconsistent. The decisions below, however, explained why the convictions here were consistent with Second Circuit precedent. Pet. App. A4-A5 & n.1; id. at B9-B13; see United States v. Bruno, 383 F.3d 65, 85 (2d Cir. 2004) (noting that the murders were committed "in contravention of Genovese Family protocols" and "actually decreased [the defendant's] standing in the Genovese Family"); United States v. Thai, 29 F.3d 785, 818 (2d Cir.) (finding "no evidence from which the jury could conclude that [the defendant's] motive for wanting to bomb the [restaurant] was other than purely mercenary"), cert. denied., 513 U.S. 977, and 513 U.S. 993 (1994). And the reasoning in two Fourth Circuit decisions (one of which is unpublished) that petitioner describes as conflicting involve different facts and different statutes of conviction. Compare United States v. Tipton, 90 F.3d 861, 891 (1996) (upholding a conviction under Section 1959(a)), with United States v. Ray, 61 Fed. Appx. 37, 49 (2003) (reversing a conviction under Section 848(e)(1)(A)); see also Ray, 61 Fed. Appx. at 58 (citing Tipton). In any event, an intracircuit division of authority within the

Second or Fourth Circuits would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Finally, petitioner points to (Pet. 16-18) the variations of phrasing employed by certain circuits when evaluating sufficiency challenges under the VICAR statute. While the Second Circuit asks whether the evidence demonstrates that "the defendant's general purpose in committing the crime of violence was to maintain or increase his position in the enterprise," Thai, 29 F.3d at 817, the Ninth Circuit asks whether the evidence shows that "one of the defendant's general purposes or dominant purposes was to enhance his status," Banks, 514 F.3d at 970, and the Sixth Circuit has stated that "VICAR's 'purpose' element is met if the jury could find that an 'animating purpose' of the defendant's action was to maintain or increase his position in the racketeering enterprise." Hackett, 762 F.3d at 500. Petitioner, however, fails to establish that any differences in the articulation of the standard lead to substantive distinctions in the results of the actual cases. To the contrary, the Sixth and Ninth Circuits have recognized that they and other circuits all require the jury to find that the defendant acted with more than the "merely incidental" purpose of maintaining his position within the racketeering enterprise. Banks, 514 F.3d at 969 (citing decisions from the First, Second, Fourth, Fifth, and Tenth Circuits); see Hackett, 762 F.3d at 500



("We agree with the Ninth Circuit.") (citing Banks, 514 F.3d at 968). The decisions below reflect such a requirement, and in the absence of any indication that the court of appeals' formulations are leading to different outcomes, this Court's review is unwarranted.

# CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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