

No. _____

IN THE
Supreme Court of the United States

KARL ROYE
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTIONS PRESENTED

Whether the Second Circuit erred, in violation of the Eighth Amendment, when it concluded that *Miller v. Alabama*, 567 U.S. 460 (2012) condoned the imposition of mandatory life without parole on a defendant who was 20 years old at the time of the offense?

Whether the jury must be instructed on the elements of the state law crime constituting a predicate act under the Violent Crimes in Aid of Racketeering (“VCAR”) statute?

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PETITION FOR CERTIORARI

Petitioner Karl Roye respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was filed in a summary order on January 12, 2021. A three-judge panel of the Second Circuit issued a summary order (the “Order”) affirming the judgment and sentence of the district court. *See United States v. Frank*, 832 F. App’x 764 (2d Cir. 2021). The Order is attached as Appendix A.

On March 12, 2021, Mr. Roye filed a petition for rehearing and suggestion for rehearing *en banc*. The Second Circuit denied his petition on April 22, 2021. That order is attached as Appendix B.

JURISDICTION

On January 12, 2021, a three-judge panel for the Second Circuit denied Petitioner’s appeal in a summary order. Subsequently, on April 22, 2021, the Second Circuit denied Mr. Roye’s petition for rehearing and suggestion for rehearing *en banc*.¹ This Court has jurisdiction to review the Second Circuit’s decision pursuant to 28 U.S.C. § 1254.

¹ The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). The petition for rehearing in this case was denied on April 22, 2021, making the petition for certiorari due on July 21, 2021. However, an order issued by this Court on March 19, 2020 in response to the COVID-19 pandemic extended the due date to 150 days instead of 90 days making this petition for writ of certiorari due by September 19, 2021. The order issued by this Court on March 19, 2020 remains in effect for cases in which the order denying a timely petition for rehearing was issued prior to July 19, 2021. A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2. September 19, 2021 is a Sunday.

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. Amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 1959(a):

Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished.

I.

STATEMENT OF THE CASE

Petitioner Karl Roye was convicted by a jury of conspiracy to commit murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5), (“conspiracy to commit VCAR murder”), and murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1) and (2), (“VCAR murder”). He was sentenced to 120 months on the conspiracy to commit VCAR murder count and mandatory life-in-prison without the possibility of release on the VCAR murder count.

Before the Second Circuit, following the resolution of post-judgment

If the due date falls on a Saturday, Sunday, federal holiday, or day the Court is closed, it is due the next day the Court is open. Sup. Ct. R. 30.1. By virtue of Rule 30.1, the writ of certiorari is due by September 20, 2021—the next day the Court is open.

appeals,² Mr. Roye appealed from his judgment of conviction and his sentence. He argued that the district court erred, in violation of the Eighth Amendment, when it sentenced him to mandatory life without the possibility of release because he was twenty years old at the time of the offense and possessed the same “hallmark features” of the youth as the juvenile defendants in *Miller v. Alabama*, 567 U.S. 460 (2012). *Frank*, 832 F. App’x at 765. As is relevant to this petition, Mr. Roye also argued that the jury instructions were prejudicially flawed because the jury was not instructed that the government must prove an overt act under Connecticut state law to convict him of conspiracy to commit VCAR murder.³ *Id.* at 765-66.

On January 12, 2021, a three-judge panel of the Court of Appeals for the Second Circuit issued an order affirming Mr. Roye’s sentence and judgment. *See id.* at 766. Relying on its own precedent interpreting *Miller v. Alabama*, the Second Circuit held that Mr. Roye’s mandatory life-without-parole sentence was constitutional because “the Supreme Court has repeatedly drawn

² On August 25, 2017, the United States District Court for the District of Connecticut (Arterton, *J.*) granted Roye’s post-trial motion for judgment of acquittal on the conspiracy to commit VCAR murder count. The government appealed that decision prior to Mr. Roye’s sentencing in *United States v. Frank*, 749 F. App’x 5 (2d Cir. 2018). While the government’s appeal was pending, the district court imposed a life sentence without the possibility of release on the VCAR murder count. Mr. Roye filed a notice of appeal challenging the VCAR murder count only (as there was no conviction for conspiracy to commit VCAR murder). The Second Circuit consolidated the government’s appeal and Mr. Roye’s cross-appeal. Thereafter, the Second Circuit issued an order remanding the case to the district court and directed the district court to reinstate the jury verdict on the conspiracy to commit VCAR murder count, proceed to sentencing, and enter a judgment of conviction. *Frank*, 749 F. App’x at *10. After the district court reinstated the jury verdict and sentenced Mr. Roye, he appealed from the judgment and conviction.

³ The conspiracy to commit VCAR murder count was predicated on a violation of Connecticut state law that requires that a member of a conspiracy commit an overt act in furtherance of the murder conspiracy. Conn. Gen. State. § 53a-48(a).

a bright line at age eighteen for Eighth Amendment limitations on sentencing” and, therefore, “mandatory life sentences without parole for individuals who were over eighteen (even though they were under twenty one) when they committed their crimes are constitutional.” *Id.* at 765 (internal quotation marks and citation omitted). It also held, on plain error review, that the district court’s failure to instruct the jury on the overt act element of the state law crime charged as a predicate act for the conspiracy to commit VCAR murder count did not “affect Roye’s substantial rights” because the jury convicted him of “murder, the overt act underlying the murder conspiracy charge.” *Id.* at 766.

This Court should grant Mr. Roye’s petition for at least two reasons.

First, the Order’s conclusion conflicts with this Court’s decision in *Miller v. Alabama*. *Miller* held that the Eighth Amendment prohibits sentencing individuals under the age of 18 to a mandatory term of life-imprisonment without the possibility of parole. *Miller*, 567 U.S. at 465. Contrary to the Order, it did not, by implication, create a bright-line rule establishing that mandatory life sentences are categorically constitutional for those 18 and older. Moreover, the Second Circuit’s conclusion, that mandatory life without parole for individuals under 21 at the time of the offense is constitutional, runs counter to the foundational principles underlying this Court’s Eighth Amendment jurisprudence. This Court should grant certiorari to clarify this important issue.

Second, the Order deepened an intra- and inter-circuit split when it found that the omission of an element of the state law crime charged as a predicate act from the jury instructions did not warrant reversal of the conspiracy to commit VCAR murder conviction. Decisions from the Fifth, Eighth, and Eleventh Circuits, as well as some Second Circuit precedent, suggest that a jury need not be instructed on the elements of the state law crime charged as the predicate act under VCAR or RICO because the references to state law in those statutes serve only a generic definitional purpose.⁴ *See United States v. Kehoe*, 310 F.3d 579, 588 (8th Cir. 2002); *United States v. Tolliver*, 61 F.3d 1189, 1208-09 (5th Cir. 1995) *judgment vacated sub nom on other grounds by Moore v. United States*, 519 U.S. 802 (1996); *United States v. Watchmaker*, 761 F.2d 1459, 1469 (11th Cir. 1985); *United States v. Bagaric*, 706 F.2d 42, 62-63 (2d Cir. 1983) *abrogated on other grounds by Nat’l Org. for Women, Inc., v. Scheidler*, 510 U.S. 249 (1994). In contrast, more recent Second Circuit decisions, along with decisions from the Third, Ninth, and Tenth Circuits, indicate that the text of RICO and VCAR require that the predicate acts violate state or federal law and, therefore, if a predicate act is premised on a violation of state law, the jury instructions must include the elements of the state law crime to avoid prejudice to the defendant. *See United*

⁴ RICO’s definition of prohibited racketeering activity includes acts prohibited by enumerated federal statute or “any act or threat involving murder, kidnapping, . . . which is chargeable under State law and punishable by imprisonment for more than one year.” 18 U.S.C. § 1961(a). VCAR prohibits only enumerated acts that are “in violation of the laws of any State or the United States” or attempting or conspiring to violate such laws. 18 U.S.C. § 1959(a).

States v. Savage, 970 F.3d 217, 274 (3rd Cir. 2020), *appeal docketed*, No. 20-1389 (Apr. 5, 2021); *United States v. Adkins*, 883 F.3d 1207, 1211 (9th Cir. 2018); *United States v. Arrington*, 409 F. App'x 190, 195-96 (10th Cir. 2010); *United States v. Carrillo*, 229 F.3d 177, 185 (2d Cir. 2000). The Court should grant this petition to ensure uniformity among the Circuits.

II.

ARGUMENT

A. This Court should grant *certiorari* because mandatory life without parole for individuals under the age of twenty-one at the time of the offense violates the Eighth Amendment and the Order's failure to so find runs counter to this Court's precedent.

The Order's conclusion that mandatory life-without-parole sentences for individuals between 18 and 21 years old is constitutional conflicts with this Court's precedent in at least two ways. First, *Miller* did not address whether the Eighth Amendment prohibits the imposition of mandatory life-without-parole sentences on young adults between the ages of 18 and 21. Second, the foundational principles informing this Court's decision in *Miller* and its Eighth Amendment jurisprudence more broadly demonstrate that mandatory life without parole for a young adult under the age of 21 at the time of the offense is unconstitutional. As a result, the Second Circuit's failure to so find runs counter to this Court's precedent.

In *Miller v. Alabama*, this Court held that mandatory life without parole for those under 18 violates the Eighth Amendment's prohibition on cruel and unusual punishment; it did not, contrary to the Order, implicitly endorse its

use for all offenders who have reached the age of 18. See *United States v. Sherrill*, 972 F.3d 752, 77 (6th Cir. 2020) (“[T]he Supreme Court has not yet decided whether a defendant may raise on direct appeal an Eighth Amendment claim that his life sentence is disproportionate, and hence cruel and unusual, because he is between the ages of eighteen and twenty-one.”); see also *In re Monschke*, 197 Wash. 2d 305, 312-13 (2021) (applying the “existing constitutional protections of *Miller* to an enlarged class of youthful offenders older than 17”). The Court had no occasion to opine on the constitutionality of mandatory life sentences for those over 18 as the two petitioners before the Court were only 14 years old when they committed their crimes. *Miller*, 567 U.S. at 465.⁵ When exercising its jurisdiction, the Court is “bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *United States v. Raines*, 362 U.S. 17, 21 (1960) (internal citation omitted) (emphasis added); see also *Miller*, 567 U.S. at

⁵ Nor does the *Miller* Court’s discussion of *Harmelin v. Michigan*, 501 U.S. 957 (1991) compel a different conclusion. In *Harmelin*, the Court upheld a mandatory-life-without parole term for an adult convicted of possessing more than 650 grams of cocaine. *Harmelin*, 501 U.S. at 996. *Miller* distinguished *Harmelin* on the ground that “children are different.” *Miller*, 567 U.S. at 481. However, because the Court was faced with two 14-year-olds it did not consider whether, as is argued here, young adults possess the same characteristics that make children “different” from adults for purpose of sentencing. Nor did *Harmelin* consider that issue as the defendant was approximately 41 years old at the time of the offense. See Ruth Marcus, *Life in Prison for Cocaine Possession?*, The Washington Post (Nov. 5, 1990), <https://www.washingtonpost.com/archive/politics/1990/11/05/life-in-prison-for-cocaine-possession/7667b420-79f4-4a4f-984d-cc32cee422fa/>.

465 (declining to consider alternative arguments because its holding was “sufficient to decide these cases”).

Nor does this Court’s precedent support the Order’s conclusion that by declaring a sentencing practice unconstitutional for those below a certain age (18), *Miller* implicitly established its constitutionality for those above that age. In *Thompson v. Oklahoma*, this Court held that the death penalty was unconstitutional for offenders under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). It subsequently held that it was constitutional to execute 16-to 18-year-old individuals. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), *abrogated by Roper v. Simons*, 543 U.S. 551 (2005). If the Court construed its “line drawing” to function as the Order construed it to in *Miller*, *Stanford* would have been unnecessary—*Thompson*’s holding that the death penalty was unconstitutional for individuals under 16 would have also established that it was constitutional for individuals 16 and older.

Moreover, the considerations that compelled this Court’s decision in *Miller* apply with equal force to young adults under the age of 21. *Miller* held “life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transit immaturity of youth.” *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016) (internal quotation marks omitted). In doing so, it reiterated one of the foundational principles that informs this Court’s Eighth Amendment analysis: “youth matters in sentencing.” *Jones v. Mississippi*, 141 S.Ct. 1307, 1314

(2021). It matters because certain “hallmark features” of youth weaken the rationales for punishment and “can render a life-without-parole sentence disproportionate.” *Miller*, 567 U.S. at 473, 477; *see also Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“[Y]outh is more than a chronological fact.”). Namely, juveniles’ brains differ from adults in ways that are significant for sentencing purposes; youth are immature, more susceptible to negative influences, and their traits are less fixed. *Miller*, 567 U.S. at 471. As a result, the penological justifications for life imprisonment disappear because individuals with those traits are less morally culpable and more likely to be reformed as their neurological development continues. *Id.* at 472. Mandatory life without parole is unconstitutional for juveniles precisely because it “precludes consideration of [an offender’s] chronological age and its hallmark features.” *Id.* at 477; *see also Jones*, 141 S.Ct. at 1316 (“[A] sentencer must have discretion to consider youth before imposing a life-without-parole sentence.”).

Based on the neurological research conducted in the years since *Miller*, we now know that young adults share these “hallmark features” of youth because “biological and psychological development continues into the early twenties[.]” Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (2016). For example, the prefrontal cortex, the area of the brain responsible for maintaining impulse control, continues developing until a person is at least 21. Kathryn Monahan et al., *Juvenile Justice Policy and*

Practice: A Developmental Perspective, 44 *Crime & Just.* 577, 582 (2015) (discussing myelination process). As a result, “[n]euroscientists now know that all three of the general differences between juveniles under 18 and adults recognized by *Roper* are present in people older than 18.” *Monschke*, 197 Wash. 2d at 324 (internal quotation marks and citation omitted). Just as the “logic of *Thompson* extend[ed] to those who are under 18,” *Roper*, 543 U.S. at 574, so too does the logic of *Miller* extend to those who are under 21 and, therefore, there is no rational basis for excluding those individuals from the constitutional protections outlined in *Miller*. Accordingly, because “no meaningful neurological bright line exists between age 17 . . . and 20 . . . sentencing courts must have *discretion* to take the mitigating qualities of youth . . . into account for defendants younger and older than 18.” *Monschke*, 197 Wash. 2d at 326 (emphasis added).

The Order’s misplaced reliance on *Miller*, without any analysis, runs afoul of another established Eighth Amendment principle: the “scope” of the words of the Eighth Amendment are not “static.” *Trop v. Dulles*, 356 U.S. 86 (1958). In analyzing “whether a punishment is cruel and unusual, courts *must* look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.” *Graham v. Florida*, 560 U.S. 48, 58 (2010) (internal quotation marks and citation omitted) (emphasis added). The “standard of extreme cruelty . . . embodies a moral judgment [and, therefore,] its applicability must change as the basic mores of a society change.” *Kennedy*

v. Louisiana, 554 U.S. 407, 419 (2008) (internal quotation marks and citation omitted).

In effectuating this principle, Eighth Amendment protections for criminal defendants have grown more protective over the years. For example, in 1989, this Court held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the intellectually disabled, *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). This Court reversed course in 2002 and held that such a punishment was unconstitutional in light of evolving standards of decency. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Similarly, in 1988, the Court held that the death penalty was unconstitutional for offenders under the age of 16 at the time of the offense. *Thompson*, 487 U.S. at 838. Twenty-seven years later, it extended that protection to individuals under the age of 18, in part because society's views about the culpability of juveniles had evolved. *Roper*, 543 U.S. at 567.

By failing to refer to evolving standards of decency, the Order departed from the framework this Court uses to determine whether a punishment violates the Eighth Amendment. *See id.* at 561 (“[W]e have established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual.”) (internal quotation marks and citation omitted). Had it engaged in this analysis, the Order would have reached a different conclusion because evolving standards

of decency, as evidenced through legislative enactments and sentencing practices, indicate a clear trend: courts and legislatures recognize that young adults are developmentally indistinguishable from juveniles and, therefore, require similar protections. *See Atkins*, 536 U.S. at 315 (it is “the consistency of the direction of change” that matters).

Courts have begun to shift lines originally drawn at age 18 upwards to encompass 18- to 21-year-old individuals. For example, the Supreme Court of Washington recently extended *Miller’s* constitutional protections to young adults aged 19 and 20 at the time of their offenses. *Monschke*, 197 Wash. 2d at 306. It ruled that the state constitutional bar against cruel punishment prohibited mandatory life-without-parole sentences for these young adults because it deprived the trial judge of the discretion to consider the mitigating qualities of youth. *Id.* at 306, 311. (“*Miller’s* constitutional guarantee of an individualized sentence—one that considers the mitigating qualities of youth—must apply to defendants at least as old as these defendants were at the time of their crimes.”). In reaching this conclusion, the court relied primarily on three pieces of information. First, “bright constitutional lines [established by this Court] in the cruel punishment context shift over time in order to accord with the evolving standards of decency that mark the progress of a maturing society” and those constitutional protections for youthful criminal defendants have grown more protective over the years. *Id.* at 313-17 (internal quotation marks and citation omitted). Second, there is a “need for

flexibility in defining the nebulous concept of ‘adult’ or ‘majority’” as evidenced by the fact that the Washington Criminal Code draws the line between “childhood” and “adulthood” at different ages depending on the context. *Id.* at 320-21. Finally, “neurological science recognizes no meaningful distinctions between 17- and 18-year-olds as a class” in terms of maturity, vulnerability to negative influences, and the transitory nature of their character at that time. *Id.* at 321.

Similarly, the Sixth Circuit indicated that it might “extend [*Miller*’s] reasoning to individuals over the age of 18” in light of evolving standards of decency. *Sherrill*, 972 F.3d at 774. The court acknowledged that “[m]embers of [the Sixth Circuit] have already begun to consider whether the line separating childhood and adulthood has shifted due to society’s recognition that young adults between the ages of eighteen and twenty-one are mentally more like children than adults, [by] pointing to various contexts in which we consider twenty-one the age of majority, as well as scientific and social research indicating that those under twenty-one retain the defining characteristics of youth.” *Id.* (citing *Pike v. Gross*, 936 F.3d 372, 385 (6th Cir. 2019)) (Stranch, J. concurring); *see also Pike*, 936 F.3d at 385 (Stranch, J., concurring) (“I believe that society’s evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense.”); *People v. Ruiz*, 2020 IL App (1st) 163145, ¶ 34, 2020 WL 2731929 (“[T]he Illinois Constitution prohibits a mandatory life sentence for a young adult offender who was 19 at

the time of the offense.”).

Many courts have recognized that young adults are different than fully formed adults for purposes of sentencing. *See, e.g., United States v. Walters*, 253 F. Supp. 3d 1033, 1036 (E.D. Wisc. 2017) (below-guidelines sentence appropriate for 19 year old in part because “[c]ourts and researchers have recognized that given their immaturity and undeveloped sense of responsibility, teens are prone to doing foolish and impetuous things”); *In re Poole*, 24 Cal. App. 5th 965, 982-83 (2018) (vacating denial of parole because parole board gave insufficient weight to the youth of a 19-year-old offender); *People v. House*, 2019 IL App (1st) 110580-B, ¶ 65, 142 N.E.3d 576, (2019) *appeal allowed*, 140 N.E.3d 231 (Ill. 2020) (mandatory life sentence for 19 year-old violated the State Constitution because it precluded trial court from considering youthfulness as a mitigating factor).

A similar trend can be found in the enactment of state legislation providing greater protection to young adults in the criminal justice system than to their adult counterparts. Numerous states have passed youthful offender laws that extend special protections to individuals between 18 and 21. *See, e.g.,* Ala. Code § 15-19-1; Colo. Rev. Stat. Ann. §§ 18-1.3-407; 18-1.8-407.5; Fla. Stat. Ann. §§ 958.011-.15; Haw. Rev. Stat. § 706-667; Va. Code § 19.2-311. Similarly, California and Illinois have expanded parole eligibility for young adults under the ages of 26 and 21 respectively. *See* CA Penal Code §§ 3051, 3051.1; 730 ILC 5/5-4.5-110.

Recognizing that young adults are developmentally similar to juveniles in ways that bear on their ability to exercise good judgment, many other areas of the law have raised the age for exercising adult rights to twenty-one.⁶ For example, in December 2019, Congress raised the age for tobacco purchase from 18 to 21. *See* 21 U.S.C. § 387f(d)(5). Individuals under the age of 21 cannot obtain a credit card without a co-signer, 15 U.S.C. § 1637(c)(8)(B), nor can they purchase handguns. 21 U.S.C. § 922(b)(1). Young adults may remain in foster care until their twenty-first birthday, 42 U.S.C. § 6751(8)(A)-(8)(B)(i)(II), and as of 2016, they can receive their parents' health care coverage until the age of 26, 42 U.S.C. § 300gg-14. If we recognize that young adults require greater protections in these seemingly less consequential areas because they possess the same “transient rashness, proclivity for risk, and inability to assess consequences [as juveniles],” *Miller*, 567 U.S. at 472 (internal citation omitted), surely, the sentencing judge must have discretion to consider these same traits before condemning a young adult to die in prison.

By assuming, without analysis, that *Miller* condoned the constitutionality of sentencing young adults who are developmentally indistinguishable from youth to mandatory life without parole, the Second Circuit abdicated its duty to interpret the Constitution and reached a conclusion contrary to this Court's Eighth Amendment jurisprudence. This

⁶ The age of majority in the United States was 21 from the time of this nation's founding until 1942 when “wartime needs prompted Congress to lower the age of conscription from twenty-one to eighteen.” Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 *Tulane Rev.* 55, 64 (2016). This led to the lowering of the voting age to eighteen in 1971. *Id.* at 65.

Court should take up this case to make clear that 20-year-old offenders, like 17-year-old offenders, cannot be subjected to mandatory life without parole.

B. This Court should grant certiorari to resolve a split among the Circuits over whether juries must be instructed on the elements of the state law crimes charged as predicate acts under RICO and VCAR.

By concluding that the omission of the overt-act element did not affect Mr. Roye's substantial rights, the Order became part of an unresolved tension in the Second Circuit's case law and a circuit split regarding judges' obligations to instruct juries on the elements of the state law crimes charged as predicate acts under RICO and VCAR. This Court should grant certiorari to answer this question and ensure uniformity among the Courts of Appeals.

The Second Circuit has held that judges are not required to charge the jury on the state law elements of the offenses constituting the predicate acts under RICO. *See Bagaric*, 706 F.2d at 62-63, *abrogated on other grounds by Nat'l Org. for Women, Inc., v. Scheidler*, 510 U.S. 249 (1994). *Bagaric* reasoned that "generic definitions of the crimes charged" suffice because "[r]eferences to state law serve [only] to identify generally the kind of activity made illegal by the federal statute." *Id.* (internal citation omitted). The Second Circuit doubled down in a later case, *United States v. Diaz*, when it suggested that the government is not required to prove every element of a state law offense to establish the commission of a racketeering act based on a violation of state law under VCAR. *United States v. Diaz*, 176 F.3d 63, 96 (2d Cir. 1999) ("[T]he government is not required to prove an 'overt act' under Connecticut law

because the reference to violating state law in the VICAR count is only meant to indicate unlawful conduct that constitutes a predicate offense for a VICAR charge under § 1959(a)(6).”.

The Fifth Circuit reached the same conclusion. *See Tolliver*, 61 F.3d at 1208-09 (district court did not err by failing to instruct jury on the elements of the predicate act of murder under state law because “federal courts typically require only a ‘generic’ definition of the underlying state crime in a RICO charge.”) (internal quotation marks and citation omitted), *judgment vacated sub nom on other grounds by Moore v. United States*, 519 U.S. 802 (1996). While addressing slightly different issues, the Eighth and Eleventh Circuits ruled that RICO’s reference to state law crimes does not incorporate the elements of the predicate state law crime into the RICO statute and, therefore, suggested that they would similarly rule that a jury need not be instructed about those elements. *See Kehoe*, 310 F.3d at 588 (“RICO’s allusion to state crimes was not intended to incorporate elements of state crimes into the RICO statute. Rather, RICO’s reference to state crimes identifies the type of generic conduct which will serve as a RICO predicate and satisfy RICO’s pattern requirement.”) (internal quotation marks and citation omitted); *Watchmaker*, 761 F.2d at 1469 (“[T]he state law reference [in RICO] is not employed to provide the specific terms of the charge” but instead to “serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute.”) (internal quotation marks and citation omitted).

More recently, the Second Circuit has expressed “serious doubts” about *Bagaric* and *Diaz* and attempted to walk back those decisions. *Carrillo*, 229 F.3d at 185. In *Carrillo*, the Second Circuit noted that “[i]t is difficult to square the assertion in *Diaz* with the RICO and VICAR statutes,” because “both the text of RICO and VICAR demand that predicate acts constitute state law crimes” and, “therefore seem to require of a predicate act based on state law that the act include the essential elements of the state crime.” *Id.* at 185-86. It warned district judges that “[d]eclining to instruct the jury on the elements of state law offenses charged as predicate acts under RICO, VICAR, and similar statutes, can prejudice the defendant” and “risks reversal on appeal.” *Id.* at 185. In *United States v. Pimentel*, the Second Circuit reiterated this warning and “again caution[ed] the Government and the district courts in this Circuit that the preferred practice in VCAR and RICO cases is to include those definitions when charging the jury, and not doing so risks vacatur of the convictions on appeal.” *United States v. Pimentel*, 346 F.3d 285, 306 (2d Cir. 2003).

Relying on the plain text of VCAR, as well as *Pimentel* and *Carrillo*, the Tenth Circuit concluded that under VCAR the “government must satisfy each element of the predicate offense under state or federal law.” *Arrington*, 409 F. App’x at 195 (unpublished opinion) (upholding conviction under VCAR after assessing whether evidence established all elements of state law murder). It similarly held that the “predicate acts” necessary to prove a RICO violation

must “be violations of certain statutes.” *Hall v. Witteman*, 584 F.3d 859, 867 (10th Cir. 2009); *see also Arrington*, 409 F. App’x at 195 (indicating that *Witteman*’s reference to “certain statutes” included state statutes).

The Third Circuit suggested that it would rule similarly. Although it noted that the Fifth and Eighth Circuits “view generic definitions as appropriate in RICO cases,” it expressed its disagreement with those decisions because “the VICAR statute requires a predicate act that is chargeable under state or federal law” and cited *Carrillo* and *Pimentel* with approval. *Savage*, 970 F.3d at 274, *appeal docketed*, No. 20-1389 (Apr. 5, 2021). Ultimately it did not have to rule on the issue as the district court’s instruction on the elements of murder tracked state law. *Id.*

The Ninth Circuit has “permitted jury instructions using generic federal definitions,” but also concluded that “courts, in certain circumstances, should instruct on the state definition or otherwise risk prejudice to the defendant.” *Adkins*, 883 F.3d at 1210-11; *see also United States v. Young*, No. 19-50355, 2021 WL 3201103, at *1 (9th Cir. July 28, 2021) (“[T]o avoid prejudice, the court should instruct on the state definition to include the requisite state of mind or the law respecting self-defense.”) (internal quotation marks and citation omitted). It agreed with *Pimentel*’s conclusion that “prejudice would result if a jury were not instructed on a state-law definition that included a self-defense instruction in the context of VCAR” because the jury may convict the defendant of murder even though the defendant’s actions, as found by jury,

might not constitute murder because he might not have had the requisite state of mind. *Adkins*, 883 F.3d at 1211 (citing *Pimentel*, 346 F.3d at 303). Accordingly, the district court “erred when it instructed the jury on the federal, rather than the Hawaii Penal Code, definition of ‘knowingly’” in a VCAR case, because it deprived the defendant “of a self-defense instruction within the Hawaii state definition, but not the federal definition.” *Id.*

The Order deepens an irreconcilable intra and inter-circuit split. The Court should take up this case to resolve this split and determine whether juries must be instructed on the elements of the state law crime serving as the predicate act underlying a RICO or VCAR charge, as recent Second, Third, Ninth, and Tenth Circuit cases suggest, or whether this is unnecessary because RICO and VCAR’s references to state law serve only a generic definitional purpose, as the Second, Fifth, Eighth and Eleventh Circuits have concluded.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,



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