IN THE SUPREME COURT OF THE UNITED STATES

21-7714

ORIGINAL

GURMEET SINGH DHINSA

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted,

Gurmeet Singh Dhinsa,

Pro Se Petitioner

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QUESTION PRESENTED

Whether categorical analysis of the predicate crime of violence for a 18 U.S.C. Section 924(c) offense allows a reviewing court to "look through" the federal predicate offense and delve into elements of the offense as prescribed by state law? If section 924(c) limits the predicate offenses to be one "prosecuted in a court of the United States," should the reviewing court be also limited to federal or generic definitions of the predicate crime of violence?

PARTIES TO THE PROCEEDING

Petitioner, Gurmeet Singh Dhinsa was the defendant-appellant below.

Respondent, United States of America was the plaintiff-appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings

United States of America v. Gurmeet Singh Dhinsa, No. 21-194, 2nd Cir (Oct. 27, 2021) (denying certificate of appealability to denial of motion to vacate the sentence under 28 U.S.C. Section 2255).

United States of America v. Gurmeet Singh Dhinsa, Criminal No.: 97-cr-00672, E.D.NY (Nov. 30, 2021) (denying motion to vacate the 18 USC 924(c) conviction under 28 U.S.C. Section 2255)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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TABLE OF AUTHORITIES

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Descamps v. United States, 570 U.S. 254 (2013)

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In The Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI

TO THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gurmeet Singh Dhinsa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The orders of the court of appeals denying Certificate of Appealability (App. B) and denying hearing en banc (App. A) are unreported. The order and opinion of the United States District Court for the Eastern District of New York (App. C) is unreported and available at 2020 WL 7024377.

JURISDICTION

The order of the court of appeals denying hearing en banc was entered on January 11, 2022. (App. 1). This Court has jurisdiction under 28 U.S.C. Section 1254(1). See. Hohn v. United States, 524 U.S. 236 (1998).

STATUTORY PROVISIONS INVOLVED

(A) Title 18 U.S.C. Section 924 provides in relevant part:

(c)(1)(A) "... any person who, during and in relation to any crime of violence or drug trafficking crime ... for which the person may be PROSECUTED IN A COURT OF THE UNITED STATES, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to the mandatory terms provided in the statute]"

. . .

(c)(3) For purpose of this subsection the term crime of violence means that an offense that is a felony and-

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(emphasis added)

(B) Title 18 U.S.C. Section 1959 provides in relevant part:

(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 -

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

. . .

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both;

18 U.S.C. Section 1959(a)(1), (5). (emphasis added)

STATEMENT OF THE CASE

This petition presents an issue which is complex and vexing for lower courts: both 18 U.S.C. Section 924(c) and the VICAR statute, 18 U.S.C. Section 1959(a) require proof of predicate offenses in addition to certain conduct targeted by the statutes. Section 924(c) requires proof of a crime of violence (the 924(c) predicate) in which the defendant used a firearm. The VICAR charge under 1959(a)(1) requires proof of murder (the VICAR predicate) in aid of a racketeering organization. In federal prosecutions, where 924(c)'s "crime of violence" predicates are the VICAR offenses, and the VICAR predicates are violations of the state statutes, courts are confused and divided on whether murder as defined by the state, or the generic definition of murder, should be the focus of the "crime of violence" inquiry.

But, using the generic definition of the conduct proscribed in the VICAR statute also comports with 924(c)'s requirement that the predicate offense be a federal crime. See 18 U.S.C. Section 924(c)(1)(A)(predicate must be one "for which the person may be prosecuted in a court of the United States"). Moreover, under 924(c), federal courts are generally considering contemporaneous predicate federal crimes, often charged in the same federal indictment. Therefore, under 924(c)'s own terms, the predicate "crime of violence" should be defined by federal law, not by the state statute underlying VICAR murder. As such, the 924(c) charges against a defendant should be based on "crime of violence" as generically defined under 924(c)(3)(A).

Further, the role that the recondite categorical analysis fulfills for 924(c) is far more limited then other sentencing statutes because 924(c) applies only to federal crimes. Compare 18 U.S.C. Section 924(e)(1) ACCA's sentencing enhancement tp "a person who violates section 922(g) of this title and has three convictions by any court referred to in section 922(g)(1)", with Section

924(c)(1)(A) where the crimes of violence is"for which the person may be prosecuted in a court of the United States." See also United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Congress expressly limited the phrase 'any crime' [in Sec. 924(c)] to only federal crimes[.]").

As a result, in determining whether the crime of violence has an element of attempted or actual use of physical force against another, federal courts need only to analyze the elements of that particular federal crime; they need not try and discern some sort of cross-jurisdictional common character for an offense that could be articulated fifty different ways by fifty different States, as ACCA required. See, e.g., Sykes v. United States, 564 U.S. 1 (2011). Section 924(c), in other words, simply does not require courts to overlay a categorical analysis on top of such broad variation in the nature, elements, and contours of the predicate crimes, and courts will confront less variation in how offense conduct is commonly manifested. The federal courts will also be dealing with a body of federal law which they are more experienced.

Racketeering statutes, such as 18 U.S.C. 1959(a) "VICAR" & 1961(a) "RICO", are highly unusual statutes that encompass within their terms, not only a wide variety of conduct, but a wide variety of specifically defined criminal acts whose separate elements are defined by state and federal statutes incorporated by reference into their defined elements. The Supreme Court has never addressed how the categorical or modified categorical approach applies to these racketeering statutes, nor there is any unanimity among the federal circuits on whether the categorical approach is to be applied to the substantive violations of these statutes. But there is even less authority addressing whether the modified categorical approach should be applied to the elements of the state statute when both the federal racketeering and state statutes are "divisible."

The VICAR and RICO violations require the indictment to charge, the government to prove, and the jury to find beyond a reasonable doubt, the elements of particular federal or state statute. A

jury deciding a VICAR case is not asked to apply a broad unitary statutory formulation (like "recklessness of conduct in murder") to particular facts to decide whether the facts fit that formulation. That is the situation for which the categorical approach was devised: does an element that the jury is required to find in order to convict necessarily include the use of force, such that every finding of guilt under that statute has found the use of force? Or might the jury have found the defendant guilty on a theory that does not involve the use of force?

This petition also discusses that in enacting 18 U.S.C. Section 1959(a) VICAR, Congress intended it's reference to crimes such as murder be "generic" because, in part, Congress viewed federal murder statute, 18 U.S.C. Section 1111 as too restrictive. See S. Rep. No. 98-225 at 305-06, 311. And, as the Supreme Court instructed in Taylor v. United States, 495 U.S. 575, 592-93 (1990), a "generic" definition usually refers to the common law meaning of the term, unless contemporary usage and relevant statute indicate a divergence from that definition. The Model Penal Code, which does not define murder by degree, defines murder as "criminal homicide" that "is committed purposely or knowingly" or that is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." M.P.C. Section 210.2(1). Thus, the generic, contemporary definition of murder in section 1959(a) includes conduct that causes the death of another with the purpose or knowledge that the conduct will kill another or reckless disregard to the high risk that another may be killed.

A. STATUTORY BACKGROUND

Congress enacted 18 U.S.C. Section 924(c) in October 1668 as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.15 In its initial form, Section 924(c) read, in relevant part:

> "Whoever-(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony

> which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years."

Pub. L. No. 90-618, Sec. 924(c), 82 Stat. 1213. This provision was originally offered as an amendment on the House Floor by Representative Richard Poff of Virginia, see 114 Cong. Rec. 22231 (July 19, 1968), and passed the same day, see id. at 22248.

Senator Poff's introduction of the amendment, to federal predicate felonies, and his remarks, while "not dispositive of the issue of Section 924(c)'s reach, [] are certainly entitled to weight, coming as they do from the provision's sponsor." Simpson v. United States, 435 U.S. 6, 13, (1978) (discussing Poff's remarks), superseded by statute, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Sec. 1005, 98 Stat. 1837, as recognized in United States v. Gonzales, 520 U.S. 1, 10 (1997).

First, Congressman Poff stated that his amendment "makes it a separate Federal crime to use a firearm in the commission of another Federal crime," 114 Cong. Rec. 22231, and he explained that the purpose of attaching a mandatory minimum sentence is "to persuade the man who is tempted to commit a Federal felony to leave his gun at home," id. Next, and more importantly, he explicitly contrasted his proposed amendment with one proposed earlier by Representative Bob Casey of Texas - which would have applied to both federal and state felonies - avoiding the burden on the prosecutor of proving a given firearm moved in interstate commerce in order to establish federal jurisdiction - Congressman Poff noted that "[e]very Federal felony defined in the code already has its own jurisdictional base," id. at 22231, which further indicates he contemplated only U.S. Code offenses as predicates.

Ultimately, a Conference Committee adopted Congressman Poff's version of Section 924(c) with only minor changes, and the Conference Report itself described the House bill as punishing "a

person [who] uses a firearm to commit, or carries a firearm unlawfully during the commission of, a Federal felony." See H.R. Rep. No. 90-1956, at 31 (1968) (Conf. Rep.); see also Simpson, 435 U.S. at 14 (detailing Congressional process of approving Sec. 924(c)). Congress has subsequently amended section 924(c) multiple times, often to expand its reach or increase the severity of its penalties. See, e.g., Abbott v. United States, 562 U.S. 8, (2010) (recounting statutory amendments to Section 924(c)). Yet there is no indication that Congress' intent changed over time as to the scope of predicate crimes sufficient to support a 924(c) charge.

As relevant here, Congress amended 924(c) as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), in part by replacing the "any felony" language with the phrase "any crime of violence." Pub. L. No. 98-473, Sec. 1005.18 In that same act, Congress added a definition of "crime of violence" to Title 18, which applied to all the provisions in that title that used the phrase, including Section 924(c). See. S. Rep. No. 98-225, at 307 (1983). The term "crime of violence" meant "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Pub. L. No. 98-473, Sec. 1001 (codified at 18 U.S.C. Sec. 16).

Although this definition of "crime of violence" does not, on its face, illuminate whether the crime must be federal or not, the legislative history for the amendment to Section 924(c) itself makes clear, once again, that Congress had in mind only federal crimes of violence as predicates. The Senate Report explained:

> "The Committee has concluded that subsection 924(c) should be completely revised to ensure that all persons who commit Federal crimes of violence, including those crimes set forth in statutes which already provide for enhanced sentences for their commission with a

> dangerous weapon, receive a mandatory sentence, without the possibility of the sentence being made to run concurrently with that for the underlying offense or for any other crime without the possibility of a probationary sentence or parole. S. Rep. No. 98-225, at 313 (footnote omitted)."

In particular, the Supreme Court has also routinely treated the phrase "may be prosecuted in a court of United States" as synonymous with a federal crime. In United States v. Gonzales, 520 U.S. 1, (1997), for instance, the Supreme Court considered whether federal courts are required to run a term of imprisonment under 924(c) consecutively with a state-imposed sentence. In reaching its holding that they are, the Court contrasted the phrase "any crime of violence or drug trafficking crime ... for which he may be prosecuted in a court of the United States" with the text of another sentence in Section 924(c) (now codified at Sec. 924(c)(1)(D)(ii)), which prohibited courts from running sentences imposed under the section concurrently with "any other term of imprisonment." Gonzales, 520 U.S. at 5. Unlike the unrestricted phrase "any other term of imprisonment," the Court highlighted that "Congress explicitly limited the scope of the phrase 'any crime of violence or drug trafficking crime' to those 'for which [a defendant] may be prosecuted in a court of the United States.'" id. at 5, and in the very next sentence of the opinion described this as meaning that "Congress expressly limited the phrase 'any crime' to only federal crimes," id.

The Supreme Court has made similar observations - often drawing directly on Congressman Poff's statements and the legislative history - in other cases too. See Busic v. United States, 446 U.S. 398, 399 (1980) (stating 924(c) "authorizes the imposition of enhanced penalties on a defendant who uses or carries a firearm while committing a federal felony" (emphasis added)); Simpson v. United States, 435 U.S. 6, 10 (1978) ("Quite clearly, Sections 924(c) and 2113(d) are addressed to the same concern and designed to combat the same problem: the use of dangerous weapons - most particularly firearms - to commit federal felonies." (emphasis added)); see also United States v. Rodriguez-Moreno, 526 U.S. 275, 283 (1999) (Scalia, J., dissenting) ("The provision of the United

States Code defining the particular predicate offenses already punish all of the defendant's alleged criminal conduct except his use or carriage of a gun; Section 924(c)(1) itself criminalizes and punishes such use or carriage 'during' the predicate crime, because that makes the crime more dangerous."); Muscarello v. United States, 524 U.S. 125, 132 (1998) (discussing Section 924(c)'s broad purpose and noting "the provision's chief legislative sponsor has said that the provision seeks 'to persuade the man who is tempted to commit a federal felony to leave his gun at home.'" (citation omitted)).

B. PROCEDURAL HISTORY

Petitioner Dhinsa owned a chain of gasoline stations throughout the New York City Metropolitan area. He was charged for running a racketeering organization by pump-rigging and overcharging six to seven percent on each purchase at gas stations. (Case No. 97-cr-672-ERK, E.D.N.Y.). He was also charged for conspiring to commit murder of two victims, who were witnesses in New York State Court proceedings against his brother. Relevant to this petition, the jury convicted Dhinsa of conspiracy to commit murder in violation of 18 U.S.C. 1959(a)(5), conspiracy and aiding and abetting murder in violation of 18 U.S.C. 1959(a)(1), and one count of aiding and abetting 18 U.S.C. 924(c). See United States v. Dhinsa, 243 F.3d 635 (2nd Cir. 2001).

Dhinsa's request for a second or successive motion under 28 U.S.C. Section 2255 was initially granted by the Second Circuit Court of Appeals based on this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019), as his 18 U.S.C. Section 924(c) conviction in count 10 was likely based on a invalid predicate crime of violence. (Case No: 18-2935, April 15, 2020). At the district court, Dhinsa's presented facts that it is impossible to determine upon which of the multiple predicate offenses the jury relied to support its guilty verdict to 924(c) conviction. Relying on Stromberg v California, 283 U.S. 359 (1931) an his progeny, Dhinsa asked for relief because it

was "impossible to tell" from the general verdict if Dhinsa was convicted based on an unconstitutional alternatively-phrased ground.

Dhinsa also agreed that the Stromberg errors and not structural, see Hedgpeth v. Pulido, 555 U.S. 57, 60-61 (2008), but are subject of a harmless error review, a standard applied to the record's facts, not a burden borne by Dhinsa, O'Neal v. McAninch, 513 U.S. 432, 436 (1995), and that in the habeas context, an error is not harmless if there is "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' ... And, the [movant] must win." O'Neal, 513 U.S. at 436. Dhinsa also argued that Brecht v. Abrahamson, 507 U.S. 619, 628 (1967), requires the examination of the "record as whole" to determine if the error was harmless and a district court must conduct a "de novo examination" of the entire trial court record. See Brecht, 507 U.S. at 641-42.

In its reply to the 2255 motion, the government agreed that Dhinsa's conviction under 1959(a)(5), does not qualify as a crime of violence under the elements clause but argued that 924(c) conviction continues to be supported by a valid predicate under 1959(a)(1). The district court held that second-degree murder under New York Penal Law Sec. 125.25, which underlies 1959(a)(1) charge of murder in aid of racketeering, is a crime of violence under the elements clause of 924(c). The District court explained, in determining whether a racketeering offense qualifies as a crime of violence, "[it] would look to the predicate offenses here, murder to determine whether a crime of violence is charged." Id. at *2, APP C. The District Court held that "N.Y. Section 125.25 is a divisible statute and it is clear from Dhinsa's indictment that he was charged under subsection (1), which criminalizes intentional murder." Id at *3. The court concluded that since "intentional murder necessarily involves the use of force and is therefore a crime of violence" for 924(c) conviction. APP.C.

Dhinsa's request for a Certificate of Appealability was denied by the Second Circuit Court of Appeals without any opinion. See APP. B. His request for a en banc consideration was denied by the court of appeals on January 11, 2022. See APP. A.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuits are split over the scope of categorical analysis of 18 U.S.C. 924(c)'s crime of violence predicate.

The Supreme Court has adopted categorical approach to criminal convictions in an effort to avoid anomalies arising from variations in state law to similarly named crimes, which increased the prospect that defendants could face enhancement of federal sentence, or not, depending on which State's law controlled the prior conviction. See Taylor v. United States, 495 U.S. 575, 598 (1990). The Court's solution was to look only to the minimal conduct proscribed by the statute of conviction, without any consideration of the offense conduct. In United States v. Davis, 139. S.Ct. 2319 (2019), this Court adopted a categorical approach to the "crime of violence" in 924(c) offenses and declared the "residual clause" as unconstitutional. But in application of the "elements clause," the lower courts are not uniform in their approach on whether to conduct elements based categorical analysis for the federal predicate crime of violence, or "look through" the federal offense and analyze the elements of the state statute.

The Second Circuit has looked to the state statutes for identifying the elements of an predicate crime of violence of 924(c) based on 1959(a). In United States v. Matthews, 841 Fed. Appx 295 (2nd Cir. Jan 14, 2021) (unpublished), the panel noted the "potentially differences in the mens rea requirements to sustain a conviction for VICAR assault with a dangerous weapon and those required to sustain a conviction under New York Penal Law" and the Court "continues to develop its approach to crimes of violence after [United States v.] Davis [and] the district courts continue to await definitive guidance." But See., United States v. Sierra, 782 Fed Appx 16, 20-21 & n.2 (2nd Cir 2019) (affirming a 924(c) conviction predicated on murder-in-aid-of-racketeering, holding that it was "self-evident that under New York law 'attempted murder is a crime

unmistakably involving the use of physical force'" and therefore "that murder is a crime involving the use of such force."); United States v. Herron, 762 Fed Appx 25, 32 n.5 (2nd Cir 2019) (collecting cases).

The First and Seventh Circuits have similarly analyzed the VICAR crime of violence predicates for a 924(c) offense based on the state statutes. See United States v. Rivera-Carrasquillo, 933 F.3d 33, 55 (1st Cir 2019) (Applying 924(c) VICAR murder predicate based on elements of Puerto Rico murder statute); Briseno v. United States, No. 20-1652 (7th Cir, May 19, 2020)(unpublished) (applying elements of state offenses in VICAR crime of violence predicate for 924(c)).

The Fourth Circuit has similarly looked beyond the elements of the enumerated VICAR offense to the state offenses in its decision regarding VICAR convictions and Section 924(c). See United States v. Mathis, 932 F.3d 242, 264-67 (4th Cir 2019) (looking through 1959 to Virginia offenses and comparing with generic definition). Adding to the confusion, the Fourth Circuit later held in United States v. Keene, 955 F.3d 391 (4th Cir 2020) that the court need not look though the VICAR elements and examine only the underlying state-law predicates. In Keene, the Fourth Circuit held that to convict a defendant of VICAR assault with a dangerous weapon, the defendant must have "engag[ed] in conduct that violated both th[e] enumerated federal offense as well as a state law offense, regardless whether the two offenses are a categorical match." Id at 398-99. Also See United States v. Alston, No: 20-7906, 2021 US App LEXIS 24171 (4th Cir. July 1, 2021) (applying elements of VICAR predicates committed through South Carolina attempted murder and assault and battery in the first degree).

By contrast, the Sixth Circuit has held that a challenge to a 924(c) conviction premised on a violation of 1959(a) requires a categorical approach to the elements of the crime as defined by 1959. See, Manners v. United States, 947 F.3d 377, 380 (6th Cir 2020). In Manners, the predicate

offense was assault with a dangerous weapon in violation of 1959(a)(3), and the Sixth Circuit applied the categorical approach and concluded that establishing this offense required proof of the elements of the violation of 1959(a)(3), without reference to the underlying state statute criminalizing "assault" per se.

Following the reasoning in Manners, the Sixth Circuit has granted a number of certificates of appealability (COA) based on the "open question" concerning what statute the courts should analyze when the predicate offense to a section 924(c) conviction is a violation of the VICAR statute, i.e., the generic, federal offense, or the underlying state offense charged in the indictment. In Hall v. United States, No. 21-5062, 2021 US App LEXIS 18017 (6th Cir July 16, 2021) (order), the court granted COA stating that the "government rightly acknowledged that 'there is an open question concerning what statute [courts should] analyze when the predicate offense [to a 924(c)(1)(A) conviction] is a violation of the VICAR; is it the generic, federal offense (e.g., VICAR murder) or the underlying state offense charged in the indictment.'"; In re Williamson, No: 19-6302, 2020 US Dist. LEXIS 9380 (6th Cir mar. 25, 2020)(order) (924(c) conviction based on 1959(a) and Tennessee Code Ann. 39-13-202 as predicates); In Re Wilson, No. 18-6058, 2019 US APP LEXIS 4626 (6th Cir. Feb 14, 2019)

The Eighth Circuit, in United States v. Eagle, 539 F.3d 1166, 1172 (8th Cir 1976), held that the terms of 924(c) require the predicate crime of violence be a federal offense and a predicate offense under 18 U.S.C. 1153 could not serve as a valid predicate. At that time, section 1153 listed several offenses which were required to be "defined and punished in accordance with the laws of the State in which such offense was committed." 18 U.S.C. 1153 (1970). As a result, Indians prosecuted for such offenses were often subject to different definitions and penalties under state law than non-Indians prosecuted under federal law. To avoid constitutional difficulties, the Eighth Circuit held

that "Congress did not intend for a 924(c)(1) prosecution to be available where the underlying felony was based on section 1153." Id. Eagle, 539 F.2d at 1172 & n.6.

The Ninth Circuit has vacated a 924(c) conviction based on VICAR second degree murder under California Law, Cal. Penal Code Sec. 188. See United States v. Young, No: 19-50355, 2021 US APP LEXIS 22383 (9th Cir. July 28, 2021). see also, United States v. Adkins, 883 F.3d 1207, 1210-1211 (9th Cir 2018) ("In the context of VICAR, we have permitted jury instructions using generic federal definitions."). But the Adkins court also noted that the Second Circuit has allowed district "courts, in certain circumstances, [to] instruct on the state definition or otherwise risk prejudice to the defendant." (citing United States v. Carrillo, 229 F.3d 177, 185 (2nd Cir 2000).

The Tenth Circuit has also looked through the VICAR convictions based on Utah and Arizona statutes and held that since these state statutes encompass reckless conduct, they could not be crime of violence to support the 924(c) conviction. See United States v. Toki, 23 F.4th 1277 (10th Cir 2022) (vacating 924(c) convictions based on state statute criminalizing assault with a dangerous weapon).

The Eleventh Circuit has acknowledged that it has not yet addressed in a published opinion whether a defendant's 924(c) predicate offense could be based on both section 1959 VICAR and the underlying state offenses as crime of violence, and this issue could be debated by reasonable jurists. See Alvarado-Linares v. United States, NO: 19-14994-E, 2020 US App LEXIS 14816 (11th Cir May 8, 2020).

The deep circuit divide over this question is obvious. While the Department of Justice's own Criminal Resource Manual describes predicate crimes of violence under 924(c) as "federal," See Dep't of Justice, United States Attorney's Manual, Title 9, Criminal Resource Manual 1434 (1997)

("To avoid exacerbating the conflicts in the circuits on this issue [of the relevant unit of prosecution for a 924(c) charge], the Criminal Division urges prosecutors to base each 924(c) count on a separate, distinct predicate ... FEDERAL crime of violence." (emphasis added). The the United States Attorney's Office has also acknowledged that courts differ on whether to analyze the general federal offense or the specific state offense charged under VICAR, but suggested that the correct approach is to evaluate VICAR predicate by a generic, federal definition, not by the underlying state statute. See United States v. Mills, 378 F. Supp.3d 563, 576 (E.D.Mich 2019).

In sum, there is a deep division in the court of appeals and district courts over whether courts should apply elements of generic federal offense or state offense in categorical analysis of a 924(c) crime of violence predicate. The different sides of the split interpret the same federal statute in ways that can result in vast differences in its application, further compounded by the categorical approach which requires the parsing of the state statute underlying the violation of 1959(a) offense. Thus, similarly situated offenders can end up serving mandatory consecutive 924(c) sentences with geographic happenstance as the only variable. Only this Court can bridge the chasm between the circuits to ensure equal treatment across the country.

II. The Question presented in Important and it's determination would provide much needed guidance to lower courts

A. The 924(c)'s jurisdictional requirement has been ignored by the lower courts while applying the categorical analysis to the predicate crime of violence

In enacting statutes like section 924(c), Congress has chosen to override sentencing discretion accorded to judges, and impose a mandatory consecutive punishment based exclusively on the nature of the particular offense in connection with which a firearm was possessed. Section 924(c)

regulates the "use and carrying," "possession," of a firearm while involved in a drug trafficking offense or crime of violence. This section further requires that predicate offenses must be one "for which the person may be prosecuted in a court of the United States." 18 USC 924(c)(1)(A). This explicit predicate federal crime limitation is notable because it is the only federal nexus involved in the section. Unlike section 924(b), which requires the firearm to move in interstate commerce, section 924(c) jurisdiction rests only when the underlying federal crime substantially affects interstate commerce thus coming within the Congress's authority.

The Supreme Court has also routinely held that Section 924(c) requires a predicate to be a federal crime. See United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Congress expressly limited the phrase "any crime of violence' [in section 924(c) to only federal crimes."); Also See, Busic v. United States, 446 U.S. 398, 399 (1978) (section 924(c) "authorizes the imposition of enhanced penalties on a defendant who uses or carries a firearm while committing a federal felony."); Simpson v. United States, 435 U.S. 6, 10 (1980) ("Quite clearly, sections 924(c) and 2113(d) are addresses to the came concern and designed to combat the same problem: the use of dangerous weapons - most particularly firearms - to commit FEDERAL felonies.")(emphasis added); Muscarello v. United States, 524 U.S. 125, 132 (1998) (discussing 924(c)'s broad purpose and noting "the provision's chief legislative sponsor has said that the provision seeks 'to persuade the man who is tempted to commit a federal felony to leave his gun at home.'").

Moreover, the department of Justice's own criminal Resource Manual describes predicate crimes of violence under section 924(c) as "federal." See Dep't of Justice United States Attorney's manual, Title 9, criminal Resource Manual 1434 (1997) ("To avoid exacerbating the conflict in the circuits on this issue [of the relevant unit of prosecution for a section 924(c) charge], the Criminal Division urges prosecutors to base each 924(c) count on a separate, distinct predicate ... FEDERAL crime

of violence." (emphasis added). But, almost all the lower federal courts have ignored this jurisdictional requirement of predicate crime of violence while applying the categorical approach to the elements of the crime of violence charged under 18 U.S.C. 1959(a) or other racketeering statutes which adopt the violations of state laws into federal definitions of the crimes.

B. The categorical analysis of the elements of 924(c)'s predicate crime of violence - charged under 18 U.S.C. Section 1959(a) offense - should be in generic terms and not be taken from definitions of state crimes.

Section 1959 was originally enacted as 18 U.S.C. Section 1952B, a companion to the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprise statute. 18 U.S.C. 1952. Both sections allow certain prosecutions "in violation of the laws of any State or the United States" in federal courts. While the statute provides definitions for "racketeering activity" and "enterprise," it does not do so with respect to the enumerated violent crimes. Congress, not wishing to unnecessarily create new crimes, sought to craft section 1959 so that it reached generic conduct described therein, whatever label a particular state might use to criminalize that conduct.

For a state offense to constitute a VICAR violation, this Court has required that the state offense must correspond to the generic offense; that is, the state offense cannot be broader than generic offense. See Scheidler v. National Organization for Women, Inc, 537 U.S. 393, 409-10 (2003) (analyzing RICO's definition of racketeering activity, that "any act or threat involving ... extortion, ... which is chargeable under state law" includes conduct constituting generic extortion that also violates state law.); United State v. Nardello, 393 U.S. 286, 293-94 (1969) (analyzing the Travel Act, 18 USC 1952, and concluding that its provisions regarding "extortion ... in violation of the laws of the State in which committed," 19 U.S.C. 1952(b)(i)(2), refers to generic extortion that also violates state law, even if the state law does not use the term "extortion.").

This approach is also supported by the legislative record of 18 USC 1959. As reported in the Congressional record:

> While section [1959] proscribes murder, kidnapping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, it is intended to apply to those crimes in GENERIC SENSE, whether or not a particular State has chosen those precise terms for such crimes.

Id. 129 Cong. Rec. 22, 906 (98 Cong. 1st Sess. Aug. 4, 1983) (emphasis added). Also see, Teresa Wallbaum, Novel Legal issues in Gang Prosecutions, 68 DOJ J. Fed. L. & Prac. 99, 105-06 (2020) ("Congress intended section 1959 to apply uniformly across the United States as a federal crime. The predicate requirement was included simply to avoid criminalizing new conduct. Requiring the state predicate to categorically match the enumerated offense would limit the application of section 1959 to the drafting whims of fifty legislatures, a result plainly not intended by Congress.").

It is also evident that a federal court's application of categorical analysis based on the elements of the state statutes would frustrate the purpose of 1959 and potentially result in contradictory and uneven application of the federal statute. Under the categorical approach, a court must "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime, i.e., the offense as commonly understood." Descamps v. United States, 570 U.S. 254, 257 (2013). A state's choice to expand the scope of its crimes to encompass both violent and non-violent conduct may make great sense in terms of state policy. It certainly makes it easier for state and local prosecutors to make their cases. But a state's definition of an offense is to ensure that anyone who falls within the scope of that state-defined crime may be punished for that particular crime. As a result, there is no reason to think that Congress would have wanted the federal courts to rely on elements of the state offense in determining the mandatory punishments imposed by 18 USC 924(c).

Moreover, application of categorical approach in the case of section 924(c)(1)(A) does not appear to be a mere design of judicial construct. By explicitly stating that the "crime of violence" must have "elements" of attempted or actual use of force against another, Congress appears to have dictated the courts to examine the elements of the underlying predicate federal offense through the categorical approach. The Supreme Court has refined this categorical approach (through categorical and modified categorical approach) both for practical and constitutional reasons that are specific to the consideration of a prior conviction or predicate offense. See Taylor v. United States, 495 U.S. 575 (1990)(applying the approach in ACCA cases to prior convictions); United States v. Davis, 139 S.Ct. 2319 (2019)(applying the approach in 924(c) cases to currently charged predicate offenses).

Finally, providing 924(c)'s mandatory minimum sentence based on court's determination of the elements of the state offense would also implicate a defendant's right to jury trial and raise serious Sixth Amendment concerns. Taylor, 495 U.S. at 601. If a district judge failed to charge a jury on the state law elements of the VICAR offense, a reviewing court could not possibly know what were the factual determinations on which the jury based its verdict. Thus, the court would be unable to determine what the jury decided the defendant actually did, and whether, under the jury's findings, the defendant committed the 1959(a) VICAR offense as charged "in violation of the laws of any State."

III. The decision below is wrong.

While the district court applied the categorical analysis to the 924(c)'s predicate crime of violence charged under 1959(a) VICAR, it relied upon the elements as defined by the second degree murder statute under N.Y Penal Law 125.25. Moreover, while the court acknowledged that N.Y. Penal Law 125.25 is "divisible," it picked the subsection charging "intentional murder" from the

indictment. Thus, not only the district court analyzed the elements of the state offense in contravention to the jurisdictional requirement of 924(c) that predicate offense be "prosecuted in the Court of the United States," it also usurped the jury's verdict in determining the applicable subsection from the state statute defining second-degree murder.

Since the time of Dhinsa's trial, the Second Circuit has consistently struggled with the correct application of 18 U.S.C. 1959(a)'s references to state offenses. See. e.g., United States v. Mapp, 170 F.3d 328, 335-36 (2nd Cir. 1999) ("we do not believe that section 1959 reaches only murders that were committed intentionally. Instead, it is sufficient for the government to prove that the defendant committed murder - however that crime is defined by the underlying state or federal law - and that he engaged in the conduct that resulted in murder, however defined, with the purpose or motivation prescribed in the statute."); United States v. Diaz, 176 F.3d 52, 100 (2nd Cir. 1999) ("the racketeering statutes are not meant to incorporate state procedural and evidentiary law; rather, references to state law in these statutes serve merely for definitional purposes, that is, to identify generally the kind of conduct made illegal by the federal statute."); United States v. Miller, 116 F.3d 641, 675 (2nd Cir. 1997) ('RICO's allusion to state crimes was not intended to incorporate elements of state crimes, but only to provide a general substantive frame of reference" and that "the government [was] not required to prove an 'overt act.'").(Citing Diaz, 176 F.3d at 96).

Subsequent panels of the Second Circuit expressed concern about viability of decisions from prior panels. See, e.g., United States v. Carrillo, 229 F.3d 177, 185 (2nd Cir. 2000) (observing that the plain language of sections 1961(a) and 1959(a) "seem to require of a predicate act based on state law that the act include the essential elements of the state crime" and expressing "serious doubts" about whether Diaz's reasoning on jury charges as to state substantive elements 'can stand the test of time."); United States v. Pimentel, 346 F.3d 285, 302-05 (2nd Cir. 2003) (repeating similar

doubts and strongly encouraging the use of special verdict forms when multiple predicates are alleged). Nevertheless, the Second Circuit has not expressly disavowed prior cases and it appears that lower courts are divided due to lack of any controlling authority.

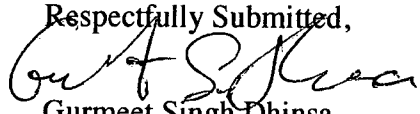
In Dhinsa's case, the trial jury was never instructed that a conviction for 1959 requires a specific intent or mental state for second-degree murder under N.Y. Penal Law 125.35. Only general intent to "maintain or increase position" in the enterprise was required as elements of the 1959 offense. The district court and government repeatedly reminded the jury that Dhinsa himself did not commit any murder, but the charges are based on New York conspiracy offenses and federal accomplice liability. The jury was required to apply only the general intent provisions for 1959 offenses and no determination was made as to the specific underlying state crimes through special interrogatories.

In such a case, the categorical analysis must not be applied to the elements of state offenses, as it will be in a direct violation of Dhinsa's sixth Amendment right to Jury trial. As this Court has explained, the categorical approach was imposed in part to "avoid [] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." Descamps v. United States, 570 U.S. 254, 267 (2013). In Dhinsa's case, since the predicate offense for 924(c) requires consideration of a contemporaneous predicate offense rather than a past conviction, that finding of fact could be only made by the jury. The district court cannot, post-hoc, insert new elements to the offense - which were never considered by the jury - when applying the categorical analysis. Any application of elements of N.Y. Penal Law 125.25 in categorical analysis would also be in violation of Dhinsa's Sixth Amendment right to jury trial.

CONCLUSION

Based on the foregoing, petitioner Gurmeet Singh Dhinsa respectfully prays this Court to grant the Writ of Certiorari to the Second Circuit Court of Appeals.

Respectfully Submitted,



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