No. 22-7065

IN THE SUPREME COURT OF THE UNITED STATES

AHMED ABU KHATALLAH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when a predicate crime applies extraterritorially, 18 U.S.C. 924(c)'s prohibition on using a firearm during and in relation to that crime likewise applies extraterritorially.

2. Whether the court of appeals erred in reversing and remanding the district court's decision to vary downward from what petitioner's Sentencing Guidelines range would have been even if acquitted conduct were not considered.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 41 F.4th 608. The opinion of the district court denying petitioner's motion to dismiss (Pet. App. 76a-124a) is reported at 151 F. Supp. 3d 116. The opinion of the district court concerning the Sentencing Guidelines calculation is reported at 314 F. Supp. 3d 179.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2022. A petition for rehearing was denied on December 20, 2022 (Pet. App. 75a). The petition for a writ of certiorari was filed

on March 20, 2023. 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 District of Columbia, petitioner was convicted on one count of conspiring to provide material support and resources to terrorists, in violation of 18 U.S.C. 2339A; one count of providing material support and resources to terrorists, in violation of 18 U.S.C. 2339A; one count of maliciously destroying and injuring property and placing lives in jeopardy within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1363; and one count of using a semi-automatic firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Judgment 1-2; see Pet. App. 5a-6a, 8a. He was sentenced to 22 years of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed the convictions and reversed and remanded to the district court for resentencing. Pet. App. 1a-74a.

1. Petitioner's convictions stem from the deadly attack on the U.S. diplomatic facility in Benghazi, Libya, on September 11, 2012. Pet. App. 76a. Petitioner was the leader of Ubaydah Bin Jarrah, an Islamist militia active in the Benghazi area. Id. at 4a. Beginning on the night of September 11, 2012, petitioner and other militia members participated in a large-scale terrorist attack on the United States Special Mission (Mission), as well as

a nearby Central Intelligence Agency (CIA) facility. Id. at 3a-4a. The attack on the Mission resulted in the death of the U.S. Ambassador and another State Department officer. Id. at 3a. The subsequent attack on the CIA facility killed two additional Americans and wounded two others. Id. at 4a.

Petitioner and two other men acquired munitions for the attack several days beforehand. Pet. App. 44a; see 314 F. Supp. 3d 179, 191. And during the attack, petitioner maintained phone contact with other attackers and established a roadblock near the Mission to prevent rival militiamen from interfering. Pet. App. 45a; see 314 F. Supp. 3d at 193. Furthermore, just before midnight on the night of the attack, petitioner was filmed entering a building within the U.S. diplomatic compound carrying a rifle accompanied by one of the men with whom he had acquired weapons a few days earlier. Pet. App. 45a-46a. Petitioner then left the building and gestured for several men to follow him. Id. at 46a.

2. Petitioner was captured overseas and brought to the United States on a U.S. Navy vessel. Pet. App. 5a. A federal grand jury sitting in the District of Columbia indicted petitioner on 18 counts. Ibid.; see Superseding Indictment 2-19. Counts 1 and 2 charged petitioner with conspiring to provide, and providing, material support for terrorism resulting in death, in violation of 18 U.S.C. 2339A. Pet. App. 5a. Counts 3 through 15 charged petitioner with various offenses related to the killing, and attempted killing, of U.S. employees during the attack, in

violation of 18 U.S.C. 844(f), 930(c), 1111, 1114, and 1116. Pet. App. 5a. Counts 16 and 17 charged petitioner with maliciously destroying and injuring property and placing lives in jeopardy within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1363. Pet. App. 6a. Finally, Count 18 charged petitioner with using a semi-automatic firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 6a.

The district court denied petitioner's motion to dismiss, Pet. App. 76a-124a; 168 F. Supp. 3d 210, 216, including his motion to dismiss the Section 924(c) count as impermissibly extraterritorial, Pet. App. 101a-105a. The court explained that Section 924(c) applies extraterritorially "insofar as its predicate 'crime of violence' may be prosecuted extraterritorially." Id. at 103a. The court observed that application of Section 924(c) in that circumstance accorded with the decisions of "six other courts" and that "no decision," "[t]o the Court's knowledge, * * * has ever held to the contrary." Ibid. And the court found that the underlying crimes of violence charged in the indictment in this case applied extraterritorially. Id. at 105a; see 168 F. Supp. 3d at 216.

3. After a trial, the jury found petitioner guilty of four counts -- the two Section 2339A charges for materially supporting terrorism (Counts 1 and 2); the Section 1363 charge related to destroying the Mission (Count 16); and the Section 924(c) charge

for using a semi-automatic firearm during and in relation to a crime of violence (Count 18). Pet. App. 8a; see Judgment 1-2. For Counts 1 and 2, however, the jury made special findings that petitioner's conduct did not result in death. Pet. App. 8a-9a. The jury also acquitted petitioner of the 13 murder-related charges (Counts 3 through 15) and the Section 1363 charge related to damaging the CIA facility (Count 17). Id. at 9a.

The district court calculated an aggregate range of life imprisonment under the Sentencing Guidelines for Counts 1, 2, and 16, which it grouped together. 314 F. Supp. 3d at 185, 202. For Count 18, the Section 924(c) conviction, the court observed that the statute required the ten-year statutory minimum to run consecutively to the sentence on the grouped counts. Id. at 202-203.

In determining the Guidelines range for the grouped counts, the district court found "by a preponderance of the evidence" that petitioner's relevant conduct "resulted in death." 314 F. Supp. 3d at 190. The court explained that petitioner "joined a conspiracy with the goal of launching an armed attack on the Mission and destroying facilities there"; "the scope of the[] agreement encompassed firing weapons and setting fires to drive U.S. personnel out of Mission buildings"; and the co-conspirators' actions in furtherance of the conspiracy "substantially contributed to the likelihood of death, and death in fact resulted." Id. at 191, 195-196.

At the sentencing hearing, however, the district court took the view that the jury had "explicitly found that the defendant's conduct did not result in death," and that "what [the jury] convicted [petitioner] of was essentially a property crime." Pet. App. 184a. And the court stated that, notwithstanding its own finding by a preponderance of the evidence that petitioner's relevant conduct did in fact result in death, it would not take acquitted conduct into account in determining the appropriate sentence. Id. at 176a-177a, 182a-185a. The court thus varied downward from the advisory Guidelines sentence of life, and sentenced petitioner to concurrent sentences of 144 months in prison on each of the grouped counts, and a consecutive sentence of 120 months in prison on the Section 924(c) count. Id. at 185a-186a.

4. The court of appeals affirmed petitioner's convictions but reversed the sentence as substantively unreasonably low. Pet. App. 1a-68a.

The court of appeals rejected petitioner's argument that his conviction under Section 924(c) was impermissibly extraterritorial. Pet. App. 28a n.12. The court observed that the relevant predicate offense, 18 U.S.C. 1363, "expressly applies to offenses committed 'within the special maritime and territorial jurisdiction of the United States,'" including the Benghazi Mission. Pet. App. 28a n.12, 31a. And it applied circuit precedent under which "the territorial reach of Section 924(c) is

coextensive with the territorial reach of the underlying predicate offense." Id. at 28a n.12 (citing United States v. Garcia Sota, 948 F.3d 356, 362 (D.C. Cir. 2020)).

The court of appeals separately reversed petitioner's sentence as substantively unreasonably low and remanded for resentencing. Pet. App. 52a-68a. The court noted that "[t]he government does not dispute that the district court was permitted to discount acquitted conduct, and so we take that as given in this case." Id. at 53a; see id. at 61a ("We need not decide that question today because the government has conceded the point."). But the court of appeals explained that "the Guidelines range would have been 30 years to life even without relying on acquitted conduct," and observed that the district court had failed to explain "the basis on which [it] varied downward from a 30-year sentence -- the bottom of the Guidelines range once acquitted conduct is set aside -- to just twelve years" for the three grouped counts. Id. at 63a-64a.

The court of appeals emphasized that "the gravity of [the] assault on an American diplomatic facility and the district court's own recognition of the vital need to deter such crimes" required a higher sentence. Pet. App. 53a. And it explained that, "while the district court's discretion to vary downward to discount acquitted conduct is undisputed in this case, the district court abused its discretion by varying downward significantly further and imposing a sentence both lower than the minimum that would be

appropriate in light of the jury's acquittals and far lower than could be justified on this record." Id. at 67a-68a.

Judge Millett authored a concurring opinion. Pet. App. 69a-74a. She emphasized that "the portion of the district court's downward variance designed to avoid reliance on acquitted conduct was a sound and commendable exercise of discretion." Id. at 74a.

ARGUMENT

Petitioner renews his claim (Pet. 7-10) that his conviction for using a firearm in a crime of violence, in violation of 18 U.S.C. 924(c), is impermissibly extraterritorial. He also claims (Pet. 10-11) that the Constitution prohibits a district court from looking to acquitted conduct in determining an appropriate sentence. The decision below was correct and does not conflict with any decision of this Court or another court of appeals. In addition, the interlocutory posture of this case counsels strongly against review at this time. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly rejected petitioner's extraterritoriality challenge to his Section 924(c) conviction, and petitioner offers no sound reason for further review.

a. Petitioner does not dispute that the predicate crime of violence underlying his Section 924(c) conviction -- a violation of 18 U.S.C. 1363, which criminalizes malicious injury to property within the special maritime and territorial jurisdiction of the United States -- applied to the attack on the Mission. And under

this Court's decision in RJR Nabisco, Inc. v. European Community, 579 U.S. 325 (2016), that means that Section 924(c) applied as well.

In RJR Nabisco, the Court addressed the extraterritorial scope of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq. Like Section 924(c), RICO's application turns on predicate offenses. See United States v. Garcia Sota, 948 F.3d 356, 361 (D.C. Cir. 2020). The Court in RJR Nabisco observed that RICO predicates include certain offenses "that plainly apply to at least some foreign conduct," such as 18 U.S.C. 351, which prohibits the assassination of government officials and provides that "'[t]here is extraterritorial jurisdiction over the conduct prohibited by this section.'" 579 U.S. at 338 (quoting 18 U.S.C. 351(i)). And the Court explained that "Congress's incorporation of these * * * extraterritorial predicates into RICO gives a clear, affirmative indication that" RICO's substantive prohibitions "appl[y] to foreign racketeering activity -- but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." Id. at 339.

Like RICO, Section 924(c) incorporates predicate statutes that explicitly apply abroad. As the court of appeals has observed, Section 924(c) "specifically enumerates 46 U.S.C. § 70503," Garcia Sota, 948 F.3d at 361, which criminalizes narcotics offenses committed on vessels and, by its terms, "applies

even though the act is committed outside" the United States, ibid. (quoting 46 U.S.C. 70503(b)). Petitioner notes (Pet. 9-10) that Section 70503 is a "drug trafficking crime," but a "crime of violence" can likewise provide the basis for a Section 924(c) violation, 18 U.S.C. 924(c), and the "history" of Section 924(c) indicates that the "provisions on crimes of violence and drug trafficking [are] a package," and thus any "effort to wall the crimes of violence off from inferences largely based on the drug trafficking provisions will not wash," Garcia Soto, 948 F.3d at 361-362. In any event, Section 924(c) also incorporates extraterritorial crimes of violence, like offenses under Section 1116, see id. at 361, and Section 1363, the crime at issue here. Thus, under RJR Nabisco, Section 924(c)'s incorporation of those extraterritorial predicates indicates that it applies extraterritorially to the extent the applicable predicate does.

b. Petitioner offers no sound basis for further review. Every court to have considered the issue has recognized Section 924(c)'s potential extraterritorial application. See, e.g., Garcia Sota, 948 F.3d at 361-362; United States v. Siddiqui, 699 F.3d 690, 701 (2d Cir. 2012), cert. denied, 569 U.S. 986 (2013); United States v. Belfast, 611 F.3d 783, 813-815 (11th Cir. 2010), cert. denied, 562 U.S. 1236 (2011); United States v. Mompremier, No. 21-cr-0198, 2022 WL 4592093, at *3-*4 (E.D. Wisc. Sept. 30, 2022); United States v. Hasan, 747 F. Supp. 2d 642, 684-685 (E.D. Va. 2010); United States v. Reumayr, 530 F. Supp. 2d 1210, 1219

(D.N.M. 2008). And while petitioner asserts (Pet. 10) that the decision below will "fuel possibilities for international discord," he identifies no examples of actual discord, which could be taken into account by the government in its charging decisions.

2. Petitioner contends (Pet. 10) that the Constitution precludes district courts from considering acquitted conduct in determining the appropriate sentence. That question is not presented in this case, and even if it were, it would not warrant this Court's review.

a. The district court elected not to consider acquitted conduct when sentencing petitioner. See Pet. App. 176a-177a, 182a-185a. And on appeal, "[t]he government d[id] not dispute that the district court was permitted to discount acquitted conduct," and the court of appeals accordingly "t[ook] that as given in this case." Id. at 53a. The court of appeals instead reversed the sentence for the separate reason that the district court's reasoning "could not have supported such a stark additional variance beyond discounting acquitted conduct." Ibid. (emphasis added). Omitting acquitted conduct lowered the bottom end of the Guidelines range to 30 years of imprisonment on the three grouped counts, but the court of appeals found nothing in the record that justified the further variance "downward from a 30-year sentence * * * to just twelve years" for those counts. Id. at 64a.

Petitioner acknowledges (Pet. 11) that "additional wrinkle" and suggests only that the scope of the acquitted conduct is

"unclear." But the relevant acquitted conduct is indeed clear -- the district court determined that the jury acquitted petitioner of any responsibility for the deaths resulting from the attack, and the court of appeals accepted that proposition. See Pet. App. 62a-63a, 184a. Contrary to petitioner's contention (Pet. 11), he "was not 'acquitted' for conduct unless the jury necessarily determined that the facts underlying a charge or enhancement were not proved beyond a reasonable doubt," Pet. App. 62a. And even if there were some residual ambiguity about the scope of acquitted conduct, petitioner could advance any arguments on remand to the extent that doing so is not foreclosed by the court of appeals' opinion. See pp. 13-14, infra (noting interlocutory posture of present petition).

Even if the question presented were implicated here, it would not warrant this Court's review. As explained in the government's brief in opposition to the petition for a writ of certiorari in McClinton v. United States, No. 21-1557 (filed June 10, 2022), a copy of which is being served on petitioner's counsel, the Constitution does not preclude a district court from relying on conduct that the jury did not find beyond a reasonable doubt, but the court finds by a preponderance, in determining the appropriate sentence. See Br. in Opp. at 7-11, McClinton, supra (No. 21-1557). Every federal court of appeals with criminal jurisdiction has upheld a district court's authority to consider such conduct. See id. at 11-12 (citing cases). And this Court has recently and

repeatedly denied petitions for writs of certiorari challenging reliance on acquitted conduct at sentencing. See id. at 14-15.*

b. At all events, even assuming that the second question presented warranted this Court's review, such review would be inappropriate at this time because the court of appeals remanded for resentencing. "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 384 (1893). That practice enables the Court to examine cases on a complete record, prevents unnecessary delays in the trial and appellate process, and allows the Court to consider all of the issues raised by a single case at one time.

Once petitioner is resentenced, he will then be able to raise the sentencing question presented in his petition -- together with any other questions that may arise on remand -- in a single petition for a writ of certiorari seeking review of the final judgment. See Major League Baseball Players Ass'n v. Garvey, 532

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* Several other pending petitions for writs of certiorari seek review of similar issues. See, e.g., Merry v. United States, No. 22-6815 (filed Feb. 12, 2023); Sanchez v. United States, No. 22-6386 (filed Dec. 20, 2022); Cain v. United States, No. 22-6212 (filed Nov. 28, 2022); Bullock v. United States, No. 22-5828 (filed Oct. 11, 2022); Karr v. United States, No. 22-5345 (filed Aug. 10, 2022); Shaw v. United States, No. 22-118 (filed Aug. 1, 2022); Luczak v. United States, No. 21-8190 (filed May 12, 2022).

U.S. 504, 508 n.1 (2001) (per curiam) (observing that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments"). Petitioner offers no reason for the Court to depart from its normal practice in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2023