No. _____

In the
Supreme Court of the United States

JUAN ALBERTO ORTIZ-ORELLANA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 924(c)(3)(A), a felony qualifies as a "crime of violence" if it "has as an element the use, at-tempted use, or threatened use of physical force against the person or property of another."

Mr. Ortiz-Orellana argued below that Maryland first degree murder does not qualify as a "crime of violence" under § 924(c) because it is an indivisible crime that encompasses felony murder — a means which requires no more than an accidental death committed in the course of an underlying felony. Such a mens rea does not suffice under the force clause of the § 924(c) "crime of violence" definition after this Court's decision in Borden v. United States, 593 U.S. 420 (2021), which held that offenses that can be committed by the reckless use of force fail to qualify as "crimes of violence" under the force clause. But the Fourth Circuit rejected this argument. The Circuit did not dispute that Maryland first degree murder criminalizes felony murder and that felony murder fails to qualify as a § 924(c) "crime of violence" after Borden. Nonetheless and notwithstanding Maryland state cases to the contrary, the Fourth Circuit concluded that Maryland first degree murder is divisible between premeditated murder and felony murder; therefore, the panel used the modified categorical

approach and looked to documents authorized under Shepard v. United States, 544 U.S. 13 (2005) to conclude that Mr. Ortiz-Orellana's VICAR Maryland first degree murder convictions were predicated on premeditated murder — which it concluded is a § 924(c) "crime of violence."

In addition, courts have disagreed about how to apply use-of-force language to crimes that require proof of a victim's bodily injury or death but can be committed by failing to take action. This Court has granted certioarari in Delligatti v. United States, No. 23-825 on the question – whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force so as to death) qualifies as a "crime of violence" under the 924(c) force clause. Specifically, at issue in the Delligatti petition is whether VICAR attempted murder qualifies as a "crime of violence."

The question presented is:

Whether a crime that requires proof of bodily injury or death, but can be committed by accidental means or by failing to take action, has as an element the use, attempted use, or threatened use of physical force.

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IN THE SUPREME COURT OF THE UNITED STATES
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JUAN ALBERTO ORTIZ-ORELLANA,
PETITIONER,

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UNITED STATES OF AMERICA,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Juan Alberto Ortiz-Orellana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the Fourth Circuit, United States v. Ortiz-Orellana, 90 F.4th 689 (4th Cir. 2024), is reproduced in the appendix to this petition at Pet. App. A1-A25. The Circuit Court's Order denying the petition for rehearing and rehearing en banc is at Pet. App. A26.

JURISDICTION

The court of appeals issued its opinion on January 10, 2024. Petitioner timely filed a petition for rehearing en banc, which the court denied on February 7, 2024. On May 3, 2024, Chief Justice Roberts extended the time for filing this petition to and including July 6, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924 of Title 18 of the United States Code provides:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

. . .

(3) For purposes of this subsection the term "crime of violence" means 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.

. . .

(j)A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall –

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

Md. Code, Crim. Law § 2-201 provides:

> (a) A murder is in the first degree if it is:
> (1) a deliberate, premeditated, and willful killing;
> (2) committed by lying in wait;
> (3) committed by poison; or
> (4) committed in the perpetration of or an attempt to perpetrate [specified felony offenses] including (v) escape in the first degree from a State correctional facility or a local correctional facility.

STATEMENT OF THE CASE

On March 7, 2016, a grand jury indicted Mr. Ortiz-Orellana charging him and others with, among other charges, conspiracy to participate in a racketeering enterprise known colloquially as "MS-13". He was also charged with one murder in violation of Maryland first and second degree murder. While other defendants were found by the jury to have participated in several other racketeering activities such as robbery, extortion, witness tampering and other violent offenses, the jury found that he was only involved in a single murder. He was found guilty of all counts, with which he was charged. At sentencing, the district court sentenced Mr. Ortiz-Orellana, a first-time offender, to two separate terms of life-imprisonment on the RICO conspiracy and murder in aid of racketeering; and ten years on conspiracy to commit the RICO murder to run

concurrently. It also imposed imprisonment for life on the two gun offenses – use of a firearm in connection with a "crime of violence" in violation of 18 U.S.C. § 924(c) and use of a firearm during and in relation to a "crime of violence" resulting in death, in violation of 18 U.S.C. § 924(j).

On appeal, Mr. Ortiz-Orellana argued that the two gun charges were void because they were not supported by a valid predicate "crime of violence." Specifically, the purported "crime of violence" for the § 924 counts was Maryland first degree murder in aid of racketeering in violation of the Violent Crimes in Aid of Racketeering statute, 18 U.S.C. § 1959(a)(1) (VICAR). Mr. Ortiz-Orellana argued that such predicate does not qualify as a "crime of violence" under 18 U.S.C. § 924(c)[1] (which is incorporated into § 924(j)) because Maryland first degree murder is an indivisible crime that encompasses felony murder — a means which requires no more than an accidental death committed in the course of an underlying felony. Such

[1] A "crime of violence" under § 924(c) (which is incorporated into § 924(j)) is defined as "an offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This is known as the force clause. In United States v. Davis, 588 U.S. __, 139 S. Ct. 2319 (2019), this Court held that the other part of the § 924(c) "crime of violence" definition known as the residual clause is unconstitutionally void.

a mens rea does not suffice under the force clause of the § 924(c) "crime of violence" definition after this Court's decision in Borden v. United States, 593 U.S. 420 (2021), which held that offenses that can be committed by the reckless use of force fail to qualify as "crimes of violence" under the force clause. Indeed, in United States v. Jackson, 32 F.4th 278 (4th Cir. 2022), the Fourth Circuit had held that after Borden, felony murder is not a "crime of violence" under the § 924(c) force clause because it can be committed with the accidental use of force. Thus, Mr. Ortiz-Orellana argued that his § 924 convictions (Counts 9 and 10) predicated on Maryland first degree murder (which encompasses felony murder) could not be sustained.

But the Fourth Circuit in United States v. Ortiz-Orellana, 90 F.4th 689, 701-704 (4th Cir. 2024)[2], rejected this argument. The Circuit did not dispute that Maryland first degree murder criminalizes felony murder and that felony murder fails to qualify as a § 924(c) "crime of violence" after Borden and Jackson, supra. Nonetheless, the panel concluded that Maryland first degree murder under Md. Code, Ann. Crim. Law § 2-201(a)

[2] Appendix A15-22.

is divisible between premeditated murder and felony murder; therefore, the panel used the modified categorical approach and looked to documents authorized under Shepard v. United States, 544 U.S. 13 (2005) to conclude that Mr. Ortiz-Orellana's VICAR Maryland first degree murder convictions were predicated on premeditated murder — which it concluded is a § 924(c) "crime of violence." Id. The Circuit's decision finding that Maryland first degree murder is divisible between premeditated murder and felony murder squarely conflicts with this Court's decision in Mathis v. United States, 579 U.S. 500 (2016) and United States v. Redd, 85 F.4th 153 (4th Cir. 2023), and Maryland case law, which conclusively establishes that Maryland first degree murder is an indivisible offense under the categorical approach. Thus, it is of exceptional importance that this Court grant this petition for certiorari to correct the Fourth Circuit's error.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision finding that Maryland first degree murder is divisible between premeditated murder and felony murder squarely conflicts with this Court's decision in Mathis v. United States, 579 U.S. 500, 517-18 (2016), that when a "state court decision definitively answers the question" of whether the disjunctive terms within a statute are

"elements or means," that ends the divisibility inquiry under the categorical approach. Mr. Ortiz-Orellana argued below that Maryland first degree murder does not qualify as a "crime of violence" under § 924(c) because it is an indivisible crime that encompasses felony murder — a means which requires no more than an accidental death committed in the course of an underlying felony. Such a mens rea does not suffice under the force clause of the § 924(c) "crime of violence" definition after this Court's decision in Borden v. United States, 593 U.S. 420 (2021), which held that offenses that can be committed by the reckless use of force fail to qualify as "crimes of violence" under the force clause. But the Fourth Circuit rejected this argument. The Fourth Circuit did not dispute that Maryland first degree murder criminalizes felony murder and that felony murder fails to qualify as a § 924(c) "crime of violence" after Borden. Nonetheless and notwithstanding Maryland state cases, the Fourth Circuit did not stop there as required by Mathis. Instead, disregarding states cases, the Fourth Circuit concluded that Maryland first degree murder is divisible between premeditated murder and felony murder; therefore, the panel used the modified categorical approach and looked to documents authorized under Shepard v. United States, 544 U.S. 13 (2005) to conclude that Mr. Ortiz-

Orellana's VICAR Maryland first degree murder convictions were predicated on premeditated murder — which it concluded is a § 924(c) "crime of violence."

The Court should also grant review to determine whether a crime that can be committed by omission qualifies as a "crime of violence" under the § 924(c) force clause. This Court granted certiorari in Delligatti v. United States, No. 23-825 on the same question – whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force so as to death) qualifies as a "crime of violence" under the 924(c) force clause. Specifically, at issue is whether VICAR attempted murder qualifies as a "crime of violence." The Court should therefore also grant the petition on this question and hold it in abeyance pending the resolution of Delligatti.

I. THE COURT SHOULD GRANT THE PETITION TO CLARIFY THAT UNDER MATHIS and BORDEN AN INDIVISIBLE STATE OFFENSE WHICH REQUIRES NO MORE THAN AN ACCIDENTAL DEATH DOES NOT QUALIFY AS A CRIME OF VIOLENCE

In Mathis, this Court held that when a ruling by a state court answers the question of whether the disjunctive terms within a statute are

elements or means,"a sentencing judge need only follow what it is says." Mathis, 579 U.S. at 518.[3] Applying this rule here, Maryland case law squarely establishes that first degree murder is an indivisible offense; therefore, the divisibility inquiry should have ended there.

Before addressing Maryland law, it is important to repeat the distinction between "means" and "elements" as understood in Mathis, 579 U.S. at 504, and Descamps v United States, 570 U.S. 254, 261 (2013). The modified categorical approach only applies when a statute is divisible – meaning it has alternative elements rather than alternative means. Descamps, 570 U.S. at 278. By "elements," this Court in Mathis and Descamps meant statutory phrases that a jury must find "unanimously and beyond a reasonable doubt" to convict the defendant. Id.; see also Mathis, 579 U.S. at 504 (same). "Means," by contrast, are statutory phrases that a jury need not unanimously find. Id. Thus, when a statute has two

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[3] "Sentencing courts conducting divisibility analysis . . . are bound to follow any state court decisions that define or interpret the statute's substantive elements [.]" United States v. Howard, 742 F.3d 1334, 1346 (11th Cir. 2014); United States v. Hemingway, 734 F.3d 323, 333 (4th Cir. 2013) ("[i]n evaluating a state court conviction for ACCA predicate offense purposes, a federal court 'is bound by the [] interpretation of state law, including its determination of the elements of' the potential predicate offense") (quoting Johnson v. United States, 559 U.S. 133, 138 (2010)).

disjunctive statutory phrases, they are alternative "means" if under state law, "it is enough that each juror agree only that one of the two occurred without settling on which one." United States v. Royal, 731 F.3d 333, 341 (4th Cir. 2013). In other words, if state law does not require the jury to select one statutory phrase to the exclusion of the other in order to find guilt, then the terms are alternative means rather than elements.

With this understanding of "means" versus "elements," as understood under federal law, it is crystal clear that Maryland premeditated murder and felony murder are alternative means of the single, indivisible offense of first degree murder. Maryland case law could not be more clear on this point. To begin, in Sobotker v. State, 2017 WL 383482 (Md. Ct. Spec. App. 2017) – a decision which the Fourth Circuit altogether overlooked — the Maryland Court of Special Appeals (now called the Appellate Court of Maryland) held that first degree murder is an indivisible offense. Indeed, in that case, the trial court permitted the jury to convict the defendant of first degree murder without requiring the jury to unanimously select premeditated murder versus felony murder. Id. at *1. The Court of Special Appeals held that the trial court did not err because felony murder and premediated murder are alternative means of a single offense – neither of

which requires jury unanimity. Id. at *2-5. Such an explicit holding could not be more on point in establishing that first degree murder is indivisible between premeditated murder and felony murder. And that Sobotker is unpublished makes no difference to the categorical analysis. The Fourth Circuit was required to adhere to that state court ruling.

First, as the Fifth and Ninth Circuits have held, a "court cannot refuse to consider unpublished state cases in conducting the categorical inquiry" because "an unpublished decision still demonstrates that the state has in fact applied a statute in a manner broader than [the 'crime of violence'] definition." United States v. Espinoza-Bazaldua, 711 Fed. Appx. 737, 745 n.7 (5th Cir. 2017) (citing United States v. Martinez, 595 Fed. Appx. 330, 334-35 (5th Cir. 2014)); see also Nicanor-Romero v. Mukasey, 523 F.3d 992, 1005 (9th Cir. 2008) (courts must consider unpublished state decisions in categorical analysis because "[i]n determining the actual application of a statute, a conviction is a conviction, regardless of the manner in which it is reported"). In other words, as applied to the instant case, Sobotker demonstrates that the state has in fact applied the Maryland first degree murder statute in an indivisible manner that would not qualify as a § 924(c) "crime of violence."

Consistent with this reasoning, the Fourth Circuit as well its sister circuits have repeatedly relied on unpublished decisions in conducting categorical divisibility analysis. See Bah v. Barr, 950 F.3d 203, 209 (4th Cir. 2020) (relying on unpublished state decision to determine that Virginia drug statute was divisible);United States v. Winston, 850 F.3d 677, 685 (4th Cir. 2017) (relying on unpublished state decisions to find that Virginia robbery statute categorically fails to qualify as a "violent felony" under the Armed Career Criminal Act (ACCA)); United States v. Perlaz-Ortiz, 869 F.3d 375, 379 (5th Cir. 2017) (relying on unpublished state decisions to find that Texas deadly conduct statute fails to qualify as a guidelines "crime of violence"); United States v. MacArthur, 850 F.3d 925, 938 (8th Cir. 2017) ("[t]he most helpful Minnesota court decision, although not precedential, holds that jury unanimity is not required as to one prong or the other of the burglary statute, thus, suggesting that the alternatives are means rather than elements"); United States v. Headbird, 832 F.3d 844, 848 (8th Cir. 2016) (relying on two unpublished intermediate appellate decisions to conclude that Minnesota second degree assault offense is an indivisible offense). Second, adherence to state case law is necessary to promote uniformity and avoid chaos. See United States v. Redd, 85 F.4th 153, 165

(4th Cir. 2023): "[T]o find that a statute is divisible, we must discern clear signals, indicating as much — signals that convince us to a certainty that the elements are correct and support divisibility." "We demand certainty because, if we interpret state law incorrectly in a single case by finding that state laws include essential elements that state courts have not treated as such, we run the risk of mistakenly casting doubt on the much higher volume of state criminal prosecutions under those same state statutes." Id. at 165 (citations and internal quotation marks omitted). Third, the ruling in Sobotker rested on the Maryland Court of Appeals' (now called the Supreme Court of Maryland) published decision in Ross v. State, 519 A.2d 735 (Md. 1987), which makes explicit that Maryland first degree murder is indivisible. Sobotker, 2017 WL 383482, at *2-3 (citing and quoting Ross, 519 A.2d at 737). Ross easily cements that Maryland first degree murder is indivisible with alternative means:

In Ross, the Maryland Court of Appeals expressly declared that "[t]here is but one offense — murder in the first degree—but that offense may be committed in more than one way." Ross, 519 A.2d at 737. Ross also confirmed that Maryland first degree murder can be charged without specifying whether it is predicated on felony murder versus premeditated

murder. Ross, 519 A.2d at 738. Because neither modality has to be specified in the charging document, it is evident that each modality is a means rather than an element. Indeed, in Mathis, 579 U.S. at 518, this Court said exactly that. Id. ("And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means)"). The Ross Court also explained that "[b]ecause murder is a single offense, the State is ordinarily required to proceed upon all available theories in a single prosecution, and it may not bring seriatim prosecutions for the same offense by alleging separate legal theories." Ross, 519 A.2d at 739. In other words, double jeopardy bars the government from prosecuting a defendant twice — once for premeditated murder and once for felony murder — for the same conduct. This means premeditated murder and felony murder are alternative means of the same offense. Several other Circuit Courts have held that this double-jeopardy bar resolves the divisibility question. See United States v. Cantu, 964 F.3d 924 (10th Cir. 2020) (because double-jeopardy doctrine prohibits prosecuting the defendant twice based on different drugs within same Oklahoma statute, the statute is indivisible by drug type); United States v. Garcia, 948 F.3d 789, 794 (7th Cir. 2020) (considering an Indiana intermediate-court case that held "possessing

marijuana and hashish is only one violation" to be "the authoritative resolution" of the divisibility issue); Martinez v. Sessions, 893 F.3d 1067, 1071 (8th Cir. 2018) (concluding that Missouri double jeopardy court decisions show that each controlled substance offense is an element).

Fourth, beyond Ross, the Maryland Court of Special Appeals' published decision in Kouadio v. State, 179 A.3d 323 (Md. Ct. Spec. App. 2018) – another decision that the panel in Mr. Ortiz-Orellana's case overlooked altogether – further confirms that the Court of Special Appeals got it right in Sobotker. In Kouadio, the Court of Special Appeals held that Maryland second-degree murder is a single offense with alternative means that a jury never has to unanimously select. Id., 179 A.3d at 329. But in reaching its decision, the Court of Special Appeals acknowledged twice that Maryland first degree murder (just like the Arizona first degree murder statute at issue in Schad v. Arizona, 501 U.S. 624 (1991)), is a "unitary crime" with alternative means that do not require jury unanimity. Kouadio, 179 A.3d at 327, 328. Moreover, no legitimate reason exists as to why Maryland second degree murder is indivisible, but Maryland first degree murder is not. Lastly, in Edwards v. State, 223 Md. App. 771 (Md. Ct. Spec. App. 2015), the Court of Special Appeals, relying on published appellate

decisions (including Ross, 519 A.2d at 738), once again reinforced that "[f]elony murder is not a separate and distinct crime from first degree premeditated murder — it is simply a different modality of a single crime. First degree murder may be committed in two ways: premeditated murder and felony murder. Premeditated murder and felony murder are simply alternative means of committing the same crime and are not separate and distinct crimes." Edwards, at *4. Yet the panel failed to consider Edwards too.

The multiple state decisions discussed above conclusively establish that Maryland first degree murder is an indivisible offense. Thus, the divisibility inquiry must end there under this Court's Mathis command.

Furthermore, in Mathis, 579 U.S. at 518, this Court made explicit that if state case law conclusively establishes that an offense is indivisible, nothing else matters. The inquiry must come to a full stop. Id. Under this command, the Fourth Circuit's divisibility inquiry should have ended with Sobotker, Ross, Kouadio, and Edwards – case law which definitively established that Maryland first degree murder is indivisible. Yet, the Fourth Circuit failed to appreciate the import of Ross, and altogether ignored the other three cases. Instead, the Fourth Circuit proceeded to rely

on pattern jury instructions, differences between felony murder and premeditated murder, and inapposite state cases – all of which equaled zero in light of the definitive case law establishing that Maryland first degree murder is indivisible.

In sum, there was no ambiguity in this case. Maryland first degree murder is an indivisible offense. The Fourth Circuit's decision to the contrary cannot be reconciled with either Supreme Court law, Fourth Circuit law, or Maryland law.

II. THE COURT SHOULD GRANT THE WRIT AND STAY THE PROCEEDINGS PENDING ITS DECISION IN DELLIGATTI WHICH WILL DETERMINE WHETHER A CRIME THAT CAN BE COMMITTED BY FAILING TO TAKE ACTION QUALIFIES AS A CRIME OF VIOLENCE

The Court should also grant review to determine whether a crime that can be committed by omission qualifies as a "crime of violence" under the § 924(c) force clause. This Court granted certiorari in Delligatti v. United States, No. 23-825 on the same question – whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force so as to death) qualifies as a "crime of violence" under the

924(c) force clause. Specifically, at issue is whether VICAR attempted murder qualifies as a "crime of violence." The Court should therefore also grant the petition on this question and hold it in abeyance pending the resolution of Delligatti.

CONCLUSION

For the foregoing reasons, this Court should grant the petition. The Court should also grant the grant the petition for a writ of certioari and hold it in abeyance pending the resolution of Delligatti.

Respectfully submitted,

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