

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS EMANUEL KINARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an inquiry into the classification of assault with a dangerous weapon, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(3), as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) must be limited solely to the VICAR element requiring proof of a violation of state law or federal statutory law, or instead may look to other elements necessary to prove the VICAR offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 93 F.4th 213. The district court's opinion is not published in the Federal Supplement but is available at 2021 WL 5099596.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2024. A petition for rehearing en banc was denied on April 19, 2024. Pet. App. 19a. The petition for a writ of certiorari was filed on July 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of conspiring to possess with intent to distribute and distribute cocaine base, in violation of 21 U.S.C. 846; one count of conspiring to commit murder, kidnapping, and assault with a dangerous weapon, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959 and 2; two counts of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1); two counts of using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c) and 2; one count of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; two counts of assault in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3) and 2; two counts of kidnapping in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. C.A. App. 103-121, 187. The district court sentenced petitioner to life plus 50 years of imprisonment, to be followed by five years of supervised release. Id. at 188-189. The court of appeals affirmed. 1996 WL 88057 (4th Cir. Mar. 1, 1996).

Petitioner later filed a motion to vacate his sentence under 28 U.S.C. 2255, which was denied. Pet. App. 3a. He subsequently requested authorization to file a second Section 2255 motion, and

the court of appeals granted the request. Ibid. The district court denied petitioner's second Section 2255 motion. Id. at 3a-4a. The court of appeals granted a certificate of appealability, C.A. Doc. 10, at 1 (March 27, 2023), and affirmed, Pet. App. 1a-18a.

1. Petitioner was a member of the Flowe organization, "a violent drug-trafficking organization that operated in Charlotte, North Carolina" from 1989 to 1993. 2021 WL 5099596, at *1 (N.D.N.C. Nov. 2, 2021). Petitioner and other members of the Flowe organization "distributed crack cocaine and carried and used firearms to steal drugs and money from other drug dealers, to assault and kill rival drug dealers, to kidnap individuals to extort drugs and money, and to protect the organization and its drugs." Ibid.

Among other things, as part of the organization, petitioner participated in two home-invasion robberies that resulted in the serious injury of one child and the death of another. 2021 WL 5099596, at *1. In June 1992, petitioner and others used firearms to rob two men of money and crack cocaine. A 12-year-old boy was shot and seriously injured during the robbery. Ibid. The following year, in June 1993, petitioner and others invaded another home "based on a rumor that a large sum of money and crack cocaine * * * would be there." Ibid. During the home invasion, two men were shot, a 16-year-old girl and a young woman were kidnapped,

and a 15-year-old boy was shot and killed. Ibid. Witnesses identified petitioner as the person who killed the 15-year-old boy. Ibid.; see 1996 WL 88057, at *1.

2. In October 1993, a grand jury in the United States District Court for the Western District of North Carolina returned an indictment charging petitioner and other members of the Flowe organization with numerous offenses relating to racketeering, drug trafficking, and firearms. C.A. App. 103-121. The indictment charged petitioner with one count of conspiring to possess with intent to distribute and distribute cocaine base, in violation of 21 U.S.C. 846; one count of conspiring to commit murder, kidnapping, and assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. 1959 and 2; three counts of assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3) and 2; two counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2; three counts of using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c) and 2; two counts of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1); one count of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; two counts of kidnapping in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; and one count of possessing a short-barreled

shot gun, in violation of 26 U.S.C. 5861(c), 5871. C.A. App. 103-121.

a. The federal offense described in Section 924(c) prescribes a mandatory consecutive sentence for possessing a firearm in furtherance of a "crime of violence," or using or carrying a firearm during and in relation to a "crime of violence." 18 U.S.C. 924(c)(1)(A). Section 924(c)(3) defines a crime of violence in two ways. First, the "elements clause" encompasses any federal felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Pursuant to Borden v. United States, 593 U.S. 420 (2021), use of force requires conduct committed with a mens rea more culpable than ordinary recklessness. See id. at 429 (plurality opinion); see also id. at 446 (Thomas, J., concurring in the judgment). Second, the "residual clause" includes any federal felony 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." 18 U.S.C. 924(c)(3)(B). In United States v. Davis, 588 U.S. 445 (2019), however, this Court held that the residual clause is unconstitutionally vague.

This Court employs a "categorical approach" to determine whether an offense is a crime of violence under Section 924(c)(3)(A). United States v. Taylor, 596 U.S. 845, 850 (2022).

Under that approach, a court “focus[es] solely” on “the elements of the crime of conviction,” not “the particular facts of the case.” Mathis v. United States, 579 U.S. 500, 504 (2016). The categorical approach assesses whether the “least culpable” conduct that could satisfy the offense elements in a hypothetical case would “necessarily involve[],” Borden, 593 U.S. at 424 (plurality opinion), the “use, attempted use, or threatened use of physical force against the person or property of another,” 18 U.S.C. 924(c) (3) (A). The defendant’s actual conduct is “irrelevant.” Borden, 593 U.S. at 424.

If, however, the statute in question lists multiple alternative elements, it is “divisible” into different offenses and a court may apply the “modified categorical approach” to classify a conviction. Mathis, 579 U.S. at 505-506 (citation omitted). Under the modified categorical approach, a court may “look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant” was found to have committed. Ibid.

b. Although the underlying crime of violence for a Section 924(c) offense need not itself be charged as a separate count, see United States v. Rodriguez-Moreno, 526 U.S. 275, 280 (1999), the Section 924(c) charge at issue here (Count 33) was premised on the VICAR assaults with a dangerous weapon, in violation of 18 U.S.C.

1959(a) (3) and 2, alleged in Counts 29 and 30 of the indictment. C.A. App. 116-119, 147-148, 163.

Section 1959(a) prohibits, inter alia, "assault[] with a dangerous weapon" against any person, "in violation of the laws of any State or the United States," "for the purpose of * * * maintaining or increasing position in an enterprise engaged in racketeering activity" or "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." 18 U.S.C. 1959(a). The charge of VICAR assault with a dangerous weapon alleged in Counts 29 and 30 was premised in part on petitioner's alleged violation of North Carolina General Statutes § 14-33 (1986), which criminalizes assault with a deadly weapon.¹ C.A. App. 116-117, 142, 147-148, 156 (Counts 29, 30). The particular VICAR offense charged in Counts 29 and 30 involved petitioner's participation in assaulting, with a dangerous weapon, the two people who were victims of the home invasion robbery in June 1993. See pp. 3-4, supra; C.A. App. 116-117.

c. Following a jury trial, petitioner was convicted on one count of conspiring to possess with intent to distribute and

¹ At the time petitioner was prosecuted, the relevant statutory subsection was North Carolina General Statutes § 14-33(b) (1). See N.C. Laws 1991, ch. 525, § 1 (effective Oct. 1, 1991). The statute has since been amended and reordered, but "a materially identical provision," Pet. App. 2a, is now in North Carolina General Statutes § 14-33(c) (1) (2023).

distribute cocaine base, in violation of 21 U.S.C. 846 (Count 1); one count of conspiring to commit murder, kidnapping, and assault with a dangerous weapon, in violation of the VICAR statute, 18 U.S.C. 1959(a)(6) and 2 (Count 2); two counts of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) (Counts 11, 12); two counts of using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c) and 2 (Counts 13, 34); one count of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2 (Count 28); two counts of assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3) and 2 (Counts 29, 30); two counts of kidnapping in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2 (Counts 31, 32); and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2 (Count 33). C.A. App. 103-121, 187.

In 1994, the district court sentenced petitioner to life plus 50 years of imprisonment, consisting of seven life terms (on Counts 1, 2, 11, 12, 28, 31, 32) and two 20-year terms (on Counts 29 and 30), all to run concurrently, to be followed by consecutive terms of ten years on Count 13, 20 years on Count 33, and another 20 years on Count 34. C.A. App. 188. The court also imposed a five-year term of supervised release and restitution. Id. at 189.

d. The court of appeals affirmed. 1996 WL 88057, at *1-*5. Petitioner did not argue on appeal that his Section 924(c) conviction in Count 33 was not supported by a categorical crime of violence.

3. In 2015, this Court held in Johnson v. United States, 576 U.S. 591, that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185, is unconstitutionally vague. Johnson, 576 U.S. at 594-597; see Welch v. United States, 578 U.S. 120, 122, 130, 135 (2016) (holding that Johnson announced a new rule with retroactive effect on collateral review).

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 in light of Johnson. Pet. App. 3a. The district court denied that motion as untimely under 28 U.S.C. 2255(f)(3), and in the alternative "as meritless" because the predicate VICAR offense of assault with a dangerous weapon satisfied Section 924(c)(3)(A)'s elements clause. Pet. App. 3a.

4. After this Court held in Davis, 588 U.S. at 470, that Section 924(c)'s residual clause is itself unconstitutionally vague, petitioner applied to the court of appeals for permission to file an additional Section 2255 motion. Pet. App. 3a. The court of appeals granted the request, ibid., and petitioner filed the authorized motion in district court, see C.A. App. 4-26.

As relevant here, in his motion, petitioner asserted that his Section 924(c) conviction is invalid on the theory that the underlying offense of VICAR assault with a dangerous weapon no longer qualifies as a crime of violence after Davis. Pet. App.

4a. In opposition, the government both responded on the merits and invoked the procedural default bar. 2021 WL 5099596, at *3.

The district court denied the Section 2255 motion. 2021 WL 5099596, at *1-*5. The court determined that the Section 924(c) conviction's underlying offense of VICAR assault with a dangerous weapon qualifies as a crime of violence under Section 924(c) (3) (A)'s elements clause because VICAR assault with a dangerous weapon requires proof of the elements of generic federal assault with a dangerous weapon. Id. at *4-*5 ("By requiring both common law assault and the use of a dangerous weapon," VICAR assault with a dangerous weapon satisfies Section 924(c)'s elements clause.). The court did not resolve whether petitioner had overcome his procedural default. Id. at *5 n.6. The court denied a certificate of appealability. Id. at *5.

5. The court of appeals granted a certificate of appealability, C.A. Doc. 10, at 1 (Mar. 27, 2023), and affirmed. Pet. App. 1a-18a. The court stated that the outcome was controlled by its recent decision in United States v. Thomas, 87 F.4th 267 (4th Cir. 2023), petition for cert. pending, No. 23-1168 (filed Apr. 26, 2024), which determined that VICAR assault with a deadly

weapon premised in part on violations of certain Virginia statutes continues to qualify as a crime of violence under Section 924(c) (3) (A)'s elements clause. Pet. App. 6a-7a.

a. In Thomas, the court of appeals observed that the VICAR crime requires both proof that the defendant committed the generic federal offense of assault with a dangerous weapon and also that the defendant "violated an independent state or federal law." 87 F.4th at 274. And the court explained that it could rely on either requirement to assess whether the charged VICAR offense qualified as a crime of violence under Section 924(c). Id. at 274-275. The court reasoned that "[i]f one element of an offense satisfies" Section 924(c)'s elements clause, "it becomes superfluous to inquire whether other elements likewise meet the requirement." Id. at 274.

Thomas recognized that courts may "look at the underlying state-law predicates" in some cases (as it had done in the past), but explained that courts "need not double their work by looking to the underlying predicates" where "the generic federal offense standing alone can satisfy the crime-of-violence requirements."

87 F.4th at 275. And Thomas explained that for a VICAR assault with a dangerous weapon, the court "need not progress to the state-law predicates" because the requirement to prove the "generic federal offense" of assault with a dangerous weapon "is sufficient in and of itself to render the offense a crime of violence." Ibid.

Thomas observed that "federal assault with a dangerous weapon easily qualifies as a crime of violence," 87 F.4th at 275, in light of precedents "establish[ing] that the inclusion of a dangerous-weapon element * * * elevates an assault to a crime of violence for purposes of § 924(c)," id. at 273. And it reasoned, based on VICAR's own element requiring an enterprise-focused purpose, that "VICAR assault with a dangerous weapon satisfies Borden's mens rea requirement because it cannot be committed recklessly," but instead includes only "deliberate and purposeful machinations to raise one's clout in a criminal enterprise." Id. at 273-274.

b. In petitioner's case, the court of appeals observed that the "holding in Thomas, that VICAR's purpose element satisfies the mens rea requirement for a § 924(c) 'crime of violence,' resolves the present appeal" because "[t]he predicate VICAR assault offense, which incorporated the North Carolina assault offense, had as an element that [petitioner] acted with one or more of the purposes set forth in § 1959(a)." Pet. App. 6a. The court therefore declined to reach the government's argument that the generic federal offense of assault with a dangerous weapon itself "requires a sufficiently culpable mens rea for a 'crime of violence.'" Id. at 6a n.3.

In a concurring opinion, Judge Keenan, joined by Judge Heytens, "disagree[d] that the purpose element of the VICAR statute necessarily satisfies the mens rea requirement under Borden." Pet.

App. 9a. Judge Keenan also disagreed with Thomas's observation that "for every charge of a VICAR assault with a dangerous weapon the government must prove as an element the enumerated federal offense of 'assault with a dangerous weapon.'" Ibid. (citation omitted).

ARGUMENT

Petitioner contends (Pet. 5-12) that the court of appeals' classification of his VICAR offense as a "crime of violence" under 18 U.S.C. 924(c) (3)(A) should have been restricted solely to the elements of the state crime underlying the VICAR offense, without any reference to the additional elements necessary to render the state crime a federal VICAR offense. Petitioner asserts that the question presented is "effectively the same question presented" as in Thomas v. United States, No. 23-1168 (filed Apr. 26, 2024), which is currently pending before this Court, Pet. i n.1, and further suggests that the "Court may wish to hold this petition for consideration concurrently" with Thomas, Pet. 12.

Petitioner's challenges to the court of appeals' analysis of the question presented lack merit for the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Thomas. See Br. in Opp. at 10-14, Thomas, supra,

(No. 23-1168).² And for the reasons explained in that brief, petitioner has not identified any circuit conflict that would warrant review by this Court. Id. at 15-16.³

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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² We have served petitioner with a copy of the government's brief in opposition in Thomas, which is also available on this Court's online docket.

³ In addition to the cases cited by the petitioner in Thomas in claiming a circuit conflict, petitioner here relies on the Tenth Circuit's decision in United States v. Toki, 23 F.4th 1277 (2022), vacated on other grounds, 143 S. Ct. 556 (2023). In Toki, the government did not argue that the court could rely on anything other than the incorporated state-law offense to satisfy the crime-of-violence definition and further agreed that the defendants' VICAR-based Section 924(c) convictions should be vacated. Id. at 1280. As the Fourth Circuit has recognized, "when a court simply "follow[s] the arguments of the parties" in looking through the elements of VICAR to the state-law predicates, that does not constitute a holding that the court is "limited to considering whether the charged state-law predicate offenses are categorically crimes of violence independent of VICAR." In re Thomas, 988 F.3d 783, 791 (2021); id. at 791 n.7.