No. 24-5098

IN THE SUPREME COURT OF THE UNITED STATES

GERALD SMITH, 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

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QUESTION PRESENTED

Whether murder in the course of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A), is a "crime of violence" under 18 U.S.C. 924(c)(3).

RELATED PROCEEDINGS

United States District Court (D.D.C.):

United States v. Smith, No. 95-cr-154 (Dec. 5, 1996)

United States v. Smith, No. 95-cr-154 (Feb. 3, 2011)

United States v. Smith, No. 95-cr-154 (May 6, 2016)

United States v. Smith, No. 95-cr-154-8 (May 16, 2022)

United States v. Smith, No. 95-cr-154-8 (Oct. 17, 2022)

United States Court of Appeals (D.C. Cir.):

United States v. Sumler, No. 96-3159 (Mar. 10, 1998)

In re Smith, No. 16-3050 (Sept. 13, 2016)

United States v. Smith, No. 22-3033 (June 14, 2024)

Supreme Court of the United States:

Smith v. United States, No. 98-5477 (Oct. 5, 1998)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20)[1] is reported at 104 F.4th 314. The opinion of the district court granting in part and denying in part petitioner's motion under 28 U.S.C. 2255 (Pet. App. 21-44) is reported at 605 F. Supp. 3d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2024. The petition for a writ of certiorari was filed on July 12,

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the page numbers of the .pdf document available on the Court's website as though they were consecutively paginated.

2024. 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 distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 846; one count of participating in a racketeer influenced corrupt organization (RICO) conspiracy, in violation of 18 U.S.C. 1962(d); four counts of first-degree murder while armed, in violation of D.C. Code §§ 22-105, 22-2401, and 22-3202 (1992); three counts of intentional murder in furtherance of a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(e)(1)(A); one count of assault with intent to kill while armed, in violation of D.C. Code §§ 22-105, 22-501, and 22-3202 (1992); one count of kidnapping, in violation of 18 U.S.C. 1201 (Supp. III 1992); one count of armed robbery, in violation of D.C. Code §§ 22-105, 22-2901, and 22-3202 (1992); one count of attempted armed robbery, in violation of D.C. Code §§ 22-105, 22-2901, 22-3202 (1992); four counts of using a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(c); and four counts of possessing a firearm during a crime of violence, in violation of D.C. Code § 22-3204(b) (1992). C.A. App. 60-103 (Superseding Indictment); id. at 115-119

(Verdict), id. at 270-271 (Judgment).[2] The district court sentenced petitioner to life plus 65 years of imprisonment. Judgment 2. The court of appeals affirmed petitioner's convictions and sentence, with the exception of one felony-murder conviction and one attempted robbery conviction. 136 F.3d 188, 189 n.1. This Court denied a petition for a writ of certiorari. 525 U.S. 907.

On postconviction review, the district court vacated one Section 924(c) conviction but otherwise denied relief. Pet. App. 21-44. The court also denied petitioner's request for a sentence reduction under the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. Pet. App. 45-62. The court of appeals affirmed. Id. at 1-20.

1. Petitioner was a member of the Fern Street Crew, an organization that distributed cocaine base for seven years in the District of Columbia and Maryland. 136 F.3d at 189. In 1992 and 1993, petitioner was primarily an "enforcer" for the organization, using lethal violence to defend territory from rival drug dealers and to subvert the efforts of the criminal justice system. Ibid.; Pet. App. 45. In that role, petitioner participated in the armed

[2] The first page of petitioner's judgment contains a typographical error, stating that petitioner was convicted on Count 28, rather than Count 18. C.A. App. 270. The verdict form and the second page of the judgment reflect that petitioner was found guilty on Count 18 (kidnapping). Id. at 98, 118, 271. Petitioner was not charged in Count 28 (assault with intent to kill while armed), id. at 100-101, and the jury did not find him guilty on that count, id. at 115-119.

robbery and murder of rival drug dealers Ucal Riley and Marcus Murray, C.A. App. 53-54; id. at 494-495; the deliberate murder of bystander Victor Hartnett, "an older gentleman who just happened to be standing in the alley" as petitioner fled after killing Murray, id. at 440, 486 (citation omitted); and the kidnapping, robbery, beating, and near-fatal shooting of rival drug dealer Eric Brake, id. at 487-488.

A federal grand jury in the District of Columbia returned a superseding indictment charging petitioner with one count of conspiring to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 846; one count of RICO conspiracy, in violation of 18 U.S.C. 1962(d); four counts of first-degree murder while armed, in violation of D.C. Code §§ 22-105, 22-2401, and 22-3202 (1992); three counts of CCE murder, in violation of 21 U.S.C. 848(e)(1)(A); one count of assault with intent to kill while armed, in violation of D.C. Code §§ 22-105, 22-501, and 22-3202 (1992); one count of kidnapping, in violation of 18 U.S.C. 1201 (Supp. III 1992); one count of armed robbery, in violation of D.C. Code §§ 22-105, 22-2901, and 22-3202 (1992); one count of attempted armed robbery, in violation of D.C. Code §§ 22-105, 22-2901, 22-3202 (1992); three counts of using a firearm during and in relation to a crime of violence or drug trafficking crime (CCE murder), in violation of 18 U.S.C. 924(c); one count of using a firearm during and in relation to a crime of violence (kidnapping), in violation

of 18 U.S.C. 924(c); and four counts of possessing a firearm during a crime of violence, in violation of D.C. Code § 22-3204(b) (1992). C.A. App. 60-103.

The three Section 924(c) counts predicated on CCE murder were for petitioner's murders of Riley, Murray, and Hartnett; the fourth Section 924(c) count was predicated on petitioner's kidnapping of Brake. C.A. App. 98-99. The jury found petitioner guilty on all counts. Id. at 115-119, 270-271. The district court sentenced petitioner to life imprisonment without parole plus 65 consecutive years of imprisonment. Judgment 2. The additional consecutive term of years consisted of five years for the first Section 924(c) count that was predicated on CCE murder; 20-year consecutive sentences for the other two Section 924(c) counts predicated on CCE murder; and a further 20-year consecutive sentence for the Section 924(c) count predicated on kidnapping. Ibid.; C.A. App. 99 (Counts 20-23).

The court of appeals affirmed petitioner's convictions and sentence, with the exception of one felony-murder conviction and one attempted robbery conviction, which the government conceded merged with other counts. 136 F.3d 188, 189 n.1; Pet. App. 30. This Court denied a petition for a writ of certiorari. 525 U.S. 907.

2. Following multiple unsuccessful collateral attacks on his convictions, see Pet. App. 30-31, the court of appeals granted

petitioner leave to file a successive motion under 28 U.S.C. 2255 to argue that his Section 924(c) convictions should be vacated under Johnson v. United States, 576 U.S. 591 (2015), which held that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. No. 16-3050 C.A. Order (Sept. 13, 2016).

The district court granted in part and denied in part petitioner's motion to vacate his four Section 924(c) convictions. Pet. App. 21-44. While petitioner's motion was pending, this Court decided United States v. Davis, 588 U.S. 445 (2019), which held that the residual clause in 18 U.S.C. 924(c)(3)(B)'s definition of "crime of violence" is unconstitutionally vague. Both parties agreed that petitioner's Section 924(c) conviction predicated on the kidnapping of Brake was no longer a crime of violence after Davis, and the district court accordingly vacated that conviction. Pet. App. 28, 32, 35-36. The court explained that after Davis, an offense can constitute a predicate "crime of violence" for a Section 924(c) offense only if it has as an element the use, attempted use, or threatened use of physical force against the person or property of another under the definition provided in 18 U.S.C. 924(c)(3)(A). Pet. App. 28, 35-36. Because kidnapping can be committed by inveiglement or deception, which would not necessarily involve the use of force, the court agreed with the parties that it was not a crime of violence. Id. at 36.

The district court declined, however, to vacate petitioner's remaining Section 924(c) convictions, each of which was predicated on a CCE murder. Pet. App. 36-41. The CCE murder statute punishes anyone "engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under [21 U.S.C. 841(b)(1)(A) or 21 U.S.C. 960(b)(1)] who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results." 21 U.S.C. 848(e)(1)(A). The court rejected petitioner's argument that the mens rea "intentionally" modifies only kills, but not the other listed verbs, such that a person could be convicted of CCE murder for recklessly or negligently counseling, commanding, inducing, procuring, or causing another person to intentionally kill someone, which would be an insufficient mens rea for a crime of violence under this Court's decision in Borden v. United States, 593 U.S. 420 (2021). Pet. App. 39. The court explained that the "active intentional nature" of the verbs counsel, command, induce, procure, and cause "reflects the same degree of direct, knowing involvement and thus the same heightened culpability" as the person who intentionally kills the victim. Ibid.

The district court also rejected petitioner's argument that CCE murder is not a crime of violence under Section 924(c) because it can be committed by someone who does not himself employ deadly

physical force. Pet. App. 37, 40. The court was unpersuaded by petitioner's comparison to the federal murder-for-hire statute, 18 U.S.C. 1958(a). It observed that unlike murder-for-hire, CCE murder requires that the intended killing actually occur. Pet. App. 40. And because an intentional killing necessarily involves the use of physical force, the court explained, id. at 40, 41, CCE murder categorically satisfies the definition of crime of violence in Section 924(c)(3)(A).

The district court corrected petitioner's sentence by vacating the 20-year consecutive sentence imposed for the vacated 924(c) count predicated on kidnapping. Pet. App. 43. It left intact petitioner's remaining sentence of life imprisonment plus 45 years for the remaining counts. Ibid.

3. The court of appeals affirmed the district court's resolution of the challenges to petitioner's Section 924(c) convictions. Pet. App. 1-20.[3] The court of appeals explained that "[b]ecause CCE murder applies only in cases where an intentional killing takes place, the plain text of the statute categorically requires the use of physical force against another." Id. at 10-11. It acknowledged that Section 848(e)(1)(A) also applies to those who do not directly apply deadly force themselves, but who

[3] With the parties' consent, the court of appeals remanded for the district court to correct the judgment by removing the felony-murder and attempted robbery convictions that had been vacated in petitioner's direct appeal. Pet. App. 7 n.1, 20.

counsel, command, induce, procure, or cause the intentional killing of a person when "'such killing results.'" Id. at 11 (citation omitted). But the court explained that by mandating that an intentional killing occur, the statute "necessarily requires proof that the defendant, in one way or another, caused physical force to be used on the victim." Ibid. And the court "declin[ed] [petitioner's] invitation to write into Section 924(c) a requirement that the defendant himself be the one to use force," observing that every court of appeals to have addressed the question has held that aiding and abetting a crime of violence is itself a crime of violence. Ibid. (emphasis omitted) (citing cases).

The court of appeals rejected petitioner's argument that intentionally causing another's death does not always require the use of force because death could be accomplished by poison or by an act of omission, such as intentionally withholding food or medicine. Pet. App. 11-12. It explained that circuit precedent and this Court's precedent foreclosed the argument that death caused by poison would not involve the use of force. Ibid. (citing United States v. Carr, 946 F.3d 598, 604 (D.C. Cir. 2020); United States v. Castleman, 572 U.S. 157, 170 (2014)). The court also rejected petitioner's "action-omission distinction," explaining that "intentionally withholding food or medicine with the object

of causing another person's death * * * involves deliberately causing bodily injury through physical processes." Id. at 12.

The court of appeals also rejected petitioner's argument that CCE murder can be committed with a mens rea of recklessness. Pet. App. 13-16. The court observed that Congress incorporated an "intentional" mens rea into Section 848(e)(1)(A) multiple times, indicating that the statutory mens rea extends to each means of committing the offense. Id. at 15. The court also observed that the actions Section 848(e)(1)(A) proscribes -- counseling, commanding, inducing, procuring, or causing -- "themselves connote intentionality, not recklessness." Ibid. And the court observed that statutory context "redouble[d] the necessity of a greater-than-reckless mens rea" for each of Section 848(e)(1)(A)'s culpable actions, given that a CCE murder conviction carries a statutory minimum of 20 years of imprisonment and may result in a death sentence or life imprisonment. Id. at 16 (emphasis omitted). The court also found that petitioner's reliance on the rule of lenity was misplaced, both because the statute was not ambiguous after applying standard tools of statutory construction and because petitioner's interpretation of Section 848(e)(1)(A) would cover a broader swath of conduct. Ibid.[4]

[4] The court of appeals also affirmed the district court's order denying petitioner's motion for a discretionary sentence reduction under Rule 404(b) of the First Step Act. Pet. App. 16-

ARGUMENT

Petitioner contends that CCE murder, in violation of 21 U.S.C. 848(e)(1)(A), is not a crime of violence because it can be committed by an act of omission (Pet. 15-19), and because -- in his view -- it can be committed with an intent of recklessness (Pet. 9-14). Because the Court has already granted certiorari on petitioner's first contention, see Delligatti v. United States, No. 23-825 (June 3, 2024), the petition should be held for Delligatti and disposed of in light of the Court's decision in that case. But the court of appeals correctly rejected petitioner's remaining arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Plenary review is therefore unwarranted.

1. Petitioner contends (Pet. 15-19) that CCE murder, in violation of 21 U.S.C. 848(e)(1)(A), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3) on the theory that because the crime can be committed by an act of omission, it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." This

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20; id. at 45-62 (district court decision). Petitioner does not seek review on that issue. Because petitioner moved for relief under Section 404(b) of the First Step Act, his case does not implicate the question presented in Hewitt v. United States, cert. granted, No. 23-1002 (July 2, 2024), and Duffey v. United States, cert. granted, No. 23-1150 (July 2, 2024), which concern the interpretation of language that appears in Sections 401 and 403 of the First Step Act.

Court granted certiorari in Delligatti to consider whether that interpretation of Section 924(c)(3) is correct in the context of New York attempted murder, N.Y. Penal Law § 125.25(1), and its decision in that case could affect the appropriate disposition here. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution of Delligatti, and then disposed of as appropriate in light of the decision in that case.

2. Petitioner also renews (Pet. 9-14) his contention that Section 848(e)(1)(A) lacks the requisite mens rea to qualify as a crime of violence under Borden v. United States, 593 U.S. 420 (2021). That contention is incorrect and does not warrant this Court's review.

The CCE statute punishes any person working in furtherance of a CCE "who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results." 21 U.S.C. 848(e)(1)(A). Petitioner contends that the word "intentionally" modifies only the verb "kills," and the other verbs ("counsels, commands, induces, procures, or causes") can encompass reckless conduct that results in an intentional murder. Ibid. The court of appeals correctly rejected that argument.

Section 848(e)(1)(A) sets forth a mens rea requirement ("intentionally") followed by a disjunctive list of various means of committing the offense ("kills or counsels, commands, induces,

procures, or causes the intentional killing"). 21 U.S.C. 848(c)(1)(A). The absence of a comma after "kills" indicates that "intentionally kills" is not an independent clause, unmoored from the disjunctive list of other means that immediately follows it. See, e.g., International Primate Prot. League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 79-80 (1991) (absence of comma between "officer of the United States" and "or any agency thereof" indicated that "officer of" applied to both "United States" and "any agency"); see also, e.g., United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (explaining that using a comma after a statutory phrase typically indicates that the phrase "stands independent of the language that follows"); cf. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 161 (2012) (punctuation "will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part").

Distributing "intentionally" across each of the statute's listed means is also consistent with the general rule that an adverb is "most naturally understood to modify the verbs that follow." Ruan v. United States, 597 U.S. 450, 470 (2022) (Alito, J., concurring in the judgment) (construing parallel mens rea/means structure in 21 U.S.C. 841(a)(1)); see, e.g., Flores-Figueroa v. United States, 556 U.S. 646, 650 (2009) ("As a matter of ordinary English grammar, it seems natural to read the

[aggravated identity theft] statute's word 'knowingly' as applying to all the subsequently listed elements of the crime."). The Court has repeatedly applied that general rule in the context of construing a statute's mens rea requirement. See Ruan, 597 U.S. at 457-458 (quoting Rehaif v. United States, 588 U.S. 225, 229 (2019)); Flores-Figueroa, 556 U.S. at 650.

Moreover, as the court of appeals recognized, the various actions set forth in 21 U.S.C. 848(e)(1)(A) ("counsels, commands, induces, procures, or causes"), in this context, "themselves connote intentionality, not recklessness" or some other lesser mental state. Pet. App. 15 (citing dictionary definitions of each term). Petitioner focuses (Pet. 13) on "causes," which he interprets broadly to include any action that intentionally or unintentionally prompts another person to commit a killing. But even if that term could encompass unintentional conduct in the abstract, it does not do so in the context of Section 848(e)(1)(A). "Settled statutory construction principles require that 'cause' be read consonantly with the verbs that surround it, each of which speaks to intentional actions." Pet. App. 15-16. Indeed, if "cause" did not require the same mens rea as the other listed means of committing the offense, it would render all the other verbs superfluous. See Clark v. Rameker, 573 U.S. 122, 131 (2014) ("[A] statute should be construed so that effect is given to all its

provisions, so that no part will be inoperative or superfluous.") (citation omitted).

Broader statutory context also indicates that Section 848(e)(1)(A) encompasses only intentional conduct. Congress enacted Section 848(e)(1)(A) to "reach the 'top brass' who order killings, not the lieutenants and foot soldiers" who who carry out the orders. Garrett v. United States, 471 U.S. 773, 781 (1985). Consistent with that purpose, Congress prescribed the same severe punishments for the principals who direct intentional killings and the agents who carry them out, up to life imprisonment or the death penalty. See 21 U.S.C. 848(e)(1)(B). Given Congress's focus on leaders who "order killings," Garrett, 471 U.S. at 781, and its decision to prescribe the most serious punishments known to our legal system for that extreme conduct, it would be incongruous to presume that Congress intended to extend liability to individuals who have no intent to kill, see Pet. App. 16.

Petitioner has identified no court that agrees with his reading. His reliance on United States v. Alvarez, 266 F.3d 587 (6th Cir. 2001), cert. denied, 535 U.S. 1098 (2002), is misplaced. In Alvarez, the Sixth Circuit concluded that it was not error to instruct a jury that "intentional killing" could include "intentionally engag[ing] in conduct which the defendant knew would create a grave risk of death to a person other than one of the participants in the offense and result[ing] in death to the

victim" by reference to now-repealed statutory aggregating "factors which are meant to be considered only in a death penalty case." Id. at 594-596 (citation omitted; brackets in original). The court did not address the updated version of the CCE statute, under which petitioner was charged. See Pet. App. 16. Moreover, intentionally engaging in conduct with knowledge that it creates a grave risk of death is not the formulation for ordinary recklessness; it describes extreme recklessness, and this Court expressly reserved judgment in Borden on whether that mental state would be sufficient for a crime of violence. See 593 U.S. at 429 n.4 (plurality opinion); id. at 482-483 n.21 (Kavanaugh, J., dissenting).

3. Petitioner further contends (Pet. 19-20) that the Court should grant certiorari to clarify how the rule of lenity should be applied in the context of the categorical approach. Petitioner does not identify any circuit conflict or other sound reason for this Court's intervention to address that issue. Furthermore, the court of appeals' observation about lenity principles being an odd fit for petitioner's reading that broadens the conduct covered by Section 848(e)(1)(A) was only one independent reason that the rule of lenity did not apply; the court principally recognized that the statute is not ambiguous. Pet. App. 16 (citing Lockhart v. United States, 577 U.S. 347, 361 (2016)). For reasons explained above,

that principal determination is correct and does not warrant review by this Court.

4. At all events, petitioner's case would be an especially poor vehicle for plenary review of any of his claims because even if petitioner's remaining Section 924(c) convictions were vacated, there would be no practical effect on his sentence. See Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties). Petitioner is serving, inter alia, ten life sentences for various convictions under federal and D.C. law. Judgment 2 (Counts 1, 3, 8, 9, 10, 12, 13, 14, 15, 18); C.A. App. 94-97; see Gov't C.A. Br. 4 (listing the sentence imposed for each count). Vacatur of convictions that only added consecutive prison time, that follows those life sentences, would have no practical effect on petitioner's imprisonment.

CONCLUSION

The petition for a writ of certiorari should be held for Delligatti v. United States, cert. granted, No. 23-825 (oral argument scheduled for Nov. 12, 2024), and disposed of in light of the Court's decision in that case.

Respectfully submitted.

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