

IN THE SUPREME COURT OF THE UNITED STATES

RAEKWON MALIK PATTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in declining to include language suggesting a heightened mens rea in its jury instruction about the offense of attempted murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), where the instruction provided closely tracked the statutory language.

2. Whether the district court abused its discretion in declining to instruct the jury on the affirmative defense of justification under Iowa Code § 704.1, where the lower courts found no evidence to support the application of that state-law defense to petitioner's participation in a drive-by shooting.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1 to A10) is reported at 104 F.4th 15.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2024. A petition for rehearing was denied on July 16, 2024 (Pet. App. C1). The petition for a writ of certiorari was filed on September 6, 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 Southern District of Iowa, petitioner was convicted on one count of attempted murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), and one count of using, carrying, and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). See Pet. App. B1. Following a guilty plea in the same district, petitioner was also convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2020). Ibid. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals affirmed. Pet. App. A1-A10.

1. Petitioner and several other individuals participated in a drive-by shooting of a rival gang member near a Des Moines, Iowa shopping mall. Pet. App. A2; Gov't C.A. Br. 8-10. Petitioner was a member of OTB, short for "Only the Brothers." See Pet. App. A2. OTB operated under a set of unwritten rules and common goals. Gov't C.A. Br. 4. Those goals included the gaining of respect by committing acts of violence and retaliating against rival gangs. Ibid. The shooting occurred during a period of increased tensions between the OTB and C-Block gangs. Id. at 6. Members of each gang had engaged in various retaliatory shootings the previous week. Id. at 6-7.

On May 10, 2020, petitioner, Austin Mallory, and three others drove to the mall in an SUV. Gov't C.A. Br. 6-7; id. at 8-9. In the parking lot, they spotted and exchanged words with Raysean Nelson -- a member of the rival C-Block street gang. Pet. App. A2; Gov't C.A. Br. 9. As Nelson drove away, petitioner's group followed him in the SUV. Pet. App. A2. Mallory drove and petitioner rode in the back seat. Ibid.

Nelson eventually pulled over and got out. Pet. App. A2. Mallory's SUV approached Nelson's parked car; the occupants of the SUV, who had guns at the ready, rolled down the windows as they approached. See id. at A4. An exchange of gunfire occurred. Id. at A2; Gov't C.A. Br. 10. It is unclear who shot first. Pet. App. A2. The dashboard camera of a Des Moines police car captured petitioner hanging out the window of the SUV, firing in Nelson's direction. See ibid.; Gov't C.A. Br. 10.

2. a. A grand jury in the Southern District of Iowa charged petitioner and Mallory with one count of attempted murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5) and 2; and one count of using, carrying, and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and 2. Indictment 9-10. The grand jury further charged petitioner with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2020). Indictment 10. Petitioner pleaded guilty to the felon-in-

possession count. D. Ct. Doc. 211 (Feb. 3, 2022). The case proceeded to trial on the remaining counts.

b. Section 1959(a), colloquially known as the violent crimes in aid of racketeering (VICAR) statute, provides in relevant part that “[w]hoever * * * for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity[] murders * * * any individual in violation of the laws of any State or the United States * * * shall be punished * * * by death or life imprisonment.” 18 U.S.C. 1959(a)(1). It further provides that anyone who attempts or conspires to commit such a murder shall be punished “by imprisonment for not more than ten years or a fine under this title, or both.” 18 U.S.C. 1959(a)(5).

At the close of trial, the district court instructed the jury that to find petitioner guilty on the VICAR count, it had to find that petitioner’s “purpose in committing attempted murder in aid of racketeering * * * was to maintain or increase [his] position in the enterprise,” but that “[t]he Government [was] not required to prove that this was the sole or principal motive.” D. Ct. Doc. 372, at 32 (Apr. 15, 2022). The court then provided “illustrat[ive]” examples of circumstances that could satisfy the purpose element: (1) “[i]f the defendant at issue committed the crime because he knew it was expected of him by reason of his membership in the enterprise”; (2) “if [the defendant] committed

the crime because he thought it would enhance his position or prestige within the enterprise"; or (3) "if [the defendant] committed [the crime] because he thought it was necessary to maintain the position he already held, or to gain entry to the enterprise, or to help someone maintain or increase their position within the enterprise." Id. at 32-33.

Petitioner asked the district court to further instruct the jury that the VICAR purpose element would be satisfied only if the jury found that "maintaining or enhancing [petitioner's] status in the [gang] was a substantial purpose of [petitioner] or that he committed the charged crime as an integral aspect of membership in the [gang]." D. Ct. Doc. 253, at 77 (Feb. 2, 2022). The court declined. Pet. App. A4.

c. Although the VICAR statute defines a federal crime, the predicate murder offense can come from state law. See 18 U.S.C. 1959(a); Pet. App. A3. Here, in charging petitioner with attempted VICAR murder, the grand jury alleged that petitioner attempted to commit a murder in violation of Iowa law. Indictment 9.

At the close of trial, petitioner argued that he was justified in using force during the shooting and requested that the district court instruct the jury on the affirmative defense of justification under Iowa law. D. Ct. Doc. 460, at 15-16 (Aug. 10, 2022). Iowa law allows individuals to use "'[r]easonable force' * * * necessary to prevent an injury or loss," which "can include deadly

force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat." Iowa Code Ann. § 704.1(1) (West 2017). Iowa law further states that "[a] person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this chapter." Id. at § 704.1(3).

The district court determined that petitioner was legally precluded from raising a justification defense under Iowa law. D. Ct. Doc. 460, at 17-18 (Aug. 10, 2022). The court observed that petitioner "was engaged in illegal activity, including being a felon in possession of a firearm," at the time of the shooting. Id. at 17. And the court further observed that petitioner "used the force * * * before any retreat occurred." Ibid.

d. The jury found petitioner guilty of attempted VICAR murder in violation of 18 U.S.C. 1959(a)(5) and of discharging a firearm during a crime of violence in violation of Section 924(c)(1)(A)(iii). Pet. App. A2.

3. The court of appeals affirmed. Pet. A1-A10. Among other things, the court rejected petitioner's challenge to the district court's instruction defining the VICAR statute's purpose element. Id. at A4-A5. It explained that the district court's "instruction fairly and adequately told the jury what it needed to know" and

"closely tracked the statutory language, which does not specify how substantial the purpose must be." Id. at A5 (internal quotation marks and citation omitted). The court of appeals also rejected petitioner's contention that the district court's instruction improperly "tempt[ed] the jury to focus just 'on [petitioner's] status as a gang member,'" explaining that the instruction "dispelled any possible confusion by giving specific examples of what would satisfy the legal standard," thereby "focus[ing] the jury's attention where it belonged, which was on [petitioner's] motivation for attempting the murder." Ibid. (quoting United States v. Banks, 514 F.3d 959, 969 (9th Cir. 2008)).

The court of appeals also agreed with the district court that petitioner was not entitled to a jury instruction on the affirmative defense of justification under Iowa law. Pet. App. A3-A4. The court of appeals explained that, under Iowa law, an individual who is "'engaged in * * * illegal activity'" has "a duty to retreat before he c[an] use force himself." Id. at A3 (quoting State v. Ellison, 985 N.W.2d 473, 477-478 (Iowa 2023)). The court found "no evidence" that petitioner -- who, as a felon in possession of a firearm, was engaged in illegal activity -- had tried to retreat, even though petitioner and the others in the SUV "had a golden opportunity" to do so "given that Nelson's car was already stopped." Id. at A4. The court additionally noted that,

because petitioner and the other individuals in the SUV "ha[d] guns at the ready and roll[ed] down the windows as they approached Nelson's parked car, the only reasonable inference was that they planned to fire regardless of what anyone else did." Ibid. The court summarized those actions as "a preplanned drive-by shooting, not an act of justified self-defense." Ibid.

ARGUMENT

Petitioner contends that the district court erred in declining to expressly instruct the jury that the elements of VICAR required a finding that a gang-related motive was a "substantial purpose" or "integral aspect" of his attempted murder (Pet. 10-15); and in declining to instruct the jury on the affirmative defense of justification under Iowa law (Pet. 15-18). The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. a. The VICAR statute imposes criminal penalties on an individual who, "for the purpose of * * * maintaining or increasing [his] position in an enterprise engaged in racketeering activity," commits any of several specified offenses, including murder and conspiracy to commit murder. 18 U.S.C. 1959(a). Congress viewed the VICAR statute as a "means of proscribing murder and other violent crimes committed as an integral aspect of membership in such enterprises." United States v. Dhinsa, 243

F.3d 635, 671 (2d Cir.) (quoting United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992), cert. denied, 510 U.S. 856 (1993)), cert. denied, 534 U.S. 897 (2001). The plain meaning of the statutory language accordingly “encompasses violent crimes intended to preserve the defendant’s position in the enterprise or to enhance his reputation and wealth within that enterprise.” Ibid. (emphases omitted).

In keeping with the VICAR statute’s plain terms, the courts of appeals that have expressly considered the issue have uniformly recognized that “the purpose element does not require the Government to show that the defendant was solely, exclusively, or even primarily motivated by a desire to gain entry into, or maintain or increase his status within, the criminal organization.” United States v. Banks, 514 F.3d 959, 968 (9th Cir. 2008); see, e.g., United States v. Velasquez, 881 F.3d 314, 332 (5th Cir.) (per curiam), cert. denied, 139 S. Ct. 138 (2018); United States v. Hackett, 762 F.3d 493, 500 (6th Cir. 2014), cert. denied, 574 U.S. 1201 (2015); United States v. Heilman, 377 Fed. Appx. 157, 204 (3d Cir.), cert. denied, 562 U.S. 974 (2010); United States v. Smith, 413 F.3d 1253, 1277-1278 (10th Cir. 2005), cert. denied, 546 U.S. 1120 (2006); United States v. Thai, 29 F.3d 785, 817 (2d Cir.), cert. denied, 513 U.S. 977, and 513 U.S. 993 (1994).

The courts of appeals to have expressly considered the issue have also accepted that the gang-related motive must be “one of

the defendant's general purposes or dominant purposes" in committing the crime. Banks, 514 F.3d at 970; see also, e.g., United States v. Devine, 40 F.4th 139, 152 (4th Cir. 2022) ("general purpose"), cert. denied, 143 S. Ct. 790 (2023); Hackett, 762 F.3d at 500 ("animating purpose"); Heilman, 377 Fed. Appx. at 204 ("more than an incidental purpose"); Smith, 413 F.3d at 1277 ("general purpose"); Thai, 29 F.3d at 817 ("general purpose"). That framework ensures that "the jury w[ill] focus * * * on [the defendant's] general purpose in committing the[] crimes and its relationship to his status in the gang" rather than "merely on his status as a gang member." Banks, 514 F.3d at 969.

b. The decision below in this case aligns with that consensus. In rejecting petitioner's requested instruction, the court favorably cited the Ninth Circuit's decision in United States v. Banks, supra, and accepted that a jury instruction would be improper if it "tempt[ed] the jury to focus just 'on [petitioner's] status as a gang member.'" Pet. App. A5 (quoting Banks, 514 F.3d at 969). But in the circumstances of this case, the court found that the district court's statute-tracking instructions and illustrative examples "'fairly and adequately'" conveyed the VICAR purpose element to the jury. Ibid. (citation omitted).

As discussed above, the district court informed the jury that it had to find that petitioner's "purpose in committing attempted murder in aid of racketeering * * * was to maintain or increase

[his] position in the enterprise." D. Ct. Doc. 372, at 32 (Apr. 15, 2022). The district court also provided examples of conduct that would "establish[]" that element -- for instance, if the jury found that petitioner "committed the crime because he knew it was expected of him by reason of his membership in the enterprise," "because he thought it would enhance his position or prestige within the enterprise," or "because he thought it was necessary to maintain the position he already held, or to gain entry to the enterprise, or to help someone maintain or increase their position within the enterprise." Id. at 32-33. As the court of appeals recognized, viewing the district court's instructions and illustrative examples together, the jury would have understood that VICAR required a gang-related purpose to be "more than merely incidental" to petitioner's attempt to murder a rival gang member. Banks, 514 F.3d at 969; see generally Victor v. Nebraska, 511 U.S. 1, 5 (1994) (jury instructions sufficient when, "taken as a whole," they "correctly convey" the relevant "concept") (brackets and citation omitted).

In arguing to the contrary, petitioner references (Pet. 11) a Ninth Circuit pattern instruction recommending specific language when defining VICAR's purpose element. See 9th Cir. Model Crim. Jury Instructions 18.11 (2022) (stating the jury "need only find that enhancing [the defendant's] status in [the enterprise] was a substantial purpose of the defendant or that [the defendant]

committed the charged crime as an integral aspect of membership in [the enterprise]". But the pattern instruction on which petitioner relies cannot create a circuit conflict warranting this Court's review because that instruction, like all pattern instructions, is not law and does not bind courts. See United States v. Haischer, 780 F.3d 1277, 1284 (9th Cir. 2015) (explaining that the "wording of model instructions, 'although extremely useful, is not blessed with any special precedential or binding authority'") (quoting McDowell v. Calderon, 130 F.3d 833, 840 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1103 (1998)). Nor, for the reasons just discussed, is it evident that any material difference exists between that instruction and the one provided in petitioner's case.

c. The court of appeals' decision does not conflict with any decision of another court of appeals. Petitioner contends that the decision below conflicts with the decisions of the other courts of appeals because it allows VICAR liability "based only on the status of the [defendant]" as a gang member. Pet. 15; see Pet. 14-15. But as explained above, the court of appeals expressly rejected that contention based on the particular instructions at issue, finding no reversible error in the instructions here because they "did not tempt the jury" to focus just on petitioner's "status as a gang member." Pet. App. A5 (emphasis added; citation omitted). Petitioner does not cite a decision from any other court

of appeals finding error in instructions similar to those at issue here, and further review of the court of appeals' assessment of those instructions is not warranted.

That is particularly so because any error in the jury instructions on the VICAR purpose element was harmless in this case. See Neder v. United States, 527 U.S. 1, 7-8 (1999) (holding that if a jury instruction misstates an element of the offense, reviewing courts must disregard the error if it is "harmless 'beyond a reasonable doubt'"') (citation omitted). The government presented overwhelming evidence at trial that petitioner was a member or associate of the OTB gang, used his social-media accounts to "disrespect" the C-Block gang and one of its recently deceased members, and chased after and eventually shot at Nelson because he was a rival C-Block member. See Gov't C.A. Br. 6-10. It is therefore clear beyond a reasonable doubt that petitioner had a substantial gang-related purpose in attempting to murder Nelson.

2. Petitioner separately contends (Pet. 15-18) that the district court erred in declining to instruct the jury on the affirmative defense of justification under Iowa law. That contention lacks merit, and the lower courts' application of state law does not warrant this Court's review.

a. A federal VICAR offense does not exist independently of the underlying state or federal VICAR predicate charged in a particular case. See 18 U.S.C. 1959(a) (premising liability on

specific criminal acts "in violation of the laws of any State or the United States"). A conviction under the VICAR statute thus requires proof that the "predicate acts constitute state law crimes." United States v. Carrillo, 229 F.3d 177, 185 (2d Cir.), cert. denied, 531 U.S. 1026 (2000). In charging petitioner with attempted VICAR murder here, the grand jury alleged that petitioner attempted to commit murder in violation of Iowa law. See Indictment 9.

Because the VICAR count was premised on an Iowa criminal offense, petitioner asserted an affirmative defense of justification under Iowa law. See D. Ct. Doc. 460, at 15-16 (Aug. 10, 2022). Iowa law allows individuals to use "'[r]easonable force' * * * necessary to prevent an injury or loss," which "can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat." Iowa Code Ann. § 704.1(1) (West 2017). Iowa law further specifies that "[a] person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this chapter." Id. at § 704.1(3) (emphasis added).

The lower courts correctly recognized that the Iowa justification defense was inapplicable in petitioner's case. See

Pet. App. A3-A4; D. Ct. Doc. 460, at 17-18 (Aug. 10, 2022). Both lower courts observed that petitioner was engaged in illegal activity -- namely, the unlawful possession of a firearm as a felon -- at the time of the shooting. See Pet. App. A3; D. Ct. Doc. 460, at 17 (Aug. 10, 2022). Both courts accordingly observed that Iowa law imposed on petitioner a duty to retreat as a condition to asserting a justification defense. Ibid. But petitioner and his fellow gang members did the opposite: upon seeing "Nelson's car * * * stopped," they "approached" with "guns at the ready and roll[ed] down the windows." Pet. App. A4.

The court of appeals' decision explained that the denial of a justification instruction here was consistent with Iowa case law. See Pet. App. A3. In State v. Ellison, 985 N.W.2d 473 (2023), the Iowa Supreme Court held that "the defendant's use of force was not justified" under Iowa Code § 704.3 where "[t]he defendant was engaged in illegal activity in the place where he used force, he made no effort to retreat, and retreat was a reasonable alternative to using force." Id. at 478. And in State v. Lorenzo Baltazar, 935 N.W.2d 862 (2019), the same court held that a defendant who illegally brought a gun to a confrontation had a "duty to retreat" as a condition to asserting a justification defense. Id. at 871. Petitioner fails to show that the court of appeals misapplied either of those state decisions.

b. Petitioner contends (Pet. 17-18) that a duty to retreat only materializes under Iowa law when it is safe to do so and, in any event, that the SUV in which he was riding "was in fact moving away from the shooter" at the time he fired.

Neither factbound contention warrants this Court's review. Pet. App. A4. The court of appeals observed that petitioner and his fellow gang members "had a golden opportunity to escape" once Nelson's car was stopped, ibid. -- i.e., an easy path to retreat from the confrontation that had started minutes earlier in the shopping mall parking lot. Nor did petitioner and his companions need to follow Nelson from the parking lot in the first place. But petitioner's group nonetheless did follow Nelson, and when he stopped, they approached his car, readied their guns, and rolled down the windows. Ibid. Because petitioner disregarded an obvious retreat option, the district court and the court of appeals correctly recognized that the record "disqualified him from asserting * * * justification" under Iowa law, Lorenzo Baltazar, 935 N.W.2d at 871.

In any event, to the extent the question whether petitioner was entitled to advance a justification defense under Iowa Code § 704.1 on this record presents any legal question, it is fundamentally a question of state law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." Bowen v.

Massachusetts, 487 U.S. 879, 908 (1988); see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) (observing that this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located"). Petitioner identifies no reason to depart from that settled policy in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

DAVID M. LIEBERMAN
Attorney

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