No. _____

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In the
Supreme Court of the United States

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Jose Muyet,

*Petitioner*,

v.

United States of America,

*Respondent*.

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On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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Daniel Habib
*Counsel of Record*
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
daniel_habib@fd.org
(212) 417–8742

*Counsel for Petitioner*

## QUESTIONS PRESENTED

I. The judge-made "concurrent sentence doctrine" allows a federal court to decline review of a prisoner's challenge to his sentence on one count of conviction if he is serving an unchallenged concurrent sentence of equal or greater length on another count of conviction. In *Ray v. United States*, this Court held that the doctrine does not apply on direct review of federal criminal convictions, because the mandatory special assessment imposed for each count of conviction means that the sentences "are not concurrent." 481 U.S. 736, 737 (1987) (*per curiam*). Notwithstanding the clarity of *Ray*'s reasoning, several Circuits continue to authorize application of the doctrine to federal criminal convictions in 28 U.S.C. § 2255 proceedings—including convictions carrying consecutive terms of imprisonment—because those attacks have come on collateral, as opposed to direct, review. Other Circuits correctly treat the direct/collateral distinction as immaterial and reject the doctrine's application to any attack on a federal criminal conviction.

The question presented, which divides the Circuits, is: Does the concurrent sentence doctrine permit a federal court to decline review of a collateral challenge to a federal criminal conviction, even one carrying a consecutive sentence?

II. In the alternative, should this petition be held for *Delligatti v. United States*, No. 23–825 (U.S.) (cert. granted June 3, 2024), where one of Petitioner's 18 U.S.C. § 924(c) convictions is predicated on the same crime of violence at issue in *Delligatti*?

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The summary order of the United States Court of Appeals for the Second Circuit affirming the denial of Petitioner's 28 U.S.C. § 2255 motion appears at Pet. App. 1a–5a and is available at 2024 WL 2890390. The opinion and order of the United States District Court for the Southern District of New York denying Petitioner's § 2255 motion and denying a certificate of appealability ("COA") appears at Pet. App. 6a–19a and is available at 2023 WL 170869. The order of the Court of Appeals granting a COA appears at Pet. App. 20a.

## JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 2255(a), denied Petitioner's § 2255 motion, and denied a COA on January 12, 2023. The Court of Appeals had jurisdiction under 28 U.S.C. § 2253(a), granted a COA on August 16, 2023, and affirmed the denial of Petitioner's § 2255 motion on June 10, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Fifth Amendment** provides, in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

**28 U.S.C. § 2255(a)** provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court

was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

**28 U.S.C. § 2255(b)** provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

The version of **18 U.S.C. § 924(c)(1) (1990 ed.)** applicable to Petitioner provided, in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, .... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years.

**18 U.S.C. § 924(c)(3)** provides:

> 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.

**N.Y. Penal Law § 110.00** provides:

> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

**N.Y. Penal Law § 125.25** provides, in relevant part:

> A person is guilty of murder in the second degree when:
>
> 1. With intent to cause the death of another person, he causes the death of such person or of a third person.

## STATEMENT OF THE CASE

The "so-called 'concurrent sentence doctrine,'" *Ray*, 481 U.S. at 737, is a judge-made tool that allows judges to avoid judging. Found in no statute or Rule of Criminal Procedure, the doctrine purports to "'allow[] courts, in their discretion, to avoid reaching the merits of a claim altogether in the presence of identical concurrent sentences,' since 'a ruling in the defendant's favor would not reduce the time he is required to serve or otherwise prejudice him in any way.'" *Kassir v. United States*, 3 F.4th 556, 561 (2d Cir. 2021) (quoting *Tavarez v. Larkin*, 814 F.3d 644, 649 (2d Cir. 2016), then *Oslund v. United States*, 944 F.3d 743, 746 (8th Cir. 2019)). The typical application of the doctrine occurs "in direct appeals where a defendant challenges only the length of one concurrent sentence, rather than the legality of a conviction underlying that sentence." *Id.* at 562 & n.28 (collecting cases). *See, e.g.*, *United States v. Torres*, 2023 WL 378942, at *5–6 (2d Cir. Jan. 25, 2023) (declining to resolve challenge to 240-month sentence on stalking count in light of concurrent 292-month sentences on kidnaping counts).

In *Ray*, this Court established that the doctrine cannot apply on direct review of federal criminal convictions. There, a federal defendant had been convicted of

three counts and sentenced to concurrent seven-year sentences on each. On appeal, the Fifth Circuit affirmed the convictions on the first two counts but declined to address the defendant's challenge to the third, invoking the doctrine because the defendant's sentence on the third count was concurrent to his valid sentences on the first two. This Court vacated the judgment and remanded for review of the third count, explaining that the defendant was "not in fact serving concurrent sentences" because each count carried a separate mandatory special assessment. 481 U.S. at 737; *see* 18 U.S.C. § 3013. Thus, "[s]ince [the defendant's] liability to pay th[e] total [assessment] depends on the validity of each of his three convictions, the sentences are not concurrent." *Id.* "Lower federal courts have concluded that *Ray* essentially abolished the doctrine for direct review of federal convictions, since the count-by-count assessment is mandated by statute." 7 LaFave, Federal Crim. Proc. § 27.5(b) (Westlaw Dec. 2023 update).

*Ray*'s reasoning could not have been more straightforward: The concurrent sentence doctrine did not apply because the sentences were "not in fact ... concurrent." 481 U.S. at 737. And sentences for multiple federal counts of conviction will never be "in fact ... concurrent" because each count always carries a special assessment that a defendant will be "liab[le] to pay" only if the underlying conviction is "valid[]." *Id.* So forgoing review of an invalid conviction will always prejudice a defendant. Thus, multiple Courts of Appeals—the Fourth, Eighth, Ninth, Tenth, and D.C. Circuits—have correctly concluded that the concurrent sentence doctrine has no application to review of federal convictions at all. *United States v.*

*Charles*, 932 F.3d 153, 160 (4th Cir. 2019) ("[T]he concurrent sentence doctrine cannot be applied to avoid reviewing the validity of one of a defendant's *convictions*." (citing *Ray*)); *Oslund*, 944 F.3d at 746 n.2 (8th Cir.) ("[T]he special assessment imposed upon a defendant for each count of conviction ... constitutes 'sufficient prejudice to require § 2255 review of a concurrent conviction's validity'" (quoting *Eason v. United States*, 912 F.3d 1122, 1123 (8th Cir. 2019))); *United States v. DeBright*, 730 F.2d 1255, 1260 (9th Cir. 1984) (*en banc*) ("We reject the use of the concurrent sentence doctrine as a discretionary means of avoiding the review of criminal convictions."); *United States v. Harris*, 695 F.3d 1125, 1139 (10th Cir. 2012) ("*Ray* effectively abolished the concurrent-sentence doctrine in cases where a defendant challenges one or more of multiple federal convictions, because every such conviction carries its own special assessment."); *United States v. Agramonte*, 276 F.3d 594, 598 (D.C. Cir. 2001) ("*Ray* ... spelled the death knell for the concurrent sentence doctrine as applied to review of convictions.").

Notwithstanding the clarity and simplicity of *Ray*'s rule, other Courts of Appeals—the Second, Third, and Seventh—have now coined an exception: The doctrine nonetheless can continue to apply to federal convictions—if challenged on collateral, as opposed to direct, review. *Kassir*, 3 F.4th at 559 (2d Cir.) ("We hold that the discretionary concurrent sentence doctrine applies when a defendant collaterally attacks one of his convictions."); *Duka v. United States*, 27 F.4th 189, 194–96 (3d Cir. 2022) (affirming denial of § 2255 challenge to conviction in reliance on concurrent sentence doctrine; distinguishing *Ray*); *United States v. Ryan*, 688

F.3d 845, 849 (7th Cir. 2012) (same as *Duka*). These Courts of Appeals have even blessed use of the doctrine to decline review of convictions, like Petitioner's, carrying not just special assessments, but consecutive sentences as well. *Al-'Owhali v. United States*, 36 F.4th 461, 467 (2d Cir. 2022) ("[W]e hold that the concurrent sentence doctrine applies to a collateral challenge to a conviction for which the sentence runs consecutively to one or more unchallenged life sentences."); *Duka*, 27 F.4th at 194 (applying doctrine to conviction carrying 360-month sentence consecutive to unchallenged life sentences); *Ruiz v. United States*, 990 F.3d 1025, 1033–34 (7th Cir. 2021) (applying doctrine to convictions carrying 45-year sentences consecutive to unchallenged life sentences).

This mature Circuit split warrants review and this case offers an ideal vehicle. Petitioner sought § 2255 vacatur of 10 counts of conviction under 18 U.S.C. § 924(c), which carried special assessments of $500 and an aggregate consecutive sentence of 200 years, arguing that they were constitutionally invalid after *United States v. Davis*, 588 U.S. 445 (2019). Without reaching the merits of his claims, the District Court *sua sponte* invoked the concurrent sentence doctrine because Petitioner was subject to life sentences on other unchallenged counts of conviction. The Second Circuit affirmed in light of its precedent in *Al-'Owhali*, expressly rejecting Petitioner's argument that the doctrine can never apply to an attack on a conviction, especially not one with a consecutive sentence. Thus, the question is preserved, and has practical significance for Petitioner, who, if he succeeds in vacating any count, would be entitled to *de novo* resentencing on all remaining

counts—including those carrying life sentences, which were not required by statute, but were imposed under the then-mandatory Sentencing Guidelines.

On the merits, the Second Circuit's rule is wrong. As *Ray* makes clear, the *concurrent sentence* doctrine's very name tells us that it doesn't apply to *convictions* with *consecutive sentences*. Claims such as Petitioner's that are cognizable in § 2255 proceedings trigger federal courts' obligation to exercise the jurisdiction conferred by Congress, and § 2255's plain text requires review of (and remedy for) constitutionally defective judgments. A prisoner always suffers prejudice from an invalid federal conviction, whether in the form of a special assessment, or, as here, a consecutive sentence amounting to an "impermissible punishment." *Rutledge v. United States*, 517 U.S. 292, 302 (1996). Accordingly, the petition should be granted.

1. Following a jury trial in the United States District Court for the Southern District of New York, Petitioner was convicted of racketeering, narcotics, and firearms offenses arising from his leadership of an enterprise known as the "Nasty Boys" in the Bronx in the 1990s. Pet. App. 2a, 7a; *see United States v. Muyet*, 225 F.3d 647, at *1 (2d Cir. 2000) (table). Specifically, Petitioner was convicted of racketeering, in violation of 18 U.S.C. § 1962(c) (Count 1); racketeering conspiracy, 18 U.S.C. § 1962(d) (Count 2); 27 counts of violent crimes in aid of racketeering, including 11 murders, 18 U.S.C. §§ 1959(a)(1), 1959(a)(3), and 1959(a)(5) (Counts 3–29); narcotics conspiracy, 21 U.S.C. § 846 (Count 30); 10 counts of using a firearm during and in relation to crimes of violence, § 924(c)(1) (Counts 31–35, 37–39, and 41–42); and using a firearm during and in relation to a drug trafficking offense, *id.*

(Count 43). *See* Pet. App. 2a, 7a–8a; C.A. App. (Doc. 66), at 162–64. The District Court (Leisure, J.), sentenced Petitioner to concurrent terms of life imprisonment on Counts 1, 2, 4, 6, 8, 9, 10, 14, 16, 19, 20, 23, 29, and 30; concurrent terms of 10 years' imprisonment on Counts 3, 5, 7, 11–13, 15, 17, 18, 21, 25–28; and mandatory consecutive terms totaling 205 years for the firearms offenses (Counts 31—35, 37–39, and 41–43: five years for the first count, and 20 years for each of the remaining counts, *see* § 924(c)(1) (1990 ed.). C.A. App. (Doc. 66), at 165–66. That is, the District Court imposed an aggregate sentence of life plus 205 years. Pet. App. 2a, 8a; C.A. App. (Doc. 66), at 165–66. The Court also imposed a special assessment of $50 on each count of conviction, $500 total on the § 924(c)(1) crime-of-violence counts. C.A. App. (Doc. 66), at 169; *see* 18 U.S.C. § 3013(a)(2)(A) (1990 ed.).

2. After *Davis*, (invalidating 18 U.S.C. § 924(c)(3)(B), the "residual clause" of § 924(c)'s crime-of-violence definition, as void for vagueness), the United States Court of Appeals for the Second Circuit authorized Petitioner to file a successive § 2255 motion challenging his convictions and consecutive sentences on Counts 31–35, 37–39, and 41–42, which were the § 924(c) counts predicated on crimes of violence. Pet. App. 2a, 10a. The commission of a predicate crime of violence is an element of a § 924(c) offense. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). In his authorized successive § 2255 motion, Petitioner sought vacatur of Counts 31–35, 37—39, and 41–42, and their accompanying consecutive sentences, arguing that after *Davis*, these counts lacked valid crime-of-violence predicates. Pet. App. 16a. All but one of the counts were predicated in part on

conspiracy to commit murder in aid of racketeering, which no longer qualifies. C.A. App. (Doc. 66), at 99–99 ¶¶ 84–95; C.A. Br. (Doc. 67), at 6; *see Davis*, 588 U.S. at 450, 470; *United States v. Heyward*, 3 F.4th 75, 78 (2d Cir. 2021). And the remaining count (Count 39) was predicated on attempted murder in aid of racketeering, the offense at issue in *Delligatti*. C.A. App. (Doc. 66), at 103–04 ¶ 92; C.A. Br. (Doc. 67), at 6. Petitioner also argued that if any of the § 924(c) counts were vacated, the District Court would have discretion to resentence him *de novo*, including on the counts carrying life sentences—which had been imposed under the mandatory Sentencing Guidelines, but which were not mandatory as a statutory matter. Pet. App. 2a–4a, 10a–11a. To that end, Petitioner adduced substantial mitigating evidence of a childhood marked by poverty, abuse, and neglect, as well as his significant rehabilitative efforts during more than 25 years in federal prison—evidence that the original sentencing judge, constrained by the mandatory Sentencing Guidelines, had not considered. *See, e.g.*, D. Ct. Doc. 68, at 12–15.

The District Court (Preska, J., who did not preside at the trial or sentencing) denied the motion and denied a COA. Pet. App. 6a–19a. The Court determined that Petitioner's claims were cognizable on § 2255 review (Pet. App. 16a–17a), but nonetheless declined to reach the merits. *Sua sponte* invoking the concurrent sentence doctrine,[1] the Court explained: "[A]bsent a showing of prejudice, this Court does have the discretion to decline to consider a § 2255 challenge when, as here, the

[1] Respondent had expressly disclaimed reliance on the concurrent sentence doctrine. D. Ct. Doc. 65, at 11 n.5 ("The Court need not apply the doctrine here.").

Petitioner will remain in custody regardless of the outcome of the motion." Pet. App. 17a (citing *Kassir*, 3 F.4 at 567). Applying the five factors set forth in *United States v. Vargas*, 615 F.2d 952, 959–60 (2d Cir. 1980)—another judge-made test, which aims to guide a court's discretion in deciding whether to apply the doctrine—the District Court saw "no meaningful possibility that [Petitioner's] challenged but unreviewed convictions will expose him to substantial risk of adverse collateral consequences." Pet. App. 17a. The Court elaborated: "[i] [P]arole is inapplicable in the federal system. Because he holds a life sentence, it is also highly unlikely that: [ii] [Petitioner] might face the prospect of an increased sentence under a recidivist statute for a future offense; [iii] that the challenged convictions will ever be used to impeach his character at a trial; or [iv] that his pardon chances would increase from vacation of these convictions." Pet. App. 17a. "Moreover, [v] any social stigma from his gun convictions would be relatively small compared to the stigma from his murder convictions." Pet. App. 17a–18a. Thus, "because even a successful challenge on the merits would afford [Petitioner] no reasonable prospect of a shorter time in custody," the court "exercise[d] its discretion not to reach the merits of [his] claims." Pet. App. 18a. The Court did not expressly address Petitioner's request for *de novo* resentencing or the mitigating evidence tendered in support of that request.

3. The Court of Appeals granted a COA (Pet. App. 20a), but a panel (Jacobs, Park, Merriam, JJ.) affirmed. Pet. App. 1a–5a. At the outset, and of principal relevance here, the Court noted and rejected "[Petitioner's] argument that the concurrent-sentence doctrine 'cannot apply when a § 2255 movant challenges a

conviction, in particular, a § 924(c) conviction carrying a consecutive sentence.'" Pet. App. 3a n.1. That argument, the Court said, was "foreclosed by our opinion in *Al-'Owhali*." *Id.* In *Al-'Owhali*, the Second Circuit had "[held] that a court may exercise its discretion under the concurrent sentence doctrine to decline to review the merits of a claim on collateral review when the challenged conviction's sentence runs consecutively to one or more unchallenged life sentences." 36 F.4th at 463.

On the facts of this case, the Court of Appeals concluded that the District Court had not abused its discretion in applying the concurrent sentence doctrine. Pet. App. 3a–5a. The panel read the District Court's order to contain an implicit determination that, even if the district judge vacated one of Petitioner's § 924(c) convictions, she would not resentence him to anything less than life imprisonment on the remaining counts. Pet. App. 3a–4a (concluding that "the district court understood its discretion to conduct a *de novo* resentencing" but "suggest[ed] that it would not exercise its discretion to resentence [Petitioner] because doing so would not result in a shorter prison term"). Finding no quarrel with the District Court's analysis of the *Vargas* factors, the Court of Appeals affirmed. Pet. App. 4a–5a.

4. In a subsequent precedential decision, the Second Circuit established that, had he succeeded in vacating any of the challenged § 924(c) counts, Petitioner would indeed have been entitled not just to implicit consideration on the papers of his request for *de novo* resentencing, but to a plenary resentencing proceeding, with "the full panoply of procedural protections defendants are entitled to in a standard sentencing," including the rights to be present and to allocution. *See Kaziu v. United*

*States*, 108 F.4th 86, 94 (2d Cir. 2024). There, the District Court had vacated one § 924(c) count on § 2255 review but declined to conduct a full, in-person resentencing, instead issuing an order that reduced the sentence on one of the remaining counts. *Id.* at 90. The Second Circuit held that the District Court had "exceeded its discretion in declining to resentence *fully*" in light of two factors, both present here: "the resentencing judge [was] not the original sentencing judge," and so could not say how the vacated count had affected the total sentencing package; and the movant had "present[ed] plausible arguments of changed circumstances," including rehabilitation while incarcerated. *Id.* at 94. Petitioner, who is identically situated to the movant in *Kaziu*, would likewise have been entitled to plenary, in-person resentencing had the District Court reached the merits of his *Davis* claims and granted § 2255 relief as to any count.

## REASONS FOR GRANTING THE WRIT

I. This petition presents a clean opportunity to resolve an acknowledged Circuit split on an important, recurring question of federal criminal law: Does the concurrent sentence doctrine permit a federal court to decline collateral review of a federal criminal conviction, even one carrying a consecutive sentence? The Fourth, Eighth, Ninth, Tenth, and D.C. Circuits, consistent with *Ray*, say no. The Second, Third, and Seventh Circuits say yes. This petition is an ideal vehicle: Petitioner preserved this argument, as the Court of Appeals recognized below (Pet. App. 3a n.1), and there is no alternative ground for affirmance, as no court has ever analyzed, let alone rejected, the merits of Petitioner's *Davis* claims. Moreover, this

petition would afford this Court flexibility to adopt one of several different rules: the concurrent sentence doctrine can never apply to convictions; it can always apply to convictions; or, as a middle ground, it can apply to convictions carrying concurrent, but not consecutive, sentences. And the question has enormous practical significance for Petitioner, who, if he prevails on the merits, would receive a plenary resentencing at which a district judge could, for the first time, consider Petitioner's history and characteristics, including his significant rehabilitation, unshackled by the mandatory Sentencing Guidelines that governed his initial sentencing. Finally, the Second Circuit's rule is wrong. Under *Ray,* the concurrent sentence doctrine can never apply to a challenge to a federal criminal conviction, especially not one that carries a consecutive sentence.

II. In the alternative, if this Court is not inclined to grant immediate review, the petition should be held for *Delligatti*. One of Petitioner's § 924(c) counts (Count 39) is predicated on the exact same offense at issue in *Delligatti*—attempted murder in aid of racketeering, § 1959(a)(5), itself premised on an attempted violation of New York State's second-degree murder statute, *see* N.Y. Penal Law §§ 110.00 and 125.25(1). If the defendant prevails in *Delligatti*, this Court could grant review on the first question presented, confident that the answer would be outcome-determinative: Petitioner's Count 39 § 924(c) conviction would then lack a valid predicate crime of violence, and he would therefore be entitled to § 2255 relief, but for the invocation of the concurrent sentence doctrine.

## I. This Court Should Grant Review To Resolve A Circuit Split And Hold That The Concurrent Sentence Doctrine Does Not Permit A Federal Court To Decline Collateral Review Of A Federal Criminal Conviction, In Particular One Carrying A Consecutive Sentence.

### A. The Circuits Are Split On The Applicability Of The Concurrent Sentence Doctrine To Federal Criminal Convictions.

As shown above, the majority of Circuits—the Fourth, Eighth, Ninth, Tenth, and D.C. Circuits—reject application of the concurrent sentence doctrine to federal criminal convictions. The strongest statement of the rule is the Ninth Circuit's. In *DeBright*, the *en banc* Court squarely held: "We reject the use of the concurrent sentence doctrine as a discretionary means of avoiding the review of criminal convictions." 730 F.2d at 1260. Although *DeBright* arose on direct appeal, the Ninth Circuit has subsequently declined to apply the concurrent sentence doctrine on collateral review, vacating a federal criminal conviction even though the 28 U.S.C. § 2241 petitioner was subject to an unchallenged life sentence on another count. *Alaimalo v. United States*, 645 F.3d 1042, 1050 (9th Cir. 2011) ("It is probable that vacating [the petitioner's] convictions for importation of methamphetamine will not reduce the length of his confinement; vacating these convictions, however, removes the possibility that he will be subject to their adverse collateral consequences."). Likewise, district courts within the Ninth Circuit regularly cite *DeBright* in refusing Respondent's requests to invoke the doctrine in § 2255 cases. *E.g.*, *Williams v. United States*, 568 F. Supp. 3d 1115, 1121 (W.D. Wash. Oct. 25, 2011); *Cruickshank v. United States*, 505 F. Supp. 3d 1127, 1131 (W.D. Wash. 2020);

*United States v. Troiano*, 2017 WL 6061530, at *5 (D. Haw. Dec. 7, 2017); *United States v. Beckham*, 202 F. Supp. 3d 1197, 1201–02 (E.D. Wash. 2016).

Equally strong is the Eighth Circuit, which has often stated, in line with *Ray*, that the special assessment imposed for every federal conviction precludes application of the concurrent sentence doctrine even in § 2255 cases. *E.g.*, *Eason*, 912 F.3d at 1123 ("[T]he special assessment imposed 'on any person convicted of an offense against the United States,' now $100 for a felony offense by an individual, is sufficient prejudice to require § 2255 review of a concurrent conviction's validity." (quoting 18 U.S.C. § 3013(a))); *Oslund*, 944 F.3d at 746 n.2 (same); *United States v. Jefferson*, 60 F.4th 433, 436 (8th Cir. 2023) (same).

Decisions from the Fourth, Tenth, and D.C. Circuit accord. For example, in *Charles*, a § 2255 case, the Fourth Circuit explained: "Because [§] 3013 imposes a special monetary assessment for each count of *conviction*, the [Supreme] Court has held that the concurrent sentence doctrine cannot be applied to avoid reaching a defendant's challenge to one of his federal *convictions*, reasoning that the additional punishment of the assessment means that the sentences are not truly concurrent." 932 F.3d at 160 (citing *Ray*, 481 U.S. at 737). Moreover, *Charles* observed, "even beyond the existence of a special assessment for each of multiple convictions, the [Supreme] Court has indicated that are other collateral consequences attaching to unreviewed convictions that limit the applicability of the concurrent sentence doctrine." *Id.* (citing *Rutledge*, 517 U.S. at 302, for the proposition that "the separate *conviction*, apart from the concurrent sentence, has potential adverse collateral

consequences that may not be ignored"). Thus, *Charles* concluded: "[T]he concurrent sentence doctrine cannot be applied to avoid reviewing the validity of one of a defendant's *convictions*."). *Id.*

Likewise, both the Tenth and D.C. Circuits read *Ray* as abolishing the concurrent sentence doctrine with respect to federal convictions, without any reference to the direct/collateral distinction. *Harris*, 695 F.3d at 1139 (10th Cir.) ("In *Ray*, ... the Supreme Court held that where a defendant is convicted on multiple counts, sentenced concurrently on those counts, and challenges his conviction or convictions, the court must review each challenged conviction notwithstanding the concurrent nature of the sentences, because the imposition of a special assessment per count of conviction renders the sentences not truly "concurrent." ... Thus, *Ray* effectively abolished the concurrent-sentence doctrine in cases where a defendant challenges one or more of multiple federal convictions, because every such conviction carries its own special assessment."); *Agramonte*, 276 F.3d at 598 (D.C. Cir.) ("*Ray* ... spelled the death knell for the concurrent sentence doctrine as applied to review of convictions."). Although these were direct appeals, neither Circuit has so much as hinted that it would adopt a different rule on collateral review, and the D.C. Circuit has expressly declined to do so. *United States v. Smith*, 104 F.4th 314, 321 (D.C. Cir. 2024) (noting "some courts have extended the rule to habeas challenges," although "[t]hat extension has not been without controversy," but declining to "wade into that debate" because Respondent had forfeited its concurrent-sentence-doctrine argument").

In contrast, the Second, Third, and Seventh Circuits apply the doctrine to convictions, including, as here, § 924(c) convictions carrying consecutive sentences. *Kassir*, 3 F.4th at 559 (2d Cir.) (conviction); *Al-'Owhali*, 36 F.4th at 463 (2d Cir.) (conviction with consecutive sentence); *Ross v. United States*, 801 F.3d 374, 381–82 (3d Cir. 2015) (conviction); *Duka*, 27 F.4th at 194–96 (3d Cir.) (conviction with consecutive sentence); *Ryan*, 688 F.3d at 849 (7th Cir.) (conviction); *Ruiz*, 990 F.3d at 1033–34 (7th Cir.) (conviction with consecutive sentence). The Sixth Circuit has adopted the same rule in substance. *Amaya v. United States*, 71 F.4th 487, 490–91 (6th Cir. 2023) (affirming denial of § 2255 motion attacking § 924(c) conviction and consecutive sentence, distinguishing *Ray* as direct-review case). The Circuit split is deep, well-developed, and ripe for this Court's resolution.

B. This Petition Is A Clean Vehicle And The Question Is Important.

This petition offers a clean presentation of the issue. The District Court recognized that Petitioner's claims were cognizable on § 2255 review (Pet. App. 16a–17a), and Respondent did not contest that ruling before the Court of Appeals. Petitioner, for his part, appealed the District Court's *sua sponte* invocation of the concurrent sentence doctrine and briefed the point for purposes of preserving the claim for this Court's review. C.A. Br. (Doc. 67), at 21–26; C.A. Reply Br. (Doc. 91), at 2. The Court of Appeals so recognized and rejected Petitoner's argument in reliance on *Al-'Owhali*. Pet. App. 3a n.1. There is no alternative ground for affirmance because no court has addressed, let alone rejected, the merits of Petitioner's *Davis* claims. Moreover, because Petitioner challenges § 924(c)

convictions carrying consecutive sentences, this Court would have the ability to explore all aspects of the question presented and articulate a rule applicable to all convictions or, more modestly, just those with consecutive terms of imprisonment.

Resolution of the question has great potential significance for Petitioner, who would be entitled to plenary resentencing under the Second Circuit's decision in *Kaziu* if he succeeded in vacating even one of the 10 challenged § 924(c) counts. Such a proceeding would not be academic. Petitioner's life sentences on the unchallenged counts are not mandatory—unlike, say, those of the movants in *Al-'Owhali* and *Ruiz*—and Petitioner could present powerful evidence of his rehabilitation after more than 25 years in prison, including earning a GED, maintaining a largely clean disciplinary record, completing dozens of educational and vocational programs, and publishing a book. *See* D. Ct. Doc. 68, at 12–15. That is, the concurrent sentence doctrine is withholding from Petitioner not just merits review of his constitutional challenges to 10 counts of conviction, but the chance for resentencing and a meaningful reduction in his term of imprisonment.

On that point, it is immaterial that the Court of Appeals divined in the District Court's order an implicit ruling that she would not resentence Petitioner to a term less than life imprisonment. The intervening decision in *Kaziu* establishes that on-the-papers resentencing does not suffice. Where, as here, the § 2255 judge was not the original sentencer and the successful movant has plausibly alleged changed circumstances, he is entitled to a face-to-face resentencing, on a full evidentiary record, with the opportunity to allocute. 108 F.4th at 94. That type of

proceeding could prompt the District Court to reconsider her view. *See, e.g.*, *United States v. Repking*, 467 F.3d 1091, 1094 (7th Cir. 2006) (sentencing judge "disclosed that, while he initially planned to impose a harsher sentence, [the defendant's] allocution had changed his mind").

The question presented is important and recurs frequently, as evidenced by the fact that most of the Circuits have weighed in on the issue in the past decade. This Court's decision in *Davis* has generated (and continues to generate) § 2255 challenges to § 924(c) convictions such as Petitioner's, and a defense win in *Delligatti* would do likewise. Indeed, anytime this Court narrows the scope of a federal criminal statute—which occurs with some regularity, *e.g.*, *Fischer v. United States*, 144 S. Ct. 2176 (2024); *Snyder v. United States*, 144 S. Ct. 1947 (2024)—the question presented may arise in the § 2255 motions that inevitably follow.

C. The Minority Rule Is Wrong.

On the merits, the rule followed in the Second, Third, and Seventh Circuits is wrong. The judge-made concurrent sentence doctrine can never apply where a § 2255 movant challenges a conviction, especially not § 924(c) conviction that carries a special assessment and a consecutive sentence. Section 2255(a) provides: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." As the District Court correctly ruled, Petitioner's

claims were cognizable under § 2255. Pet. App. 16a–17a. He was "in custody" pursuant to his § 924(c) convictions. *See Peyton v. Rowe*, 391 U.S. 54, 67 (1968) ("[A] prisoner serving consecutive sentences is 'in custody' under any one of them" for habeas purposes."); *Kassir*, 3 F.4th at 567 n.59 (prisoner "may challenge consecutive sentence he is not yet serving" (citing *Peyton*)). By seeking vacatur of those convictions, Petitioner was "claiming the right to be released" from the "custody" attributable to them. And he was also claiming "the right to be released" via the *de novo* resentencing that would follow vacatur of any count.

Because Petitioner's claim was properly before the District Court, that Court had an "unflagging obligation ... to exercise the jurisdiction given" it by Congress. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). "Article III courts have a duty to decide cases before them, no matter how novel or complicated the issues may be." *Ruiz*, 990 F.3d at 1040 (Wood, J., dissenting). "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

Furthermore, 28 U.S.C. § 2255(b)'s text required review. "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," § 2255(b) imposes a series of mandatory duties on a district court. First, "the court *shall* ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." *Id.* (emphasis

added). Next, "[i]f the court finds ... that the sentence imposed was ... open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court *shall* vacate and set the judgment aside and *shall* discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* (emphases added). *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' ... to impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' ... normally creates an obligation impervious to judicial discretion."). The concurrent sentence doctrine, as broadened by the Second, Third, and Seventh Circuits, flouts this language.

This Court's precedents also foreclose the minority rule. *Ray* abolished the concurrent sentence doctrine on direct review of federal criminal convictions. The Courts of Appeals on the short side of the split distinguish *Ray* on the ground that collateral review differs. *E.g.*, *Kassir*, 3 F.4th at 565; *Al-'Owhali*, 36 F.4th at 466. But this distinction—based on the idea that a special assessment supports direct but not collateral relief—misses *Ray*'s rationale. *Ray* held the concurrent sentence doctrine inapplicable not just because the defendant owed a special assessment on each count, but because these assessments meant that the defendant was "not in fact serving concurrent sentences." 481 U.S. at 737. *See also id.* ("[T]he sentences are not concurrent. The judgment of the Court of Appeals is therefore vacated, and the cause is remanded to that court so that it may consider [Ray's] challenge.").

*Ray*'s major premise is self-evident, and self-evidently right: Where "the sentences are not concurrent," the concurrent sentence doctrine does not apply *See id.*

Likewise, this Court's decision in *Rutledge* establishes that every conviction carries collateral consequences—even if only a special assessment—that compel vacatur regardless of another concurrent term. "'The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. ... Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.'" 517 U.S. at 302 (quoting *Ball v. United States*, 470 U.S. 856, 864–65 (1985)). "[T]he collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence." *Id. See also Sibron v. New York*, 392 U.S. 40, 55 (1968) ("acknowledg[ing] the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences").

In addition, vacatur of a count of conviction always has the potential to reopen a federal prisoner's aggregate sentence. Under § 2255(b), if a district court "finds ... that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack," the court has discretion to "resentence" the prisoner "as may appear appropriate." *See Kaziu*, 108 F.4th at 87; *United States v. Peña*, 58 F.4th 613, 618–20 (2d Cir. 2023) (holding that § 2255(b) authorizes district court to conduct *de novo* resentencing upon vacating count of conviction). Petitioner sought such a remedy. Most fundamentally, "conviction and punishment ... for an act that the law does not make

criminal ... inherently results in a complete miscarriage of justice.'" *Davis v. United States*, 417 U.S. 333, 346 (1974). Thus, the correct rule is also the simplest: " [A] conviction for a noncrime is always prejudicial error as a matter of law, regardless of the sentence and how it relates to other convictions and sentences from the same or other proceedings." *Ruiz*, 990 F.3d at 1035 (Wood, J., dissenting).

It is irrelevant that a special assessment does not constitute "custody" for purposes of § 2255(a), a point that drives the analysis in the Second, Third, and Seventh Circuits. *See, e.g.*, *Kassir*, 3 F.4th at 566; *Duka*, 27 F.4th at 195–96; *Ryan*, 688 F.3d at 849. At least with respect to prisoners who, like Petitioner, challenge convictions carrying consecutive sentences, the special assessment is not necessary to satisfy the statutory "custody" requirement—the consecutive sentence does that work. Under *Peyton*, "a prisoner serving consecutive sentences is 'in custody' under any one of them" for habeas purposes. 391 U.S. at 67. So § 2255(a)'s "custody" prerequisite is satisfied without regard to the special assessment.

## II. In The Alternative, This Court Should Hold This Petition For *Delligatti*.

If this Court is not inclined to grant immediate review, this petition should be held for *Delligatti*, and then granted if *Delligatti* prevails. Here, one of Petitioner's challenged § 924(c) convictions (Count 39) rests on the exact same predicate at issue in *Delligatti*—attempted murder in aid of racketeering, in violation of § 1959(a)(5), itself based on an attempted violation of New York's second-degree murder statute. *See* C.A. App. (Doc. 66), at 103–04 ¶ 92 (Count 39's predicate crime of violence was "the attempted murder of Miguel Parilla, charged in Racketeering Act Eleven of

Counts One and Two, and in Count Twenty-Two, of this Indictment"); *id.* at 70 ¶ 17(b) (Racketeering Act Eleven of Count One, alleging that Petitioner "unlawfully, intentionally, and knowingly attempted to murder Miguel Parilla, in violation of New York State Penal Law [§§] 110.00, 125.25, and 20.00"); *id.* at 74–75 ¶ 23 (Count Two, incorporating this Racketeering Act); *id.* at 90 ¶¶ 64–65 (Count Twenty-Two, alleging same attempted murder pursuant to § 1959(a)(5)). *Compare* Pet. for Cert. 11, *Delligatti* (§ 924(c) predicate was attempted second-degree murder under N.Y. Penal Law § 125.25(1)") *and United States v. Pastore*, 83 F.4th 113, 120 & n.5 (2d Cir. 2023) (noting that "Delligatti was convicted of attempting to commit murder under N.Y. Penal Law § 125.25(1)"), *cert. granted sub nom. Delligatti.*

Before the District Court, Petitioner made the same argument that is advanced in *Delligatti*, namely, that "attempted murder ... can ... be accomplished by culpable omission, and thus do[es] not satisfy 18 U.S.C. § 924(c)(3)(A)." D. Ct. Doc. 64, at 6. While Petitioner's § 2255 motion was pending, that argument was foreclosed by the Second Circuit's *en banc* decision in *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (*en banc*). However, as the petition for a writ of certiorari in *Delligatti* explains (at 20–26), *Scott* was wrongly decided, and the correct analysis is that of the Courts of Appeals on the short side of the split that this Court granted certiorari to resolve. *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018); *United States v. Martinez-Rodriguez*, 857 F.3d 282 (5th Cir. 2017).

Section 924(c)(3)(A)'s elements clause applies only where a crime "has as an element the *use*, attempted *use*, or threatened *use of physical force*." (emphases

added). But where an offense can be committed by "total inaction," the defendant may "exert no physical force at all on the victim." *United States v. Harris*, 88 F.4th 458, 464 (3d Cir. 2023) (Jordan, J., concurring in denial of rehearing *en banc*). Such a crime, even if it results (or is calculated to result) in serious bodily injury or death, does not necessarily involve the use of physical force.

New York State's second-degree intentional murder offense, § 125.25(1), is an example of such a crime. As state appellate courts interpreting that statute have held, § 125.25(1), like other New York State homicide offenses, can be violated by "failure to perform a legally imposed duty." *People v. Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992). New York State courts have thus upheld the convictions of a father who was charged with the "omission" of "withholding medical care" from a fatally sick child, *id.* at 848; and of a mother who "fail[ed] to seek medical attention for [her] boy." *People v. Best*, 609 N.Y.S. 2d 478, 480 (N.Y. App. Div. 1994). *See also People v. Wong*, 619 N.E.2d 377, 380 (N.Y. 1993) (accepting the legal validity of prosecuting "passive" parent who "failed to seek medical assistance" after other parent violently shook child). When a crime is committed by failing to take any action, it cannot be said that the defense "use[d] ... physical force" against the victim.

That conclusion flows from § 924(c)(3)(A)'s text, construed in light of the plain meaning of the statutory terms. First, "the word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." *United States v. Castleman*, 572 U.S. 157, 170–71 (2014). It is unnatural to say that a person "made" physical force his "instrument" by doing nothing. This Court's cases

have consistently understood the term "use" to refer to "active employment." *Bailey v. United States*, 516 U.S. 137, 143 (1995). *See also id.* at 145 (dictionary definitions of "use" "imply action and implementation"); *Voisine v. United States*, 579 U.S. 686, 692–93 (2016) (noting that "[d]ictionaries consistently define the noun 'use' to mean the 'act of employing' something," and construing use to require "active employment"). Next, the phrase "physical force" "plainly refers to force exerted by and through concrete bodies." *Johnson v. United States*, 559 U.S. 133, 138 (2010). That phrase requires the kind of tangible force that produces "the acceleration of mass." *Id.* at 139. Finally, § 924(c)(3)(A) demands not just force but "violent force." *See id.* at 140. Allowing a dependent to starve or die for want of medical attention, does not involve "violent" or "substantial" force "strong enough to constitute power." *Johnson*, 559 U.S. at 140, 142. At a minimum, the rule of lenity compels Petitioner's construction. *See Scott*, 990 F.3d at 137 (Leval, J., dissenting).

If the defendant prevails in *Delligatti*, Petitioner's Count 39 § 924(c) conviction will lack any valid predicate. In that case, but for the invocation of the concurrent sentence doctrine, he would be entitled to vacatur of that count and *de novo* resentencing under *Kaziu*. Thus, if this Court wishes to assure itself that resolution of Petitioner's first question presented would have practical impact, this Court could opt to hold this petition for *Delligatti*, and then, if the defendant prevails there, grant this petition on the concurrent-sentence-doctrine issue. To be clear, Petitioner maintains that the first question presented warrants review

regardless of the outcome in *Delligatti*, but this Court could permissibly take the conservative course of a hold with view to a grant as well.

## CONCLUSION

The petition for a writ of certiorari should granted. In the alternative, the petition should be held for *Delligatti*.

Respectfully submitted,

/s/
Daniel Habib
*Counsel of Record*
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417–8742
daniel_habib@fd.org

September 9, 2024