No. 24–5529

In the
Supreme Court of the United States

Jose Muyet,

*Petitioner*,

v.

United States of America,

*Respondent*.

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

# REPLY BRIEF FOR PETITIONER

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### 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.

1. As the Petition showed, the Circuits are split on the question whether the concurrent sentence doctrine applies on collateral review of federal convictions. The BIO does what it can to minimize the split, arguing that the Fourth, Eight, Ninth, Tenth, or D.C. Circuits "have not confronted in published opinions the circumstances presented here—where a defendant's collateral attack on certain convictions, even if successful, would not affect separate convictions and life sentences and the defendant has failed to identify adverse collateral consequences stemming from the challenged convictions." BIO 17. Whittling a Petition down to the finest of fine-grained facts is one way to finesse an obvious Circuit split, but it isn't a sound one. Each of the Circuits just listed has made crystal clear that the doctrine does not apply to federal convictions, period, and Respondent has identified no decision from any of these Courts of Appeals (or the districts that they comprise) invoking the doctrine to decline a 28 U.S.C. § 2255 movant's request for relief.

Start with the Ninth Circuit. As Respondent concedes, "the Ninth Circuit's decision in *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984) (*en banc*) 'reject[ed] the use of the concurrent sentence doctrine as a discretionary means of avoiding the review of criminal convictions.'" BIO 18 (quoting 730 F.2d at 1260).

Respondent points out that *DeBright* was a direct appeal, but in the next breath concedes that "[t]he Ninth Circuit has subsequently declined to apply the concurrent-sentence doctrine in a collateral challenge." BIO 18 (citing *Alaimalo v. United States*, 645 F.3d 1042, 1050 (9th Cir. 2011)). Respondent waves *Alaimalo* away too, making the bald assertion that "the brief statement of the panel majority in that case"—which is another way of saying "the holding"—would not "necessarily be deemed binding by a future panel." BIO 19. Why not? Make no mistake, declining to apply the concurrent sentence doctrine was integral to *Alaimalo*'s holding: The disposition of that case was the reversal of the denial of habeas corpus relief and remand for vacatur of certain convictions, notwithstanding concurrent life sentences on other unchallenged counts. So it is the law of the Ninth Circuit. *See, e.g.*, *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (*en banc*). Moreover, district courts within the Ninth Circuit have had no difficulty extracting from *DeBright* and *Alaimalo* the rule that the doctrine cannot bar collateral review of a conviction. *See* Pet. 14–15 (collecting cases); *see also Colino v. United States*, 2012 WL 1198446, at *11 n.6 (C.D. Cal. Apr. 9, 2012) (citing *Alaimalo* for the proposition that "adverse collateral consequences flow from a prior conviction even when the petitioner is serving a life sentence for a separate conviction"). Respondent does not address these cases and offers no reason to believe that any judge within the Ninth Circuit has applied, or would apply, the doctrine to a case like Petitioner's.

Likewise, the Eighth Circuit has squarely stated, following the rationale of *Ray v. United States*, 481 U.S. 736 (1987) (*per curiam*), that a special assessment

precludes the application of the concurrent sentence doctrine to conviction challenges on both direct and collateral review. In fact, the Eighth Circuit has done that three times in three recent published opinions, repeating: "[T]he special assessment imposed on each count of conviction constitutes sufficient prejudice to require § 2255 review of a concurrent conviction's validity." *United States v. Jefferson*, 60 F.4th 433, 436 (8th Cir. 2023); *Oslund v. United States*, 944 F.3d 743, 746 n.2 (8th Cir. 2019) (same); *Eason v. United States*, 912 F.3d 1122, 1123 (8th Cir. 2019) (same). The BIO dismisses this as "apparent dictum" (at 18), but once again offers no example of any judge within the Eighth Circuit treating this language in this way, and no evidence that an Eighth Circuit district judge would feel free to disregard these repeated statements—that is, no evidence that Petitioner's § 2255 would not have received merits review in the Eighth Circuit as well.

Likewise, the Fourth Circuit has stated, in a § 2255 case, that "the concurrent sentence doctrine cannot be applied to avoid reviewing the validity of one of a defendant's convictions." *United States v. Charles*, 932 F.3d 153, 160 (4th Cir. 2019). If this too is "dictum" (BIO 18), district courts in that Circuit haven't gotten the memo. *See*, *e.g.*, *Graham v. United States*, 944 F. Supp. 2d 451, 453 (E.D.N.C. 2013) (on § 2255 review, vacating felon in possession conviction notwithstanding concurrent sentence on other count, explaining that "where one conviction is invalid, [the] concurrent sentence doctrine is inapplicable (citing *United States v. Hill*, 859 F.2d 325, 326 (4th Cir. 1988), discussed *infra* § II)); *Greenwood v. United States*, 2012 WL 5866253 (E.D.N.C. Nov. 19, 2012) (same as

*Graham*, explaining that "the best interests of justice require that [the § 2255 movant] be afforded relief from a conviction of which he is actually innocent").

2. Respondent also labors to show that review would have no practical benefit for Petitioner. BIO 12–14. Respondent is wrong. First, Respondent ignores the $50 special assessment imposed on each of the 10 challenged 18 U.S.C. § 924(c) counts, a direct (not collateral) consequence of those convictions. Second, under the intervening decision in *Kaziu v. United States*, 108 F.4th 86 (2d Cir. 2024), Petitioner, if he succeeded in vacating even one § 924(c) count, would be entitled as a matter of Second Circuit law to in-person, *de novo* resentencing on all counts. At that proceeding, he would no longer be subject to a mandatory life sentence on any count, and could mount a plausible argument for a substantial sentence reduction in light of his personal mitigating circumstances, including his extraordinary rehabilitative efforts during the past three decades spent in federal prison.

Respondent misconstrues the relevance of *Kaziu*. Petitioner does not cite *Kaziu* to make a "factbound challenge" to the Court of Appeals's decision affirming application of the concurrent sentence doctrine. BIO 14. Rather, Petitioner relies on *Kaziu* to show that this Petition could indeed have "meaningful practical consequences" for him. BIO 21. Put differently, the analysis of the courts below on which Respondent rests its harmlessness argument—namely, that, after reviewing the papers, the district judge decided that she would not reduce Petitioner's aggregate sentence—does not survive *Kaziu* as a matter of Second Circuit law. That means that this Court could grant certiorari, confident that the disposition of the

Petition would matter. If he prevailed here, Petitioner would obtain merits review of his § 924(c) convictions, and if successful in challenging even one of them—as he would be if the defendant wins in *Delligatti v. United States*, No. 23–825 (argued Nov. 12, 2024, *see infra* § II—he would not only recoup any special assessment paid, but, much more importantly, would receive *de novo* resentencing under controlling Second Circuit precedent, and a realistic chance at the "relief" of "release" from "custody." 28 U.S.C. § 2255(a).

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

In the alternative, and at a minimum, the Petition should be held for *Delligatti*. If the defendant prevails in *Delligatti*, then Petitioner's Count 39 conviction under § 924(c) will be indisputably invalid, because it was predicated on the exact same offense at issue in *Delligatti*—attempted murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), itself predicated on attempted second-degree murder in violation of New York State Law, N.Y. Penal Law §§ 110.00 and 125.25(1). *See* Pet. 23–24. Not only would Count 39 be invalid, but so would Count 34, which was predicated on conspiracy to commit murder and attempted murder. *See* C.A. App. (Doc. 66), at 101; *United States v. Heyward*, 3 F.4th 75, 78 (2d Cir. 2021) (holding, in light of *United States v. Davis*, 588 U.S. 445 (2019), that conspiracy to commit murder in aid of racketeering is not a § 924(c) crime of violence). Indeed, depending on this Court's disposition of *Delligatti*, it is possible that Counts 31, 32, 33, 35, 38, and 42 would fail as well. Each of those was a § 924(c) count predicated on conspiracy to commit murder and completed murder.

*See* C.A. App. (Doc. 66), at 99–105. And in its *Delligatti* briefing, Respondent has argued that those offenses are "equivalent." Br. for United States 9, *Delligatti*, *supra* (U.S. Sept. 30, 2024) ("Petitioner's attempted murder offense ... is equivalent for present purposes to a completed murder offense.").

The BIO resists even a hold, reiterating the argument that vacatur of any of Petitioner's § 924(c) counts would have "no meaningful practical consequences," such that certiorari review would not be "appropriately exercised." BIO 20–21. That argument is incorrect, *see supra* § I, but even if it were right, it would not prevent this Court from GVR'ing this Petition in light of *Delligatti*. The concurrent sentence doctrine, to the extent that it can be justified at all in this context, is at most "a rule of judicial convenience." BIO 10 (quoting *Benton v. Maryland*, 395 U.S. 784, 791 (1969)). But if one, two, or as many as eight of Petitioner's convictions were concededly invalid in light of *Delligatti*, there would not only be no justification for leaving them intact, but there would also be no inconvenience to the lower courts in vacating them on what would presumably be Respondent's consent. For that reason, multiple Circuits have held that—whatever the propriety of the concurrent sentence doctrine in other situations—the doctrine is inapplicable, even on collateral review, where Respondent concedes that a conviction is invalid. *E.g.*, *Hill*, 859 F.2d at 326 (4th Cir.) (in § 2255 case, refusing Respondent's request to invoke doctrine and vacating "invalid conviction" despite concurrent sentence); *United States v. Evans*, 572 F.2d 455, 477 (5th Cir. 1978) (same); *United States v. Jones*, 28 F.3d 1574, 1582 (11th Cir. 1994) (same), *vacated on other grounds sub nom. Jones v. United States*,

516 U.S. 1022 (1995). Thus, if the defendant prevails in *Delligatti*, plenary review on the first question presented would be warranted, but at the very least, a GVR—which would permit the lower courts to vacate convictions whose infirmity would then be beyond doubt—would be proper.

## CONCLUSION

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

Respectfully submitted,

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