

IN THE SUPREME COURT OF THE UNITED STATES

CESAR YOALDO CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.C.)

United States v. Castillo, No. 08-cr-134 (Jan. 7, 2011)

Castillo v. United States, No. 16-cv-431 (Mar. 24, 2020)

United States Court of Appeals (4th Cir.):

United States v. Castillo, No. 20-6767 (Feb. 27, 2024)

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No. 24-5535

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is available at 2024 WL 809690. The opinion of the district court (Pet. App. A9-A25) is available at 2020 WL 1490727.

JURISDICTION

The judgment of the court of appeals (Pet. App. A8) was entered on February 27, 2024. A petition for rehearing en banc was denied on April 26, 2024 (Pet. App. A33). On July 15, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 9, 2024, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of North Carolina, petitioner was convicted on one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); three counts of assault with a dangerous weapon in aid of racketeering, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(3) and 2; and two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006). Judgment 1. The court sentenced petitioner to 392 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

Petitioner later filed a motion to vacate his sentence under 28 U.S.C. 2255, which was denied. Pet. App. A9-A25. The court of appeals granted a certificate of appealability and affirmed. Id. at A1-A7.

1. Petitioner was a member of La Mara Salvatrucha, commonly known as MS-13. Pet. App. A3. As a member of the gang, he "participated in various racketeering activities" in North Carolina with his fellow gang members, "including two shootings" in 2008. Ibid.

In February 2008, security guards at a nightclub in Charlotte refused to permit petitioner and other MS-13 gang members to enter when they tried to bring in an open bottle of beer. Pet. App. A3, A11. Upon being turned away, the gang members stated, "We are Mara Salvatrucha, and we will kill all of you," and then began shooting their firearms at the crowd. Id. at A3. The club owner and a patron were shot. Ibid.

Later that same month, petitioner and his fellow gang members were outside another Charlotte night club when a car containing rival gang members arrived. Pet. App. A3, A12. "Gang signs were flashed, then weapons." Id. at A3. The MS-13 members got into their own vehicle and chased the car containing the rival gang members. Ibid. Petitioner "sat in the back seat, window cracked, emptying his weapon into the other vehicle. One of his bullets struck a rival gang member." Id. at A3-A4.

2. In July 2009, a grand jury in the Western District of North Carolina charged petitioner and 25 other MS-13 gang members with numerous crimes, including racketeering and firearms offenses. Pet. App. A34-A138. The indictment charged petitioner in particular with one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of being an accessory after the fact to murder, in violation of 18 U.S.C. 3 and 2; three counts of VICAR assault with a dangerous weapon, in violation of 18 U.S.C. 1959(a)(3) and 2; three counts of using or carrying a

firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006); one count of conspiring to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); and one count of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2. Pet. App. A9-A10.

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

¹ At the time of petitioner's offenses, as well as at the time of his sentencing, Section 924(c) provided for a mandatory consecutive 25-year imprisonment sentence for a defendant's "second or subsequent" Section 924(c) violation, including if a defendant was convicted of that violation in the same proceeding as the defendant's first Section 924(c) violation. 18 U.S.C. 924(c)(1)(C)(i) (2006); see Deal v. United States, 508 U.S. 129, 132-137 (1993). Congress has since amended that provision. First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5221-5222.

federal felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c) (3) (B). In United States v. Davis, 588 U.S. 445 (2019), however, this Court held that the residual clause is unconstitutionally vague.

This Court employs a "categorical approach" to determine whether an offense is a crime of violence under Section 924(c) (3) (A). United States v. Taylor, 596 U.S. 845, 850 (2022). Under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis v. United States, 579 U.S. 500, 504 (2016). The categorical approach assesses whether the "least culpable" conduct that could satisfy the offense elements in a hypothetical case would "necessarily involve[]," Borden, 593 U.S. at 424 (plurality opinion), the "use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c) (3) (A). The defendant's actual conduct is "irrelevant." Borden, 593 U.S. at 424.

If, however, the statute in question lists multiple alternative elements, it is "divisible" into different offenses and a court may apply the "modified categorical approach" to classify a conviction. Mathis, 579 U.S. at 505-506 (citations omitted). Under the modified categorical approach, a court may

"look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant" was found to have committed. Ibid.

b. Although the underlying crime of violence for a Section 924(c) offense need not itself be charged as a separate count, see United States v. Rodriguez-Moreno, 526 U.S. 275, 280 (1999), the Section 924(c) charges at issue here (Counts 36 and 40) were premised on the VICAR assaults with a dangerous weapon, in violation of 18 U.S.C. 1959(a)(3) and 2, alleged in Counts 35 and 39 of the indictment. Pet. App. A93-A94, A97-A98.

Section 1959(a) prohibits, inter alia, "assault[] with a dangerous weapon" against any person, "in violation of the laws of any State or the United States," "for the purpose of * * * maintaining or increasing position in an enterprise engaged in racketeering activity" or "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a). The charges of VICAR assault with a dangerous weapon alleged in Counts 35 and 39 were premised in part on petitioner's alleged violation of North Carolina General Statutes Annotated § 14-32 (West 1994), which criminalizes assault

with a deadly weapon.² The VICAR offense charged in Count 35 involved petitioner's participation in the first nightclub shooting; and the VICAR offense charged in Count 39 involved petitioner's participation in the second nightclub shooting, during which petitioner discharged his firearm and struck a victim with one of his shots. See p. 3, supra; Pet. App. A11-A12.

c. Pursuant to a plea agreement, petitioner pleaded guilty before a magistrate judge to one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d) (Count 1); three counts of VICAR assault with a dangerous weapon, in violation of 18 U.S.C. 1959(a) (3) and 2 (Counts 35, 37, 39); and two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006) (Counts 36, 40). Pet. App. A10; D. Ct. Doc. 1551, at 1-26 (July 10, 2013). With

² At the time petitioner was prosecuted, that statute provided:

- (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
- (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
- (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

N.C. Gen. Stat. Ann. § 14-32 (1999). The statute has since been amended to add additional provisions covering assaults on emergency workers. See N.C. Gen. Stat. Ann. § 14-32 (West 2023).

respect to the VICAR counts, the indictment charged and petitioner pleaded guilty to "knowingly" assaulting each victim with a firearm. Pet. App. A21-A22; D. Ct. Doc. 1551, at 9, 12. Petitioner also agreed to waive his right to collaterally attack his conviction on any ground other than prosecutorial misconduct or ineffective assistance of counsel. Pet. App. A4. In exchange, the government dismissed several counts.³ D. Ct. Doc. 1551, at 17-21.

At the December 2010 sentencing hearing, the district court confirmed the existence of a factual basis to support the plea based on the facts set forth in the Presentence Investigation Report, which petitioner admitted. Pet. App. A11-A12. The court sentenced petitioner to 292 months of imprisonment, consisting of four two-month terms (on Counts 1, 35, 37, 39), all to run concurrently, to be followed by a consecutive term of 90 months on Count 36⁴ and another 300 months on Count 40. Id. at A27-A28. The court also imposed a five-year term of supervised release. Id. at A29. Petitioner did not appeal.

3. In 2015, this Court held in Johnson v. United States, 576 U.S. 591, that the residual clause of the definition of

³ Petitioner initially also pleaded guilty to Count 26, but the government later dismissed that count. Pet. App. A10 n.1.

⁴ The court imposed a sentence below the ten-year mandatory minimum for discharging a firearm, 18 U.S.C. 924(c), based on the government's substantial assistance motion under 18 U.S.C. 3553(e). D. Ct. Doc. 1560, at 9 (July 10, 2013).

"violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), is unconstitutionally vague. Johnson, 576 U.S. at 594-597; see Welch v. United States, 578 U.S. 120, 122, 130, 135 (2016) (holding that Johnson announced a new rule with retroactive effect on collateral review).

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 in light of Johnson. Pet. App. A12. The district court stayed the motion pending Davis, 588 U.S. at 470, in which this Court held that Section 924(c)'s residual clause is itself unconstitutionally vague. Pet. App. A13. Following that decision, petitioner asserted that his Section 924(c) convictions are invalid on the theory that the underlying offense of VICAR assault with a dangerous weapon no longer qualifies as a crime of violence after Davis. Id. at A17. In opposition, the government both responded on the merits and also invoked petitioner's collateral-attack waiver and the general bar on collateral review of claims that were procedurally defaulted in the original proceedings. Id. at A13.

The district court denied the Section 2255 motion. Pet. App. A9-A25. The court first observed that petitioner was not entitled to any relief because he had waived the ability to bring a collateral challenge and also was unable to overcome his procedural default. Id. at A14-A17. And it determined that even if

petitioner's claims were not waived and procedurally defaulted, they would "fail on the merits." Id. at A17.

In particular, the district court explained that the Section 924(c) convictions' underlying offense of VICAR assault with a dangerous weapon qualifies as a crime of violence under Section 924(c) (3) (A)'s elements clause because VICAR assault with a dangerous weapon requires proof of the elements of generic federal assault with a dangerous weapon. Pet. App. A20-A21. And the court observed that the generic federal offense requires the "use, attempted use, or threatened use of physical force against the person of another." Id. at A21.

The district court also determined that the state-law element of the VICAR offense satisfied Section 924(c) (3) (A)'s elements clause. Pet. App. A22-A23. Emphasizing that petitioner had pleaded guilty to "'knowing' assault [with a dangerous weapon] in violation of [North Carolina General Statutes] § 14-32," the court found that the record showed that petitioner's guilty plea was based in part on his admission to violations of Sections 14-32(a) or (c), "which require an intent to kill, rather than subsection (b), which requires only culpable negligence," and therefore satisfied the crime-of-violence definition. Id. at A22, see id. at A21-A24.

The district court denied a certificate of appealability. Pet. App. A24.

4. The court of appeals granted a certificate of appealability and affirmed. Pet. App. A1-A7. The court stated that the outcome was controlled by its recent decision in United States v. Thomas, 87 F.4th 267 (4th Cir. 2023), cert. denied, No. 23-1168 (Oct. 7, 2024), which recognized that VICAR assault with a deadly weapon premised in part on violations of certain Virginia statutes continues to qualify as a crime of violence under Section 924(c) (3) (A)'s elements clause. Pet. App. A6-A7.

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

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

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

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

b. In petitioner's case, the court of appeals observed that it had already held in Thomas "that VICAR assault with a dangerous weapon was itself a valid crime of violence and that there was no need to look through the VICAR offense to its underlying predicates to make that determination." Pet. App. A6. Accordingly, the court affirmed the district court "[f]or the reasons set forth in Thomas," without reaching the government's alternative arguments. Id. at A7; see id. at A6-A7.

ARGUMENT

Petitioner contends (Pet. 7-16) that the court of appeals' classification of each of his VICAR offenses as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) should have been restricted solely to the elements of the state crime underlying the VICAR offenses, without any reference to the additional elements necessary to render the state crime a federal VICAR offense. Petitioner's challenges to the court's analysis of the question presented lack merit for the reasons explained on pages 10 to 14 of the government's brief in opposition to the petition for a writ of certiorari in Thomas v. United States, No. 23-1168 (July 31, 2024). And for the reasons explained in that brief as well as the government's brief in opposition to certiorari in Kinard v. United States, No. 24-5042 (Sept. 9, 2024),⁵ petitioner has not identified any circuit conflict that would warrant review by this Court. See Br. in Opp. at 14 & n.3, Kinard, supra (No. 24-5042); Br. in Opp. at 15-16, Thomas, supra (No. 23-1168).⁶ Petitioner agrees (Pet.

⁵ We have served petitioner with a copy of the government's briefs in opposition in Thomas and Kinard, which are also available on this Court's online docket.

⁶ In a case decided after petitioner filed his petition for a writ of certiorari, the Ninth Circuit rejected the government's reliance on the generic federal offense element of a VICAR murder to satisfy Section 924(c)(3)(A)'s crime-of-violence definition, but only "[i]n the context of th[at] case," where the court determined that "[n]othing in the record suggests that generic murder supplied the definition of murder for [the defendant's] charged VICAR offenses, or that the government was prepared to prove generic murder at trial." United States v.

9-10) that "the legal issues presented by this case" are the same as those presented in the petitions for writs of certiorari in Thomas and Kinard. This Court recently denied certiorari in both of those cases. See Thomas, No. 23-1168 (Oct. 7, 2024); Kinard, No. 24-5042 (Oct. 15, 2024). The same result is warranted here, especially in light of the independent grounds for affirmance relied upon by the district court.

Contrary to petitioner's suggestion (Pet. 3, 16), this Court should not hold this case pending its decision in Delligatti v. United States, No. 23-825 (argued Nov. 12, 2024). The petitioner in Delligatti contends that attempted murder in aid of racketeering, in violation of 18 U.S.C. 1959(a), based on New York attempted murder, N.Y. Penal Law § 125.25(1), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3) on the theory that the crime can be committed by an act of omission and therefore does not "ha[ve] as an element the use, attempted use, or

Elmore, 118 F.4th 1193, 1200-1201 (2024); id. at 1201 ("Where, as here, there is no evidence that a generic offense was an element of the charged VICAR offense, courts should look through to elements of the charged state-law predicate violation to determine whether the VICAR offense satisfies § 924(c)(3)(A), the elements clause of § 924(c)(3)."). The court specifically declined to consider more broadly "whether generic murder is an independent element of VICAR murder, such that it should be charged or instructed." Id. at 1200. Accordingly, in another case, where the generic federal offense element is more specifically "charged or instructed," the Ninth Circuit might well resolve the issue differently, and the Ninth Circuit's decision therefore does not squarely conflict with the decision below in this case.

threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Here, however, neither in the petition nor at any other point has petitioner contended that VICAR assault with a dangerous weapon can be committed by omission. Because petitioner would not benefit even if this Court in Delligatti interprets Section 924(c)(3)(A) to exclude crimes that can be committed by an act of omission, there is no basis to hold this case for Delligatti.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2024