No. 24-

IN THE

Supreme Court of the United States

AZIBO AQUART,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In federal criminal prosecutions, a district court has jurisdiction only over "offenses against the laws of the United States." 18 U.S.C. § 3231. Here, on a remand for resentencing, Petitioner argued that his indictment failed to allege an offense against the laws of the United States and—because this error was jurisdictional—the mandate rule did not bar the court from considering this issue. The Second Circuit held that challenges to the sufficiency of an indictment are categorically non-jurisdictional. The question presented is:

Whether a defect in an indictment is categorically a non-jurisdictional error, even if the indictment alleges conduct that is beyond the scope of the charging statute.

PARTIES TO THE PROCEEDING

Petitioner is Azibo Aquart.

Respondent is the United States of America.

No parties are corporations.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the U.S. District Court for the District of Connecticut and the U.S. Court of Appeals for the Second Circuit:

United States v. *Aquart*
No. 3:06-cr-160-JBA (D. Conn. Oct. 18, 2021)

United States v. *Aquart*
No. 12-5086 (2d Cir. Dec. 20, 2018)

United States v. *Aquart*
No. 21-2763 (2d Cir. Jan. 29, 2024)

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

CONSTITUTIONS AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Azibo Aquart respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The Second Circuit's opinion is reported at *United States* v. *Aquart*, 92 F.4th 77 (2d Cir. 2024), and reproduced at Pet. App. 1a–44a.

STATEMENT OF JURISDICTION

The Second Circuit entered judgment on January 29, 2024, and denied a timely petition for rehearing on May 14, 2024. Pet. App. 45a. On September 4, 2024, Justice Sotomayor extended the time to file this petition to October 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case presents an important and recurring question that has split the circuits.

Federal district courts have original and exclusive jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231. Though this jurisdictional grant is broad, a district court has no power to hear a criminal case that exceeds its bounds. So if a federal indictment does not allege an offense against the laws of the United States, the district court must dismiss the indictment for lack of jurisdiction.

This conclusion is straightforward, but the Second Circuit held the opposite below. Pet. App. 11a. Petitioner Azibo Aquart argued that the conduct alleged in his indictment cannot, as a matter of law, constitute offenses against the laws of the United States, meaning the district court lacked jurisdiction over his convictions. *Id.* The Second Circuit, however, concluded that any defect in Mr. Aquart's indictment was not jurisdictional and therefore could not be raised on a remand for resentencing. *Id.*

In so holding, the Second Circuit deepened a circuit split on whether indictment defects are categorically non-jurisdictional. Like the court below, the Fifth, Sixth, Seventh, Tenth, and D.C. Circuits agree that indictment defects are *never* jurisdictional—even where the indictment alleges a "non-offense" under federal law. The First and Eleventh Circuits, by contrast, have rejected that categorical approach, recognizing that not all indictment defects are the same. For example, an indictment that alleges a federal offense but is missing a specific fact necessary to prove a sentencing enhancement presents no jurisdictional problem. But an indictment that alleges conduct that is outside

the sweep of the federal charging statute—and therefore does not constitute a federal offense at all—lies beyond the federal courts' jurisdiction. This case involves the latter.

The Court should resolve this split by reviewing and reversing the decision below.

STATEMENT OF THE CASE

Over a decade ago, Mr. Aquart was found guilty on one conspiracy and three substantive counts of violent crimes in aid of racketeering ("VICAR"), see 18 U.S.C. § 1959(a)(1), (a)(5); three substantive counts of murder in connection with a conspiracy to traffic crack cocaine in an amount proscribed by 21 U.S.C. § 841(b)(1)(A) ("drug-related murder"), see *id.* § 848(e)(1)(A); and one count of conspiracy to traffic 50 grams or more of crack cocaine, see *id.* §§ 841(a)(1), (b)(1)(A)(iii), 846. See Pet. App. 3a. A jury sentenced him to death. *Id.*

The Second Circuit affirmed the conviction but vacated the sentence. Pet. App. 3a. On remand, the prosecution declined to pursue the death penalty. *Id.* Mr. Aquart received three mandatory terms of life imprisonment for the substantive VICAR murders, four terms of 40 years of imprisonment for the three drug-related murders and the single drug conspiracy count, and one 10-year prison term for the VICAR conspiracy. *Id.* at 4a. All sentences were to run concurrently. *Id.*

After the remand, and with new counsel, Mr. Aquart raised new challenges to his conviction, including the sufficiency of the indictment for his VICAR and drug-related murder convictions. Pet. App. 4a–5a. With respect to the VICAR counts, Mr. Aquart argued that the Connecticut statutes underlying his convictions can-

not, as a matter of law, constitute VICAR murder predicates. *Id.* at 12a. And as to the drug-related murder counts, Mr. Aquart contended that, by the time of his trial, Congress had raised the minimum drug quantity above the amount stated in his indictment. *Id.* at 14a–15a. The district court, however, refused to consider these new arguments, concluding that the mandate rule prevented it from reconsidering the guilt component of Mr. Aquart's judgment. *Id.* at 10a.

On his second appeal to the Second Circuit, Mr. Aquart argued that the mandate rule does not bar his arguments because the indictment's defects are jurisdictional. Pet. App. 10a. He contended that his indictment alleged specific conduct that was beyond the reach of the charging statutes; accordingly, the court lacked jurisdiction over both the VICAR offenses and the drug-related murder offenses. *Id.* at 11a–12a, 14a–15a.

The Second Circuit rejected Mr. Aquart's argument, holding that "his challenges do not implicate jurisdiction." Pet. App. 11a. The court of appeals relied on this Court's opinion in *United States* v. *Cotton*, 535 U.S. 625 (2002), as well as its own precedent in *United States* v. *Rubin*, which held that jurisdiction exists "even where an indictment alleges conduct that does not state an offense under the statute purportedly violated." 743 F.3d 31, 37 (2d Cir. 2014). The Second Circuit thus concluded that any alleged defects in Mr. Aquart's indictment did not deprive the district court of jurisdiction over the VICAR and drug-related murder charges. Pet. App. 13a–15a. And because the indictment defects were non-jurisdictional, the Second Circuit concluded that the mandate rule barred consideration of those challenges.

Mr. Aquart timely petitioned for panel and en banc rehearing, which were denied. Pet. App. 45a.

REASONS FOR GRANTING THE PETITION

I. Courts of appeals are split on the question presented.

The circuit split at issue arises from *Cotton*. There, the Fourth Circuit vacated the sentences of seven people convicted of drug offenses because their indictments omitted the drug quantities. 535 U.S. at 628–29. This Court then granted certiorari to decide "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court." *Id.* at 627. The Court's answer was no: Failing to allege drug quantities is not a jurisdictional error because such "defects in an indictment do not deprive a court of its power to adjudicate a case." *Id.* at 630–34.

A. Six circuits read *Cotton* to require that indictment defects are categorically non-jurisdictional.

The Second, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits interpret *Cotton* to mean that indictment defects are never jurisdictional.

1. The Second Circuit in *Rubin* confronted a challenge to a conviction under the Unlawful Internet Gambling Enforcement Act, see 31 U.S.C. §§ 5361–5367. 743 F.3d at 34. The defendant, who pleaded guilty before the district court, argued on appeal that his conduct was exempt from prosecution under the statute because he only handled gambling funds. *Id.* at 35. Although a guilty plea would normally preclude raising this argument on appeal, he asserted that his challenge was jurisdictional. *Id.* at 35–36. He contended that, because the indictment failed to allege a federal offense against him, the district court lacked

subject-matter jurisdiction to enter his guilty plea. *Id.* at 36.

The Second Circuit rejected this argument. *Id.* at 37. It interpreted *Cotton* to require a categorical approach to indictment defects: "[A] district court has 'jurisdiction' even where an indictment alleges conduct that does not state an offense under the statute purportedly violated." *Id.* Thus, in the Second Circuit, "[e]ven a defendant's persuasive argument that the conduct set out in the indictment does not make out a violation of the charged statute does not implicate subject-matter jurisdiction." *United States* v. *Yousef*, 750 F.3d 254, 260 (2d Cir. 2014), *abrogated on other grounds as recognized in United States* v. *Van Der End*, 943 F.3d 98, 104–05 (2d Cir. 2019); see also Pet. App. 11a–15a.

2. The Fifth Circuit in *United States* v. *Scruggs* reviewed a collateral challenge to a conviction for aiding and abetting honest-services mail fraud. 714 F.3d 258, 261 (5th Cir. 2013). After the petitioner's guilty plea, this Court held that the statute for honest-services fraud requires proof of a bribe. *Id.* at 262 (citing *Skilling* v. *United States*, 561 U.S. 358 (2010)). The petitioner moved to vacate his sentence in light of *Skilling*, but the district court ruled that the petitioner had procedurally defaulted by pleading guilty. *Id.* at 261. On appeal, he argued that his challenge was jurisdictional because the charging document stated a "non-offense." *Id.* at 262.

Citing this Court's language in *Cotton* that "defects in an indictment do not deprive a court of its power to adjudicate a case," the Fifth Circuit rejected the defendant's jurisdictional argument. *Scruggs*, 714 F.3d at 263 (quoting *Cotton*, 535 U.S. at 630). The court explained that although the failure to allege a bribe

might have rendered the indictment "*factually* insufficient, it did not divest the district court of subject matter jurisdiction over the case." *Id.*

3. The Sixth Circuit in *Vanwinkle* v. *United States* reviewed a collateral challenge to a conviction for unauthorized use of an access device under 18 U.S.C. § 1029. 645 F.3d 365, 367–68 (6th Cir. 2011). The petitioner, who had pleaded guilty, argued that he had not procedurally defaulted on his challenge because his indictment did not allege a violation of federal law and, therefore, the district court lacked jurisdiction. *Id.* at 368–69. The Sixth Circuit rejected this argument, citing *Cotton* and holding that the petitioner's claim was "more properly considered as a legal sufficiency challenge." *Id.* at 369.

4. The Seventh Circuit in *United States* v. *Perez* reviewed a direct challenge to a conviction for racketeering conspiracy under 18 U.S.C. § 1962(d). 673 F.3d 667, 668 (7th Cir. 2012). The defendant argued on appeal that the renumbering of the paragraphs in his indictment and the redaction of the allegations against his former co-defendants constituted a constructive amendment of the indictment, which violated the Grand Jury Clause of the Fifth Amendment. *Id.* at 669. Because the defendant had not objected in the district court, his challenge was subject to plain error review. *Id.* The defendant rejoined that the error was jurisdictional and therefore subject to *de novo* review. *Id.* at 670. But the Seventh Circuit concluded that, under *Cotton*, a defective indictment does not deprive a court of jurisdiction. *Id.*

Later, the Seventh Circuit acknowledged the "existence of a circuit split about the reach of *Cotton*," contrasting its own decision in *Perez* with the Eleventh Circuit's rule adopted in *United States* v. *Peter*, 310 F.3d 709, 715 (11th Cir. 2002) (per curiam), discussed

below. See *United States* v. *Lowe*, 512 F. App'x 628, 630 (7th Cir. 2013).

5. The Tenth Circuit in *United States* v. *De Vaughn* reviewed a challenge to a conviction for mailing threatening communications, including hoax anthrax letters that were addressed to the President of the United States. 694 F.3d 1141, 1142–43 (10th Cir. 2012). The defendant pleaded guilty before the district court. *Id.* at 1143. On appeal, however, he argued that his statements did not constitute true "threats," so his charging document did not allege offenses against the United States, depriving the district court of jurisdiction. *Id.* at 1143, 1146. The Tenth Circuit disagreed, reading *Cotton* to adopt a categorical rule that all "indictment defects are not jurisdictional," including "both omissions from the indictment and arguments that the indictment does not charge a crime against the United States." *Id.* at 1149 (cleaned up). Accordingly, the court of appeals concluded that "the objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Id.* (cleaned up).

6. The D.C. Circuit in *United States* v. *Delgado-Garcia* reviewed a direct appeal to three convictions for conspiring and attempting to induce illegal aliens to enter the country under 8 U.S.C. § 1324(a). 374 F.3d 1337, 1339 (D.C. Cir. 2004). The defendants argued that their indictments failed to state an offense against the laws of the United States because the charging statute does not apply extraterritorially and that this defect was jurisdictional. *Id.* at 1340–41. The court rejected this argument, concluding that "the substantive sufficiency of the indictment is a question that goes to the merits of the case, rather than the district court's subject-matter jurisdiction." *Id.* at 1342.

B. Two circuits have rejected the categorical approach to indictment defects.

The First and Eleventh Circuits have held that whether an indictment defect is jurisdictional depends on the type of defect.

1. The First Circuit in *United States* v. *Rosa-Ortiz* reviewed a direct appeal from a conviction for conspiracy to violate the Federal Escape Act, see 18 U.S.C. § 751(a). 384 F.3d 33, 34 (1st Cir. 2003). The defendants argued that the conduct charged in their indictments was outside the sweep of the charging statute. *Id.* at 36. Although the defendants had pleaded guilty, they argued that the court could still review their challenge because the indictment defect was jurisdictional. *Id.* The First Circuit agreed, holding that a federal court "lacks jurisdiction to enter a judgment of conviction when the indictment charges no offense under federal law whatsoever." *Id.*[1]

2. The Eleventh Circuit in *Peter* reviewed a petition for a writ of error coram nobis to a conviction for racketeering conspiracy based on predicate acts of mail fraud. 310 F.3d at 710–11. The petitioner argued that, in light of an intervening Supreme Court decision interpreting the mail fraud statute, his indictment failed to allege a federal offense. *Id.* at 711.

The court agreed, holding that coram nobis relief was warranted because the district court never had jurisdiction to enter the judgment of conviction. *Id.* at

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[1] In a subsequent case, the First Circuit described *Rosa-Ortiz* as using an "awkward locution" to describe "a non-waivable defect," since *Cotton* had since clarified that "an indictment's factual insufficiency does not deprive a federal court of subject matter jurisdiction." *United States* v. *George*, 676 F.3d 249, 259–60 (1st Cir. 2012). This limitation of *Rosa-Ortiz* is not relevant here, as this case does not involve factual insufficiency, but a non-offense.

716. The Eleventh Circuit relied primarily on *United States* v. *Meacham*, where the former Fifth Circuit held that "[t]he entry of a guilty plea does not act as a waiver of jurisdictional defects such as an indictment's failure to charge an offense." 626 F.2d 503, 510 (5th Cir. 1980). In other words, "a district court is without jurisdiction to accept a guilty plea to a 'non-offense.'" *Peter*, 310 F.3d at 713.

The Eleventh Circuit rejected the government's argument that *Cotton* had abrogated *Meacham*. See *id.* at 713–14. *Cotton*, the court explained, does not require a "categorical approach that treats all indictment problems the same way." *Id.* at 714 (quoting *McCoy* v. *United States*, 266 F.3d 1245, 1252–53 (11th Cir. 2001)). Under *Cotton*, some indictment defects, like "the failure to allege a fact requisite to the imposition of defendants' sentences"—as in *Cotton* itself—are non-jurisdictional. *Id.* But other defects, like alleging only "specific conduct that, as a matter of law, [is] outside the sweep of the charging statute," are jurisdictional. *Id.*

The Eleventh Circuit has since reaffirmed *Peter*. For example, it held that a defendant who pleaded guilty to Hobbs Act robbery and attempted robbery while carrying a firearm did not waive his argument that his crimes were not "crimes of violence" for the purpose of the firearms convictions under 18 U.S.C. § 924(c). *United States* v. *St. Hubert*, 909 F.3d 335, 344 (11th Cir. 2018), *abrogated on other grounds as recognized in United States* v. *Taylor*, 596 U.S. 845 (2022). The Eleventh Circuit reiterated that if the indictment did not allege offenses against the laws of the United States, then the district court lacked jurisdiction. *Id.*

II. The decision below is wrong.

Treating all indictment defects as categorically non-jurisdictional violates the jurisdictional statute's plain language. For a district court to have jurisdiction over a federal criminal prosecution, the indictment must allege an "offense[] against the laws of the United States." 18 U.S.C. § 3231. If a criminal indictment does not allege a federal offense, then the district court must dismiss the case for lack of jurisdiction. Under the categorical approach, however, "a district court has 'jurisdiction' even where an indictment alleges conduct that does not state an offense under" the laws of the United States. *Rubin*, 743 F.3d at 37.

The categorical approach would thus require federal courts to exercise jurisdiction in situations where it is clear that no federal offense has occurred. A prosecutor could simply slap the label of a federal criminal statute on an indictment, and the district court would be required to exercise exclusive jurisdiction over the case, even if it were evident from the face of the indictment that the conduct alleged did not—and never could—constitute a federal offense as a matter of law. The jurisdictional statute for federal crimes would provide no meaningful check on the federal courts' power. That cannot be right.

Nothing in *Cotton* compels this categorical approach. The indictment there clearly alleged conduct that fell within the charging statute—*i.e.*, an offense against the laws of the United States. The only question was whether omitting a fact necessary to a sentencing enhancement presented a jurisdictional issue. 535 U.S. at 627. This Court held that the answer is no because not every defect in an indictment implicates the court's subject-matter jurisdiction. See *id.* at 630–31. But that holding does not mean that *no* indictment defects are jurisdictional.

Consider the federal racketeering statute at issue in *Peter*. The term "racketeering activity" includes "any act or threat involving . . . dealing in a controlled substance." 18 U.S.C. § 1961(1). And a "controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V" of the Controlled Substances Act. 21 U.S.C. § 802(6). If a federal prosecutor files an indictment alleging that a defendant violated the racketeering statute by participating in a conspiracy to deal in sugar, it would be farcical to suggest that a federal court has jurisdiction to hear that case. The indictment does not just omit some fact relevant to a real federal crime; it facially alleges a *non-offense*: dealing in a substance not listed on any schedule of the Controlled Substances Act. Whether dealing in sugar violates the racketeering statute is not a merits question; the allegation is plainly beyond the sweep of the charging statute and thus beyond the federal courts' criminal jurisdiction.

Or consider the firearms statute in *St. Hubert*, which imposes additional penalties for individuals who use or carry a firearm during a "crime of violence." 18 U.S.C. § 924(c)(1)(A). A crime of violence is defined to mean a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." See *id.* § 924(c)(3)(A). If a federal prosecutor files an indictment alleging that an individual violated section 924(c) by carrying a firearm during a state cyberbullying offense, it would make no sense to say that the indictment alleges a federal crime. Cyberbullying is not a "crime of violence," and the section 924(c) charge in the indictment would not allege a federal offense.

So too here. Mr. Aquart's arguments with respect to his VICAR and drug-related murder convictions implicate the district court's jurisdiction. For the VICAR charge, see 18 U.S.C. § 1959(a)(1), Mr. Aquart contends that the federal statute references only *generic* murder, and that the Connecticut murder statute that serves as the predicate offense for this charge sweeps more broadly. Pet. App. 12a. And for the drug-related murder charge, see 21 U.S.C. § 848(e)(1)(A), Mr. Aquart alleges that, by the time of his trial, the minimum drug quantity for a conviction was raised to 280 grams of crack cocaine, which was more than the amount alleged in his indictment. Pet. App. 14a–15a. In other words, for both charges, the indictment alleges conduct that is beyond the sweep of the charging statutes—*i.e.*, conduct that is a non-offense. These defects implicate the district court's jurisdiction, which means that the Second Circuit was required to consider them in the first instance.

The First and Eleventh Circuits have correctly held that whether an indictment defect is jurisdictional depends on the type of indictment problem at issue. An indictment that is missing a fact necessary for a sentencing enhancement does not implicate the court's jurisdiction because the defect does not cast any doubt on whether the government is alleging the commission of a federal offense. But an indictment that charges no federal offense at all—like the indictment here—gives rise to a jurisdictional error because a district court can exercise jurisdiction only over "offenses against the laws of the United States." 18 U.S.C. § 3231.

III. This question is important and recurring.

The question presented is vitally important because it involves two significant, intersecting legal principles. The first is the constitutional principle that "a court cannot permit a defendant to be tried on charges

that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). This Court just last term emphasized the historic centrality of the indictment in our system: "Should an indictment or accusation lack any particular fact which the laws made essential to the punishment, it was treated as no accusation at all." *Erlinger* v. *United States*, 144 S. Ct. 1840, 1849 (2024) (cleaned up); see also U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]"). The second is the principle that federal courts have limited subject-matter jurisdiction, which "functions as a restriction on federal power." *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Here, Mr. Aquart was prosecuted and convicted based on an indictment that did not allege federal crimes.

This question also recurs often. Defendants in federal criminal prosecutions frequently argue that defects in their indictments give rise to jurisdictional errors. See *supra* § I; see also, *e.g.*, *United States* v. *Roque*, No. 18-cr-10451, 2020 WL 5821515, at *2 & n.4 (D. Mass. Sept. 30, 2020); *Roberson* v. *Director, TDCJ-CID*, No. 6:16-cv-104, 2017 WL 2573856, at *3 (E.D. Tex. June 13, 2017); *United States* v. *Spellissy*, No. 8:05-CR-475, 2017 WL 729549, at *7–8 (M.D. Fla. Feb. 23, 2017); *United States* v. *Parker*, 36 F. Supp. 3d 550, 556 (W.D.N.C. 2014). In light of the persistent circuit split on this issue, the lower courts need guidance on what does or does not constitute a jurisdictional error in a criminal indictment.

IV. The case is an ideal vehicle.

This case is an ideal vehicle to address the question presented. No jurisdictional obstacles exist. The question was pressed and passed upon below. And the facts

squarely present the question whether defects in an indictment are categorically non-jurisdictional.

The question presented is also dispositive to Mr. Aquart's case. If indictment defects are not categorically non-jurisdictional, then Mr. Aquart's arguments about his VICAR and drug-related murder charges—that the charges do not allege offenses against the laws of the United States—clearly implicate the district court's jurisdiction.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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