No. 24-5754

IN THE SUPREME COURT OF THE UNITED STATES

AZIBO AQUART, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

DAVID M. LIEBERMAN
Attorney

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

QUESTION PRESENTED

Whether the court of appeals permissibly applied the mandate rule to decline to entertain petitioner's challenge to his convictions, which alleged an error in the indictment, when the challenge was raised for the first time on remand from a decision that affirmed those convictions but remanded for resentencing.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Conn.):

United States v. Aquart, No. 06-cr-160 (Nov. 1, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 92 F.4th 77. A prior opinion of the court of appeals is reported at 912 F.3d 1. The order of the district court is available at 2021 WL 4859863. Prior orders of the district court are available at 2012 WL 554439, 2012 WL 603243, and 2012 WL 6087265.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2024. A petition for rehearing was denied on May 14, 2024 (Pet. App. 45a). On August 5, 2024, Justice Sotomayor extended

the time within which to file a petition for a writ of certiorari to and including September 11, 2024. On September 4, 2024, Justice Sotomayor further extended the time to and including October 11, 2024. The petition for a writ of certiorari was filed on October 10, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of conspiring to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); one count of conspiring to traffic cocaine, in violation of 21 U.S.C. 841(a)(1), 846 and 21 U.S.C. 841(b)(1)(A)(iii) (2000 & Supp. II 2002); three counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; and three counts of murder in connection with a criminal drug enterprise, in violation of 21 U.S.C. 848(e)(1)(A) and 2. D. Ct. Doc. 1185, at 1-2 (Dec. 18, 2012).

Following a penalty hearing, the jury unanimously determined that petitioner should receive a capital sentence for two of the counts of murder in aid of racketeering and two of the counts of murder in connection with a criminal drug enterprise. D. Ct. Doc. 936, at 12-13 (June 15, 2011). The district court sentenced petitioner in accordance with that recommendation, and further imposed consecutive life sentences for the remaining murder and

drug-conspiracy counts and a 120-month term of imprisonment on the count of conspiring to commit murder in aid of racketeering. D. Ct. Doc. 1185, at 2-3. The court of appeals affirmed petitioner's convictions but vacated his capital sentence and remanded for a new capital-sentencing proceeding. 912 F.3d 1. This Court denied a writ of certiorari. 140 S. Ct. 511.

On remand, the government withdrew its notice of intent to seek the death penalty. Pet. App. 5a. The district court then imposed concurrent life sentences on each of the three counts of murder in aid of racketeering, 480-month terms of imprisonment on each of the remaining murder counts and the drug-conspiracy count, and a 120-month term of imprisonment on the count of conspiring to commit murder in aid of racketeering. D. Ct. Doc. 1366, at 2 (Nov. 1, 2021). The court of appeals affirmed. Pet. App. 1a-44a.

1. Petitioner operated a drug-distribution enterprise out of an apartment building in Bridgeport, Connecticut. 912 F.3d at 10. Petitioner and his lieutenants would distribute crack cocaine to dealers and collect drug proceeds from them in return. Ibid. Dealers who failed to account for their drug proceeds or who sold drugs from other sources faced violent retaliation, often at the hands of petitioner himself. Ibid.

In the summer of 2005, Tina Johnson and her boyfriend, James Reid, moved into the apartment building and started purchasing crack cocaine from one of petitioner's dealers. 915 F.3d at 10.

But Johnson subsequently contacted another supplier and began selling small crack-cocaine packets from that source out of her apartment, drawing customers away from petitioner's enterprise. Ibid. After petitioner learned of these activities, he confronted Johnson, telling her that she "better quit" and that he was "not playing." Ibid. (citation omitted). Johnson ignored petitioner's warning, even after one of petitioner's lieutenants confronted her brandishing a table leg. Ibid. Johnson said that if she could not sell crack in the building, then "nobody is selling" because she would call the police and shut down petitioner's operation. Ibid. (citation omitted). When petitioner learned of Johnson's refusal, petitioner said he would "take care of it." Ibid. (citation omitted).

In late August 2005, petitioner recruited John Taylor and Efrain Johnson to help him with "something." 912 F.3d at 10 (citation omitted). Several days later, petitioner, his brother Azikiwe Aquart, and Taylor purchased rolls of duct tape. Id. at 11. They then met Efrain Johnson, and petitioner explained to the group that people in the apartment building were "into his money business" and he wanted to "take them out or move them out . . . of the building." Ibid. (citation omitted). Azikiwe supplied facemasks and gloves, and Efrain Johnson produced two baseball bats. Ibid. The group then went to the building with the intent

to enter Tina Johnson's apartment, but left when they saw someone else knock on Tina Johnson's door and get no answer. Ibid.

The group renewed their venture in the early morning hours on August 24, 2005, when petitioner, Azikiwe, Taylor, and Efrain Johnson met at the apartment building. 912 F.3d at 11. Petitioner drew a gun, approached Tina Johnson's apartment, and kicked in the door. Ibid. Once inside, petitioner shouted for everyone to "get on the ground." Ibid. (citation omitted). Petitioner and Azikiwe located Tina Johnson and her boyfriend, Reid, in one bedroom. Ibid. Efrain Johnson encountered a third occupant, Basil Williams, in another bedroom. Ibid. Petitioner and Taylor moved a couch against the front door, and Taylor guarded the door. Ibid.; No. 21-2763 Gov't C.A. Br. 23. Petitioner and Azikiwe then bound Tina Johnson and Reid with duct tape, and bludgeoned them with the baseball bats. 912 F.3d at 11. Taylor later testified that petitioner "bash[ed] [Tina Johnson] like he was . . . at a meat market." Ibid. (citation omitted). Williams was also beaten to death -- likely by petitioner. Id. at 46-48.

Later that morning, Tina Johnson's adult son visited the apartment and discovered that his mother, Reid, and Williams had all been killed. 912 F.3d at 11-12. Tina Johnson's son recounted that the bedrooms were covered with blood and that the living room looked like there had been "a war in there." Id. at 12 (citation omitted). The medical examiner concluded that each of the victims

had suffered multiple skull fractures and died from blunt-force trauma. Ibid. Their hands, feet, heads, and mouths had been wrapped tightly with duct tape. Ibid. Law enforcement subsequently identified Azikiwe's fingerprints on two plastic bags found in one of the bedrooms, and petitioner's fingerprints on a nearby piece of duct tape. Ibid. DNA analysis linked petitioner to a section of a latex glove found under the cushion of the couch that had been pushed up against the front door, and Efrain Johnson to a piece of duct tape cut from Tina Johnson's hands and wrists. Id. at 12 & n.2; No. 21-2763 Gov't C.A. Br. 35-38.

2. A federal grand jury for the District of Connecticut returned an indictment charging petitioner with one count of conspiring to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); one count of conspiring to traffic cocaine, in violation of 21 U.S.C. 841(a)(1), 846 and 21 U.S.C. 841(b)(1)(A)(iii) (2000 & Supp. II 2002)); three counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; and three counts of murder in connection with a criminal drug enterprise, in violation of 21 U.S.C. 848(e)(1)(A) and 2. Fourth Superseding Indictment 1-11.[1] The government also filed notice of

[1] The grand jury also charged petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Fourth Superseding Indictment 12-13. The government later dismissed that charge. D. Ct. Doc. 1184, at 1 (Dec. 17, 2012).

its intent to seek the death penalty. D. Ct. Doc. 228 (Jan. 29, 2009).

The jury found petitioner guilty on the charged counts. 912 F.3d at 14. At the penalty phase, the jury recommended that petitioner be sentenced to death for the two murder-in-aid-of-racketeering counts and for the two drug-enterprise murder counts related to Tina Johnson's and Williams's deaths. Id. at 16. The district court accepted that recommendation and imposed capital sentences on those counts. Ibid. The court imposed consecutive life sentences for the remaining murder-in-aid-of-racketeering count and drug-enterprise murder count (related to Reid's death); another consecutive life sentence for the drug-conspiracy count; and a consecutive 120-month term of imprisonment for the murder-in-aid-of-racketeering conspiracy count. Ibid.

3. The court of appeals affirmed petitioner's convictions, but vacated his capital sentence and remanded for a new capital-sentencing proceeding. 912 F.3d at 69-70. Among other things, the court rejected all of petitioner's challenges to the guilt-phase of trial, including his challenges to the sufficiency of the evidence supporting his murder-in-aid-of-racketeering convictions. Ibid. Petitioner filed a petition for a writ of certiorari, which this Court denied. 140 S. Ct. at 512. On remand, the government withdrew its notice of intent to seek the death penalty. Pet. App. 3a. Petitioner then moved to dismiss

various counts in the Fourth Superseding Indictment, including the counts charging him with conspiring to commit murder in aid of racketeering and murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and (5), and the counts charging him with drug-enterprise murder, in violation of 21 U.S.C. 848(e)(1)(A). D. Ct. Docs. 1310, 1312 (June 2, 2021).

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

Petitioner argued, for the first time, that the VICAR statute refers to generic "murder," and that the Connecticut murder statutes underlying his convictions do not constitute generic murder because those statutes criminalize a broader set of conduct than generic murder. D. Ct. Doc. 1310, at 11-24; see Mathis v. United States, 579 U.S. 500, 504 (2016) (explaining that, under a

categorical approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case," to determine whether the offense meets the statutory definition).

b. As to the drug-enterprise murder counts, Section 848(e)(1)(A) provides in relevant part that "any person engaging in an offense punishable under [21 U.S.C.] 841(b)(1)(A) * * * who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results," shall be sentenced to 20 years to life imprisonment, or to death. 21 U.S.C. 848(e)(1)(A). At the time of petitioner's offenses, 21 U.S.C. 841(b)(1)(A) authorized enhanced criminal penalties for a defendant who was convicted of a federal distribution offense involving "50 grams or more of a mixture or substance * * * which contains cocaine base." 21 U.S.C. 841(b)(1)(A)(iii) (2000 & Supp. II 2002).

Petitioner observed that, in 2010 -- after his offense conduct, but before his trial -- Congress raised the quantity of cocaine base required to trigger Section 841(b)(1)(A)'s enhanced penalties to 280 grams. See D. Ct. Doc. 1312, at 14; Fair Sentencing Act of 2010, § 2(a), Pub. L. No. 111-220, 124 Stat. 2372. Because the drug-enterprise murder counts in the indictment referenced the 50-gram threshold in effect at the time of petitioner's offense conduct, petitioner argued (again, for the

first time) that those convictions were invalid. D. Ct. Doc. 1312, at 28.

c. The district court denied the motions. D. Ct. Doc. 1354 (Oct. 18, 2021). The district court observed that the court of appeals had previously affirmed petitioner's convictions and had remanded the case solely for the limited purpose of conducting "a new penalty proceeding consistent with [its] opinion." Id. at 5. The district court observed that it was bound by that mandate. Id. at 6. The district court explained that because "[t]he judgment of conviction was plainly affirmed" by the court of appeals, petitioner could not "relitigate the merits of his convictions, whether or not the specific issues he raise[d] now were addressed by the Second Circuit." Id. at 5.

4. The court of appeals affirmed. Pet. App. 1a-44a. The court agreed that review of petitioner's new challenges to his convictions "on remand was barred by the mandate rule," which precludes the district court's consideration of all "issues explicitly or implicitly decided on [the initial] appeal" as well as "issues that were 'ripe for review at the time of an initial appeal but nonetheless for[]gone' by a party." Id. at 9a (quoting United States v. Quintieri, 306 F.3d 1217, 1229 (2d Cir. 2002) (ellipses omitted), cert. denied, 539 U.S. 902 (2003)).

The court of appeals rejected petitioner's contention that review was not barred by the mandate rule because his new claims

were jurisdictional. Pet. App. 10a-17a. The court explained that "so long as an 'indictment alleges an offense under U.S. criminal statutes, the courts of the United States have jurisdiction to adjudicate the claim.'" Id. at 11a (citation omitted). And it observed that in United States v. Cotton, 535 U.S. 625, 630 (2002), this Court had "expressly held" that "'defects in an indictment do not deprive a court of its power to adjudicate a case.'" Pet. App. 13a (citation omitted). Accordingly, the court of appeals found that petitioner's "challenges do not implicate jurisdiction." Id. at 11a.

As to the VICAR convictions, petitioner had argued only "that the Connecticut statutes underlying his VICAR convictions cannot, as a matter of law, constitute murder predicates." Pet. App. 12a. "Whatever the merits of this line of reasoning," the court of appeals explained, "it states no challenge to federal jurisdiction": an "'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.'" Id. at 13a-14a (quoting United States v. Yousef, 750 F.3d 254, 260 (2d Cir.), cert. denied, 574 U.S. 898 (2014)).

As to the drug-enterprise counts, the court of appeals observed that this Court had expressly "held that an indictment was not jurisdictionally deficient because it failed to allege 'any of the threshold levels of drug quantity that lead to enhanced

penalties under § 841(b),' even though the sentencing court subsequently attributed a drug quantity to the defendant that made him eligible for the 'enhanced penalties of § 841(b)(1)(A).'" pet. App. 15a (quoting Cotton, 535 U.S. at 628). The court of appeals also determined, in the alternative, that "the district court's jurisdiction was established" in petitioner's particular case because "[a]t the time [petitioner] committed the charged murders, the quantity of crack cocaine 'punishable' under § 841(b)(1)(A) was 50 or more grams." Id. at 16a.

ARGUMENT

Petitioner renews (Pet. 5-13) his contention that the district court erred in relying on the mandate rule to dismiss his new challenges to the indictment because those challenges are jurisdictional. The court of appeals correctly rejected that argument as foreclosed by this Court's decision in United States v. Cotton, 535 U.S. 625 (2002), and its decision does not warrant further review. This Court has repeatedly denied review of other petitions that, like this one, allege a conflict about the application of this Court's decision in Cotton. See, e.g., Jackson v. United States, 142 S. Ct. 513 (2021) (No. 21-6034); Malik v. United States, 140 S. Ct. 1133 (2020) (No. 19-6087); Masilotti v. United States, 574 U.S. 1078 (2015) (No. 14-565); Scruggs v. United States, 571 U.S. 889 (2013) (No. 13-206); De Vaughn v. United States, 569 U.S. 976 (2013) (No. 12-7537); Stewart v. United

States, 538 U.S. 908 (2003) (No. 02-1165). The Court should follow the same course here.

1. The court of appeals correctly recognized that an indictment's alleged failure to charge conduct that makes out a violation of the charged statute does not implicate subject-matter jurisdiction.

a. In Cotton, this Court held that an indictment's failure to charge drug quantity, which was necessary to increase the statutory maximum for the charged offense under 21 U.S.C. 841(b)(1)(A) (1994), was a nonjurisdictional defect. 535 U.S. at 629-631. While true "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court," the Court explained that it has "some time ago departed from [the] view that indictment defects are 'jurisdictional'" in the modern sense of referring to "'the courts' statutory or constitutional power to adjudicate the case.'" Id. at 630-631 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998)).

Instead, "defects in an indictment do not deprive a court of its power to adjudicate a case." Cotton, 535 U.S. at 631. Rather, "a district court 'has jurisdiction of all crimes cognizable under the authority of the United States * * * [and] [t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case.'" Id. at 630-631

(quoting Lamar v. United States, 240 U.S. 60, 65 (1916) (Holmes, J.)) (brackets in original). Thus, unlike true "jurisdictional" defects that "involve[] a court's power to hear a case," it "can never be forfeited or waived"; "[c]onsequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." Id. at 630.

b. Consistent with Cotton, the court of appeals correctly recognized that petitioner's challenges to the VICAR and drug-enterprise murder counts of the indictment "state[d] no cognizable jurisdiction challenge." Pet. App. 11a. As the court explained, petitioner argued only that the conduct "set out in the indictment does not make out a violation of the charged statute." Id. at 13a-14a (citation omitted); see pp. 11-12, supra. And "whether alleged conduct constitutes the charged offense[s] is a non-jurisdictional question." Pet. App. 13a. Review of petitioner's claims was thus barred on remand by the mandate rule because, although "ripe for review on initial appeal," petitioner had failed to raise his challenges to the indictment then. Id. at 9a; see Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168 (1939) (noting that a lower court is "bound to carry the mandate of [an] upper court into execution and could not consider the questions which the mandate laid at rest").

c. Petitioner acknowledges (Pet. 13) that a challenge asserting that an indictment "miss[es] a fact necessary" for the

charged offense is not jurisdictional. But he argues (ibid.) that his challenge -- which asserts that the indictment charged "conduct that is beyond the sweep of the charging statutes" -- is nonetheless jurisdictional. That distinction does not withstand scrutiny.

A claim that an indictment charged conduct that does not violate the charged statutes is still a "claim that * * * 'the indictment does not charge a crime against the United States,'" which "'goes only to the merits of the case.'" Cotton, 535 U.S. at 630-631 (citations omitted); see United States v. Williams, 341 U.S. 58, 66 (1951) (holding that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment"). And the Court has more recently reiterated in the civil context that "to ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question," not a jurisdictional question. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 254 (2010). Accordingly, petitioner's challenges to his convictions based on the underlying Connecticut law on which the VICAR counts were based and the quantity of drugs charged in the drug-enterprise counts do not implicate the jurisdiction of the district court. The court of appeals thus did not err in determining that the mandate rule barred review of these non-jurisdictional claims.

2. Petitioner asserts (Pet. 5-10) that the Court should grant review to resolve a circuit conflict as to the scope of this Court's holding in Cotton. Any disagreement in the courts of appeals, however, is narrow and does not warrant the Court's review in this case.

The vast majority of the courts of appeals to have considered the issue have properly read Cotton as holding that defects in an indictment "do not deprive a court of its power to adjudicate a case," Cotton, 535 U.S. at 630, without distinguishing between whether the alleged defect was an omission of a factual allegation or some other failure to properly state a claim. See United States v. George, 676 F.3d 249, 259-260 (1st Cir. 2012); United States v. Rubin, 743 F.3d 31, 36-38 (2d Cir. 2014); United States v. Scruggs, 714 F.3d 258, 262-264 (5th Cir.), cert. denied, 571 U.S. 889 (2013); VanWinkle v. United States, 645 F.3d 365, 368-369 (6th Cir. 2011); United States v. Muresanu, 951 F.3d 833, 837-839 (7th Cir. 2020); United States v. Turner, 94 F.4th 739, 742 (8th Cir. 2024), cert. denied, 2024 WL 4426945 (Oct. 7, 2024); United States v. Velasco-Medina, 305 F.3d 839, 845-846 (9th Cir. 2002), cert. denied, 540 U.S. 1210 (2004); United States v. De Vaughn, 694 F.3d 1141, 1147 (10th Cir. 2012), cert. denied, 569 U.S. 976 (2013); United States v. Delgado-Garcia, 374 F.3d 1337, 1341-1342 (D.C. Cir. 2004), cert. denied, 544 U.S. 950 (2005); cf. Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999) ("Subject-matter

jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231," and that is "the beginning and the end of the 'jurisdictional' inquiry.").

Petitioner argues (Pet. 9) that the First Circuit held otherwise in United States v. Rosa-Ortiz, 348 F.3d 33 (2003). There, the court found that the defendant's unconditional guilty plea "did not waive his right to argue that he has been imprisoned for conduct that Congress did not proscribe in the crime charged." Id. at 36. The court did not mention, let alone attempt to distinguish, this Court's decision in Cotton. And subsequently, the First Circuit has both distinguished and questioned the continuing validity of Rosa-Ortiz. Those subsequent decisions undercut petitioner's contention that the First Circuit has charted a different course than its sister circuits -- or that the First Circuit would have reached a different conclusion in petitioner's case.

Two years later, in United States v. Gonzalez-Mercado, 402 F.3d 294 (1st Cir. 2005), the defendant argued that he did not waive his challenge to his indictment by entering an unconditional guilty plea because his conduct "does not amount to a violation of the statute of conviction" and, thus, "the district court lacked jurisdiction to convict him." Id. at 300. The court declined to follow Rosa-Ortiz and explained that "a jurisdictional defect is one that calls into doubt a court's power to entertain a matter,

not one that merely calls into doubt the sufficiency or quantum of proof relating to guilt." Id. at 301 (citation omitted).

Subsequently, in United States v. George, the First Circuit identified Rosa-Ortiz as a "paradigmatic example" of a court using the term "jurisdiction" in a "less than meticulous" manner. 676 F.3d at 259 (citations omitted). The court explained that Rosa-Ortiz "dealt with an instance in which the indictment was factually insufficient," and "Supreme Court precedent makes transparently clear that an indictment's factual insufficiency does not deprive a federal court of subject matter jurisdiction." Ibid. (citing Cotton, 535 U.S. at 630-631; Lamar, 240 U.S. at 64-65). And in light of that precedent, the First Circuit categorized Rosa-Ortiz's reference to "'jurisdiction'" as simply "an awkward locution." Id. at 260; see United States v. Lara, 970 F.3d 68, 85-86 (1st Cir. 2020) (same), cert. denied, 141 S. Ct. 2821 (2021).

Petitioner also relies (Pet. 9-10) on the Eleventh Circuit's decision in United States v. Peter, 310 F.3d 709 (2002) (per curiam). There, the Eleventh Circuit described a claim relying on subsequent decision of this Court to assert a defect in an indictment failed to charge an offense as a "jurisdictional claim" cognizable in a petition for a writ of coram nobis. Id. at 713 (citation omitted). And it stated that that because "[t]he district court had no jurisdiction to accept a plea to conduct that does not constitute" a federal offense, "the doctrine of

procedural default therefore d[id] not bar" the claim. Id. at 715. The Eleventh Circuit distinguished this Court's decision in Cotton on the theory that Cotton did not include a claim "that the indictment consisted only of specific conduct that, as a matter of law, was outside the sweep of the charging statute." Id. at 714. And on that basis, the court of appeals concluded that it was bound by pre-Cotton circuit precedent concerning the jurisdictional nature of such a claim. Id. at 713-715.

As the Tenth Circuit has observed, the Eleventh Circuit's reasoning in Peter cannot be squared this Court's reasoning in Cotton and "overlooks the cases Cotton relied on for its holding -- Lamar and Williams." De Vaughan, 694 F.3d at 1148. Accordingly, every court of appeals to subsequently consider the issue has disagreed with the Eleventh Circuit's narrow reading of Cotton. See ibid. ("We are not persuaded by Peter's overly narrow reading of Cotton."); Scruggs, 714 F.3d at 264 ("We join the Tenth Circuit in holding that Peter was wrongly decided and cannot be squared with Cotton."); Rubin, 743 F.3d at 36 (rejecting the argument "that Cotton stands for the limited proposition that indictment omissions, such as a missing element or an inadequate factual basis, do not deprive a district court of subject-matter jurisdiction"); United States v. Lowe, 512 Fed. Appx. 628, 630 (7th Cir. 2013) ("A claim that the indictment is defective because

it does not state an offense is nonjurisdictional.") (citing De Vaughn approvingly and Peter disapprovingly).

Furthermore, the Eleventh Circuit itself, in United States v. Brown, 752 F.3d 1344 (2014), described its decision in Peter as limited to the "specific and narrow circumstances" presented there. Brown, 752 F.3d at 1353. The government in Peter had "affirmatively alleged a specific course of conduct [in the charging document] that [wa]s outside the reach of the mail fraud statute." 310 F.3d at 715. Because it was clear from the face of the charging document that the misconduct alleged was not a federal crime, the indictment could be understood as having failed to "invoke the district court's statutory authority under 18 U.S.C. § 3231 over 'offenses against the laws of the United States.'" Brown, 752 F.3d at 1353 (citation omitted). In light of Brown and the consistent holdings of other courts of appeals, any disagreement regarding this Court's holding in Cotton has become increasingly narrow and does not warrant the Court's review in this case.

3. Finally, even if the Court were inclined to reexamine whether certain defects in an indictment are jurisdictional, this case would not be a suitable vehicle for doing so because resolution of the question presented would not likely affect the outcome of this case.

As explained in Brown, even the Eleventh Circuit's decision in Peter would only apply (at most) where the conduct in the indictment "undoubtedly" falls outside the scope of the charged statute. Brown, 752 F.3d at 1353; see Peter, 310 F.3d at 715 (noting that "the Government affirmatively alleged a specific course of conduct that [wa]s outside the reach of the mail fraud statute"). No situation akin to Peter -- which involved a definitive construction of a federal criminal statute by this Court -- exists here. No decision of this Court or any other court has ever suggested that petitioner's conduct (e.g., the premeditated fatal bludgeoning of three victims with baseball bats, see pp. 3-6, supra) fails to qualify as "murder" under the VICAR statute. And, as the court of appeals explained, the drug-enterprise murder counts adequately alleged each element of 21 U.S.C. 848(e)(1)(A) in effect at the time of petitioner's offense. See Pet. App. 15a-16a.

Each of petitioner's challenges, moreover, lacks merit. The VICAR statute does not require that the state crime underlying a charge of VICAR murder categorically match the federal generic murder crime; instead, it requires only that the defendant's conduct satisfy each. See United States v. Keene, 955 F.3d 391, 398 (4th Cir. 2020); see also Johnson v. United States, 64 F.4th 715, 728 (6th Cir. 2023) (similar under Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 et seq.); United States

v. Brown, 973 F.3d 667, 709 (7th Cir. 2020) (same), cert. denied, 141 S. Ct. 1253, 142 S. Ct. 243, 142 S. Ct. 245, and 142 S. Ct. 2048 (2021), and 142 S. Ct. 932 (2022).

And as to the drug-enterprise murder counts, the court of appeals correctly explained that "the 'validity' of a § 848(e)(1)(A) conviction 'for conduct committed before the Fair Sentencing Act was not affected by changes to § 841(b)(1)(A) that post-date the murder.'" Pet. App. 16a (quoting United States v. Fletcher, 997 F.3d 95, 98 (2d Cir. 2021)); see 1 U.S.C. 109; Warden v. Marrero, 417 U.S. 653, 661 (1974) (observing that Section 109's "saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense"). Moreover, as the court observed, petitioner could not show that "he was prejudiced by the indictment's reference to 50 grams or more of crack because, at trial, the prosecution in fact proved the higher 280 gram crack quantity." Pet. App. 17a. Indeed, "[t]he jury responded affirmatively to a special interrogatory asking whether [petitioner] engaged in a drug conspiracy involving 280 grams or more of crack cocaine," and "[t]hat finding was * * * amply supported by the trial evidence indicating a conspiracy trafficking in many kilograms of crack cocaine." Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

DAVID M. LIEBERMAN
Attorney

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