

Nos. 24-5322 and 24-5768

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD TIPTON, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

JAMES H. ROANE, JR. PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

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 (E.D. Va.):

United States v. Tipton, No. 92-cr-68, 22-cv-99 (Oct. 6, 2022)

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

United States v. Tipton, No. 93-4005 (July 8, 1996)

In re Tipton, No. 16-7 (June 6, 2016)

In re Tipton, No. 19-2 (May 14, 2019)

United States v. Johnson, No. 20-15 (Jan. 12, 2021)

In re Tipton, No. 20-10 (Jan. 24, 2022)

United States v. Tipton, No. 22-5 (Mar. 18, 2024)

United States v. Roane, No. 23-1 (Mar. 18, 2024)

Supreme Court of the United States:

Johnson v. United States, No. 96-7686 (June 2, 1997)

Tipton v. United States, No. 96-7692 (June 2, 1997)

Johnson v. United States, No. 04-8850 (Oct. 3, 2005)

Roane v. United States, No. 04-1136 (Oct. 3, 2005)

Tipton v. United States, No. 04-8856 (Oct. 3, 2005)

Johnson v. United States, No. 20A130 (Jan. 14, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Tipton Pet. App. 1-34, Roane Pet. App. A2-A35) is reported at 95 F.4th 831. The opinion of the district court in United States v. Tipton, No. 92-cr-68, is available at 2022 WL 5249440. The opinion of the district court in United States v. Roane, No. 92-cr-68, (Roane Pet. App. A36-A56) is available at 2022 WL 16700390.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2024. Petitioner Tipton's petition for rehearing en banc was denied on May 14, 2024. Tipton Pet. App. 35. Tipton's petition for a writ of certiorari was filed on August 12, 2024. Petitioner Roane's petition for rehearing en banc was also denied on May 14, 2024. Roane Pet. App. A1. On July 31, 2024, the Chief Justice extended Roane's time within which to file a petition for a writ of certiorari to and including October 11, 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 jury trial in the United States District Court for the Eastern District of Virginia, Tipton was convicted on one count of conspiring to possess with intent to distribute and to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 846; one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); six counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988); six counts of intentional murder in aid of racketeering, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(1) (1988); two counts of VICAR maiming, in violation of 18 U.S.C. 1959(a)(2) (1988); two counts of using a firearm during and in relation to a

crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and two counts of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Tipton C.A. App. 136-137, 1525. The jury recommended capital sentences for three of his Section 848(e) murder convictions and life sentences on the other three, and the district court sentenced him in accordance with those recommendations. Id. at 137-138. On the remaining convictions, the district court imposed a sentence of life plus 25 years of imprisonment. Id. at 11.

Following the same jury trial, Roane was convicted on one count of conspiring to possess with intent to distribute and to distribute crack cocaine, in violation of 21 U.S.C. 846; one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); three counts of murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988); four counts of intentional VICAR murder, in violation of 18 U.S.C. 1959(a)(1) (1988); one count of VICAR maiming, in violation of 18 U.S.C. 1959(a)(2) (1988); four counts of using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and one count of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Roane Pet. App. A38-A39; Tipton C.A. App. 1525. The jury recommended a capital

sentence for Roane on one of his Section 848(e) murder convictions and life imprisonment on the other two, and the district court sentenced him in accordance with those recommendations. Roane Pet. App. A39. On the remaining convictions, the court imposed a sentence of life plus 65 years of imprisonment. Id. at A39-A40.

On direct review, the court of appeals vacated petitioners' convictions for conspiring to distribute crack cocaine but affirmed in all other respects, 90 F.3d 861, 868, and this Court denied petitions for writs of certiorari, 520 U.S. 1253. Petitioners filed numerous unsuccessful collateral attacks on their convictions; they also each filed an unsuccessful motion seeking a discretionary reduction in their sentences for murder and distributing crack cocaine. Tipton Pet. App. 3;¹ 51 F.4th 541, 544-545, 552-553. In 2022, the court of appeals granted each petitioner's request for authorization to file a successive motion to vacate his sentence under 28 U.S.C. 2255. Tipton Pet. App. 4. The district court denied each petitioner's successive Section 2255 motion and also denied a certificate of appealability. Ibid. The court of appeals granted each petitioner a certificate of appealability, ibid., and affirmed, id. at 1-34.

¹ For ease of reference, this brief cites only Tipton's petition appendix when referencing the court of appeals' consolidated opinion addressing both petitioners' claims.

1. From 1989 to 1992, petitioners and their co-defendant, Cory Johnson, ran a multistate drug-trafficking enterprise. 90 F.3d at 868. Petitioners' enterprise obtained wholesale quantities of powder cocaine from suppliers in New York City, converted it into crack cocaine, and then distributed the crack cocaine through a network of 30-40 dealers in New Jersey and Virginia. Ibid. In furtherance of the enterprise, over a "short span of time in early 1992," petitioners and Johnson committed a spree of murders in Richmond, Virginia. Ibid.

The spree began on January 4, 1992, when Tipton, accompanied by Roane, killed Douglas Talley, "an underling in disfavor for mishandling a drug transaction." 90 F.3d at 868. After driving Talley to the south side of Richmond, Roane grabbed Talley from behind while Tipton stabbed him 84 times. Ibid.

On January 13, 1992, Tipton and Roane went to the apartment of rival drug dealer Douglas Moody, where Tipton shot Moody twice in the back. 90 F.3d at 868. When Moody fled out a window, petitioners pursued and caught him, and Roane killed him by stabbing him 18 times. Ibid.

The next day, Roane and Cory Johnson retrieved a bag of guns before Roane located another rival drug dealer, Peyton Johnson, at a tavern. 90 F.3d at 868. Cory Johnson entered the tavern and fatally shot Peyton Johnson. Ibid.

On January 29, 1992, Roane, Cory Johnson, and a third co-conspirator were driving together when they spotted a rival drug dealer's bodyguard, Louis Johnson. 90 F.3d at 869. Roane stopped the car, approached Louis Johnson, and shot him. Ibid. Cory Johnson and the third co-conspirator also began shooting, and one of them fatally "shot [Louis Johnson] twice at close range." Ibid.

That same week, Tipton drove Cory Johnson to an apartment where Dorothy Armstrong, who owed them a drug debt, was staying with her brother, Bobby Long. 90 F.3d at 869. While Tipton waited in the car, Johnson shot and killed Armstrong -- along with her brother and another man, Anthony Carter, who was in the apartment. Ibid.

Later on the same day, Roane, Johnson, and another co-conspirator gathered outside the apartment of Torrick Brown, with whom Roane had been having a dispute. 90 F.3d at 869. After Brown's half-sister Martha McCoy answered the door and summoned Brown to the door, Roane, Johnson, and the third co-conspirator "opened fire with semi-automatic weapons, killing Brown and critically wounding McCoy." Ibid.

Around the same time, Johnson began to suspect that an associate named Linwood Chiles was cooperating with the police. 90 F.3d at 869. On February 19, 1992, Johnson arranged to meet with Chiles and drove with him to an alley, where Tipton met them. Ibid. With Tipton standing outside the car, Johnson "told Chiles

to put his head on the steering wheel and then shot Chiles twice at close range," killing him. Ibid. "Additional shots were fired" in the incident, killing another passenger in the car, Curtis Thorne, and critically wounding two other passengers, sisters Priscilla and Gwen Greene. Ibid.

2. A grand jury in the Eastern District of Virginia returned a 33-count indictment charging petitioners and Johnson with numerous offenses relating to their drug-trafficking organization, including conspiring to possess with intent to distribute and to distribute crack cocaine, in violation of 21 U.S.C. 846; engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988); intentional VICAR murder, in violation of 18 U.S.C. 1959(a)(1) (1988); VICAR maiming, in violation of 18 U.S.C. 1959(a)(2) (1988); using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Tipton C.A. App. 63-83.

a. The federal offense described in 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).² 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 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

² At the time of petitioners’ offenses, the statute did not contain the possession prong of the offense. 18 U.S.C. 924(c) (1988 & Supp. II 1990). Also at that time, as well as at the time of their sentencing, Section 924(c) provided for a mandatory consecutive 20-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. Ibid.; 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, 132 Stat. 5221-5222.

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 (citation 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. Id. at 505.

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 20 and 26 for Tipton

and Counts 6, 9, 12, 15 for Roane), were each premised on multiple underlying crimes charged in the indictment.

Tipton's Section 924(c) charge in Count 20 was supported by seven predicate offenses: three Section 848(e) murders of victims Long, Carter, Armstrong (Counts 17-19); the VICAR murders of the same victims (Counts 21-23); and the drug-distribution conspiracy (Count 1). Tipton Pet. App. 9-10. Tipton's Section 924(c) charge in Count 26 was also supported by seven predicate offenses: the Section 848(e) murders of victims Thorne and Chiles (Counts 24-25); the VICAR murders of those same victims (Counts 27-28); the VICAR maiming of Priscilla and Gwen Greene (Counts 29-30); and the drug-distribution conspiracy (Count 1). Id. at 10.

For Roane, each of Counts 6, 9, and 12 was premised on the Section 848(e) murders of victims Moody, Peyton Johnson, and Louis Johnson, respectively (Counts 5, 8, and 11); the VICAR murders involving the same victims (Counts 7, 10, 13); and the Count 1 drug-distribution conspiracy. Roane Pet. App. A10-A11. The Section 924(c) charge against Roane in Count 15 was premised on the VICAR murder of Brown (Count 14) and the VICAR maiming of McCoy (Count 16). Id. at A11.

The VICAR murder offense under Section 1959(a)(1) penalizes, inter alia, anyone who "murders" another 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)(1). The various VICAR murder charges here did not specify the state statute petitioners allegedly violated, but specified that each murder was "intentional[]." See, e.g., Tipton C.A. App. 69, 76-77.

c. The case proceeded to trial. The jury found Tipton guilty on one count of conspiring to possess with intent to distribute and to distribute crack cocaine, in violation of 21 U.S.C. 846 (Count 1); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a) (Count 2); six counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988) (Counts 3, 17-19, 24-25); six counts of intentional VICAR murder, in violation of 18 U.S.C. 1959(a)(1) (1988) (Counts 4, 21-23, 27-28); two counts of VICAR maiming, in violation of 18 U.S.C. 1959 (1988) (Counts 29-30); two counts of using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990) (Counts 20, 26); and two counts of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Counts 32, 33). Tipton C.A. App. 136-137, 1525. The jury found Roane guilty on one count of conspiring to possess with intent to distribute and

to distribute crack cocaine, in violation of 21 U.S.C. 846 (Count 1); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a) (Count 2); three counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988) (Counts 5, 8, 11); four counts of intentional VICAR murder, in violation of 18 U.S.C. 1959(a)(1) (1988) (Counts 7, 10, 13, 14); one count of VICAR maiming, in violation of 18 U.S.C. 1959(a)(2) (1988); four counts of using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and one count of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 32). Roane Pet. App. A38-A39; Tipton C.A. App. 1525.

The district court then held separate penalty proceedings on the government's requests for capital sentences on the Section 848(e) murder counts. For Tipton, the jury recommended capital sentences on three Section 848(e) murder counts and life sentences on the other three, and the court sentenced Tipton in accordance with the jury's recommendations. Tipton Pet. App. 10. As to the remaining convictions, the court imposed life terms on the six VICAR murder counts and the Section 848(a) offense; 30 years each on the VICAR maiming counts; 40 years and 20 years on the two drug-distribution offenses under Section 841; and consecutive terms of

five years and 20 years on the two Section 924(c) offenses. Tipton C.A. App. 11.

For Roane, the jury recommended a capital sentence on one Section 848(e) murder count and life imprisonment on the other two, and the court sentenced Roane in accordance with the jury's recommendations. Roane Pet. App. A39. As to the remaining convictions, the court sentenced Roane to life terms for the four VICAR murder counts and the Section 848(a) count; 20 years for the VICAR maiming count; 40 years for the Section 841 drug distribution offense; and a five-year consecutive term for the first Section 924(c) offense and a 20-year consecutive term for each of the three other Section 924(c) offenses. Id. at A39-A40.

d. The court of appeals affirmed all of petitioners' convictions and sentences, except the Count 1 drug-distribution conspiracy convictions, which the court vacated as duplicative. 90 F.3d at 868; see id. at 891. Petitioners did not argue on appeal that their Section 924(c) convictions were not supported by a crime of violence. This Court denied petitions for writs of certiorari. 520 U.S. 1253.

3. In the ensuing decades, petitioners "filed numerous unsuccessful collateral attacks on their convictions and sentences" as well as an unsuccessful motion seeking a discretionary reduction for the sentences they had received for their drug-related offenses. 51 F.4th 541, 544-545, 552-553

(listing examples of collateral proceedings); Tipton Pet. App. 11-12 (same).

In 2015, this Court held in Johnson v. United States, 576 U.S. 591, that the residual clause of the definition of “violent felony” in the Armed Career Criminal Act of 1984 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 2019, this Court held that Section 924(c)’s residual clause is likewise unconstitutionally vague. Davis, 588 U.S. at 470.

Petitioners each applied to the court of appeals for permission to file an additional Section 2255 motion based on this Court’s decision in Davis. Tipton Pet. App. 14. The court of appeals granted each request, and petitioners filed the authorized motions in district court. Ibid. In their motions, petitioners asserted (inter alia) that their Section 924(c) convictions are invalid on the theory that none of the alleged underlying offenses qualifies as a crime of violence after Davis. Tipton C.A. App. 146; Roane Pet. App. A36-A56. In opposition, the government both responded on the merits and invoked the procedural default bar. Tipton C.A. App. 97; Roane C.A. App. 189-190. In separate opinions, the district court denied each petitioner’s Section 2255 motion. Tipton C.A. App. 134-163; Roane Pet. App. A36-A56.

With respect to Tipton, the court of appeals found that his Section 924(c) convictions in Counts 20 and 26 were “supported by multiple, valid drug trafficking and crime of violence predicates.” Tipton C.A. App. 146. The court pointed to, inter alia, the Section 848(e) murder counts, which the court recognized were both drug trafficking offenses as well as crimes of violence, because the statute prohibits “killing while trafficking in drugs,” id. at 148; see id. at 148-150, 153-155.

In light of the “multiple other valid predicates,” the district court declined to reach the question whether the underlying VICAR murder and VICAR maiming offenses also supported the Section 924(c) convictions. Tipton C.A. App. 158 n.11. The court also rejected Tipton’s argument that a Section 924(c) conviction falls if any underlying predicate is invalid. Because the jury had found Tipton guilty on multiple Section 848(e) murders alleged as predicates for each Section 924(c) offense, as well as the Count 1 drug trafficking conspiracy, the court observed that “[c]ommon sense dictates that the jury had at least one of these valid predicates in mind when it convicted” Tipton on the Section 924(c) offense in Counts 20 and 26. Id. at 159.

With respect to Roane, the district court relied on its analysis in Tipton’s case to find that the Count 1 drug trafficking conspiracy was a drug trafficking crime that supported all four Section 924(c) convictions, Roane Pet. App. A49 (explaining that

double-jeopardy vacatur of conspiracy conviction did not vacate jury's underlying factual finding), and that three of the Section 924(c) convictions were additionally supported by a Section 848(e) murder, which qualified as both a drug trafficking crime and a crime of violence, see id. at A48. In addition, the court found that the "premeditated" and "intentional" VICAR murder (Count 14) underlying the fourth Section 924(c) offense (Count 15) also qualified as a crime of violence. Id. at A53; see id. at A50-A55. The court based that finding on an assessment of Virginia murder, generic murder, and (alternatively) the federal murder statute. Id. at A50-A55.

After denying each petitioner's Section 2255 motion, the district court denied each petitioner a certificate of appealability. Tipton Pet. App. 4.

4. The court of appeals granted each petitioner a certificate of appealability and affirmed. Tipton Pet. App. 1-34. Relying on its recent decision in United States v. Thomas, 87 F.4th 267 (4th Cir. 2023), cert. denied, No. 23-1168 (Oct. 7, 2024), the court observed that VICAR murder, a charged offense that underlay each of petitioners' Section 924(c) convictions, qualifies as a crime of violence under Section 924(c)(3)(A). Tipton Pet. App. 24. And because petitioners were unable to demonstrate a reasonable possibility that the jury did not rely on the VICAR murder predicates in finding them guilty of the Section

924(c) offenses, the court rejected petitioners' challenges without considering whether the other offenses charged as predicates for the Section 924(c) convictions qualified as a drug trafficking crime or crime of violence. Id. at 31-33.

a. In Thomas, the court of appeals explained that VICAR assault with a deadly weapon premised in part on violations of certain Virginia statutes continues to qualify as a crime of violence. The court 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, it “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 petitioners’ cases, the court of appeals pointed to Thomas’s observation that a court need not “look through” the VICAR statute to the underlying violation of state or federal law in order to assess whether a charged VICAR offense satisfies the crime-of-violence definition. Tipton Pet. App. 30-31. The court therefore relied on the element of “generic federal murder * * * enumerated in the VICAR statute” in finding that petitioners’ VICAR murder offenses satisfied Section 924(c)(3)(A). Ibid.

The court of appeals also adhered to Thomas in finding that VICAR’s purpose element ensured that petitioners’ VICAR murder

offenses satisfied Borden's mens rea requirement. The court explained that "the use of force in a VICAR murder is both purposeful and knowing, for when a person 'murders to gain a personal collateral advantage with an enterprise, he makes a decision -- a deliberate choice -- to carry out . . . the murder to demonstrate his worth to the enterprise." Tipton Pet. App. 26 (citation omitted).

ARGUMENT

Petitioners contend (Tipton Pet. 4-13; Roane Pet. 4-12) that the court of appeals' classification of each of their VICAR murder offenses as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) should have been restricted solely to the elements of any state crime underlying the VICAR offenses, without any reference to the additional elements necessary to render the state crime a federal VICAR offense. This Court has recently denied petitions for writs of certiorari raising the same question. Thomas v. United States, No. 23-1168 (Oct. 7, 2024); Kinard v. United States, No. 24-5042 (Oct. 15, 2024). It should follow the same course here. And in any event, this case would be an unsuitable vehicle for further review because even a favorable decision on the question presented would have no practical effect on petitioners' sentences.

Petitioners' challenges to the court of appeals' 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. See Br. in Opp., Thomas, supra (No. 23-1168) (July 31, 2024). And for the reasons explained in that brief as well as the government's brief in opposition to the petition for a writ of certiorari in Kinard,³ petitioners have 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) (Sept. 9, 2024); Br. in Opp. at 15-16, Thomas, supra (No. 23-1168).⁴ Petitioners do not dispute that the question presented in this case is largely the same as the question

³ We have served petitioners with a copy of the government's briefs in opposition in Thomas and Kinard, which are also available on this Court's online docket.

⁴ In a case decided after Tipton filed his petition for a writ of certiorari but before Roane filed his petition, 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. See United States v. Elmore, 118 F.4th 1193, 1200-1201 (2024). Roane does not invoke Elmore or suggest that it conflicts with the decision below, and for good reason: The Ninth Circuit rejected the government's argument 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." Ibid.; see 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 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.

presented in Thomas. See Tipton Pet. ii n.1 (“The question presented in this case is nearly identical to the question presented in the pending petition for writ of certiorari in Thomas.”); Roane Pet. 3. This Court recently denied certiorari in both Thomas and Kinard. See Thomas, No. 23-1168 (Oct. 7, 2024); Kinard, No. 24-5042 (Oct. 15, 2024). The same result is warranted here.

Even if the question presented otherwise warranted this Court’s review, petitioners’ cases would be unsuitable vehicles for such review because a decision in petitioners’ favor on their challenges to their Section 924(c) convictions would have no practical effect on their sentences. See The Monrosa v. Carbon Black Exp., Inc., 359 U.S. 180, 184 (1959) (“While this Court decides questions of public importance, it decides them in the context of meaningful litigation.”); Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (explaining that this Court does not “decide abstract questions of law * * * which, if decided either way, affect no right” of the parties).

Petitioners are each subject to at least one sentence of death for certain Section 848(e) murder offenses, and, in addition, are subject to multiple concurrent life terms of imprisonment on their other Section 848(e) murder convictions, VICAR murder convictions, and Section 848(a) conviction. Accordingly, even if petitioners’ consecutive sentences for violating Section 924(c) were vacated,

that would not “secure any prospect of tangible relief,” and therefore this Court’s discretionary review is not warranted. United States v. Ruiz, 990 F.3d 1025, 1035 (7th Cir. 2021) (recognizing when a defendant faces a life sentence on a valid count of conviction, such that prevailing on a collateral challenge to an allegedly “constitutionally infirm conviction and consecutive sentence[] will” not change the duration of the defendant’s time in custody, the court may decline to consider claim), cert. denied, 142 S. Ct. 1421 (2022); accord Al-’Owhali v. United States, 36 F.4th 461, 467-468 (2d Cir. 2022).

For similar reasons, contrary to Tipton’s suggestion (Tipton Pet. 13), 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 threatened use of physical force against the person or property of another.” Tipton has not previously challenged his Section 924(c) convictions on that theory. And even if this Court in Delligatti interprets Section 924(c)(3)(A) to exclude crimes that can be committed by an act of omission, that interpretation would have no

effect on Tipton's overall sentence because, as explained above, he would remain subject to sentences of death as well as multiple life terms on other counts.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.