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No. **24 - 6348**

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Christopher Howard — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Christopher Howard
(Your Name)

P.O. BOX 9000
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(City, State, Zip Code)

N/A
(Phone Number)

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QUESTION(S) PRESENTED

1. Whether The Second Circuit Court of Appeal's Decisions to overturn the District Court's Acquittal of Petitioner on both the VICAR and 924(c) Counts, in Petitioner's Rule 29(c) Motion was in disregard for the District Court's full and plain assessment that the Government did not meet it's burden of establishing the elements of VICAR resulted in an, inter-circuit split that all elements of VICAR must be met to find a Defendant Guilty beyond a reasonable doubt.
2. Whether the jury verdict resulted in a Yates or Stromberg error when both the RICO Conspiracy and VICAR were used as predicates supporting the conviction of the 924(c) and at least one of the two is constitutionally invalid.
3. Whether VICAR is a crime of violence under, (N.Y.P.L. §120.05 Assault with a deadly weapon), under the now constitutionally invalid residual clause. If the specific subsection was not specifically addressed and the jury instructions track the language of both the non-qualified and The qualified subsections of N.Y.P.L §120.05.
4. Whether the Jury instructions under the now unconstitutional residual clause for 924(c) caused the prejudice effect allowing the jury to find petitioner guilty for conduct beyond the scope of what the government can constitutionally prosecute, without proper and full notice at all stages of the indictment.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Michael White, 17-CR-611-1(AT)

Michael White v. United States, 19-3313, 20-805

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18 U.S.C.A. §1959(a)(3) Violent Crime in Aid of Racketeering.

18 U.S.C. §1962(d). Racketeering Conspiracy.

OTHER

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A-(1), (2) the petition and is

☒ reported at 19-3833-cr(Con), 20-2051-Cr(XAP); or, 22-3079
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at 17-CR-611; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 31, 2024.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including Ori. Filing Date (date) on Post Marked 09/26/24 (date) in Application No. A. See Attached Letter From Clerk.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment 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, ...nor be deprived of life, liberty, or property, without due process of law... (relevant parts).

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (relevant parts).

STATEMENT OF THE CASE

The Court of Appeals in this case held that the District Court's Acquittal of Count's six and twelve, VICAR and 924(c) respectively), was decided in error. "If the jury has returned a guilty verdict, the Court may set aside the verdict and enter an acquittal ", pursuant to Fed. R. Crim. P. 29(c), but it may do so only when, "There is 'no evidence upon which a reasonably mind might fairly conclude guilt beyond a reasonable doubt.,". U.S. v. Irving 952 F.3d 110, 117, (2d Cir. 2006)(Quoting U.S. V. Taylor 464 F.2d 240, 243)(2d Cir. 1972).

The Appeals Court reviews the challenge to the sufficiency of evidence De Novo, and determines that a conviction must be upheld, "If 'any' rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

The Appeals Court Held That:

- (1) Evidence was sufficient to support conviction for RICO Conspiracy; "NOT AT ISSUE IN THIS WRIT);
- (2) Evidence was sufficient to support conviction for violent crime in aid of racketeering; and
- (3) offense of violent crime in aid of racketeering was valid predicate crime of violence to sustain conviction for using firearm in furtherance of crime of violence.

It is important to emphasize that, in evaluating the evidence under this standard," Courts must be careful to avoid usurping the role of the jury when confronted with a Motion for acquittal ." The Second Circuit explained that Rule

29(c) does not provide the trial court with an opportunity to substitute its own determination of the weight of evidence and the reasonable inferences to be drawn for that of the jury. However, "If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilty and a theory of innocence, then a reasonable jury might necessarily entertain a reasonable doubt." U.S. V. Glen 312 F.3d 58, 70, (2nd Cir. 2002); Accord U.S. V. Cassese, 428 F.3d 92, 99, (2nd Cir. 2005).

Applying this standard does not, however, mean that a reviewing court must affirm all jury verdicts if, "We are to be faithful to the constitutional requirement 'That no person may be convicted unless the government has proven guilt beyond a reasonable doubt, we must take seriously our obligation to assess the record to determine...whether a jury could reasonably find guilt beyond a reasonable doubt.'" U.S. V. Clark, 740 F.3d 808, 811; (2nd Cir. 2014). This standard does not mean that if there is any evidence that arguably could support a verdict, we must affirm.

While we defer to a jury's assessments with respect to credibility, conflicting testimony, and the jury's choice of the competing inferences that can be drawn from the evidence, specious inferences are not to be indulged, because it would not satisfy the constitution to have a jury determine that the defendant is probably guilty. If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a

theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.

Howard was found guilty of VICAR by the jury. This finding of guilt by the jury provides that the Court is to defer to a jury's assessments with respect to credibility, conflicting testimony, and the jury's choice of the competing inferences that can be drawn from the evidence. Yet, specious inferences are not to be indulged, because it would not satisfy the Constitution to have a jury determine that the defendant Howard is probably guilty of VICAR on all elements, because he may have committed the offense of assault with a dangerous weapon as a personal retaliation or for the purpose of maintaining or increasing his position or status in the gang. If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.

The Second Circuit's previous position on beyond a reasonable doubt premised on 'All elements of the offense', is definitive, "It is not enough that inferences in the government's favor are permissible. A Court must also be satisfied that the inferences are sufficiently supported to permit a rational juror to find that each element of the offense is established beyond a reasonable doubt: if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then

a reasonable jury must necessarily entertain a reasonable doubt.

Even broadly stated there was, "No evidence to support the Government's speciously strained inference that Howard had a generalized need to use 'gun violence', in response to all acts of disrespect - regardless of whether the disrespect was directed at him personally or was related to the affairs of the enterprise " in order to maintain his position in the enterprise or to further the enterprise's objectives." id. "Without such evidence," the Court concluded, "It was Impermissible 'to infer that Howard violent response to Samuel's actions were related to the enterprise's affairs or was an integral aspect of Howard's membership." id. Indeed, to hold otherwise would "blur Concepcion's distinction between violent crimes that are committed in connection with a criminal enterprise's affairs and those that arise from purely non-enterprise-related matters. Indeed, taking the government's theory to its logical conclusion, an act of violence committed by a member of a drug trafficking group, whether related to its drug trafficking objectives or not, would be a [Section 1959 (a) offense].".

Without arguing Petitioner ask this Honorable Court to answer the question of whether the District Court ruling in both Jones, 291 F. Supp. 2d 78, (2003), and Blondet 2022 U.S. Dist. LEXIS 217762, in the final analysis, to Blondet the Court has used an out of Circuit Case Banks, 514 F.3d 959, @ 968-70 and other decades of Second Circuit precedent

the question asked today is whether the government's specious inferences met the burden of beyond a reasonable doubt standard. In regards to element five of the VICAR count, for the act of violence committed by petitioner Howard for a non-enterprise related matter?

This question is both ripe and pertinent for this Court due to the effect that this particular issue has on many similiar situated youth, and urban men who may be affiliated with gangs and thus arbitrary labling of every act of criminal behavior is being condemned as VICAR. The District Court Judge recognized these errors and flawed thinking and granted the Rule 29(c) Judgement of acquittal , the District Judge gave a well thought out and articulate sound explanation for determining that the government did not meet their burden of proving beyond a reasonable doubt that petitioner Howard, acted with more than mixed motives or in fact he acted with a general purpose, dominant purpose as an intregral aspect of gang membership. This is the statutes full scope that provides lucidity to how this statute is to be viewed and imposed. The government did not meet their burden and this deprived petitioner of his rights to be free from the loss of life and liberty without being found guilty by a jury of his peers beyond a reasonable doubt, (on all elements of a crime.).

REASONS FOR GRANTING THE PETITION

There is a conflict among the circuits on the exact point involved in this case. The Second Circuit has a long line of cases holding that the fifth element of VICAR, "That his general purpose in so doing was to maintain or increase his position in the enterprise." In vacating Howard's conviction (By Acquittal), The District Court Relied solely on the fifth element." The District Court determined that the burden of proof was not met by the government. See e.g., United States V. Concepcion, 983 F.2d 369, 381 (2nd Cir. 1992). "That his General purpose in so doing was to maintain or increase his position in the enterprise." The provision itself contains no reference to the defendant's "sole" or "exclusive" or "primary" purpose.

Conversely, the Ninth Circuit was ruled that the same circumstances do or would result in saying, that a defendant falls within the scope of VICAR if his desire to enhance or maintain his status in the organization had any role, no matter how incidental, in his decision to commit a violent act. To adopt such a broad interpretation would risk extending VICAR to any violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang; if the reach of this element were not cabined in some way, prosecutors might attempt to turn every spontaneous act or threat of violence by a gang member into a VICAR offense. The VICAR statute itself

contains no indication that congress intended it to make gang membership a status offense such that mere membership plus proof of a criminal act would be sufficient to prove a VICAR violation. Otherwise, every traffic altercation or act of domestic violence, when committed by a gang member, could be prosecuted under VICAR as well. As shown above, as well as below, the Ninth Circuit law and interpretation on this point is correct and much more consistent with the Congressional Statute and Intent.

I. The Second Circuit reasoning is flawed; The Ninth Circuits Reasoning correctly applies to the fifth element of VICAR.

Like every other Circuit that has ruled on the matter, the Second Circuit was held that, if and only if there is no evidence, i.e. non-existent or so meager as to preclude the inference necessary to a finding favorable to the government. Aquart, 912 F.3d 1, 17 (2d Cir. 2018), (quoting U.S. V. McPherson, 424 f.3d 183, 190 (2d Cir. 2005)). id. @ 44-45 (quoting U.S. v. Jiau, 734 f.3d 147, 152, (2d Cir. 2013)).

Yet, the Second Circuit has made clear in the ruling decision in Valle 807 f.3d 508, 515, that through the Court must be careful to avoid usurping the role of the jury when confronted with a Motion for Acquittal however, "if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial

support to a theory of guilt and theory of innocence, then a reasonable jury must necessarily entertain' a reasonable doubt." U.S. v. Glen, 312 f.3d 58, 70 (2d Cir. 2002).

This Decision on it's face should comport with the out of Circuit cases of both U.S. v. Banks, 519 f.3d 959, 969 (9th Cir.), U.S. v. Jones, 291 F. Supp. 2d 78, (2003), that specious inferences can not meet the standard required by the statute and the constitutional standard of beyond a reasonable doubt.

The Ninth Circuit:

The Ninth Circuit holds as that a defendant falls within the scope of VICAR if his desire to enhance or maintain his status in the organization had any role, no matter how incidental, in his decision to commit a violent act. Risk extending VICAR to encapsulate behavior not criminalized by the statute. U.S. v. Banks 514 f.3d 959, 969, SHOULD BE THE RULE.

II. Banks is sound whereas Santiago-Ortiz 797 F. App'x 34, (2d Cir. 2019) is unfair and invites future mistakes.

VICAR itself commands that the elements test for the fifth elements of VICAR requires that the reach of the interpretation of maintain status within the gang in some way:

In every case the court should be concerned with ensuring that the fair use of reasonable inference is the standard relied upon when holding a defendant accountable for a infamous crime, without this strong reliable consistent approach, the result will particularly be unreasonable. Because of a over reach of the government to meet it's burden of establishing each element beyond a reasonable doubt.

Surely, such an overreach has occurred when as Banks aptly described it, "The VICAR statute itself contains no indication that congress intended it to make gang membership a status offense such that mere membership

plus proof of a criminal act would be sufficient to prove a VICAR violation....," The government did not meet it's burden of proof that maintain and increase was an intregal part of the violent act. If Santiago-Ortiz rather than Banks is to be the nationwide standard, defendants, at least who go to trial may as well plead guilty if the government is not required to find all elements of the crime beyond a reasonable doubt.

Were Banks the National Rule, not only would defendant's more likely receive a fair trial, the procedure would ensure that the intent of congress is met in regards to the burden of establishing the fifth element of VICAR relying on reasonable inference not specious inferences which only establish reasonable doubt but does not meet the burden of extending beyond such doubt.

A remand in order to dismiss the VICAR along with 924(c) would promote such nationwide coherence with congressional intent, not to mention the fair and just treatment for all defendants charged with such an offense that has unclear mixed motives. The Burden is always upon the government to prove the offense upon which it exercised its prosecutorial discretion to charge the defendant with.

The petition for writ of certiorari should be granted.

STATEMENT OF FACTS
QUESTIONS PRESENTED QUESTION 2.

The Trial Court in this case held that the jury was instructed under the residual clause. Page 652 of Trial Transcripts lines 7-17, as follows, "The [second element], that the government must prove beyond a reasonable doubt with respect to Count Three is that the Defendant, or someone he aided and abetted, either used or carried a firearm during and in relation to a crime of violence, or possessed a firearm in furtherance of such a crime. An offense qualifies as a crime of violence if you find that the offense, as committed, involved a substantial risk that physical force might be used against the person or property of another. To prove Count Three the government must have established that Count One, Two, or both qualify as a crime of violence."

The jury verdict form Question 5 definitively shows that both Count One and Count Two were found to qualify as the predicate upon which the Jury relied under the Jury Instructions to find that either Count could serve as the predicate offense for the 924(c). Question 5, "Do you find that the defendant is guilty on Count Three in relation to the conduct charged in Count One, the conduct charged in Count Two, or both?" Answer, "Both".

This Court having Supreme Jurisdiction over the land has ruled previously that when there is an instructional error in a case which has a substantial and injurious effect

and or influence in determining the jury's verdict," *Brecht v. Abrahamson*; 507 U.S. 619, 6223, 113 S. Ct. 1710, 123 L. ED. 2d 353(1993) and petitioner's 924(c) conviction must therefore be reversed?

In *Yates*, The Court explained that, "Constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory", *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, (1957). A General Verdict of guilty in a criminal case must be set aside where it is supported on one ground but not on another and it is impossible to tell which ground the jury selected.

The Residual Clause was struck down as unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336, (2019). Following *Davis*, in order for a 924(c) conviction to count, it must qualify under the "elements" clause or "force" clause, §924(c)(3)(A).

Employing the analysis prescribed in *Davis*, the Court of Appeals for the Second Circuit held that Rico Conspiracy in violation of 18 U.S.C. §1962(d) (one of the predicates for the firearms count), is no longer categorically a crime of violence under 18 U.S.C. §924(C)(3)(A), because the elements do not require the use, attempted use, or threatened use of physical force. *United States v. Capers*, 20 F.4th 105, (2d Cir. 2021).

The New York state law statute that covers, Assault in the second degree, only qualifies under some of the subsections.

In every case the Court should be concerned with ensuring that fair and just trial is being conducted. In order for this Trial to be considered fair and just we must look to what took place during trial and not the hypothetical things that could of or may have taken place had things been different, the jury verdict form clearly shows the following facts;

Verdict on Count Two: Guilty.

Count Three. Question 1. Have you found that the defendant is guilty with respect to either count one or count two?

Answer: Yes.

Question 2. On or about August 17, 2014, did the defendant use, carry or possess a firearm, or do any combination of those acts; or aid and abet the use, carrying or possession of a firearm by another?

Answer: Yes.

Question 3. On or about August 17, 2014, did the defendant use or carry the firearm during and in relation to a crime of violence or possess the firearm in furtherance of such crime?

Answer: Yes.

Question 4. Did the defendant act knowingly and unlawfully in using or carrying firearm on or about August 17, 2014?

Answer: Yes.

Verdict on Count Three: Guilty.

Question 5. Do you find that the defendant is guilty on Count Three in relation to the conduct charged in Count One, the conduct charged in Charged in Count two, or both?

Answer: Both.

Question 6. Did the defendant brandish a firearm in relation to this offense?

Answer: Yes.

Question 7. Did the defendant discharge the firearm in relation to this offense?

Answer: Yes.

Given the ambiguity of the verdict form and its repeated reference to a single crime, ("crime or crimes of violence," "such crime," "this offense," and, again "this offense"), the jury may have found, consistent with the district court's instructions and the verdict form, that Christopher Howard had carried and brandished the firearm in relation to the RICO Conspiracy was alleged to have extended over a period of time was quiet longer then the VICAR offense which was alleged to have occurred on a single day, so the jury did have a more extensive window of time for possible possession, brandishing, or discharging with respect to the RICO Conspiracy, perhaps making it easier to find possession, brandishing, or discharge with respect to the conspiracy charge.

The Due Process Clause of the Fifth Amendment (as well as its counterpart in the Fourteenth Amendment) both require that a defendant be proven guilty beyond a reasonable doubt. That standard "provides concrete substance for the presumption of innocence -- that... 'elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

"In re Winship, 397 U.S. 358, 363, 90 S. CT. 1068, 25 L. Ed. 2d 368(1970)(quoting Coffin v. United States, 156 U.S. 432, 453, 15 S. CT. 394, 39 L. Ed. 481(1895); See Also Estelle v. Williams, 425 U.S. 501, 503, 96 S. CT. 1691, 48 L.ED. 2d 126(1976)(discussing the reasonable doubt standard).

Surely, the Jury Verdict Form left the jury to be able to return a verdict of guilty on the 924(c) charge if it found Christopher Howard possessed, brandished, or discharged a firearm in relation to RICO Conspiracy, even if it found that he had not possessed, brandished, or discharged a firearm in relation to the VICAR offense.

While the jury verdict form established that the jury had found Christopher Howard guilty of both the RICO Conspiracy and the VICAR charge, the jury could have, consistently with the Court's instructions, found that the firearm had been possessed, brandished, and discharged in relation to the RICO Conspiracy and not in relation to the VICAR. As we have noted, the evidence that a firearm was possessed, brandished, and discharged in relation to a long-term RICO Conspiracy is arguably stonger than the evidence that it was possessed , brandished, and discharged during the one day VICAR offense - but it is impossible and probably unwise to try to imagine the course of a jury's deliberations.

The Government did not meet its standard of properly instructing the Jury and due to the Yates and Stromberg v. California 283 US 359, standard of alternative theories of

guilt and a return of a general verdict that rest on legally invalid theory. The Rule is, " A general verdict of GUILTY in a criminal case MUST be set aside where it is supported on one ground but not on another and it is impossible to tell which ground the jury selected.

A remand for hearing in this case on the Yates or Stromberg issue would promote such nationwide coherence with congressional intent, not to mention the fair and just treatment for all defendant's who exercise their right to jury trial and the jury being instructed on the proper elements of the crime charged against the defendant. The burden is always on the government to prove the offense upon which it exercised it's prosecutorial discretion to charge the defendant with.

The Petition for writ of certiorari should be granted.

REASON FOR GRANTING THE PETITION
IN REGARDS TO QUESTION 2.

To not Grant the Petition in regards to Question 2. would allow the Second Circuit to continue to conduct trials in error of the Yates ruling that constitutional errors in jury instructions resulting in a general jury verdict in a criminal case (MUST) be set aside where it is supported on one ground but not on another and it is impossible to tell which ground the jury selected.

Here, in this case, the District Court's instructions allowed the jury to return a guilty verdict on the 924(c) charge if it found that Christopher Howard had possessed, brandished, or discharged a firearm in relation to RICO Conspiracy, even if it found that he had not possessed, brandishing , or discharged a firearm in relation to the VICAR offense. While the Jury verdict form established that the jury had found Christopher Howard guilty of both the RICO Conspiracy and the VICAR charge, the jury could have, consistently with the Court's instructions, found that the firearm had been possessed, brandished, and discharged in relation to the RICO Conspiracy and not in relation to the VICAR. As we have noted, the evidence that a firearm was possessed, brandished, and discharged in relation to a long-term RICO Conspiracy is arguably stronger than the evidence that it was possessed, brandished, and discharged during the one day VICAR offense - but it is impossible and probably unwise to try to imagine the course of a jury's deliberations.

Christopher Howard's arguments gain added force because this Court struck down the one definition prong on which the Court did instruct the jury. Mr. Howard views this case as similar to cases in which the only predicate crime for a §924(c) firearms has been a RICO Conspiracy. In such cases, the consequences of the Davis decision has been that the conviction has been vacated and the Count dismissed. See, e.g., Simmons, 11 F. 4th at 254-61. To phrase the argument in a different way, because the jury used an invalid definition in order to reach its finding that RICO conspiracy and VICAR are crimes of violence, that essential element of a §924(c) offense was not established.

It is axiomatic that a defendant is entitled to have the jury adequately instructed on each essential element of the crime for which he is charged. *United States v. Montiel*, 526 F. 2d 1008, 1010 (2d Cir. 1975). The failure to charge accurately each and every element of the offense may be plain error cognizable on appeal even where no exception or request for charge was made below. *United States v. Natale*, 526 F.2d 1160, (2d Cir. 1975); *United States v. Howard*, 506 F. 2d 1131, (2d Cir. 1974); *United States v. Fields*, 466 F. 2d 119, (2d Cir. 1972).

The failure properly to instruct the jury on an essential element as complex as the definition of violent crime created an impermissible risk that the jury did not make a finding that the Constitution requires and this Court should Grant Certiorari in order to review this issue.

The Jury's verdict form does nothing to alleviate the concern that the jury found that the possession, brandishing, and discharging of the weapon was in relation to the non-violent RICO Conspiracy offense. Indeed, the phrasing of the verdict for ~~suggesting~~ a finding of possession related to only one of the charges, and it is impossible to determine to which of the two charges the possession, brandishing, and discharging was related.

The erroneous jury instruction: The District Court instructed the jury that one of the elements of a violation of 18 U.S.C. §924(c) is that the predicate offense must be a crime of violence. The District Court also instructed that the jurors were required to determine whether the RICO Conspiracy Count and the VICAR Count were crimes of violence. In order to make that determination, the District Court instructed, the jurors were to use the standards set forth in the residual clause, §924(c)(3)(B). The District Court did not, however, also instruct the jurors that they were to use the standards set forth in the "elements" or "force" clause, §924(c)(3)(A). This Court, of course, struck down the standards set forth as unconstitutionally vague the standards of the residual clause which the jurors were told to utilize.

Christopher Howard, The Government, The District Court, and the Court of Appeals, (at least by implication), agreed that the District Court's jury instruction on crime of violence was erroneous. The government argued and the District Court held that the error was harmless because the

question of whether a particular crime satisfies the statutory definition of "Crime of Violence" is a question of law and the district Court's instructing the jury that it was required to make a finding as to whether RICO Conspiracy and VICAR are crimes of violence was superfluous.

The jury was not told that VICAR is a crime of violence as a matter of law. They were told the opposite. They were told that it was up to them to determine whether the charged VICAR and the RICO conspiracy was a crime of violence. According to the instruction, either would serve as a predicate for a §924(c) conviction. We don't know whether the jury relied on one or the other or both. And more to the point, we don't know if the jury determined, as it was instructed, that either of the charged crimes of violence was a sufficient predicate because they involved a substantial risk that physical force may be used - a yardstick the Supreme Court has disallowed.

Mr. Howard presents the argument to this Court that whatever or not it was proper to instruct the jury that it was required to make a finding concerning whether RICO Conspiracy and VICAR are crimes of violence, nevertheless, having done so, the District Court was certainly required to instruct the jury as to both aspects - both the elements clause and the residual clause - of the statutory definition of crime of violence.

Although the jury found that Christopher Howard was guilty on the VICAR Count, it did not make a specific finding that he had carried the firearm in relation to the VICAR Count. The wording of the special jury verdict form left ambiguous whether the jury found one; that he had used or carried a firearm in relation to the VICAR Count, (not determined on the record), The Conspiracy Count, (not a crime of violence) or both, and Two which if any subsection was being relied upon with regards to the Assault with a deadly weapon.

STATEMENT OF FACTS
QUESTIONS PRESENTED QUESTION 3.

Whether the "Trial's VICAR is a crime of violence under, (N.Y.P.L. §120.05 Assault with a deadly weapon), under the now constitutionally invalid residual clause. If the specific subsection was not specifically addressed and the jury instructions track the language of both the non-qualified and the qualified subsections of N.Y.P.L. §120.05.

To resolve this issue, the Court must consider the mens rea required for the commission of New York assault with a deadly weapon. This is because, in *Borden v. United States*, the Supreme Court determined a criminal offense requiring only a mens rea of recklessness cannot count as a "violent felony" under the elements clause. 141 S. Ct. 1817. (2021).

In accordance with N.Y.P.L. §120.05 there are six subsections that constitute assault with a deadly weapon and the means to which these particular subsections can be carried out and committed in order to determine which type of assault was committed under each varying subsection the burden of giving notice to the defendant as to which of the subsections he was being charged with violating. This is a Due Process Right and must be adhered to in order to be in compliance with the Constitution and the Federal Rules of Court. Each of the subsections have a reckless mens rea except for subsection 2 all others read as follows: In *Chrzanoski v. Ashcroft*, 327 F.3d 188, (2d Cir. 2003), the Second Circuit has clearly stated in the *Poindexter* Court which reasoned that to qualify as a predicated offense the offense must contain as an element the ~~use attempted use or threatened use~~

of violent force not simply result in physical injury or death the Court held that 120.05(4) permits conviction with a mental state of recklessness, which fails to qualify as use of physical force. In granting the habeas petition, the court found that even 120.05(1) does not require the government to prove that the offender used violent force in causing the injury, and requiring only intent and result does not satisfy the force clause." See Chrzanoski; 1327 F.3d at 196).

The Government in the Second Circuit in the Singleton v. United States, No.3:07-CR-282(RJC) 2016 U.S. Dist LEXIS 78919 2016 WL 3406248 (W.D.N.C. June 15, 2016), There the government stated under New York Law, Second Degree assault may be committed in numerous ways, some of which do not satisfy the force clause. Because the government in Singleton could not establish under which subdivision/subsection of Second Degree assault the petitioner was convicted under the government conceded that the petitioner's conviction was not for a violent felony and request for relief should be granted.

The Court is being asked to determine whether the actions of the Government deprived Howard of his Fifth Amendment Due Process Rights when they failed to enumerate which [Qualifying] subsection was being charged against him and whether that was something that needed to be sent to the jury as well. In a criminal proceeding where a person is facing the deprivation of life and liberty he is afforded

rights which can not be impinged upon without first providing notice but not just any notice, proper notice of what is at stake and what the elements are of the particular statute.

After Borden VICAR's cannot be a crime of violence due to the many variations by which these particular state actions can be committed many with underlying elements that involve reckless mens rea. The Residual Clause was the catch all clause that allowed many of these crimes to be prosecuted under the particular statute of VICAR without requiring that the individual be held to account for individualized conduct but the overreach of the statute has been reined in by the ruling in Borden and the government is asking that it be granted a reprieve on its duty to prove these elements each of them beyond a reasonable doubt in front of a jury and instead is saying the Court can find the defendant guilty.

Is this the standard, has the law changed and made it where the jury trial is only a farce and the actual finding of guilt is determined by the judge even if the jury determines otherwise, or does the government just present the proverbial issues to the judge to determine, and then justify that abuse of providing proper notice by saying on this issue is a matter of law therefore it is not up to the jury. The finding of guilt is always up to the jury, the burden of proof lies on the shoulders of the government. The question is whether the two are overlapping in this instance and whether the Government is denying defendant his right by refusing to vacate his sentence and charge.

See Trial Transcripts the District Court's Jury Instruction on "Crime of Violence", pg 652, lines 12-17, "An offense qualifies as a 'Crime of Violence', if you find that the offense, as committed, involved a substantial risk that physical force might be used against the person or property of another." "To prove Count Three, the Government must have established that Counts One, Two, or both qualify as a crime of violence." Accordingly the District Court purely established the elements as those relying on the now invalid and constitutionally impermissible residual clause and none other as the Appeal Court later states.

Citing this Court's ruling in Borden which states that "offense with a Mens Rea of recklessness did not meet the definition of a "violent felony", . . . because they did not require, active employment of force against another person.

Borden and it's determination that a Mens Rea of recklessness not counting as a "violent felony" or "crime of violence", have to apply equally across the country, if Howard committed the identical assault in Utah or Arizona as did in New York Borden has been decided differently in those two Circuit and this Court is being asked to clear the split in how the Borden decision is effecting the overview of the VICAR statute and it's definition of what qualifies as a crime of violence. The New York Statute has a reckless Mens Rea and therefore can not be considered a crime of violence as was determined in the Norton Ruling, that when a statute particularly the Georgia aggravated assault can be committed recklessly and with intent, it is therefore not

categorically a crime of violence. See Moss, 920 F.3d at 758; Flores v. U.S. Att'y Gen., No. 21-10514, 2022 U.S. App. LEXIS 2605, 2022 WL 248180, at *3 (11th Cir. Jan. 27, 2022). See also Norton 5:92-CR-29, 5:19-CV-102, as well as Toki 23 F.4th 1277, 1279.

The Petition for Writ of Certiorari should be Granted.

REASON FOR GRANTING THE PETITION

IN REGARDS TO QUESTION 3.

To Grant the Petition in regards to Question 3 would afford the District Court the opportunity to correct the errors on the record in regards to the failure to present to the jury the specific elements that must be found by the jury not the Court's nor the Government in order to observe the letter of the law by vacating the sentence and conviction.

Howard was found guilty pre-Davis and therefore it is not for the Appeals Court nor the District Court to usurp the duty of the jury and say what they may have determined, this is a Court of Law and the Law presided not opinions, therefore, in order to be properly adhered to, the law dictates that because an element was omitted then the sentence should be vacated. The Court of Appeals failed to follow the letter of the Law and decided to find Defendant Howard Guilty under the elements clause without a jury or a trial, outside the scope of their authority. This is why this Petition should be granted.

The law is on the side of the Defendant in regards to requesting the Court vacate the sentence and the conviction. The errors that were made are not ones to be overlooked nor minor trivial things that don't require correction but they are major issues that were used to bring a defendant back into imprisonment after being acquitted of the very charges that the Appeals Court reinstated after stating that they should never have been used to release him in the first place this must be corrected and addressed. This Petition should be granted.

STATEMENT OF FACTS
QUESTIONS PRESENTED QUESTION 4.

Whether the Jury Instructions under the now unconstitutional residual clause for 924(c) caused the prejudice effect allowing the jury to find petitioner guilty for conduct beyond the scope of what the government can constitutionally prosecute, without proper and full notice at all stages of the indictment.

United States v. Frady, 456 U.S. 152, 170, 102 S. CT. 1584, 71, L.ED. 2d 816 (1982)). "A sentence that is not authorized by law is certainly an 'actual and substantial disadvantage' of 'constitutional dimensions.'" Id. (quoting Frady, 456 U.S. at 170). If the Court erred by basing Mr. Howard's conviction and sentence on the unconstitutional residual clause, he most certainly suffered prejudice by being convicted for an act that the statute unconstitutionally criminalized.

The Government asserts that whether an offense is a crime of violence under 18 U.S.C. 924(c) is a question of law." U.S. v. Cheese, 849 F. App'x __. All VICAR's are governed by the underlying state convictions and the District Court looks to the decisions that have been decided in regards to the particular offense from the state courts. The government seems to miss the mark by attempting to work around the error that took place in the Defendant's trial, Post-Davis the residual clause has been determined to be unconstitutional, period, and there is no way to correct the fact that Howard was found guilty only with those

instructions given to the jury. In order to resolve this question, the jury first must consider the full nature of the elements of the charge and crime and the Court nor the Government is properly seated in a position to usurp that authority if Howard's Rights are being upheld and the Constitution to be honored.

If any individualized particular jury instruction violates the Constitution for failing to properly instruct the jury regarding the elements of an offense only when "there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution".

In all federal criminal trials, the Fifth Amendment's guarantee of Due Process of Law requires the government to prove beyond a reasonable doubt every element of the offense for which the defendant is charged. Thus, jury instructions may violate a defendant's Constitutional Right to Due Process if they relieve the government of it's obligation to meet the requirement. See *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L. ED. 2d 701 (2004).

If the District Court omitted an element but the evidence was sufficient to prove the element beyond a reasonable doubt, the appropriate remedy is to vacate & remand for a new trial. "If however the evidence presented in the District Court was insufficient and an element was omitted then the proper remedy is vacatur of the conviction or sentence. *U.S.v. Markiewicz* 12d, Cir. 1992).

See Trial Transcripts the District Court's Jury Instruction on "Crime of Violence", pg 652, lines 12-17, "An offense qualifies as a 'Crime of Violence', if you find that the offense, as committed, involved a substantial risk that physical force might be used against the person or property of another." "To prove Count three, the Government must have established that Counts One, Two, or both qualify as a crime of violence." Accordingly the District Court purely established the elements as those relying on the now invalid and constitutionally impermissible residual clause and none other as the Appeal Court later states.

The Petition for Writ of Certiorari should be Granted.

REASON FOR GRANTING THE PETITION

IN REGARDS TO QUESTION 4.

As for active prejudice Mr. Howard has shown that the claimed error is an "error of constitutional dimensions" that worked to his actual and substantial disadvantage, quoting United States v. Frady 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L.ED. 2d 816 (1982)). Disadvantages of Constitutional dimensions exist if the court erred by basing Mr. Howard's conviction on the unconstitutional residual clause, he most certainly suffered prejudice by being convicted for an act that the statute unconstitutionally criminalized.

The residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the juries assessment of risk to a hypothetically imagined ordinary case of crime not to real world events with facts or statutory elements.

In order for the law to be properly upheld the Jury must be afforded the opportunity to perform the duty it has been appointed to undertake. The Defendant who has exercised his right to trial and stood firm on under the Constitutional standing that he is innocent until proven guilty is properly advised that he has the right to have the government prove beyond a reasonable doubt each and every element of the particular charge under which he is being indicted. To allow the indictment to stand under the partial jury instruction and pervert the system into saying, well they would have found this count under the finding of guilt

anyway is to literally say the government can and has read the mind of all the jurors. This is not the law, this is an opinion and that is not the objective nor the standard that the government is sanctioned with proving.

The Government and the Appeals Court have repeatedly stated that the jury instruction was harmless error because Defendant Could have been found guilty under the elements clause this is another hypothetical scenario in which the government is admitting that essential elements have been omitted yet, it wants to be granted authority to forego it's duty to prove it to the jury. The omission of those elements are prejudicial and can not stand as such and therefore reversal is demanded by the Constitution itself. The possibility of a finding of guilt is not a standard which exist within the Constitution and to allow any Court to speak such falsity into truth is to delude the Constitution of it's full protection to the rights afforded by this foundational document upon which our democracy is built.

The Government has the prosecutorial discretion to bring forth any and all charges that it feels it may be able to prove to a jury and that is an unchecked power to further allow them to say, well we charged this count but we don't have to prosecute it because the defendant would have been found guilty anyway, is to say that the jury system no longer requires an actual jury only the facade of a jury that the government can then say we know they would have found him guilty because other juries have found similar persons guilty previously.

The denial of Due Process occurs whenever the jury is instructed in error as to the full elements of a charge. There is no circumventing this truth. In this case pre-Davis the residual clause was good law and part of the correct jury instruction yet, the omitted elements clause was also essential to the full jury instructions and was omitted from those instructions given to the jury. Since the initial trial the residual clause has been repealed and due to the elements clause never being instructed the instructions were devoid of the full elements the jury was to make it's determination on in violation of the Due Process Rights of Howard in violation of the Constitution and therefore the government cannot be allowed to forego the full responsibility that it has been tasked with when it intends to deprive a man, a citizen, a tax-payer of his life, liberty, and property.

This is not an issue of one man seeking redress but an act of one man asking this court to determine if the government is outside of it's authority by refusing to vacate the sentence.

The Writ of Certiorari is an opportunity to review this issue and acquit Howard on these counts in which the District Court has already previously acquitted him on.

This petition should be granted and the conviction and sentence should be reversed and dismissed due to the the fact that convicting someone for something that the law does not make criminal inherently results in a miscarriage of justice.

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Therefore, since Mr. Howard was denied his Constitutional Rights pursuant to both the Fifth and Sixth Amendments of the Bill of Rights, therefore his convictions and sentence should be vacated.

CONCLUSION

Based on the foregoing. Mr. Howard respectfully prays, that this Court vacate his convictions on all remaining counts 1, 6, and 12, and remand for further proceedings.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Chris Howard

Date: 11/29/2024