No. 17-7703

IN THE SUPREME COURT OF THE UNITED STATES

JOHNATHAN OLDHAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioner was not denied his right to an impartial jury when, after some jurors stated they had seen individuals observing the jurors' cars or following them from the courthouse, the district court held a hearing to question each juror, replaced the two jurors who gave equivocal answers about whether the incidents affected their ability to be impartial, and credited the remaining jurors' testimony that they could remain fair and impartial.

2. Whether the court of appeals correctly determined that petitioner's murder and attempted-murder offenses were committed for "the purpose of * * * maintaining or increasing [his] position in an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a).

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OPINION BELOW

The amended opinion of the court of appeals (Pet. App. 25a-47a) is not published in the Federal Reporter but is available at 702 Fed. Appx. 367.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2017 and amended on November 6, 2017. Petitions for rehearing were denied on January 3, 2018 (Pet. App. 49a). The petition for a writ of certiorari was filed on February 5, 2018. 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 Michigan, petitioner was convicted on one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); one count of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2; one count of attempted murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5) and 2; two counts of using and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); six counts of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1); one count of possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k); one count of possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d); and one count of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1)(A). Pet. App. 52a. The district court sentenced petitioner to life plus 35 years of imprisonment, to be followed by three years of supervised release. Id. at 53a-54a. The court of appeals affirmed. Id. at 25a-47a.

1. a. Petitioner was a member of "Murda Ville," a violent street gang based at a housing project in Flint, Michigan. Pet. App. 25a. The gang's primary purpose was to "facilitate individual members' drug dealing" in and around the housing project. Id. at 27a. Gang members sought to "maintain[] exclusive control" over

the housing project, including by "arm[ing] themselves with jointly-owned weapons and patroll[ing] the [housing project]" in order to "assault or kill rivals found on their territory." Ibid. "[W]hen an individual member was disrespected or threatened, other members helped him retaliate, so as to preserve his (and the gang's) reputation for violence." Ibid.

As a member of Murda Ville, petitioner sold heroin and crack cocaine, including by making six sales of crack cocaine to a confidential informant. Gov't C.A. Br. 15. Petitioner also committed several violent crimes, including the murder of Malachi Wilson (Malachi) and the attempted murder of Efrem Anderson. Id. at 11-13, 22-24, 45, 56-58, 62.

The murder of Malachi originated in a feud between petitioner's fellow gang member, Leon Gills, and a former gang member, Jonathan Wilson (Wilson). Pet. App. 31a-32a. Wilson had threatened Gills with a gun after discovering Gills in bed with Wilson's former girlfriend. Id. at 31a. Gills later went searching for Wilson and shot at Wilson's friends. Id. at 31a-32a. When Wilson then fled town, "Gills called him and threatened that, if he did not return to face Gills, Gills would kill Malachi," who was Wilson's brother. Id. at 34a. Months later, petitioner and another gang member spotted Malachi at the housing project. Ibid. They called Gills for instructions, and Gills "told them to 'lay law down.'" D. Ct. Doc. 785, at 32 (May 13, 2015); see id. at 31. Petitioner then "ran up to the SUV [that] Malachi was sitting in, opened the door, and started shooting." Pet. App. 34a. Malachi ran, but petitioner "chased him down and shot him in the head three times, execution-style." Ibid.

The attempted murder of Anderson arose from another dispute. A member of a biker gang called the Drifters shot Gills in the foot, after which petitioner and another individual "told fellow gang members that they planned to retaliate." Pet. App. 34a. The next night, the two drove to a biker club, where they encountered Anderson. Ibid. "Anderson pulled a gun on them, ordered them to leave, and then drove off." Ibid. Believing Anderson to be a member of the Drifters, petitioner and his fellow gang member "waited for [Anderson] in the parking lot," and when Anderson later returned, petitioner "shot him three times, once in the head." Ibid. Anderson, however, survived. Gov't C.A. Br. 12-13. Afterwards, the Drifters and Murda Ville "negotiated a ceasefire," and petitioner "bragged about scaring the rival [gang] into the truce." Pet. App. 35a.

b. In 2012, petitioner and 11 alleged co-conspirators were indicted by a grand jury in the United States District Court for the Eastern District of Michigan. Pet. App. 26a. As relevant here, petitioner was charged with two violent-crime-in-aid-of-racketeering (VICAR) offenses: one count of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2 (VICAR murder), and one count of attempted murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5) and 2 (VICAR attempted murder). Am. First Superseding Indictment 27-28, 41-42. Petitioner was also charged with one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); two counts of using and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); six counts of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1); one count of possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k); one count of possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d); and one count of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1)(A). Am. First Superseding Indictment 2-21, 28-33, 35, 38, 42.

c. Petitioner proceeded to trial along with five codefendants. Two weeks into the trial, "jurors told the district court about several instances of potential jury tampering." Pet. App. 36a. "Four jurors reported that, while they were driving home from the courthouse one evening, they spotted cars that they thought were following them. Two of the jurors identified the drivers as people they had seen sitting in the courtroom gallery." Ibid. "Several other jurors told the court that, through the window of the jury room, they had seen people loitering in the jurors' parking lot. To the jurors, the people appeared to be recording jurors' license plate numbers." Ibid. Petitioner, joined by the other trial defendants, moved for a mistrial.

In accordance with Remmer v. United States, 347 U.S. 227 (1954), the district court held a hearing to determine whether the reported incidents had prejudiced the defendants. See 6/17/14 Trial Tr. 1-106. The court individually questioned "each sitting and alternate juror about the potential tampering." Pet. App. 37a. Fourteen of the jurors gave "unequivocal and unhesitating responses" that they could remain "impartial and fair," while the two remaining jurors (who were both sitting jurors) "gave equivocal responses." D. Ct. Doc. 761, at 8 (July 18, 2014). The court dismissed those two jurors before deliberations and replaced them with alternates. See id. at 8-9. The court then denied petitioner's request for a mistrial, reasoning that the court was not required to "presume bias" in these circumstances, id. at 10, and finding that the record did not support defendants' assertion that "fear ha[d] contaminated the jury panel," id. at 9.

d. The jury found petitioner guilty on all 14 counts charged against him. Pet. App. 51a. The district court sentenced petitioner to an aggregate term of life imprisonment plus 35 years, to be followed by three years of supervised release. Id. at 53a-54a. As relevant here, petitioner received a term of life imprisonment on the VICAR murder charge and a concurrent ten-year term on the VICAR attempted-murder charge. Id. at 52a-53a.[1]

2. The court of appeals affirmed petitioner's convictions in an amended, unpublished opinion. Pet. App. 25a-47a.

As relevant here, the court of appeals rejected petitioner's contention that the district court abused its discretion in declining to declare a mistrial. Pet. App. 36a-39a. The court of appeals stated that where "potential jury tampering" has occurred, a court must "'hold a hearing to determine whether the incident[s] complained of' prejudiced the defendants." Id. at 37a (quoting Remmer, 347 U.S. at 230) (brackets in original). The court explained, however, that a court "cannot assume prejudice just because jurors have been 'placed in a potentially compromising situation,'" ibid. (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)), and noted that under circuit precedent, "the defendant must prove 'actual bias'" by tendering "circumstantial evidence of partiality," ibid. (citing United States v. Pennell, 737 F.2d 521, 532-534 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)).

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[1] In addition, the district court sentenced petitioner to a term of life imprisonment on the racketeering-conspiracy count; concurrent 20-year terms for each of the Section 841(a) drug counts; concurrent 10-year terms for the Section 922(k) and Section 922(a) firearms counts; and a concurrent 5-year term on the Section 5861(d) firearms count. Pet. App. 52a-53a. The court also sentenced petitioner to a consecutive 10-year term on one of the Section 924(c) counts, and a consecutive 25-year term on the other Section 924(c) count. Ibid.

The court of appeals determined that the district court "did not abuse its discretion in handling the alleged jury tampering." Pet. App. 39a. The court observed that the district court had held a hearing during which it had "questioned each sitting and alternate juror" and had the "opportunity to assess their demeanor." Id. at 37a-38a. The court of appeals further observed that the district court had "f[ound] * * * credible" the unequivocal testimony of fourteen jurors that they could remain impartial, id. at 38a, and had replaced the two jurors who "equivocated about whether they could be fair," id. at 37a. The court of appeals found that petitioner had failed to "rebut the jurors' assurances with compelling evidence of partiality." Id. at 38a. The court also observed that the facts here resembled those of a prior case in which it had similarly found no reversible error. See id. at 38a-39a (citing United States v. Zelinka, 862 F.2d 92, 93, 96 (6th Cir. 1988), and noting that "Zelinka featured a defendant who committed a gang-related crime, an associate who had made a threat on the defendant's behalf, and jurors who admitted to being frightened by the threat").

The court of appeals separately rejected petitioner's claim of "insufficient proof that he had a gang-related motive" for murdering Malachi and attempting to murder Anderson. Pet. App. 34a; cf. 18 U.S.C. 1959(a) (requiring proof that a defendant acted "for the purpose of * * * maintaining or increasing position in an enterprise engaged in racketeering activity"). The court explained that, to convict petitioner on the two VICAR counts, the government had to prove that "'an animating purpose of [petitioner's] action[s] was to maintain or increase his position' in the gang." Pet. App. 30a (quoting United States v. Hackett, 762 F.3d 493, 500 (6th Cir. 2014), cert. denied, 135 S. Ct. 1518 (2015)). The court found sufficient evidence to satisfy that element for both counts. Id. at 34a-35a. As to the murder of Malachi, the court determined that a jury could reasonably find that petitioner was motivated by a "fear of losing standing in Murda Ville if he let Malachi go free." Id. at 34a. As to the attempted murder of Anderson, the court noted petitioner's intent "to retaliate against a rival gang that had shot Gills"; his need under "the gang's code" to respond after he himself was "personally threatened by Anderson"; and his "bragg[ing] about scaring [his] rival into the truce," which constituted "circumstantial evidence that [he] committed the crime to increase his standing in the gang." Id. at 34a-35a.

ARGUMENT

Petitioner renews his contention (Pet. 9-16) that the district court abused its discretion in declining to order a new trial based on alleged jury tampering and further contends (Pet. 16-18) that the court of appeals erred in finding sufficient evidence that the murder of Malachi and attempted murder of

Anderson were for the purpose of maintaining or increasing petitioner's status in his gang. The court of appeals' unpublished decision correctly rejected petitioner's contentions on both issues, and neither warrants further review.

1. Petitioner first claims (Pet. 9-16) that the court of appeals was required under Remmer v. United States, 347 U.S. 227 (1954), to presume prejudice based on jurors' reports about individuals following them or looking at their cars. Petitioner urges this Court to grant certiorari in order to resolve disagreements among the courts of appeals about when a juror's exposure to extrajudicial contacts or information should be presumed to be prejudicial. This Court has repeatedly denied certiorari on that issue, and it should follow the same course here.[2] Although the courts of appeals have adopted varying approaches to the Remmer inquiry, this case is not an appropriate vehicle to resolve any conflict because petitioner would not prevail under any approach. The court of appeals here correctly determined that petitioner was not deprived of a fair trial, and further review is not warranted.

[2] See, e.g., Filson v. Tarango, 137 S. Ct. 1816 (2017) (No. 16-1000); Baras v. United States, 137 S. Ct. 589 (2016) (No. 15-1474); Blauvelt v. United States, 565 U.S. 823 (2011) (No. 10-1473); Basham v. United States, 560 U.S. 938 (2010) (No. 09-617).

a. In Remmer, a convicted defendant sought a new trial after learning that, during trial, a third party had attempted to bribe a juror and that the district court had initiated an FBI inquiry into the matter. 347 U.S. at 228. This Court remanded the case "with directions to hold a hearing to determine whether the incident complained of was harmful to the [defendant]." Id. at 230. In so holding, the Court stated that, "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." Id. at 229. The Court added that this presumption, although "not conclusive," places the burden on the government "to establish * * * that such contact with the juror was harmless to the defendant." Ibid.

Since Remmer, however, this Court has declined to apply a presumption of prejudice to other claims of jury irregularities. In Smith v. Phillips, 455 U.S. 209 (1982), the Court cited Remmer, but ultimately held that the proper remedy in a case in which a juror had applied for a position in the prosecutor's office during trial was "a hearing in which the defendant has the opportunity to prove actual bias." Id. at 215; see id. at 217 ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation."). In refusing to presume prejudice, the Court explained that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Ibid.

Likewise, in United States v. Olano, 507 U.S. 725 (1993), the Court declined to apply any presumption of prejudice when alternate jurors were present during jury deliberations. Id. at 737-741. The Court held that no new trial was required in light of a post-verdict inquiry that showed that the alternate jurors did not participate in the deliberations. Id. at 739-741. The Court explained that, although "[t]here may be cases where an intrusion should be presumed prejudicial," a "presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" Id. at 739.

b. The courts of appeals have adopted divergent positions on whether and to what extent Remmer's presumption of prejudice survives Phillips and Olano. The court of appeals below has long reasoned that a court "cannot assume prejudice" and that the defendant bears the burden of "prov[ing] 'actual bias.'" Pet. App. 37a (citing United States v. Pennell, 737 F.2d 521, 532-534 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)); see also United States v. Orlando, 281 F.3d 586, 598 (6th Cir.) ("This court * * * has consistently held that Smith v. Phillips reinterpreted Remmer to shift the burden of showing bias to the defendant.")

(citation and internal quotation marks omitted), cert. denied, 537 U.S. 947 (2002).

Other courts of appeals have applied a presumption of prejudice in at least some cases, but have employed varying articulations about when the circumstances rise to a level at which such a presumption is appropriate. See, e.g., United States v. Alexander, 782 F.3d 1251, 1258 (11th Cir. 2015) (requiring a "colorable showing" of improper contacts before applying a presumption of prejudice) (citation omitted); Stouffer v. Trammell, 738 F.3d 1205, 1214 n.5 (10th Cir. 2013) ("Although circuit courts disagree about the contours of the Remmer presumption of prejudice, this circuit has continued to follow the presumption."); United States v. Dehertogh, 696 F.3d 162, 167 (1st Cir. 2012) ("This court continues to assume that a presumption of prejudice exists but only 'where there is an egregious tampering or third party communication which directly injects itself into the jury process.'") (citation omitted); United States v. Blauvelt, 638 F.3d 281, 295 (4th Cir.) (requiring threshold showing that the "extrajudicial communications or contacts were more than innocuous" before applying presumption of prejudice), cert. denied, 565 U.S. 823 (2011); United States v. Honken, 541 F.3d 1146, 1167 (8th Cir. 2008) (stating that a presumption of prejudice applies only when "the alleged outside contact relates to factual evidence not developed at trial" or when the contact resembles that in Remmer, in which "'a juror [was] subjected to psychological pressure by an outsider trying to coopt that juror's vote'") (citation omitted), cert. denied, 558 U.S. 1091 (2009); United States v. Gallardo, 497 F.3d 727, 735-736 (7th Cir. 2007) (declining to apply presumption where alleged misconduct "d[id] not rise to the level of the misconduct in Remmer"), cert. denied, 555 U.S. 922 (2008); United States v. Smith, 354 F.3d 390, 395 (5th Cir. 2003) (requiring "some evidence of a prejudicial effect before burdening the government with a requirement that it prove the intrusion harmless"), cert. denied, 541 U.S. 953 (2004); United States v. Lloyd, 269 F.3d 228, 238 (3d Cir. 2001) ("This court has applied the presumption of prejudice only when the extraneous information is of a considerably serious nature."); United States v. Williams-Davis, 90 F.3d 490, 497 (D.C. Cir. 1996) (concluding that courts must "inquire whether any particular intrusion showed enough of a likelihood of prejudice to justify assigning the government a burden of proving harmlessness") (internal quotation marks omitted), cert. denied, 519 U.S. 1128, and 519 U.S. 1129 (1997).

c. This petition would present a poor vehicle for resolving any disagreement over the proper interpretation of Remmer in light of this Court's subsequent decisions in Phillips and Olano because that disagreement would not affect the outcome of this case. Even if, as petitioner contends (Pet. 14-15), the district court should have started its analysis by presuming the existence of prejudice against petitioner, any such presumption was rebutted here.

The district court did not rest its decision solely on its allocation of the burden of proof. Rather, the court undertook a lengthy hearing to investigate the concerns brought to its attention, and it individually questioned each of the sitting and alternate jurors. See 6/17/14 Trial Tr. 1-106. Fourteen of the jurors gave "unequivocal and unhesitating responses" that they could remain "impartial and fair," and the court found that testimony to be credible. D. Ct. Doc. 761, at 8. Meanwhile, as to the two jurors who "gave equivocal responses," the court decided that a sufficient possibility of prejudice existed to warrant dismissing those two jurors and replacing them with alternates. Ibid. The court also correctly noted that the incidents at issue did not involve any "direct contact" between jurors and any third party. Id. at 10. And the court also mitigated any possibility of prejudice by instructing the jurors not to further discuss the incidents amongst themselves. See, e.g., 6/17/14 Trial Tr. 26-27, 45-46, 56-57. Thus, any presumption of prejudice would have been overcome even if one had been applied at the outset. See Remmer, 347 U.S. at 229 (explaining that "[t]he presumption is not conclusive," but may be rebutted by evidence of harmlessness).

Petitioner errs in arguing (Pet. 14-15) that the courts below erred in relying upon jurors' statements regarding their ability to remain impartial. This Court has explained that "determinations made in Remmer-type hearings will frequently turn upon testimony of the juror in question" and has squarely rejected the argument that such juror evidence is "inherently suspect." Phillips, 455 U.S. at 217 n.7. And the court of appeals' reliance on juror testimony was consistent with decisions of other courts of appeals that "have likewise affirmed the denial of a mistrial when a juror was threatened but assured the court that he could remain impartial in deciding the case." United States v. Tejeda, 481 F.3d 44, 53 (1st Cir.) (collecting cases), cert. denied, 552 U.S. 1021 (2007). Because petitioner has not shown that any court of appeals would have found an abuse of discretion on these facts, this case is not a suitable vehicle for resolving any disagreement concerning the conditions that give rise to a presumption of prejudice.

2. Petitioner's contention (Pet. 16-18) that the court of appeals erred in upholding his VICAR convictions also does not warrant this Court's review.

a. As relevant here, the VICAR statute imposes criminal penalties on an individual who, "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity," commits any of several specified offenses, including murder and attempted murder. 18 U.S.C. 1959(a). In seeking this Court's review, petitioner contends (Pet. 16-17) that the court of appeals' decision "extends th[is] motivational language to include conduct unrelated to the racketeering activity, and does not require proof of an animating purpose to commit the violent crime so as to affect position within a racketeering enterprise."

Even putting to one side the nonprecedential nature of the court of appeals' unpublished decision in this case, petitioner's contention cannot be squared with the opinion below. In reviewing petitioner's VICAR convictions, the court explained that the "purpose" element of the statute "'is met if . . . an animating purpose of the defendant's action was to maintain or increase his position' in the gang." Pet. App. 30a (quoting United States v. Hackett, 762 F.3d 493, 500 (6th Cir. 2014), cert. denied, 135 S. Ct. 1518 (2015)) (emphasis added). As the court explained elsewhere in its opinion, the Murda Ville gang qualified as a "racketeering enterprise." Id. at 28a (citation omitted); see id. at 26a-29a. Thus, the court recognized that petitioner's VICAR convictions required sufficient evidence that his murder of Malachi and his attempted murder of Anderson were motivated by the purpose of maintaining or increasing his position in Murda Ville. See id. at 34a-35a.

To the extent petitioner claims that the court of appeals misapplied that standard here, cf. Pet. 8-9, 16-18, that factbound claim of error does not warrant this Court's review. See Sup. Ct. R. 10. In any event, the court of appeals correctly concluded that sufficient evidence supported each of petitioner's VICAR convictions. See Jackson v. Virginia, 443 U.S. 307, 319 (1979) (Evidence is sufficient if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (emphasis omitted).

As to the VICAR murder charge, the court of appeals properly rejected petitioner's argument that the evidence dictated that he killed Malachi only "because Gills asked him to, not because the gang's code demanded it." Pet. App. 34a. Observing that "people generally do not commit murder at a friend's say-so," the court correctly stated that the jury could reasonably find that petitioner "had another motive -- the fear of losing standing in Murda Ville if he let Malachi go free." Ibid.; see also D. Ct. Doc. 785, at 32 (denying petitioner's post-trial motion and finding that petitioner carried out Gills' directive to "lay law down" in order to "maintain or enhance his position within the enterprise").

Similarly, as to the VICAR attempted-murder charge, the court of appeals correctly found sufficient evidence that petitioner attempted to kill Anderson in order to maintain or enhance his status within the Murda Ville gang. Petitioner and a fellow gang member had gone to the biker club seeking to retaliate against a rival gang, the Drifters. Once there, petitioner was "personally threatened by Anderson," whom petitioner took to be a Drifter.

Pet. App. 34a. Had petitioner failed to retaliate against that insult, "he would have broken the gang's code twice over," by allowing both himself and the gang to be impugned without response. Id. at 34a-35a. And when the Drifters and Murda Ville later negotiated a ceasefire, petitioner "bragged about scaring the rival into the truce." Id. at 35a. The court properly recognized that this "after-the-fact boasting" was "circumstantial evidence that [petitioner] committed the crime to increase his standing in the gang." Ibid.; see also D. Ct. Doc. 785, at 42 (observing that petitioner "committed the shooting in public and in front of [his fellow gang member], suggesting that he wanted people -- including members of the enterprise -- to know of his violent act" in order to "promote [his] violent reputation").

b. The court of appeals' affirmance of petitioner's VICAR convictions does not conflict with any decision of this Court or another court of appeals. The courts of appeals have consistently held that a defendant violates the VICAR statute whenever he acts substantially for the purpose of maintaining or increasing his position in a racketeering enterprise, even if that purpose is not his sole or paramount objective. See, e.g., Hackett, 762 F.3d at 500; United States v. Kamahele, 748 F.3d 984, 1008 (10th Cir. 2014); United States v. Whitten, 610 F.3d 168, 178-179 (2d Cir. 2010); United States v. Banks, 514 F.3d 959, 965-969 (9th Cir. 2008); United States v. Carson, 455 F.3d 336, 371 (D.C. Cir. 2006) (per curiam), cert. denied, 549 U.S. 1246 (2007); United States v. Tse, 135 F.3d 200, 206 (1st Cir. 1998); United States v. Wilson, 116 F.3d 1066, 1078 (5th Cir. 1997), cert. denied, 522 U.S. 1053, 522 U.S. 1078, and 523 U.S. 1024 (1998); United States v. Tipton, 90 F.3d 861, 891 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997).

Citing the Ninth Circuit's decision in Banks, petitioner argues that a defendant's purpose in committing the violent offense "must be 'integral' to [his] membership" in the gang. Pet. 17 (citation omitted). But that formulation is fully consistent with the standard employed by the court of appeals below. Indeed, the Sixth Circuit expressly relied upon Banks in explaining that "VICAR's 'purpose' element is met if the jury could find that an 'animating purpose' of the defendant's action was to maintain or increase his position in the racketeering enterprise." Hackett, 762 F.3d at 500; see Pet. App. 30a.[3] Petitioner thus fails to identify any conflict warranting this Court's review.

c. Finally, review of the second question presented would be unwarranted for the further reason that reversal of petitioner's

[3] The district court instructed the jury, without objection from petitioner, that it could find him guilty for each of the VICAR offenses only if it found that petitioner's motive to maintain or increase his status in the gang was a "substantial purpose" or that petitioner "committed the murder as an integral aspect of membership in the enterprise." 7/17/14 Trial Tr. 37-38; see id. at 43-44.

VICAR convictions would have little practical effect. The sentences for these counts are concurrent to sentences for other counts that do not depend on any finding of purpose under the VICAR statute. Petitioner’s life-plus-35-year term of imprisonment accordingly does not depend on his VICAR convictions. Pet. App. 52a-53a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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