No. 17-8381

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM FRAZIER, 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 federal offense of committing a violent crime in aid of "an enterprise engaged in racketeering activity," 18 U.S.C. 1959(a), includes as an element the defendant's prior knowledge of the enterprise's racketeering activity.

2. Whether assault with a dangerous weapon in aid of an enterprise engaged in racketeering activity, in violation of 18 U.S.C. 1959(a), qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 878 F.3d 508.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on November 30, 2017. A petition for rehearing was denied on January 4, 2018 (Pet. App. 25a). The petition for a writ of certiorari was filed on March 28, 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 two counts of assault with a dangerous weapon in aid of an enterprise engaged in racketeering activity, in violation of 18 U.S.C. 1959(a)(3); and one count of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 2a, 18a-19a. The district court sentenced him to 144 months of imprisonment, to be followed by three years of supervised release. Id. at 20a-21a. The court of appeals affirmed. Id. at 1a-16a.

1. Petitioner was a member of an "'outlaw' motorcycle club" called Phantom Motorcycle Club (PMC). Pet. App. 2a-3a. PMC "has a hierarchical structure" and has chapters in eight States. Id. at 2a. PMC has, among other things, intimidated, stolen from, and conspired to murder members of other motorcycle clubs -- all "with instruction and encouragement from PMC leadership." Id. at 7a. In 2010, petitioner was named Vice President of PMC's Pontiac, Michigan, chapter after he transferred there from a different chapter. Id. at 3a.

In October 2012, petitioner traveled to Columbus, Ohio for a PMC gathering. Pet. App. 3a. Once he arrived, he met up with two other PMC members, Vincente Phillips and Maurice Williams, and the three men -- wearing their PMC vests, "which are important symbols in motorcycle club culture" -- traveled together to a restaurant

located at another motorcycle club's clubhouse. Id. at 2a-3a. While there, a man wearing a third club's vest bumped into Williams, and a fight ensued. Id. at 3a. Petitioner fired two shots, each of which hit a member (including the national president) of the Zulus motorcycle club. Ibid.

Following the shooting, petitioner, Phillips, and Williams returned to the PMC clubhouse to report the incident to PMC leadership. Pet. App. 3a. Leadership decided to require the Pontiac chapter to pay for PMC's national president to travel to meet with the Zulus to prevent any acts of retaliation. Ibid.

2. A federal grand jury in the Eastern District of Michigan returned a third superseding indictment charging petitioner with two counts of assault with a dangerous weapon in aid of an enterprise engaged in racketeering activity, in violation of 18 U.S.C. 1959(a)(3) (known as the violent crimes in aid of racketeering (VICAR) statute); and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Third Superseding Indictment 19-23. The two VICAR counts -- one count for each Zulu member shot by petitioner -- were predicated on violations of Ohio's felonious assault statute, Ohio Rev. Code Ann. § 2903.11 (LexisNexis 2014). Third Superseding Indictment 19-22. The Section 924(c) count was predicated on the two VICAR counts. See id. at 22-23.

The VICAR statute provides that "[w]hoever * * * for the purpose of gaining entrance to or maintaining or increasing

position in an enterprise engaged in racketeering activity * * * assaults with a dangerous weapon [or] commits assault resulting in serious bodily injury upon, or * * * against any individual in violation of the laws of any State or the United States * * * shall be punished * * * by imprisonment for not more than twenty years." 18 U.S.C. 1959(a)(3). The district court instructed the jury that the elements of a Section 1959 VICAR offense are (i) "that an enterprise as alleged in the indictment, existed," (ii) "that the enterprise was engaged in racketeering activity," (iii) "that the enterprise affected interstate commerce," (iv) "that a particular Defendant had a position or was seeking a position in the enterprise," (v) "that a particular Defendant committed or aided and abetted the commission of an assault with a dangerous weapon," and (vi) "that a particular Defendant's general purpose in committing or aiding and abetting the commission of an assault with a dangerous weapon was to maintain or increase his position in the enterprise." 5/22/15 Tr. 24; see id. at 24-33.

The jury found petitioner guilty on all three counts, and the district court sentenced petitioner to concurrent terms of 24 months of imprisonment on the two VICAR counts, to be followed by a consecutive term of 120 months of imprisonment on the Section 924(c) count, for a total term of 144 months of imprisonment. Pet. App. 18a-21a.

3. The court of appeals affirmed. Pet. App. 1a-16a.

a. As to the VICAR convictions, the court of appeals rejected petitioner's argument, made for the first time on appeal, see Gov't C.A. Br. 47, that Section 1959(a) "requires that the government prove the defendant actually knew that the enterprise was engaged in racketeering activity -- that is, an explicit knowledge-of-racketeering requirement," Pet. App. 7a. The court observed that "[n]o court * * * has ever found such a requirement." Ibid. (citing United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992), cert. denied, 510 U.S. 856 (1993), and United States v. Fiel, 35 F.3d 997, 1003 (4th Cir. 1994), cert. denied, 513 U.S. 1177 (1995)). The court rejected petitioner's argument and held that "proof that the enterprise as a whole engaged in racketeering activity is sufficient to satisfy this prong." Id. at 8a.

The court explained that "grafting [petitioner's] knowledge-of-racketeering requirement onto the statute would allow acts contemplated by VICAR to escape prosecution under the statute." Ibid. "For example," the court reasoned, VICAR applies to acts of violence committed for the "'purpose of gaining entrance to an enterprise engaged in racketeering activity,'" but under petitioner's reading of the statute, "VICAR might not cover an individual who commits a violent crime as a part of gaining entry to a gang but who does not have specific knowledge of the group's racketeering activities." Id. at 7a-8a (quoting 18 U.S.C. 1959(a) (ellipsis omitted)).

The court of appeals also stated that "even if" petitioner's argument were otherwise "compelling," "VICAR is not subject to standard rules of statutory interpretation." Pet. App. 8a. The court reasoned that, like the analogous Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq., VICAR requires a "liberal construction" in light of Congress's intent that VICAR (like RICO) be used to curb organized crime. Pet. App. 8a.

b. The court of appeals also rejected petitioner's argument that 18 U.S.C. 924(c) is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the definition of a "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. Pet. App. 10a. As petitioner recognized below, the court of appeals' prior decision in United States v. Taylor, 814 F.3d 340 (6th Cir. 2016), cert. denied, 138 S. Ct. 1975 (2018), upheld Section 924(c)(3)(B) against a vagueness challenge and therefore foreclosed petitioner's argument. Pet. App. 10a; see Taylor, 814 F.3d at 376-379.

ARGUMENT

Petitioner contends (i) that 18 U.S.C. 1959(a) requires the government to prove that he had specific knowledge that the outlaw motorcycle club in which he sought to maintain or increase his position by committing assault with a dangerous weapon was engaged

in racketeering activity (Pet. 7-15); and (ii) that 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague (Pet. 15-17). Further review of petitioner's claims is unwarranted. The court of appeals correctly rejected petitioner's argument that Section 1959(a) contains his proposed mens rea element, and its decision does not conflict with any decision of this Court or another court of appeals. And the issue of Section 924(c)(3)(B)'s constitutionality is not squarely presented in this case. Separate and apart from Section 924(c)(3)(B), petitioner's offense of assault with a dangerous weapon in aid of racketeering qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A)'s alternative definition, because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Ibid. Petitioner does not dispute the constitutionality of that alternative definition, and recent decisions of this Court do not call it into question. Resolution of the question presented will therefore have no effect on the validity of petitioner's conviction under Section 924(c). The petition for a writ of certiorari should be denied.

1. a. The VICAR statute, 18 U.S.C. 1959(a)(3), makes it a crime, as relevant here, to commit "assault with a dangerous weapon or assault resulting in serious bodily injury," in "violation of the laws of any State or the United States," "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity."

Petitioner contends (Pet. 7-14) that Section 1959(a) requires proof of the defendant's knowledge that the enterprise "was engaged in racketeering activity." But he cites no case from any court that has interpreted the statute in the way he proposes, and the government is unaware of any such case. See Pet. App. 7a (court of appeals stating that "[n]o court * * * has ever found such a requirement."). If anything, the description of the elements of Section 1959(a)(3) in the case law supports rather than conflicts with the court of appeals' decision below. See, e.g., United States v. Johnson, 219 F.3d 349, 358 n.7 (4th Cir.) (in VICAR case charging murder predicate, stating that "[t]o prove a violation of section 1959(a)(1), the government must show that there was (1) an enterprise engaged in racketeering activity, (2) murder or aiding and abetting another person in murdering, and (3) murder undertaken for the purpose of gaining entrance into or maintaining the defendant's position in the enterprise, or in exchange for anything of pecuniary value."), cert. denied, 531 U.S. 1024 (2000); see also, e.g., United States v. Jones, 566 F.3d 353, 363 (3d Cir.), cert. denied, 558 U.S. 1005 (2009) (describing element in similar way); United States v. Carson, 455 F.3d 336, 369 (D.C. Cir. 2006) (per curiam), cert. denied, 549 U.S. 1246 (2007) (similar); United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992), cert. denied, 510 U.S. 856 (1993) (similar). The lack of any case law supporting petitioner's reading of the statute counsels strongly against this Court's review.

Petitioner contends (Pet. 8) that the court of appeals' decision, and in particular the court's discussion of VICAR's remedial purposes in rejecting petitioner's mens rea argument, conflicts with decisions of the Second Circuit in United States v. Mapp, 170 F.3d 328, cert. denied, 528 U.S. 901 (1999), and Concepcion, 983 F.2d 369. That is incorrect. As a threshold matter, the court's discussion of the statute's remedial purposes appears to have been offered only as additional support for a determination it had already made on other grounds. See Pet. App. 8a. In any event, both Mapp and Concepcion explicitly endorsed the idea that "[S]ection 1959 is to be construed liberally in order to effectuate its remedial purposes." Mapp, 170 F.3d at 335; see Concepcion, 983 F.2d at 381-382. Moreover, neither of those cases even addressed the question presented here -- whether Section 1959(a) contains a knowledge-of-racketeering requirement -- let alone reached a different conclusion from the decision below (or even overturned a conviction). See Mapp, 170 F.3d at 335 (rejecting argument that Section 1959 "reaches only murders that were committed intentionally" so long as the defendant committed murder under state law, including felony murder); Concepcion, 983 F.2d at 381 (rejecting argument that the element of Section 1959 that requires a defendant to act with the "purpose" of maintaining or increasing his position in the enterprise requires the government to prove that such a purpose "was the defendant's sole or principal motive").

b. Petitioner further contends (Pet. 9-14) that the court of appeals' decision conflicts with several decisions of this Court that, according to petitioner, "extend[ed] the mens rea requirement to each element of [an] offense." Pet. 10. Petitioner's reliance on those cases -- none of which involves VICAR or addresses the elements of the VICAR offense -- is misplaced. If anything, the decisions on which petitioner relies undermine his argument.

In United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), this Court explained that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." Id. at 72 (emphasis added). The Court therefore determined that a defendant convicted under 18 U.S.C. 2252 must know that the individuals depicted in images he distributed were minors, because "the age of the performers is the crucial element separating legal innocence from wrongful conduct." 513 U.S. at 73. The Court expressed a similar view in Liparota v. United States, 471 U.S. 419 (1985), where it concluded that the "knowingly" mens rea requirement in 7 U.S.C. 2024(b)(1) (1982) required the government to prove that a defendant had knowledge of the facts that made his use of food stamps unauthorized. 471 U.S. at 426. "[T]o interpret the statute otherwise," the Court explained, "would be to criminalize a broad range of apparently innocent conduct." Ibid. The other decisions cited by petitioner are much the same. See Elonis v. United

States, 135 S. Ct. 2001, 2011-2012 (2015) (holding that 18 U.S.C. 875(c) requires proof that the defendant knew that he was transmitting a communication and was at least reckless about the communication containing a threat, because "'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication") (citation omitted); Morissette v. United States, 342 U.S. 246, 270-271 (1952) (holding that "knowing conversion" of government property in violation of 18 U.S.C. 641 (1952) requires not only "knowledge that defendant was taking the property into his possession," but also "knowledge of the facts * * * that made the taking a conversion," because the statute would otherwise "ma[k]e crimes of all unwitting, inadvertent and unintended conversions").

Those concerns are not implicated in the VICAR statute. A required element in every Section 1959(a) prosecution is that the defendant committed (or conspired or attempted to commit) a violent underlying state or federal offense -- e.g., murder, kidnapping, maiming, assault with a deadly weapon, or assault resulting in serious bodily injury -- that itself requires proof of mens rea. 18 U.S.C. 1959(a)(1)-(6). As a result, there is no concern in the VICAR context, as there was in the decisions discussed above, that otherwise innocent conduct would be criminalized if a defendant could be convicted under Section 1959(a) without knowledge that the enterprise in which he sought to maintain or increase his position was engaged in racketeering activity. Cf. Elonis, 135

S. Ct. at 2010 ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.'") (citation omitted); Carter v. United States, 530 U.S. 255, 269 (2000) (same).

In Flores-Figueroa v. United States, 556 U.S. 646 (2009), the Court held that the phrase "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" in 18 U.S.C. 1028A(a)(1) was best understood to mean that "know[ingly]" applies to the fact that the means of identification belonged to another person. 556 U.S. at 647 (emphasis omitted). In considerable part, the Court grounded its holding in the statute's plain text and in the premise that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." Id. at 652. But Section 1959(a) does not contain that statutory structure. The statute's reference to a defendant's "purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity," 18 U.S.C. 1959(a), does not contain any express knowledge requirement, and is focused on the defendant's purpose vis-à-vis the enterprise -- not the defendant's purpose or knowledge with respect to the enterprise's other activities. Flores-Figueroa therefore does not suggest any error in the court of appeals' decision in petitioner's case.

Moreover, absent constitutional concerns, courts do not attach a mens rea requirement to a particular statutory element if "the language or legislative history of the statute" shows that Congress did not intend for a mens rea requirement to apply to that element. Liparota, 471 U.S. at 425. Here, the text of Section 1959(a) does not require petitioner's reading of the statute, and the court of appeals recognized that petitioner's proposed knowledge element would undermine the statute's broad remedial purposes. See Pet. App. 8a. Given this Court's instruction that the related RICO statute "is to be read broadly" and must "'be liberally construed to effectuate its remedial purposes,'" Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-498 (1985) (citation omitted)), it would be incongruous to engraft additional elements onto the VICAR statute that are not evident from its text. See, e.g., United States v. Banks, 514 F.3d 959, 967 (9th Cir. 2008) ("As the Second Circuit noted in Concepcion, Congress enacted VICAR to complement RICO, and it intended VICAR, like RICO, 'to be liberally construed to effectuate its remedial purposes.'") (citations and internal quotation marks omitted). The decision below is also consistent with United States v. Feola, 420 U.S. 671 (1975), in which the Court relied on the plain text and history of 18 U.S.C. 111 to hold that the crime of assaulting a federal officer does not require knowledge that the victim was a federal officer. See id. at 676-686. Petitioner has not

identified a conflict between the court of appeals' decision and any decision of this Court that would warrant further review.

2. Petitioner separately contends (Pet. 15-17) that the Court should grant the petition to resolve whether 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. But petitioner's Section 924(c) conviction is independently valid under Section 924(c)(3)(A), the constitutionality of which he does not challenge. Resolution of the second question raised in the petition will therefore have no effect on petitioner's Section 924(c) conviction.

a. Section 924(c)(1)(A) prohibits a person from using or carrying a firearm "during and in relation to any crime of violence" or possessing a firearm in furtherance of such a crime. Section 924(c)(3) defines "crime of violence" as a felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) 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).

To determine whether an offense falls within Section 924(c)(3)(A), courts generally apply a "categorical approach." See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Taylor v. United States, 495 U.S. 575, 602 (1990). Under that

approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis, 136 S. Ct. at 2248. If the statute of conviction lists multiple alternative elements, as opposed to alternative means of committing a single element, it is "divisible" into different offenses. Id. at 2249 (citation omitted). To classify a conviction under a divisible statute, 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 convicted of." Ibid.

b. Here, petitioner's predicate offense under Section 924(c) -- "assault[] with a dangerous weapon * * * in violation of the laws of any State" in furtherance of an enterprise engaged in racketeering activity -- was a "crime of violence" under Section 924(c)(3)(A), because it required proof that he committed a state crime that has force as an element.

A violation of Section 1959(a) requires proof that the "predicate acts constitute state law crimes." United States v. Carrillo, 229 F.3d 177, 185 (2d Cir.), cert. denied, 531 U.S. 1026 (2000). Petitioner's indictment shows that his offense qualified as assault with a dangerous weapon under Ohio's felonious assault statute, which makes it a crime to "[c]ause serious physical harm to another" or to "[c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

Ohio Rev. Code Ann. § 2903.11(A)(1) and (2) (LexisNexis 2014); see Third Superseding Indictment 19-22.

The Sixth Circuit has held correctly recognized that a conviction under Ohio Rev. Code Ann. § 2903.11(A) (LexisNexis 2014) qualifies as a violent felony under the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i), which defines the term "violent felony" to mean a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." See United States v. Anderson, 695 F.3d 390, 401-402 (6th Cir. 2012); see also, e.g., United States v. Turner, 698 Fed. Appx. 803, 807 (6th Cir. 2017), cert. denied, 138 S. Ct. 976 (2018). That understanding of Ohio law warrants deference from this Court. See Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). Anderson's determination applies equally to Section 924(c)(3)(A), which differs from ACCA's elements clause only insofar as it is broader -- Section 924(c)(3)(A) applies to force against persons or property whereas the ACCA relates only to force against persons. And because the commission of felonious assault under Ohio law is a necessary component of petitioner's offense of assault with a dangerous weapon in aid of racketeering, see 18

U.S.C. 1959(a), the latter offense likewise qualifies as a "crime of violence" under Section 924(c)(3)(A).*

Petitioner focuses his argument (Pet. 16-17) on the divisibility of VICAR and, in particular, whether Section 1959(a)(3) itself categorically requires as an element the use, attempted use, or threatened use of physical force. But a federal VICAR offense does not exist independently of the underlying state or federal VICAR predicate charged in a particular case. See 18 U.S.C. 1959(a) (premising liability on specific criminal acts "in violation of the laws of any State or the United States"). As a result, whether VICAR qualifies as a crime of violence under Section 924(c)(3)(A) turns on whether the charged VICAR predicate (not VICAR itself) has as an element the use, attempted use, or threatened use of physical force.

c. Because assault with a dangerous weapon in aid of racketeering qualifies as a "crime of violence" under Section 924(c)(3)(A), no reason exists to consider petitioner's argument (Pet. 15-17) that the alternative "crime of violence" definition in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Nor does any reason exist to remand this case to the court of appeals for

* On June 13, 2018, the Sixth Circuit, sitting en banc in United States v. Burris, No. 16-3855, heard argument on whether to overrule Anderson's holding that Section 2903.11(A) categorically requires the use, attempted use, or threatened use of physical force. A decision in that case remains pending. To the extent that it might be appropriate to hold this petition pending the court of appeals' decision in Burris, petitioner has not asked the Court to do so.

further consideration in light of this Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). In Dimaya, this Court held that the definition of a "crime of violence" in 18 U.S.C. 16(b), which contains language that is nearly identical to that in Section 924(c)(3)(B), is unconstitutionally vague. 138 S. Ct. at 1223. But Dimaya does not address the constitutionality of a provision similar to Section 924(c)(3)(A). See id. at 1211 (noting that 18 U.S.C. 16(a), which is nearly identical to Section 924(c)(3)(A), was not at issue in Dimaya). This Court's holding in Dimaya thus does not resolve any question that will affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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