No. 23-918

In the Supreme Court of the United States

RANITO ALLEN, 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

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QUESTION PRESENTED

Whether petitioner's counsel provided ineffective assistance by not objecting to the consideration of petitioner's federal offense of attempted murder in aid of racketeering as a crime of violence under 18 U.S.C. 924(c)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2023 WL 4145321. The order granting a certificate of appealability (Pet. App. 10a-15a) is unreported. The order of the district court (Pet. App. 16a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2023. A petition for rehearing was denied on September 25, 2023 (Pet. App. 9a). On December 12, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including February 22, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted on five counts of aiding and abetting attempted murder in aid of racketeering, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(5) and 2, and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and 2. Judgment 1-2. The court sentenced him to a term of 172 months of imprisonment on the VICAR counts and a consecutive term of 120 months on the Section 924(c) count, to be followed by three years of supervised release. Judgment 3-4. Petitioner did not appeal.

Petitioner later filed a timely motion under 28 U.S.C. 2255 challenging his Section 924(c) conviction. The district court denied the motion. Pet. App. 16a-36a. The court of appeals granted a certificate of appealability, *id.* at 10a-15a, and affirmed, *id.* at 1a-8a.

1. Petitioner was the "Assistant Chief of Security" in the Memphis branch of the Gangster Disciples, a "highly-structured," long-standing, and nationwide criminal organization. D. Ct. Doc. 355, at 2, 6 (Feb. 9, 2017) (Factual Basis); Pet. App. 21a. The Gangster Disciples use "threats, intimidation, violence, and destruction"—including such criminal acts as murder, attempted murder, and armed assault—to "[p]reserv[e] and protect[] the power, territory, operations, and proceeds" of the organization. Factual Basis 4.

In June 2014, petitioner joined four fellow gang members in a mission to retaliate against a rival gang at an apartment complex in Memphis. Pet. App. 21-22a. All five men were armed, and they intended to kill. *Id.*

at 22a. Petitioner "participated in the shooting to maintain his position" in the Gangster Disciples. *Id.* at 23a.

When they arrived at the complex, petitioner and the others "jumped from the vehicle" and "fired shots at the victims as they scattered for cover." Pet. App. 22a. They shot five victims—four of whom were minors. *Id.* at 23a. Although the victims all survived, some "sustained serious bodily injuries," *ibid.*, and one "is likely crippled for life," D. Ct. Doc. 480-1, at 74 (July 10, 2018).

2. A grand jury in the Western District of Tennessee charged petitioner with five counts of VICAR attempted murder, in violation of 18 U.S.C. 1959(a)(5) and 2; five counts of using and carrying a firearm during and in relation to a crime of violence (the five VICAR attempted murders), in violation of 18 U.S.C. 924(c)(1)(A)(iii) and 2; and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). D. Ct. Doc. 242, at 13-19, 22 (June 16, 2016) (Second Superseding Indictment). Petitioner pleaded guilty pursuant to a plea agreement to the five VICAR attempted murder charges and one Section 924(c) charge; the government dismissed the remaining charges. D. Ct. Doc. 357, at 1 (Feb. 9, 2017).

a. The VICAR statute prohibits, *inter alia*, "attempting * * * to commit murder" of any person, "in violation of the laws of any State or the United States," "for the purpose of * * * maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a)(5). Because the VICAR statute requires an underlying state or federal crime that constitutes attempted "murder," proving a violation requires that a defendant's conduct both qualifies as a violation of a state or federal attempted-murder statute and satisfies the generic definition of attempted "murder." See *United States* v. *Keene*, 955 F.3d 391, 398-399 (4th Cir.

2020). As a practical matter, if the relevant state or federal law is substantially similar to or narrower than the generic definition, the jury may be instructed only as to the state or federal offense.

Petitioner's VICAR charges were each defined by reference to Tennessee attempted second-degree murder, in violation of Tenn. Code Ann. § 39-13-210(a)(1) (2014). Second Superseding Indictment 14. In relevant part, Tennessee second-degree murder criminalizes the "knowing killing of another." Tenn. Code Ann. § 39-13-210 (2014); see also *id.* § 39-11-402(2) (aiding and abetting liability for one "[a]cting with intent to promote or assist the commission of the offense"); *id.* § 39-12-101(a)(3) (attempt liability for "acting with the kind of culpability otherwise required for the offense" and intentionally taking a "substantial step" toward completion of the offense).

b. Section 924(c) specifies a mandatory consecutive sentence for using or carrying a firearm during and in relation to a "crime of violence," or possessing a firearm in furtherance of a "crime of violence." 18 U.S.C. 924(c)(1)(A). Section 924(c)(3) defines a crime of violence in two ways. First, the "elements clause" encompasses any federal felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Second, the "residual clause" includes any federal felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). In *United States* v. *Davis*, 588 U.S. 445 (2019), this Court held that the residual clause is unconstitutionally vague.

This Court employs a "categorical approach" to determine whether an offense is a crime of violence under Section 924(c)(3)(A). *United States* v. *Taylor*, 596 U.S. 845, 850 (2022). Under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." *Mathis* v. *United States*, 579 U.S. 500, 504 (2016). The categorical approach assesses whether the "least culpable" conduct that could satisfy the offense elements in a hypothetical case would "necessarily involve[]," *Borden* v. *United States*, 593 U.S. 420, 424 (2021) (plurality opinion), the "use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). The defendant's actual conduct is "irrelevant." *Borden*, 593 U.S. at 424.

c. Following his guilty plea, petitioner proceeded to sentencing. Based on his conduct and criminal history, petitioner's Guidelines sentencing range was 480 months to life. Presentence Investigation Report ¶¶ 142-144. The district court sentenced him to a term of 172 months of imprisonment on the VICAR counts and a consecutive term of 120 months on the Section 924(c) count, to be followed by three years of supervised release. Judgment 3-4. Petitioner did not appeal.

3. a. Petitioner subsequently filed a pro se motion under 28 U.S.C. 2255 seeking to vacate his Section 924(c) conviction on two related grounds. Compl. 1. First, he claimed that his trial counsel had rendered ineffective assistance by failing to object "during sentencing" to his Section 924(c) conviction that the "underlying crime"—which petitioner asserted was VICAR conspiracy—was not a crime of violence. Compl. 3. Second, he claimed that VICAR conspiracy is not a crime

of violence. Compl. 5-6. The district court rejected both claims. Pet. App. 16a-36a.

As to petitioner's ineffective-assistance claim, the district court noted that, to prevail, petitioner had to show both that his "counsel's representation fell below an objective standard of reasonableness" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 27a-28a (quoting *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984)). The court found that petitioner's claim satisfied neither element. *Id.* at 30a-32a. With respect to prejudice, the court recognized that because petitioner pleaded guilty, he needed to show that had counsel objected to his Section 924(c) conviction, petitioner would have insisted on going to trial. *Id*. at 30a. (citing *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)). The court found that petitioner did "not allege" as much, let alone show it. *Ibid.*

The district court further found that, in any event, petitioner's Section 924(c) predicate qualified as a crime of violence. Pet. App. 32a. In rejecting petitioner's arguments, the court observed that petitioner "was not convicted of conspiracy," as he had asserted, but of substantive VICAR attempted murder. *Id.* at 30a; see *id.* at 30a-31a. And the court observed that VICAR attempted murder qualifies as a crime of violence under Section 924(c)'s elements clause "because it has as an element the attempted use of physical force." *Id.* at 32a. The court reasoned that "Congress intended § 1969 offenses," which are listed as "'violent crimes in aid of racketeering,'" to qualify "as 'crimes of violence.'" *Id.* at 32a-33a. And the court emphasized the petitioner did not receive ineffective assistance because the "failure to * * * raise a groundless objection does not constitute

defective performance" and counsel did not "miss[] a meritorious argument under the controlling law." *Id.* at 33a.

For similar reasons, the district court also rejected petitioner's direct challenge to his Section 924(c) conviction. See Pet. App. 31a-33a. The court did not address the government's argument that petitioner had procedurally defaulted that claim because he had not raised it either before his plea or on direct appeal. *Ibid.* See D. Ct. Doc. 8, at 3 (Aug. 13, 2018). The court denied a certificate of appealability. Pet. App. 34a-35a.

b. Before the court of appeals, petitioner abandoned his conspiracy argument and sought a certificate of appealability on the question of whether Tennessee attempted second-degree murder was not a crime of violence because it "encompasses crimes of inaction." Pet. C.A. Certificate of Appealability (COA) Appl. 8 (emphasis omitted). He also contested the district court's conclusion that the substantive VICAR offense was a valid Section 924(c) predicate. *Id.* at 5-8. And he reasserted his ineffective-assistance claim, faulting counsel for failing to challenge his Section 924(c) conviction under *Johnson* v. *United States*, 576 U.S. 591 (2015), but addressing neither deficiency nor prejudice. Pet. C.A. COA Appl. 8-10.

A circuit judge granted a certificate of appealability on three questions: (1) whether the appropriate Section 924(c) predicate is VICAR itself or the underlying offense referenced therein; (2) whether, if the proper predicate is the underlying offense, aiding and abetting Tennessee attempted second-degree murder "constitutes a crime of violence under the use-of-force clause because it encompasses killing by acts of omission"; and (3) "whether counsel was ineffective for failing to raise"

the first two issues. Pet. App. 14a. The judge also appointed counsel, who pressed all three questions on appeal. Pet. C.A. Br. 11-23.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-7a. The court noted that in *United States* v. *Martin*, No. 22-5278, 2023 WL 2755656 (6th Cir. Apr. 3, 2023), cert. denied, 144 S. Ct. 156 (2023), the court held that the "the knowing-killing subsection of the Tennessee second-degree murder statute 'has as an element the attempted use of physical force against the person of another,'" thereby qualifying as a crime of violence. Pet. App. 5a-6a (quoting *Martin*, 2023 WL 2755656, at *6). And the court observed that binding circuit precedent in *United States* v. *Harrison*, 54 F.4th 884 (6th Cir. 2022), had recognized that "murder always involves the use of physical force, even when committed by omission." Pet. App. 7a (citation omitted).

In *Harrison*, the court of appeals reasoned that a "victim dies only if some 'physical force' damages his body so severely that the body no longer functions." *Harrison*, 54 F.4th at 889. The court explained that the force that kills the victim "isn't always the same as the force applied directly by the criminal"—what matters is not, for example, "the force it takes for the shooter to pull the trigger," but "the force it takes for the bullet to injure the victim's body"—but that "'use of force' can refer to both direct uses, like strangling the victim, and indirect uses, like pulling a trigger to shoot the victim." *Ibid.* (quoting *United States* v. *Castleman*, 572 U.S. 157, 170-171 (2014)).

Harrison accordingly recognized that "the murderer uses physical force in some way to cause a death * * * even when murder is carried out by omission rather

than commission." 54 F.4th at 889. "For instance," the court of appeals explained, "if a parent intentionally fails to give his child food, * * * [t]he malicious parent uses the force that lack of food exerts on the body to kill his child." *Ibid.* And the court emphasized that treating murder by omission as a crime of violence "reflects the general principle that in criminal law, omission in the face of a legal duty is a type of action," and that Congress legislates with "background principles of criminal law in mind." *Ibid.*; see *id.* at 890 (collecting cases from the seven other circuits that have adopted the same interpretation of similar use-of-force language).

In petitioner's case, the court of appeals saw no dispute that petitioner's conviction rested on the knowing-killing subsection of Tennessee law; observed that "because the predicate offense for [petitioner's] VICAR conviction constitutes a crime of violence, the VICAR conviction itself must also be a conviction for a crime of violence"; and determined that petitioner's Section 924(c) conviction remained valid "and that his trial counsel was not ineffective for failing to challenge his firearm conviction" on the theory that it lacked an underlying crime of violence. Pet. App. 6a-7a.

DISCUSSION

Petitioner contends (Pet. 10-26) that the VICAR attempted-murder offense underlying his conviction under 18 U.S.C. 924(c) is not a crime of violence, because it rests on a state-law attempted murder crime whose elements can, in theory, be satisfied by an act of omission. The same argument has been raised in the petition for a writ of certiorari in *Delligatti* v. *United States*, petition for cert. pending, No. 23-825 (filed Jan. 29, 2024). The government has filed a response to the petition in *Delligatti* in which it acknowledges that the

issue warrants this Court's review in that case. See Gov't Cert. Br. at 16-18, *Delligatti*, *supra* (No. 23-825).[*] Because that case presents a more suitable vehicle for the Court's consideration of the question, the Court should grant review in *Delligatti* and hold the petition here pending the disposition of that case.

As the government noted in its brief in *Delligatti*, the circuits are divided on the question presented. The First, Second, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have recognized that even if crimes like murder and aggravated assault can be committed by acts of omission, they satisfy the elements clause of Section 924(c)—or similarly worded clauses such as the definition of a "violent felony" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), or a "crime of violence" under Sentencing Guidelines § 4B1.2(a)—when they require the knowing or intentional causation of bodily injury. See Gov't Cert. Br. at 16 & n.3, *Delligatti*, *supra* (No. 23-825) (collecting cases). The Third Circuit, however, has disagreed. See *United States* v. *Mayo*, 901 F.3d 218, 230 (2018) (holding that Pennsylvania first-degree aggravated assault is not an ACCA violent felony because it can be committed by omission). That conflict warrants this Court's review. See Gov't Cert. Br. at 17, *Delligatti*, *supra* (No. 23-825).

This case, however, would not itself be a good vehicle for plenary review of the question presented. As an initial matter, while *Delligatti* presents the question on direct appeal, petitioner raises the question on collateral review under Section 2255 in the context of an ineffective-

[*] The government has served petitioner with a copy of its response in *Delligatti*, which is also available on the Court's electronic docket.

assistance claim, acknowledging that "to ultimately prevail, [petitioner] will also have to demonstrate that his counsel was ineffective." Pet. 25. That context imposes additional barriers to relief; at a minimum, his counsel would not have been "constitutionally required to predict" that attempted murder might not actually be a "crime of violence." *Maryland* v. *Kulbicki*, 577 U.S. 1, 4 (2015) (per curiam); see, *e.g.*, *United States* v. *Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016) (out-of-circuit authority rejecting that view prior to petitioner's plea), cert. denied, 580 U.S. 1021 (2016).

In addition, as relevant to prejudice, petitioner has never contended that "he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal" or eventual vindication of his legal claim. *Lee* v. *United States*, 582 U.S. 357, 366 (2017). And there is no reason to think that he would have done so: the evidence against him on the dismissed Section 924(c) and felon-in-possession counts was strong, the four dismissed Section 924(c) counts carried a combined mandatory consecutive sentence of 100 years, and he received charging and sentencing benefits by pleading guilty. See pp. 3, 5, *supra*.

Moreover, another reason that this case would be an inappropriate vehicle for considering petitioner's act-of-omission argument is that the argument was neither presented to, nor passed on by, the district court. See Pet. App. 30a-33a. Both claims petitioner raised in his Section 2255 motion concerned using a VICAR *conspiracy* conviction to support his Section 924(c) conviction. See pp. 5-6, *supra*. As the district court held, that claim was meritless on the facts of this case. See Pet. App. 31a. In failing to raise the act-of-omission issue before the district court, petitioner did not preserve it for

appeal. See *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997). Thus, proper appellate review of petitioner's argument should, at most, be for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993).

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Delligatti* v. *United States*, petition for cert. pending, No. 23-825 (filed Jan. 29, 2024), and the Court's decision on the merits in that case if that petition is granted, and then disposed of as appropriate.

Respectfully submitted.

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