No. 23-1168

In the Supreme Court of the United States

DEARNTA LAVON THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an inquiry into the classification of assault with a dangerous weapon, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(3), as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) must be limited solely to the VICAR element requiring a violation of state law or federal statutory law, or instead may look to other elements necessary to prove the VICAR offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 87 F.4th 267. A prior opinion of the court of appeals (Pet. App. 36a-53a) is reported at 988 F.3d 783. The opinion and order of the district court (Pet. App. 18a-35a) is not published in the Federal Supplement but is available at 2021 WL 3493493.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2023. On February 23, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 28, 2024. On March 20, 2024, the Chief Justice further extended the time to and including April 27, 2024, and the petition was filed on April 26, 2024. 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 Eastern District of Virginia, petitioner was convicted on one count of participating in a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO Act), 18 U.S.C. 1962(c); and one count of discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and 2. Pet. App. 54a-55a; see *id.* at 59a, 73a-74a, 107a-108a. The district court sentenced petitioner to an aggregate 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at 57a; C.A. J.A. 95 (judgment). Petitioner did not appeal his conviction or sentence.

Petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, which was denied. Pet. App. 6a. He subsequently twice requested authorization to file a second Section 2255 motion. *Ibid.* The court of appeals granted his second request, *ibid.*, after which the district court denied the successive Section 2255 motion on the merits. *Id.* at 18a-35a. The court of appeals granted a certificate of appealability, C.A. Doc. 25 (May 22, 2023), and affirmed, Pet. App. 1a-17a.

1. Petitioner was "a founding member and 'three-star general' of a street gang known as the Bounty Hunter Bloods/Nine Tech Gangsters." Pet. App. 3a. The gang operated in Southeast Virginia from roughly 2003 to 2011. *Ibid.* The gang's activities during that time included "murder, attempted murder, kidnaping, robbery, and narcotics trafficking." *Id.* at 71a.

Petitioner, who "went by the nickname 'Bloody Razor,'" was heavily involved in the gang's criminal activities. Pet. App. 3a. On multiple occasions, petitioner attempted to murder a member of the Crips—a rival

gang—through methods that included chasing after the victim in a car, "h[a]ng[ing] out the passenger side window," and shooting at the victim. *Id.* at 74a-75a.

In an earlier incident, petitioner joined with fellow gang members in attempting to rob that same Crips member—a victim individually selected by petitioner. Pet. App. 73a-74a. When the victim took off running, petitioner's accomplices shot at him, hitting him in the lower back. *Id.* at 74a. Petitioner then drove the getaway vehicle. *Id.* at 73a-74a. Petitioner also engaged in multiple additional robberies and attempted robberies, conduct which often involved him or accomplices firing shots at a victim or threatening a victim with a firearm. *Id.* at 72a-74a. Petitioner also distributed crack cocaine and heroin for the gang. *Id.* at 75a.

2. In April 2011, a grand jury in the Eastern District of Virginia returned an indictment charging 11 gang members with 59 offenses relating to racketeering, drug trafficking, and firearms. Pet. App. 78a-145a. The indictment charged petitioner with 15 counts: one count of participating in a RICO enterprise, in violation of 18 U.S.C. 1962(c) (Count 1); one count of conspiring to violate the RICO Act, in violation of 18 U.S.C. 1962(d) (Count 2); four counts of assault with a dangerous weapon, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(3) and 2 (Counts 3, 6, 12, 16); four counts of possessing, brandishing, and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and 2 (Counts 4, 7, 13, 17); two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 2 (Counts 5, 8); two counts of VICAR attempted murder, in violation of 18 U.S.C. 1959(a)(5) and 2 (Counts 14, 15); and one count of conspiring to engage

in drug trafficking, in violation of 21 U.S.C. 846 (Count 58). Pet. App. 78a-110a, 112a-115a, 140a-144a.

a. Section 924(c) prescribes a mandatory consecutive sentence for possessing a firearm in furtherance of a "crime of violence," or using or carrying a firearm during and in relation to a "crime of violence." 18 U.S.C. 924(c)(1)(A). If the firearm is discharged, the mandatory consecutive sentence is enhanced from a five-year term to a ten-year term. 18 U.S.C. 924(c)(1)(A)(i) and (iii).

Section 924(c)(3) defines a crime of violence in two ways. First, the "elements clause" encompasses any federal felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Pursuant to *Borden* v. *United States*, 593 U.S. 420 (2021), use of force requires conduct committed with a mens rea more culpable than ordinary recklessness. See *id.* at 429 (plurality opinion); see also *id.* at 446 (Thomas, J., concurring in the judgment). Second, the "residual clause" includes any federal felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). In *United States* v. *Davis*, 588 U.S. 445 (2019), however, this Court held that the residual clause is unconstitutionally vague.

This Court employs a "categorical approach" to determine whether an offense is a crime of violence under Section 924(c)(3)(A). *United States* v. *Taylor*, 596 U.S. 845, 850 (2022). Under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." *Mathis* v. *United States*, 579 U.S. 500, 504 (2016). The categorical approach assesses whether the "least culpable" conduct that could

satisfy the offense elements in a hypothetical case would "necessarily involve[ ]," *Borden*, 593 U.S. at 424 (plurality opinion), the "use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). The defendant's actual conduct is "irrelevant." *Borden*, 593 U.S. at 424.

If, however, the statute in question lists multiple alternative elements, it is "divisible" into different offenses and a court may apply the "modified categorical approach" to classify a conviction. *Mathis*, 579 U.S. at 505-506 (citation omitted). Under the modified categorical approach, a court may "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant" was found to have committed. *Ibid.*

b. Although the underlying crime of violence for a Section 924(c) offense need not itself be charged as a separate count, see *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999), the Section 924(c) charge at issue here listed the VICAR assault with a dangerous weapon, in violation of 18 U.S.C. 1959(a)(3), alleged in Count 3 of the indictment, as the predicate crime. Pet. App. 106a-108a.

Section 1959(a)(3) prohibits, *inter alia*, "assault[] with a dangerous weapon" against 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" or "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a). The charge of VICAR assault

with a dangerous weapon alleged in Count 3 was premised in part on petitioner's alleged violation of Va. Code Ann. § 18.2-53.1 (2004), which criminalizes the use or display of a firearm in committing a felony, and Va. Code Ann. § 18.2-282 (2005), which criminalizes pointing, holding, or brandishing a firearm in such manner as to reasonably induce fear in another. Pet. App. 106a-107a (Count 3).

The particular VICAR offense charged in Count 3 involved petitioner's participation in the attempted robbery and assault with a dangerous weapon that resulted in the Crips member being shot in the back. See p. 3, *supra*; Pet. App. 73a-74a, 93a, 106a-107a. The Section 924(c) charge, in turn, included an allegation that the firearm was discharged, carrying a statutory minimum consecutive sentence of ten years of imprisonment, 18 U.S.C. 924(c)(1)(A)(iii). Pet. App. 59a, 107a-108a.

c. Pursuant to a plea agreement, petitioner pleaded guilty to a substantive RICO offense (Count 1) and to a single Section 924(c) offense (Count 4)—specifically, the one premised on the VICAR assault with a dangerous weapon charged in Count 3. Pet. App. 54a-55a, 58a-70a, 107a-108a. In return, the government dismissed the other charges. *Id.* at 58a-70a.

In December 2011, the district court sentenced petitioner to 180 months of imprisonment, consisting of a 60-month sentence on the RICO conviction and a consecutive 120-month (ten-year) sentence on the Section 924(c) conviction, to be followed by concurrent terms of five years of supervised release on each count. Pet. App. 57a; C.A. J.A. 95. Petitioner did not appeal.

3. In 2015, this Court held in *Johnson* v. *United States*, 576 U.S. 591, that the residual clause of the definition of "violent felony" in the Armed Career Criminal

Act of 1984, 18 U.S.C. 924(e), is unconstitutionally vague. *Johnson*, 576 U.S. at 594-597; see *Welch* v. *United States*, 578 U.S. 120, 122, 130, 135 (2016) (holding that *Johnson* announced a new rule with retroactive effect on collateral review). Thereafter, this Court held in *Sessions* v. *Dimaya*, 584 U.S. 148 (2018), that the residual definition of a "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. 584 U.S. at 152.

In 2018, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 in light of *Dimaya*. Pet. App. 6a. The district court denied that motion as untimely under 28 U.S.C. 2255(f)(3) "after noting that the rule applied in *Dimaya* had been set forth in *Johnson* three years earlier." Pet. App. 6a.

Petitioner later applied to the court of appeals under 28 U.S.C. 2255(h) for authorization to file an additional Section 2255 motion, "though there had been no other changes in the law" at that point. Pet. App. 6a. The court denied the request. *Ibid.*

4. After this Court held in *Davis*, 588 U.S. at 470, that Section 924(c)'s residual clause is itself unconstitutionally vague, petitioner applied again to the court of appeals for permission to file an additional Section 2255 motion. Pet. App. 6a. The court granted the request, *id.* at 36a-53a, and petitioner filed the authorized motion in district court, see D. Ct. Doc. 678 (Mar. 18, 2021).

In his motion, petitioner asserted that his Section 924(c) conviction is invalid, on the theory that the underlying offense of VICAR assault with a dangerous weapon no longer qualifies as a crime of violence after *Davis*. Pet. App. 19a-20a. In opposition, the government both responded on the merits and invoked the procedural default bar, pointing out that petitioner had failed to challenge his Section 924(c) conviction before

it became final and had failed to demonstrate prejudice or actual innocence to overcome his procedural default. D. Ct. Doc. 696, at 8-9 (May 24, 2021).

The district court denied the Section 2255 motion on the merits without resolving whether petitioner had overcome his procedural default. Pet. App. 18a-35a. The court determined that the Section 924(c) conviction's underlying offense of VICAR assault with a dangerous weapon qualifies as a crime of violence under Section 924(c)(3)(A)'s elements clause because VICAR assault with a dangerous weapon requires proof of the elements of generic federal assault with a dangerous weapon. *Id.* at 33a-34a. The court reasoned that the generic federal offense requires the "use, attempted use, or threatened use of physical force against the person or property or another," *id.* at 34a (quoting 18 U.S.C. 924(c)(3)(A)), and that intent greater than recklessness is "inherent in placing another in reasonable apprehension of immediate harm with a dangerous weapon," *ibid.* (emphasis omitted). The court denied a certificate of appealability. *Id.* at 35a.

5. The court of appeals granted a certificate of appealability, C.A. Doc. 25, and affirmed, Pet. App. 1a-17a. Relying on its prior decision in *United States* v. *Keene*, 955 F.3d 391, 398-399 (4th Cir. 2020), the court observed that the VICAR crime requires both proof that the defendant committed the generic federal offense of assault with a dangerous weapon and also that the defendant "violated an independent state or federal law." Pet. App. 15a. And the court explained that it could rely on either requirement to assess whether the charged VICAR offense qualified as a crime of violence under Section 924(c). *Id.* at 15a-16a. The court reasoned that "[i]f one element of an offense satisfies" Section 924(c)'s

elements clause, "it becomes superfluous to inquire whether other elements likewise meet the requirement." *Id.* at 15a.

The court of appeals recognized that courts may "look at the underlying state-law predicates" in some cases (as it had done in the past), but explained that courts "need not double their work by looking to the underlying predicates" where "the generic federal offense standing alone can satisfy the crime-of-violence requirements." Pet. App. 16a. As to this case, the court found that it "need not progress to the state-law predicates" because the requirement to prove the "generic federal offense" of assault with a dangerous weapon "is sufficient in and of itself to render the offense a crime of violence." *Id.* at 15a-16a. The court determined that "federal assault with a dangerous weapon easily qualifies as a crime of violence," *id.* at 15a, in light of precedents "establish[ing] that the inclusion of a dangerous-weapon element * * * elevates an assault to a crime of violence for purposes of § 924(c)," *id.* at 11a-12a (discussing *United States* v. *Bryant*, 949 F.3d 168 (4th Cir. 2020), and *United States* v. *McDaniel*, 85 F.4th 176 (4th Cir. 2023)). And it reasoned, based on VICAR's own element requiring an enterprise-focused purpose, that "VICAR assault with a dangerous weapon satisfies *Borden*'s mens rea requirement because it cannot be committed recklessly," but instead includes only "deliberate and purposeful machinations to raise one's clout in a criminal enterprise." *Id.* at 13a-14a.

ARGUMENT

Petitioner contends (Pet. 13-33) that the court of appeals' classification of his VICAR offense as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) should have been restricted solely to the elements of the state crime

underlying the VICAR offense, without any reference to the additional elements necessary to render the state crime a federal VICAR offense. The court of appeals correctly rejected that contention, and despite petitioner's contrary assertions (Pet. 14-24), the circuits are not in direct conflict on the question presented. No further review is warranted.

1. The court of appeals correctly recognized that the crime-of-violence classification under 18 U.S.C. 924(c)(3)(A) was not limited solely to the elements of the underlying violation of state law, but could instead include the additional requirements of the VICAR offense—in particular, the requirement that the crime be "federal assault with a dangerous weapon." Pet. App. 15a.

a. The VICAR statute requires proof of both a generic federal offense and a violation of state law or federal statutory law. The VICAR statute applies to anyone who "murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual 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" or "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a). The plain statutory text thus requires *both* that the conduct be in "violation of the laws of any State or the United States" *and* be a listed crime, such as murder or assault with a dangerous weapon. *Ibid.*

Petitioner does not directly dispute that by including the enumerated offenses without defining those terms,

Congress indicated that the conduct at issue must fall within the generic federal definition of the particular offense. And the structure and language of the VICAR statute is similar to others that require proof of a generic offense as well as a state or federal offense. In *United States* v. *Nardello*, 393 U.S. 286 (1969), for example, the Court construed the Travel Act, 18 U.S.C. 1952—which defines the prohibited "unlawful activity" as "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States," 393 U.S. at 287 & n.1 (quoting 18 U.S.C. 1952(b) (Supp. III 1967))—to require conduct that meets the generic definition of extortion in addition to violating a particular state law. *Id.* at 295-296. And in *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393 (2003), the Court held that the RICO Act's reference to an "act or threat involving . . . extortion, . . . which is chargeable under State law," *id.* at 409 (quoting 18 U.S.C. 1961(1) (Supp. III 2003)), requires proof that "the conduct must be capable of being generically classified as extortionate" in addition to violating state law, *id.* at 409-410.

Likewise here, because Section 1959(a)'s text requires proof that a defendant "assault[s] with a dangerous weapon" and does so "'in violation of the laws of any State or the United States,'" the statutory language imposes two separate requirements: (1) that the defendant commits "the generic federal offense" of assault with a dangerous weapon and (2) that the defendant's conduct violates state law or federal statutory law. Pet. App. 15a-16a (quoting 18 U.S.C. 1959(a)); see *United States* v. *Keene*, 955 F.3d 391, 398-399 (4th Cir. 2020) ("Congress intended for individuals to be convicted of VICAR assault with a dangerous weapon by engaging in conduct that violated both that enumerated federal

offense as well as a state law offense."); cf. *United States* v. *Adkins*, 883 F.3d 1207, 1210-1211 (9th Cir. 2018) ("In the context of VICAR, we have permitted jury instructions using generic federal definitions," but "courts, in certain circumstances, should instruct on the state definition or otherwise risk prejudice to the defendant.").

By imposing those two requirements in VICAR, Congress avoided a scenario in which conduct escaped the statute's reach simply because it might not have been labeled as, for example, "murder," "maiming," or "assault with a dangerous weapon" by a few states—thereby ensuring a high degree of nationwide uniformity. See *Nardello*, 393 U.S. at 293 (rejecting as a "fallacy" the contention that "by defining extortion with reference to state law, Congress also incorporated state labels for particular offenses"). As the Senate Judiciary Committee explained in describing the proposed VICAR statute: "While section [1959] proscribes murder, kidnaping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, it is intended to apply to these crimes in a generic sense, whether or not a particular State has chosen those precise terms for such crimes." 129 Cong. Rec. 22883-22884, 22906 (1983).

Because a VICAR offense has two separate requirements that must be satisfied—the generic federal offense as well as a state-law or federal-statutory-law violation—a court may rely on either (or both) to determine whether the VICAR offense constitutes a crime of violence under Section 924(c)(3). Pet. App. 15a-16a; see *Manners* v. *United States*, 947 F.3d 377, 379-382 (6th Cir. 2020) (determining that a VICAR offense qualified as a crime of violence without determining whether a

particular predicate state-law offense or federal statutory offense was a crime of violence). Both the generic-federal-offense requirement and the violation-of-law requirement are individually "elements"—or, more specifically, individual sets of elements (the elements of the generic and state/federal crimes)—that must be satisfied to prove a VICAR offense. *Mathis* v. *United States*, 579 U.S. 500, 504 (2016) (explaining that elements "are what the jury must find beyond a reasonable doubt to convict the defendant"). And as the court of appeals correctly reasoned, once a court identifies an element that satisfies Section 924(c)'s elements clause, "it becomes superfluous to inquire whether other elements likewise meet the requirement." Pet. App. 15a.

b. In arguing that a court must instead rely exclusively on the state-law predicate for a VICAR offense in determining whether that VICAR offense satisfies Section 924(c)(3)'s crime-of-violence definition, petitioner asserts that such an approach "makes sense, because the modified categorical approach directs courts to look to the elements of the crime 'as charged and instructed,'" "or to which the defendant pleaded guilty." Pet. 26 (quoting *Alvarado-Linares* v. *United States*, 44 F.4th 1334, 1343 (11th Cir. 2022)). But any VICAR-based charge inherently includes the elements of the charged offense, and the indictment here expressly alleged *both* the generic federal offense of assault with a dangerous weapon and the underlying predicate based on Virginia law.

Specifically, Count 3 charged that petitioner "did unlawfully and knowingly assault D.B. with a dangerous weapon" and did so "in violation of Va. Code Ann. §§ 18.2-53.1 and 18.2-282." Pet. App. 107a. By charging that petitioner "did unlawfully and knowingly assault

D.B. with a dangerous weapon" and also that the conduct was "in violation of" Virginia law, *ibid.*, Count 3 essentially mirrored the VICAR statute and therefore charged both the generic-federal-offense element as well as the state-law element.

Petitioner's guilty plea did not limit the VICAR charge to the underlying state-law predicates—nor could it have. A pure state-law crime would not be a valid Section 924(c) predicate, because it would not be a "crime of violence * * * for which the person may be prosecuted in a court *of the United States*." 18 U.S.C. 924(c)(1)(A) (emphasis added); see *United States* v. *Davis*, 588 U.S. 445, 448 (2019); cf. 18 U.S.C. 924(e)(1) (referring to "convictions by any court referred to in section 922(g)(1) of this title"); *Small* v. *United States*, 544 U.S. 385, 387 (2005) (interpreting phrase "convicted in any court" in 18 U.S.C. 922(g)(1)'s felon-in-possession ban to encompass all domestic convictions). And here, petitioner pleaded guilty to the Section 924(c)(3) offense in "[Count] 4," for which the indictment in turn referenced Count 3—which, as just explained, referenced the generic-federal-offense and state-offense requirements. Pet. App. 54a; see *id.* at 59a, 108a.[1] Moreover, petitioner's factual statement described his conduct in committing the assault with a dangerous weapon without specifically referencing the underlying Virginia statutes. *Id.* at 73a-74a.[2]

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[1] In addition, to the extent that petitioner's argument depends on his characterization of his plea, see Pet. 28-29, the court of appeals has not yet addressed how that (or any other argument) might be affected by the standard of review on his procedurally defaulted claim, see pp. 7-9, *supra*.

[2] Petitioner's suggestion (Pet. 29) that the court of appeals' approach calls into question VICAR convictions that lacked jury

2. Contrary to petitioner's claim (Pet. 15-18), the decisions he cites from the Second and Eleventh Circuits do not directly conflict with the court of appeals' decision here. None of those decisions limits the court to assessing the state-law or federal-statutory predicate in determining whether a VICAR offense qualifies as a crime of violence.

In several cases, the Second Circuit has concluded that a particular charged VICAR offense qualified as a crime of violence under Section 924(c)(3)(A) because the underlying state-law predicate satisfied the crime-of-violence definition. See *United States* v. *Pastore*, 83 F.4th 113, 119-120 (2023), cert. granted on other grounds *sub nom*. *Delligatti* v. *United States*, No. 23-825 (June 3, 2024)[3]; *United States* v. *Davis*, 74 F.4th 50, 54-56, cert. denied, 144 S. Ct. 436 (2023); *United States* v. *Morris*, 61 F.4th 311, 319-320 (2023). Those cases are consistent with the court of appeals' decision here, which recognizes that a VICAR offense can qualify as a crime of violence based solely on a consideration of the underlying state-law offense. Pet. App. 16a (noting that the court has previously relied on a state-law predicate in particular cases). The Second Circuit did not, in any of the cases cited by petitioner, hold that a VICAR offense

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instructions regarding the generic federal offense is likewise mistaken. As a practical matter, if the relevant state or federal-statutory law is substantially similar to or narrower than the generic definition, the jury may be instructed only as to the state or federal-statutory offense.

[3] In *Delligatti*, the Court granted a writ of certiorari to consider whether a VICAR attempted murder offense qualifies as a crime of violence under Section 924(c)(3)(A) where it rests on a state-law attempted murder crime that can, in theory, be satisfied by an act of omission. See U.S. Br. at 8, 18, *Delligatti*, *supra* (No. 23-825) (acquiescing to petition for certiorari).

lacks an additional generic-federal-offense requirement, let alone hold that a court cannot rely on that requirement in classifying a VICAR offense as a crime of violence.

The Eleventh Circuit's decision in *Alvarado-Linares* v. *United States*, *supra*, likewise does not address whether a court may rely on an element of the generic federal offense in assessing whether a VICAR conviction is a crime of violence. In that case, the Eleventh Circuit looked to the state-law element in determining whether a VICAR murder predicated on Georgia law qualified as a crime of violence under the elements clause because, *inter alia*, the jury instructions defined the crime by reference to state law. *Alvarado-Linares*, 44 F.4th at 1342-1343. The Eleventh Circuit then concluded that Georgia malice murder qualifies as a crime of violence. *Id.* at 1344. And "[a]ssuming without deciding" that the defendant's convictions also required that "the generic federal definition of murder contains an element of force," the court further held that "federal murder also meets the definition of a crime of violence." *Id.* at 1345. But the Eleventh Circuit explicitly left open the question whether, in a different case, a court could rely on "the generic federal definition of murder" alone to determine whether a VICAR murder satisfied the force clause. *Ibid.*[4]

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[4] Petitioner additionally asserts (Pet. 29-31) that the court of appeals erred in concluding that VICAR's purpose requirement establishes that the use of force in a VICAR offense is committed with a state of mind more than ordinary recklessness, as required by *Borden* v. *United States*, 593 U.S. 420, 429 (2021) (plurality opinion). That issue, however, is not included in the single question presented on which petitioner has sought certiorari. See Pet. I; see also Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Nor has

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2024

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petitioner claimed the existence of a circuit conflict on that issue. And he provides no sound basis for concluding that the issue would be outcome-determinative in his own case. Even without consideration of the VICAR purpose element, the district court held that generic federal assault with a dangerous weapon requires a state of mind greater than ordinary recklessness. Pet. App. 33a-34a; see Gov't C.A. Br. 20-23, 28-32.