No. 17-8074

IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS SCHAEFFER COX, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioner's conviction for conspiracy to murder federal officials, in violation of 18 U.S.C. 1114 and 1117.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 705 Fed. Appx. 573.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2017. A petition for rehearing was denied on November 7, 2017 (Pet. App. 7a). On January 12, 2018, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 7, 2018, 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 jury trial in the United States District Court for the District of Alaska, petitioner was convicted of conspiring to possess unregistered firearms, in violation of 18 U.S.C. 371; four counts of possessing unregistered firearms, in violation of 26 U.S.C. 5861(d) and 5871; possessing a machine gun, in violation of 18 U.S.C. 922(o) and 924(a)(2); making a silencer, in violation of 26 U.S.C. 5861(f) and 5871; conspiring to murder an officer or employee of the United States, in violation of 18 U.S.C. 1114 and 1117; and soliciting another person to murder an officer or employee of the United States, in violation of 18 U.S.C. 373 and 1114. Pet. C.A. E.R. 2-3 (A.E.R.); Pet. C.A. Supp. E.R. (S.E.R.) 1-4. He was sentenced to 310 months of imprisonment, to be followed by five years of supervised release. A.E.R. 4-5. The court of appeals reversed petitioner's conviction for soliciting another person to murder an officer or employee of the United States, affirmed the other convictions, vacated the sentence, and remanded for resentencing. Pet. App. 1a-6a.

1. Petitioner was the "commander" of the Alaska Peacemakers Militia, a "sovereign citizen" group based in Fairbanks, Alaska. Gov't C.A. Br. 3. Coleman Barney was a "major" and Lonnie Vernon was a "sergeant" in the militia. Ibid. Petitioner and members of his group believed the government was no longer operating under

the rule of law and harbored deep suspicions about governmental incursions on citizens' rights. Id. at 3-5. They stockpiled substantial arsenals and developed plans for the imminent murder of federal officials. Ibid.

In 2009, petitioner and Michael Anderson plotted a strategy for addressing a government declaration of martial law. Gov't C.A. Br. 5-6. They agreed that government leaders would have to be killed. Id. at 6. They decided to create a list of government officials, with their home addresses, to kill when martial law was imposed. Id. at 7. Petitioner provided Anderson with the names of three federal officials to include in the list, and Anderson wrote the information in a notepad. Id. at 7-8. In the same notepad, Anderson wrote that he "need[ed] the names of Federal Marshals" and began a "Federal Hit List," which included the name of a deputy United States marshal in Anchorage, Alaska. Id. at 8 & n.2. Petitioner and Anderson also compiled names and addresses of Alaska state troopers. Id. at 7-9.

Petitioner aggressively confronted federal employees. Gov't C.A. Br. 10-12. He attended a lunch at the house of a Transportation Security Administration (TSA) employee, and asked her whether he was on the "no-fly" list. Id. at 10. After the employee declined to answer, she was added to the "hit list." Ibid. Petitioner also approached a Department of Homeland Security (DHS) employee when she was off-duty, but in uniform, at a Wal-Mart with her daughter. Id. at 10-11. Petitioner told the

employee that he did not like to see "a lot of feds" in Fairbanks, that he did not consider DHS to be a legally formed agency, and that he had a few thousand armed men in his militia. Id. at 11. Petitioner added the DHS employee to his "hit list." Ibid. Finally, petitioner aggressively accosted two TSA employees at the Fairbanks airport, calling them "Nazis" and taking a picture of one. Id. at 11-12. After a TSA supervisor spoke to petitioner, the supervisor was added to petitioner's "hit list." Id. at 12.

Petitioner subsequently spoke of plans to burn the homes of federal agents and shoot the agents and their family members as they fled the fires. Gov't C.A. Br. 12. The plan to kill federal agents was, by this point, no longer contingent exclusively on a declaration of martial law; petitioner spoke of killing federal agents if they did anything to his family or if he was arrested. Id. at 12-13. Petitioner, who had been charged with domestic violence and was the subject of an Alaska Office of Children's Services (OCS) inquiry, accused the federal government of being behind the OCS investigation. Id. at 16.

By the summer of 2010, petitioner's public statements and aggressive encounters with federal and state officials had generated concern, and the FBI enlisted the help of a cooperating witness, Gerald Olson, with active ties to the militia movement. Gov't C.A. Br. 15. Olson attended a "commissioning ceremony" for new members of petitioner's militia, at which petitioner claimed that a federal assassination team was targeting him and his family.

Id. at 15-16. Petitioner later put together an armed and armored "security detail" to protect him from the supposed federal assassination team while he attended a court hearing in Fairbanks in a state misdemeanor weapons case against him and while he was interviewed by a television station. Id. at 16-17. The security detail was instructed to shoot to kill if necessary. Ibid. Barney, who was in charge of petitioner's security detail during the television interview, was armed that night with a 37mm launcher loaded with "Hornet's Nest" anti-personnel rounds attached to an AR-15 rifle. Id. at 18. Written plans later found in petitioner's and others' houses showed that petitioner had instructed his security team to use "lead poisoning" and grenades against federal agents. Id. at 17.

Petitioner subsequently instructed Vernon and Olson to attend a militia convention in Anchorage. Gov't C.A. Br. 20-21. He told them to purchase grenades and explosives while there. Id. at 21. In Anchorage, Vernon and Olson went to a military surplus store to buy the weapons. Id. at 21-22. Vernon told the store owner that petitioner "wants the big show"; that petitioner's group knew where judges and the assistant district attorney lived; and that the group intended to go to their houses and "drag them out and they will never find them." Id. at 22-24.

In February 2011, petitioner held a meeting with members of his militia and announced a "2-4-1" plan. Gov't C.A. Br. 24-25. Petitioner said that he was not going to appear at his next

scheduled state court hearing and if, as a result, he or any other militia member was killed, petitioner and his confederates would, pursuant to the "2-4-1" plan, kill two people in retribution. Id. at 24. Petitioner specifically identified two state court employees and said they "need to dangle together like a windchime." Ibid. Petitioner said that killing was "morally allowable" because "it's war." Id. at 24-25. Petitioner added that it would be "well within [his] rights to go drill McConahy" -- the state court judge presiding over his pending criminal case -- "in the forehead." Id. at 25.

As planned, petitioner did not appear for his February 2011 state court hearing and Judge McConahy issued a warrant for his arrest. Gov't C.A. Br. 27. Petitioner hid out at Vernon's home and talked with Vernon about ways to set up booby traps to block law enforcement access to the home. Id. at 27-28. Petitioner said the plan was to "kill a whole butt load of them and then offer peace." Id. at 28. As petitioner and his crew continued to plan "2-4-1," petitioner said he was "not against some * * * drastic, shocking things either, like, you know, mailing heads to people." Id. at 30.

Petitioner, Barney, and Olson later loaded assault rifles, ammunition, and grenades from a shed on petitioner's property into Barney's truck. Gov't C.A. Br. 31. The group spent the next few weeks discussing the acquisition of weapons, ammunition, and silencers and making other preparations for their "2-4-1" plan.

Id. at 31-34. As part of that effort, petitioner sought to get Anderson's list of government officials and their addresses. Id. at 34-36. Anderson, however, destroyed the list because he was concerned about what petitioner was going to do with the information. Id. at 36.

Petitioner, Barney, and Vernon were arrested in March 2011. Gov't C.A. Br. 37. When petitioner was arrested, he was wearing body armor and carrying a loaded firearm. Id. at 39-40. Law enforcement officers searched the residences and vehicles of petitioner, Vernon, and Barney. Id. at 40. Officers found massive arsenals, see id. at 41-46 (reproducing pictures of the weapons), as well as detailed plans and notes, instructions on how to convert firearms and build silencers, and other documents. Id. at 40-51.

2. A federal grand jury in the District of Alaska returned a 16-count third superseding indictment against petitioner, Barney, and Vernon. A.E.R. 9-32. Petitioner was charged with conspiracy to possess silencers and destructive devices, in violation of 18 U.S.C. 371; two counts of possession of unregistered destructive devices, in violation of 26 U.S.C. 5861(d) and 5871; possession of an unregistered silencer, in violation of 26 U.S.C. 5861(d) and 5871; possession of an unregistered machine gun, in violation of 26 U.S.C. 5861(d) and 5871; possession of a machine gun, in violation of 18 U.S.C. 922(o) and 924(a)(2); making a silencer, in violation of 26 U.S.C. 5861(f) and 5871; two counts of carrying a firearm during a crime of

violence, in violation of 18 U.S.C. 924(c)(1)(A); conspiracy to murder federal officials, in violation of 18 U.S.C. 1114 and 1117; and solicitation to commit a crime of violence (murder of a federal official), in violation of 18 U.S.C. 373 and 1114. A.E.R. 9-32.

3. At the close of the government's case at trial, petitioner moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing that the conspiracies were contingent and that the condition precedent, which petitioner characterized as the collapse of the government, had not been fulfilled and was never likely to be fulfilled. Gov't C.A. E.R. 63-103. The district court denied the motion. Id. at 99-103. The court explained that the government's allegations were that a condition precedent could be the "the arrest of [petitioner] rather than the collapse of the government," id. at 64-65, and it determined that the government had presented sufficient evidence to send the case to the jury, id. at 102. Petitioner did not renew his Rule 29 motion at the close of the evidence. See Pet. 9 (acknowledging failure to renew the motion).

The jury found petitioner guilty of all charges except the counts that charged the carrying of a firearm during a crime of violence. S.E.R. 1-4. The district court sentenced petitioner to 310 months of imprisonment, to be followed by five years of supervised release. A.E.R. 4-5.

4. In an unpublished memorandum, the court of appeals vacated petitioner's conviction for soliciting another person to

murder an officer or employee of the United States, affirmed the other convictions, vacated the sentence, and remanded for resentencing. Pet. App. 1a-6a.

As relevant here, the court of appeals sustained petitioner's conviction for conspiring to murder federal officials. Pet. App. 3a. First, the court assumed without deciding that petitioner had preserved a challenge to the sufficiency of the evidence supporting that charge. Ibid. The court then determined that the evidence was sufficient on the record here. The court stated that petitioner "and his co-conspirators agreed to attack government officials -- including federal officers -- in the event of certain conditions that they subjectively thought were likely to occur." Ibid. Moreover, a rational trier of fact, the court determined, "could find beyond a reasonable doubt that the agreement was not merely one for self-defense" and that "'the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.'" Ibid. (quoting United States v. Feola, 420 U.S. 671, 695 (1975)).

The court of appeals reversed petitioner's conviction for solicitation, however. Pet. App. 4a-5a. The court accordingly vacated that conviction, vacated petitioner's sentence, and remanded for resentencing. Id. at 6a.

ARGUMENT

Petitioner contends (Pet. 11-19) that the evidence was insufficient to support his conviction for conspiracy to murder

federal officials because the condition precedent to the murders was unlikely to occur and because he did not specifically target federal employees. The court of appeals correctly rejected petitioner's claims and its unpublished decision is factbound and does not conflict with the decision of any other circuit court. Moreover, even if a circuit conflict existed here, this case would present a poor vehicle for resolving it because this case arises on an interlocutory posture and petitioner did not properly preserve his sufficiency claim below.

1. This case arises in an interlocutory posture because the court of appeals reversed petitioner's conviction for soliciting another person to murder an officer or employee of the United States, vacated his sentence, and remanded for resentencing. Pet. App. 4a-6a. That posture "alone furnishe[s] sufficient ground for the denial of" the petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). Petitioner will have the opportunity to raise his current claim, together with any other claims that may arise during his resentencing, in a single petition for a writ of certiorari following the further proceedings in the lower courts. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating

that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

2. In any event, petitioners' claims do not warrant further review. Petitioner contends (Pet. 11-19) that the evidence was insufficient to support his conviction for conspiring to murder federal officials because, he asserts, the conspiracy was contingent on an event -- the collapse of the government and the imposition of martial law -- that was highly unlikely to occur, and because the evidence did not establish that he specifically targeted federal officials. Petitioner's contentions are entirely factbound and lack merit.

At the outset, although the court of appeals assumed without deciding that de novo review applied to petitioner's sufficiency-of-the-evidence claims, petitioner failed to preserve those claims in the district court. Specifically, petitioner failed to renew a motion for a judgment of acquittal on those charges after the end of his trial. See Gov't C.A. Br. 97. And under circuit precedent, the Ninth Circuit "may review an unrenewed motion for judgment of acquittal, but only to prevent a manifest miscarriage of justice, or for plain error." United States v. Alvarez-Valenzuela, 231 F.3d 1198, 1200-1201 (2000).

No error exists here, much less a plain error. "Sufficiency review essentially addresses whether 'the government's case was so lacking that it should not have even been submitted to the jury.'"

Musacchio v. United States, 136 S. Ct. 709, 715 (2016) (citation omitted). "The reviewing court considers only the 'legal' question 'whether, after 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.'" Ibid. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Here, the court of appeals correctly determined that the evidence presented at trial was sufficient to support the jury's finding that petitioner and his co-conspirators agreed to murder federal employees and committed overt acts in furtherance of that goal. See 18 U.S.C. 1114, 1117. Indeed, the record is replete with evidence of a conspiracy to murder federal officials; evidence that petitioner was a member of that conspiracy; and evidence that its members took overt acts in furtherance of that conspiracy, even if they had not yet finalized the details of executing their plans. As previously discussed, see pp. 2-7, supra, the evidence showed that petitioner and his cohorts compiled a "Federal Hit List"; that petitioner provided the names of three federal officials to include in the list; and that the list included the name of a deputy United States marshal. The evidence also showed that petitioner aggressively confronted TSA and DHS employees, whose names were added to the hit list, and spoke of plans to burn the homes of federal agents and then shoot the agents and their families as they fled. And written plans found in petitioner's and others' homes revealed that petitioner had instructed his

security team to use "lead poisoning" and grenades against federal agents. See Gov't C.A. Br. 3-51 (collecting evidence). The court thus correctly affirmed petitioner's conviction for conspiracy to murder a federal employee, reasoning in part that a "rational trier of fact could * * * conclude that 'the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.'" Pet. App. 3a (quoting United States v. Feola, 420 U.S. 671, 695 (1975)).

Petitioner characterizes his activities (e.g., Pet. 15) as "conditional" and argues (Pet. 11-16) that his plans cannot provide the basis for criminal liability because they were contingent on the collapse of the government and the imposition of martial law, which were objectively unlikely. That argument lacks merit. As a threshold matter, nothing was contingent about the existence of the conspiracy itself; petitioner and his co-conspirators agreed to and were prepared to kill federal agents and took overt steps towards that end. And the conditions that would trigger the planned murders included not only the imposition of martial law, but also petitioner's arrest. See Gov't C.A. E.R. 64-65; Gov't C.A. Br. 12-13, 113. Although petitioner's criminal matters were in the state system, a jury could rationally find that petitioner, who accosted federal employees (including at the airport), committed numerous firearms offenses, and created a list of targets that included federal employees, could have been arrested by federal agents, or that retaliation for further actions by the

State would include federal officers. Indeed, petitioner believed that the federal government was behind his investigation by the Alaska OCS. Gov't C.A. Br. 5, 16.

Petitioner likewise errs in asserting (Pet. 16-19) that federal prosecution is precluded because the evidence did not show that he specifically targeted federal employees. As noted, petitioner identified federal employees by name and added them to his "Federal Hit List." Gov't C.A. Br. 8, 10, 11. Petitioner thus identified the objects of his intended attack "with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer." Feola, 420 U.S. at 695-696.

3. Petitioner contends (Pet. 3, 11-14) that the court of appeals' decision here created a conflict with the First Circuit's decision in United States v. Palmer, 203 F.3d 55, cert. denied, 530 U.S. 1281 (2000), and tension with the Seventh Circuit's decision in United States v. Podolsky, 798 F.2d 177, 179 (1986). As an initial matter, the court of appeals' unpublished memorandum opinion could not have created a conflict warranting this Court's review because it is not binding precedent. See 9th Cir. R. 36-3; Pet. App. 1a n.*. In any event, no circuit conflict exists.

Petitioner errs in citing Palmer to assert (Pet. 10) that, if he had "been tried in the First Circuit, he never would have been convicted." Ibid. Palmer's statement that liability for conspiracy based on a contingent agreement "should attach if the

defendant reasonably believed that the conditions would obtain," 203 F.3d at 64, relied on the First Circuit's prior decision in United States v. Dworken, 855 F.2d 12, 19 (1988). In Dworken, the court explained that the requirement of a "reasonable" belief means that conspiracy liability should not attach "[i]f there is virtually no chance that the condition would be fulfilled," such that "there is virtually no likelihood that the defendant presents any risk of actual dangerousness." Id. at 19 & n.6. Here, as noted above, the court of appeals correctly determined that sufficient evidence established that the conspiracy here did present a risk of actual dangerousness. See Pet. App. 3a. Among other things, the evidence showed that the murders planned by petitioner and his group were not limited to a circumstance in which the federal government declared martial law; the conspirators also agreed to kill federal agents if petitioner was arrested. See Gov't C.A. E.R. 64-65. Petitioner, who had identified specific federal employees, accosted federal employees, and amassed an enormous arsenal, thus presented a "risk of actual dangerousness." Dworken, 855 F.2d at 19 n.6. Accordingly, no decision of the First Circuit would foreclose petitioner's conviction.

The court of appeals' decision in this case is also consistent with the Seventh Circuit's decision in Podolsky. The court in Podolsky noted some concern among courts and scholars that "without some attention to the likelihood of [a condition to an agreement]

being fulfilled, all sorts of fantastic hyperbole might become punishable," giving the example of an agreement to "horsewhip Idi Amin if he ever shows his face on Rush Street" in Chicago. 798 F.2d at 179. But the Court expressed "doubt" as to "whether it is necessary to complicate the trial of conspiracy cases by making likelihood of fulfilling all conditions another element of the crime," because the general federal conspiracy statute, 18 U.S.C. 371, already requires an agreement and the commission of an overt act. 798 F.2d at 179. The court suggested that "if the conditions were known to be impossible of fulfillment when the agreement was made," the agreement "could not sensibly be understood as an agreement to do something; it would be a mere rhetorical flourish." Ibid. But the court ultimately declined to decide "how to deal with the situation where an agreement is conditioned on an event that is highly unlikely ever to occur," because the conspiracy in the case before it -- to burn down a building if it was first emptied of people -- "was not of that type." Ibid.

Nothing in Podolsky suggests that petitioner would have prevailed if his case arose in the Seventh Circuit. That decision expressed "doubt" about the merits of petitioner's broader argument that a conviction for conspiracy depends on the "likelihood of fulfilling all conditions," 798 F.2d at 179, and the conspiracy statute in this case, like Section 371, requires proof of an agreement and an overt act, see 18 U.S.C. 1117. Furthermore, the record here shows that this is not a case about

"fantastic hyperbole." 798 F.2d at 179. Among other things, one of the conditions precedent to begin the planned attacks was petitioner's arrest. Gov't C.A. Br. 12-13, 113. Accordingly, petitioner cannot show that, even if he had preserved his sufficiency-of-the-evidence challenge, he would have prevailed in any other circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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