No. 16-6392

IN THE SUPREME COURT OF THE UNITED STATES

REJON TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding rebuttal testimony by two defense witnesses during the penalty phase of petitioner’s capital trial, which the court determined was not responsive to the government’s evidence concerning petitioner’s future dangerousness.

2. Whether the definition of the term “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 814 F.3d 340. The opinion of the district court is reported at 583 F. Supp. 2d 923.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2016. A petition for rehearing was denied on May 9, 2016 (Pet. App. 60a). On July 21, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 6, 2016, 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 Eastern District of Tennessee, petitioner was convicted of carjacking resulting in death, in violation of 18 U.S.C. 2119(3); kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1); and two counts of using a firearm to commit murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j)(1). At a penalty hearing, the jury unanimously recommended that petitioner be sentenced to death on each count. The district court imposed that sentence, and the court of appeals affirmed. Pet. App. 1a-40a.

1. Between 2001 and 2003, petitioner committed a series of burglaries in residential neighborhoods in Atlanta, Georgia. Pet. App. 6a. One of the homes petitioner burglarized belonged to Guy Luck, a local restaurateur. Ibid.; see Gov't C.A. Br. 13. Petitioner and two accomplices, Joey Marshall and Sir Jack Matthews, stole "cash, credit cards, and checks" from Luck's home on five separate occasions. Gov't C.A. Br. 13. Petitioner "speculated that Luck was making a lot of money" and, after following Luck and watching his restaurant, discovered that Luck sometimes brought large amounts of cash home with him at night so he could take it to a bank the next morning. Id. at 13-14.

Petitioner developed a plan to rob Luck of those proceeds. Id. at 14.

On the morning of August 6, 2003, petitioner, Marshall, and Matthews drove to Luck's house and confronted him at gunpoint. Pet. App. 6a; see Gov't Br. 14-15. While Marshall or Matthews held Luck prisoner, petitioner searched Luck's home and stole several hundred dollars. Ibid. Petitioner also discovered documents in Luck's house relating to petitioner's arrest on theft charges in another case. Pet. App. 6a; see Gov't C.A. Br. 15. Petitioner concluded that Luck could be a witness against him in that case. Ibid.

Petitioner and Matthews, who were both armed, forced Luck out of his home and into Luck's van. Pet. App. 6a. Petitioner got into the driver's seat while Matthews guarded Luck at gunpoint in the back. Ibid. Petitioner drove the van north for approximately an hour and a half, eventually crossing into Tennessee, while Marshall followed behind in another car. Ibid.; see Gov't C.A. Br. 15-16.

As petitioner and Marshall drove through Tennessee, a confrontation broke out in the back of the van. Pet. App. 6a. Matthews fired a shot, which hit Luck in the arm. Ibid. Petitioner then turned around from the driver's seat and fired several shots at Luck, the last of which hit Luck in the mouth. Ibid. Petitioner and Matthews abandoned the van and fled with

Marshall in the other car. Ibid.; see Gov't C.A. Br. 16. A passing motorist found Luck inside the van with blood "pouring out of his mouth." Gov't C.A. Br. 4 (citation omitted). The final shot blew out several of Luck's teeth, passed through his tongue, and severed his carotid artery. Ibid. Luck died at the hospital a few hours later. Ibid.

While driving back to Atlanta, petitioner, Marshall, and Matthews divided up the cash that they had stolen from Luck. Gov't C.A. Br. 16. Matthews (who had been shot during the scuffle) went to the hospital for treatment while petitioner hid the getaway car. Id. at 17-18. Petitioner and Marshall used the money they had stolen from Luck to take their girlfriends to dinner. Id. at 18.

2. A federal grand jury charged petitioner with carjacking resulting in death, in violation of 18 U.S.C. 2119(3) (Count 1); kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (Count 3); and two counts of using a firearm to commit murder during and in relation to crimes of violence (i.e., the carjacking charged in Count 1 and the kidnapping charged in Count 3), in violation of 18 U.S.C. 924(j)(1) (Counts 2 and 4). Superseding Indictment 1-4. The grand jury also alleged statutory aggravating factors that, if proved, would make petitioner eligible for the death penalty on each count.

Id. at 5-6.[1] The government notified petitioner that, in addition to those statutory factors, it would also seek to prove several non-statutory aggravating factors, including that petitioner was likely to pose "a continuing and serious threat to the lives and safety of other persons" even if he was incarcerated. D. Ct. Doc. 547, at 4 (Mar. 4, 2008).

3. Pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq., the district court divided petitioner's trial into two phases, one to determine his guilt and the other to determine the appropriate penalty. See 18 U.S.C. 3593(b). At the guilt phase, the jury found petitioner guilty on all counts. See D. Ct. Doc. 670, at 1-2 (Sept. 8, 2008). At the penalty phase, the jury unanimously found that the government had proved two statutory aggravating factors and the non-statutory aggravating factor related to petitioner's future dangerousness. See D. Ct. Doc. 760, at 2-3 (Oct. 21, 2008) (Penalty Verdict Form).

a. The government introduced two types of evidence to prove future dangerousness. First, the government relied on

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[1] The grand jury alleged four statutory aggravating factors, see Superseding Indictment 5-6, but only two were submitted to the jury: that petitioner killed Luck during the commission of another crime (18 U.S.C. 3592(c)(1)), and that he committed the murder after substantial planning and premeditation (18 U.S.C. 3592(c)(9)). See D. Ct. Doc. 760, at 2 (Oct. 21, 2008).

evidence from the guilt phase demonstrating petitioner's ability to influence other inmates to commit crimes on his behalf. See Pet. App. 13a; Gov't C.A. Br. 18-19. That evidence showed, for example, that while petitioner was in a Tennessee jail awaiting trial for Luck's murder, he became "the leader of [a] conspiracy to escape." Pet. App. 13a. The plan was for three other inmates to assault and restrain the guards while petitioner and Marshall (who was detained in the same jail) took the guards' keys and escaped out a window. Ibid. Petitioner had arranged for his mother to have a car waiting outside. Ibid. Although one of the inmates managed to punch a guard and petitioner helped hold down another guard, other officers intervened and thwarted the escape attempt. Ibid. The government also relied on evidence that petitioner had persuaded Matthews, with whom petitioner shared a cell, to commit perjury at petitioner's trial by minimizing petitioner's role in the murder and by suggesting that Luck was killed in self defense. See Gov't C.A. Br. 22-23 & n.9, 34-35, 58.

Second, the government introduced evidence that petitioner was able to communicate his criminal plans to people outside the jail. See Pet. App. 13a. The government established, for example, that petitioner wrote a letter to an inmate at another jail in which he made a veiled threat against Marshall, who had testified against petitioner at trial. See ibid. ("So many

people want to do something to [Marshall]. Next time I go to trial, I bet he won't testify against me. Trust me on that.") (quoting text of letter); see also Gov't C.A. Br. 34-35. Petitioner also bragged about his skill at impersonating other people and stealing their identities. Gov't C.A. Br. 35-36. After petitioner learned that jail officials were monitoring his communications, he attempted to send a follow-up letter to the same inmate, using another person's name, in which he asked the inmate to place a telephone call to petitioner's sister. Pet. App. 13a; see Gov't C.A. Br. 36. The FBI received reports around the same time that someone had broken into or vandalized homes belonging to members of Marshall's family. Pet. App. 13a; see 10/6/08 Tr. 2044.

b. Petitioner called two expert witnesses to testify in mitigation and to rebut the government's evidence of future dangerousness. See Pet. App. 13a-16a.

i. James Aiken, a former prison warden, proposed to testify about security features at federal Bureau of Prisons (BOP) facilities where petitioner might be incarcerated, including the United States Penitentiary in Terra Haute, Indiana, and the Administrative Maximum (ADX) facility in Florence, Colorado. See 10/7/08 Tr. 2225, 2237-2239, 2244-2245, 2250-2252. Aiken also proposed to testify about the steps BOP officials would likely take to prevent petitioner from becoming

involved in violent confrontations with other inmates. See id. at 2233-2236, 2238-2247.

The government filed a motion in limine to exclude Aiken's testimony. D. Ct. Doc. 681, at 1-4 (Sept. 18, 2008). After hearing a live proffer of Aiken's testimony outside the presence of the jury, the district court granted the government's motion in part. 583 F. Supp. 2d at 936-939; see 10/7/08 Tr. 2271-2272.

The district court explained that Aiken's proposed testimony about security measures that BOP might use to avert violence between petitioner and others in prison did not tend to rebut the government's evidence of future dangerousness, which rested not on petitioner's ability "to personally injure other inmates or prison staff members while incarcerated" (an unlikely scenario, given petitioner's "slight build and physique"),[2] but rather on his demonstrated ability to "be involved in or [to] influence others to commit harm to others." 583 F. Supp. 2d at 937 n.13, 938-939; see id. at 939 ("The defense has set up a chimera, which they seek to destroy by introducing rebuttal testimony."). The court also reasoned that allowing Aiken to testify "about any specific institution" would be "speculative" because BOP had not yet decided where petitioner would be

[2] As the court of appeals noted, petitioner is 5'8" tall, weighed 140 to 150 pounds, and "looked extremely youthful." Pet. App. 14a.

incarcerated. Id. at 939. The court concluded, however, that Aiken could testify about measures to prevent petitioner from communicating with or influencing other inmates or people outside the prison, and could explain that petitioner would "be transferred from the county jail where he is currently detained, and from which he allegedly tried to escape, to a [BOP] facility, where security would be different and greater." Ibid.; see 10/7/08 Tr. 2272.

Consistent with the district court's ruling, Aiken testified before the jury that if petitioner were sentenced to life imprisonment, he would be placed in a "high security" BOP facility from which he would be unlikely to escape. Pet. App. 13a; see 10/8/08 Tr. 2293-2295 (explaining that BOP "[s]taff are better trained" than the staff at the jail and that the probability of a similar escape attempt occurring at a BOP facility was "extremely remote"). He also testified about security measures in BOP facilities that allow prison officials to control "every aspect of [a prisoner's] communications with other inmates," to "monitor [his] telephone calls," and to "monitor [his] correspondence coming in and going out." 10/8/08 Tr. 2306.

Aiken also testified about a variety of subjects that "exceeded the permissible scope" of the district court's ruling, which the court nonetheless allowed because the government did

not object. 583 F. Supp. 2d at 939. He stated, for example, that petitioner would be continuously monitored by armed guards for the rest of his life. Pet. App. 13a-14a; see 10/8/08 Tr. 2292. He noted petitioner's small size and youthful appearance and explained that BOP would consider petitioner's "age, build, criminal background, medical condition, gang membership, institutional behavior, sentence, and type of crime" in determining appropriate security measures for his incarceration. Pet. App. 13a-14a; see 10/8/08 Tr. 2290, 2296. Aiken also testified at length about security procedures at the ADX facility and in other high-security BOP facilities that ensure a "total * * * security envelope," providing "continuous" control of inmates' movements and interactions "day in, day out, 24 hours a day, 7 days a week." 10/8/08 Tr. 2306; see Pet. App. 13a-14a; 10/8/08 Tr. 2303-2309. As the court later explained, Aiken "brought out a great deal of information regarding Bureau of Prisons policies, procedures, general prison conditions and typical life in prison." 583 F. Supp. 2d at 939.

ii. Petitioner also called Dr. Mark Cunningham, a psychologist, to testify as an expert in mitigation. Pet. App. 13a-14a. Cunningham, who had interviewed 11 members of petitioner's family, testified at length about the family's troubled history and concluded that petitioner's background contained numerous risk factors that correlated with increased

violence and crime. Id. at 14a-15a. He also testified about petitioner's "wiring" and noted that younger men like petitioner (who was 18 or 19 at the time of Luck's murder) are more likely to be violent than older men. Id. at 15a.

Cunningham also proposed to testify about security in BOP facilities and the likelihood that petitioner would engage in violence while in prison. Pet. App. 15a-16a. The district court heard a live proffer of that testimony outside the presence of the jury, see 10/8/08 Tr. 2406-2441, and excluded it. The court explained that Cunningham was proposing to "testify[] as a fact witness" about issues outside the scope of his expertise, which could "mislead" and "confuse" the jury. 583 F. Supp. 2d at 940. The court further noted that Cunningham's proposed testimony (like Aiken's) was "irrelevan[t]" because it did not respond to the government's evidence of future dangerousness. Ibid.; see id. at 940-941. And the court expressed concern that Cunningham's presentation (which included video exhibits and illustrations of BOP facilities where petitioner might never be housed, see 10/8/08 Tr. 2411-2415, 2439-2441) "could be given verbatim in any capital case in the country without changing a single word," potentially running afoul of the "individualized inquiry" required in capital cases. 583 F. Supp. 2d at 942 (citing Jones v. United States, 527 U.S. 373, 381 (1999)).

c. After weighing all mitigating factors against the aggravating factors, including future dangerousness, the jury recommended a sentence of death on all counts. Penalty Verdict Form 8. The district court imposed that sentence. Judgment 3; see 18 U.S.C. 3594.

4. The court of appeals affirmed. Pet. App. 1a-40a. As relevant here, petitioner argued that the district court erred in excluding Aiken's and Cunningham's testimony about BOP conditions and security. Id. at 12a-13a. Petitioner also argued that his convictions on Counts 2 and 4 were invalid because they depended on whether his carjacking and kidnapping offenses were "crime[s] of violence" under 18 U.S.C. 924(c)(3)(B), which petitioner contended is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Pet. App. 36a-37a.

a. The court of appeals held that the district court did not abuse its discretion in excluding Aiken's and Cunningham's testimony. Pet. App. 13a, 24a. The court of appeals explained that "[t]he excluded portion of Aiken's testimony" concerned physical security issues that did not rebut the government's evidence of future dangerousness. Id. at 21a. The court observed that the government had not "seriously contend[ed]" or "even intimate[d]" at trial "that [petitioner] was personally dangerous"; indeed, the court reasoned, "such [an] argument

would have been patently absurd given [petitioner]'s slight stature[,] something the jurors could not only see for themselves, but on which Aiken remarked" during his testimony. Ibid. The court rejected petitioner's reliance on Kelly v. South Carolina, 534 U.S. 246 (2002), and Simmons v. South Carolina, 512 U.S. 154 (1994), because neither case addressed similar evidence of future dangerousness. Pet. App. 21a-22a (explaining that, here, the government "neither suggested nor implied that [petitioner] would be directly dangerous to others while in prison," and in fact "did the very opposite").

As for Cunningham, the court of appeals noted that his proposed testimony concerned "generalized facts" about "inmate classification procedures and prison security conditions" used to prevent acts of violence in prison. Pet. App. 23a. Although the court acknowledged that such evidence could be admissible "to rebut allegations that an individual might be directly dangerous in the future," it noted that petitioner's "propensity [for] direct dangerousness" was not at issue in this case. Id. at 23a-24a. Thus, as with Aiken's testimony, the court concluded that the district court did not err in excluding that portion of Cunningham's testimony. Id. at 24a.

The court of appeals explained that its decision did not suggest that courts would be "required to exclude" such evidence in future cases, or that the district court could not have made

a discretionary judgment to allow the evidence in this case. Pet. App. 24a. The court of appeals observed, however, that "the district court is not an automaton that can only come to one right answer on any evidentiary issue," ibid., and concluded that the district court's "thoughtful" and "compelling" opinion reflected an appropriate exercise of the court's discretion, id. at 16a-17a, 24a.

b. The court of appeals also rejected petitioner's claim that his convictions on Counts 2 and 4 were invalid under Johnson. Pet. App. 36a-37a. Johnson held that one of the definitions of a "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), known as the "residual clause," is unconstitutionally vague. 135 S. Ct. at 2557; see 18 U.S.C. 924(e)(2)(B)(ii). Petitioner argued that Johnson's reasoning also applied to the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B), which (according to petitioner) was the basis for his convictions on Counts 2 and 4. Pet. App. 36a-37a. The court held, however, that Section 924(c)(3)(B) "is considerably narrower" than the residual clause and thus is not unconstitutionally vague. Id. at 36a; see id. at 37a-40a (explaining differences between Section 924(c)(3)(B) and the residual clause).

c. Judge White concurred in part and dissented in part. Pet. App. 40a-59a. In her view, the district court should have

admitted Aiken's and Cunningham's testimony to rebut evidence of petitioner's future dangerousness. Id. at 46a-48a. She argued that petitioner's actions in killing Luck and in attempting to escape from jail showed a "propensity for violence" that petitioner should have been permitted to rebut using additional evidence of the "likely security arrangements" BOP would use to "manage" him in prison. Id. at 47a-48a. Judge White also would have held that Section 924(c)(3)(B) is invalid under Johnson. Id. at 54a-59a.

ARGUMENT

Petitioner contends (Pet. 25-32) that the court of appeals erred in affirming the district court's discretionary decision to exclude testimony by Aiken and Cunningham about BOP conditions and security arrangements. He asserts (Pet. 25) that this Court should grant "[s]ummary reversal" of that judgment. The lower courts' factbound rulings are not erroneous, do not conflict with any decision of this Court or with decisions of other courts of appeals, and do not merit review.

Petitioner also renews (Pet. 32-35) his contention that 18 U.S.C. 924(c)(3)(B) is unconstitutional. He notes (Pet. 32) that this Court has granted a writ of certiorari to consider whether a statute with identical language, 18 U.S.C. 16(b), is unconstitutionally vague, see Sessions v. Dimaya, No. 15-1498 (reargument restored to the calendar on June 26, 2017), and

argues that the Court should hold his petition for a writ of certiorari pending the decision in that case. No reason exists to hold this petition for Dimaya. Petitioner received death sentences on four counts, only one of which (Count 4, involving use of a firearm to commit murder during and in relation to a kidnapping) requires the application of Section 924(c)(3)(B). A ruling in Dimaya would not, therefore, affect petitioner's death sentence. The petition should be denied.

1. The FDPA gives district courts wide discretion to exclude evidence in a capital sentencing proceeding "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. 3593(c). A court's decision to exclude evidence under that standard is reviewed for abuse of discretion. General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997); see Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 (2008) (noting that appellate courts should give appropriate "deference" to a trial court's "balancing of probative value and prejudice" in light of the trial court's greater "familiarity with the details of the case and its greater experience in evidentiary matters") (citation omitted).

a. The district court did not abuse its discretion in excluding some of petitioner's proffered testimony about security measures in BOP facilities. The government's evidence

of future dangerousness related specifically to petitioner's ability to influence others and to communicate instructions and threats to people outside the jail, including by impersonating other people. Pet. App. 13a; see 583 F. Supp. 2d at 938. As the lower courts explained, "no rational fact finder could conclude" from the government's evidence that petitioner was "likely to personally injure someone while in custody." 583 F. Supp. 2d at 939; see Pet. App. 18a. Indeed, the government affirmatively disclaimed that argument as a basis for finding future dangerousness. Pet. App. 21a; see 10/14/08 Tr. 2624-2625 (arguing in closing that petitioner was not physically dangerous but was "dangerous because he's smart," "controlling," and "never stops manipulating," and because "prison walls cannot contain or deter his influence"). The district court instructed the jury accordingly. See 10/14/08 Tr. 2637-2638 (instructing the jury that the government's evidence of future dangerousness related to petitioner's escape attempt, his efforts to communicate threats against Marshall, and the acts of intimidation against Marshall's family).

The district court allowed Aiken to testify that petitioner would be imprisoned in a high-security BOP facility from which it would be far more difficult to escape than the jail where petitioner was held prior to his trial. Pet. App. 13a-14a; see 10/8/08 Tr. 2292-2295. The court also permitted evidence that

petitioner's ability to communicate with other inmates and with people outside the prison would be closely monitored and controlled. 10/8/08 Tr. 2306. And although the court ruled before trial that Aiken could not testify about general prison security measures or specific BOP facilities, it permitted extensive testimony on those subjects at trial because the government did not object. Pet. App. 13a-14a; see 583 F. Supp. 2d at 939; 10/8/08 Tr. 2292, 2303-2309.

The effect of the district court's ruling on Aiken's testimony was thus limited to the exclusion of additional testimony about specific prison facilities and security arrangements designed to prevent petitioner from becoming violent. The court determined, in its discretion, that further testimony on those subjects was beyond the scope of rebuttal because (1) no decision had been made about where petitioner would be incarcerated, and (2) no evidence had been introduced from which a reasonable jury could conclude that petitioner would engage in acts of violence himself. 583 F. Supp. 2d at 937 & n.13, 938-939; cf. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993) ("Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.") (citation omitted). As the court explained, petitioner sought to "set up a chimera" and then "to destroy

[it] by introducing rebuttal testimony" that was not responsive to the government's evidence. 583 F. Supp. 2d at 939.

The district court properly excluded Cunningham's testimony about BOP facilities and security measures for the same reasons. See 583 F. Supp. 2d at 940-941. Moreover, the court correctly noted that Cunningham's proposed testimony on those subjects -- which was so general that it "could be given verbatim in any capital case in the country without changing a single word," id. at 942 -- strayed far beyond his areas of expertise and could confuse and mislead the jury, id. at 940. See, e.g., United States v. Flores-De-Jesús, 569 F.3d 8, 21 (1st Cir.) (noting "the heightened possibility of undue prejudice" when "the same witness provides both lay and expert testimony") (citation omitted), cert. denied, 558 U.S. 974 (2009).

The district court explained that its decision might have been different if the government had "presented evidence that [petitioner] was likely to personally injure other inmates or prison staff members while incarcerated, as is often the allegation and evidence in federal death penalty prosecutions." 583 F. Supp. 2d at 937 n.13. And the court of appeals noted that its decision affirming the district court's exercise of discretion did not suggest that courts would be "required to exclude" evidence of the type proffered here in future cases or that the district court could not have made a different

discretionary judgment in this case. Pet. App. 24a; cf. McCleskey v. Kemp, 481 U.S. 279, 289 (1987) ("The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law.") (citation omitted). The court of appeals determined only that the district court's "thoughtful" and "compelling" decision to exclude certain evidence on the facts of this case was not an abuse of discretion. Pet. App. 16a-17a, 24a. That factbound determination does not merit review.

b. Petitioner asserts (Pet. 28) that the government's evidence that he "kidnapp[ed] and kill[ed] Luck" and that he "tr[ied] to help grab a guard" during his attempt to escape from jail suggested that he was, in fact, likely to be violent in prison. The district court specifically instructed the jury on the evidence it could consider in evaluating petitioner's future dangerousness, however, and did not include petitioner's involvement in Luck's murder. 10/14/08 Tr. 2637-2638. Nor did the government argue that petitioner would be capable of obtaining a firearm to commit a similar murder in prison. See ibid. As for petitioner's escape attempt, the court permitted Aiken to testify that another such incident was extremely unlikely given the better training and security in BOP facilities. Pet. App. 14a; see 10/8/08 Tr. 2292-2295, 2306.

The single instance in which petitioner "tr[ied] to help grab a guard" in a county jail, Pet. 28, provided scant evidence that petitioner would commit, or was capable of committing, acts of violence in a federal prison.[3]

Petitioner further argues (Pet. 29) that the district court should have allowed Aiken to testify that petitioner might be "preyed upon" by older and larger inmates and would "need to be segregated for his own protection," reducing his ability to "recruit, manipulate, and control other inmates." Petitioner overstates Aiken's proposed testimony: Aiken stated that petitioner might need to be "protected" from other inmates "until he becomes seasoned," not that he would be segregated from them for the rest of his life. 10/7/08 Tr. 2234. And in any event, the court allowed Aiken to testify that petitioner's age and small stature would be taken into account in determining his placement in the prison and that his movements and interactions with other inmates would be tightly controlled. Pet. App. 13a-14a; see 10/8/08 Tr. 2290, 2296, 2306. The court's decision not to permit more extensive testimony --

[3] Petitioner also cites (Pet. 28) a statement made by the prosecutor in the government's rebuttal summation that petitioner was dangerous because "you don't see him coming." In context, however, the prosecutor clearly was referring to petitioner's demonstrated ability to orchestrate acts of violence without directly participating in them. See 10/14/08 Tr. 2624-2625.

mostly about hypothetical situations petitioner might encounter upon his arrival in prison, see 10/7/08 Tr. 2234-2235, 2239-2241 -- was not an abuse of discretion.

c. Petitioner contends (Pet. 26-27, 29-30) that the court of appeals' decision conflicts with this Court's decisions in Kelly v. South Carolina, 534 U.S. 246 (2002), Shafer v. South Carolina, 532 U.S. 36 (2001), and Simmons v. South Carolina, 512 U.S. 154 (1994). Those cases invalidated various versions of South Carolina's capital sentencing scheme that prohibited defendants from rebutting evidence of future dangerousness by informing the jury that, under state law, a sentence of life imprisonment would preclude the possibility of parole. See Kelly, 534 U.S. at 257; Shafer, 532 U.S. at 51; Simmons, 512 U.S. at 156 (plurality opinion); id. at 176-178 (O'Connor, J., concurring in the judgment). That issue is not presented here. The jury found unanimously, as a mitigating factor, that if petitioner were not sentenced to death, he would "be incarcerated for the rest of his life in a federal prison with no possibility of release." Penalty Verdict Form 4.

Nor do those decisions indicate, as a more general matter, that the district court's discretionary decision to exclude certain testimony in this case denied petitioner his right to rebut evidence of future dangerousness. In Kelly and Simmons, for example, the prosecution argued that the defendants would be

dangers to the public if they were ever released from prison, and thus "precluding evidence of ineligibility for parole * * * gutted the defendant[s'] ability to respond to the very arguments made by the prosecutors." Pet. App. 22a; see Kelly, 534 U.S. at 255 (prosecutor implied that defendant might one day be released if he was not put to death and compared him "to a notorious serial killer, variously calling him a 'dangerous' 'bloody' 'butcher'"); Simmons, 512 U.S. at 176 (O'Connor, J., concurring in the judgment) (noting that "the State sought to show that [the defendant] is a vicious predator who would pose a continuing threat to the community" unless he was put to death). Here, in contrast, the government "made specific arguments about the way in which" petitioner "could be vicariously dangerous if given a life sentence," Pet. App. 22a, and petitioner had the ability to respond to those arguments with relevant rebuttal evidence, see 583 F. Supp. 2d at 939. And in Shafer, this Court left open the possibility that state courts might on remand deny relief on the ground that future dangerousness was not sufficiently "at issue" to warrant informing the jury about the effect of a life sentence. 532 U.S. at 54-55. None of those decisions establishes a constitutional principle requiring courts to allow evidence rebutting claims of future dangerousness that the government did not make.

Petitioner's reliance (Pet. 26 n.21) on United States v. Troya, 733 F.3d 1125 (11th Cir. 2013), cert. denied, 135 S. Ct. 2048 (2015), and United States v. Johnson, 223 F.3d 665 (7th Cir. 2000), cert. denied, 534 U.S. 829 (2001), is similarly misplaced. Those decisions state that a defendant may, in an appropriate case, attempt to rebut the prosecution's evidence of future dangerousness by showing that he could safely be managed in prison. See Troya, 733 F.3d at 1135, 1137 (holding that defendant was entitled to rebut the government's "extensive evidence * * * that [he] was a tremendously dangerous individual" with evidence of his age and positive adjustment to prison); Johnson, 223 F.3d at 671, 674 (approving, in dicta, the district court's decision to allow testimony about prison security measures in order to rebut the government's evidence that defendant, the leader of a prison gang, would be dangerous in prison). Neither case suggests that the district court abused its discretion in deciding, on the facts of this case, to exclude some evidence about prison security measures while allowing petitioner to present other evidence on that subject. Petitioner's factbound claim does not merit review.

2. Petitioner contends (Pet. 32-35) that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. He argues (Pet. 32) that his petition for a writ of certiorari on that issue should be held pending

this Court's decision in Dimaya, supra, which concerns whether identical language in 18 U.S.C. 16(b) is vague, and then disposed of as appropriate in light of that decision. The decision in Dimaya, however, will not affect this case. The petition should be denied.

a. Petitioner was convicted and sentenced to death for four separate offenses: carjacking resulting in death, in violation of 18 U.S.C. 2119(3) (Count 1); kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (Count 3); and two counts of using a firearm to commit murder during and in relation to crimes of violence (i.e., the carjacking charged in Count 1 and the kidnapping charged in Count 3), in violation of 18 U.S.C. 924(j)(1) (Counts 2 and 4). Judgment 2-3.

As relevant to petitioner's convictions on Counts 2 and 4, 18 U.S.C. 924(c) makes it a crime to use or carry a firearm "during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A). The statute defines a "crime of violence" as a felony that (1) "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); or (2) "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). Under Section 924(j), a person who uses a firearm to murder someone "in the course of a violation of subsection (c)" may be sentenced to death. 18 U.S.C. 924(j)(1).

This Court granted certiorari in Dimaya to resolve a circuit conflict over whether the definition of a "crime of violence" in Section 16(b), which contains language identical to that in Section 924(c)(3)(B), is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015).[4] Petitioner asserts (Pet. 32) that his predicate offenses for Counts 2 and 4 (carjacking and kidnapping) can only qualify as crimes of violence under Section 924(c)(3)(B), and thus a decision holding Section 16(b) void for vagueness in Dimaya would necessarily imply that his convictions on those counts are invalid. He therefore seeks a hold for Dimaya and, if Dimaya holds Section 16(b) void for vagueness, requests that the Court grant his petition, vacate the judgment below, and remand for further consideration (GVR).

b. Petitioner's request for a hold pending Dimaya, and potentially a GVR in light of that decision, is unwarranted.

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[4] Johnson held that the ACCA's "residual clause," 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA's residual clause defines a "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

Petitioner was convicted of four death-eligible offenses and received a death sentence on each count. Judgment 3; see Penalty Verdict Form 8. Because his conviction and sentence on only one of those counts rests on an application of Section 924(c)(3)(B), a decision holding the similarly worded statute in Dimaya vague would have no practical effect on petitioner.

Count 1 charged petitioner with carjacking resulting in death, in violation of 18 U.S.C. 2119(3). Count 3 charged petitioner with kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1). Neither of those convictions, or the death sentences imposed as a result, depends on the validity of the "crime of violence" definition in Section 924(c)(3)(B).

Count 2 charged petitioner with using a firearm to commit murder during and in relation to the carjacking charged in Count 1, in violation of 18 U.S.C. 924(j)(1). Every court of appeals to have considered the question has held that carjacking, in violation of 18 U.S.C. 2119, is a "crime of violence" under Section 924(c)(3)(A). See, e.g., United States v. Jones, 854 F.3d 737, 740-741 (5th Cir. 2017); United States v. Evans, 848 F.3d 242, 244 (4th Cir.), cert. denied, No. 16-9114, 2017 WL 2022266 (June 12, 2017); In re Smith, 829 F.3d 1276, 1280-1281 (11th Cir. 2016); United States v. Mohammed, 27 F.3d 815, 819 (2d Cir.), cert. denied, 513 U.S. 975 (1994); cf. Br. in Opp. at 8-12, Johnson v. United States, No. 16-8415 (June 19, 2017).

The carjacking statute requires proof that the defendant took a person's vehicle "by force and violence or by intimidation" "with the intent to cause death or serious bodily harm." 18 U.S.C. 2119. It thus necessarily requires "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). That is especially true of petitioner's aggravated offense, which required proof that death actually resulted from his actions. 18 U.S.C. 2119(3). Because the constitutionality of Section 924(c)(3)(A) is not contested, the decision in Dimaya will not affect petitioner's conviction or sentence on Count 2.

That leaves only Count 4, which charged petitioner with using a firearm to commit murder during and in relation to the kidnapping charged in Count 3. The federal kidnapping statute makes it a crime to unlawfully "seize[], confine[], inveigle[], decoy[], kidnap[], abduct[], or carr[y] away" a person, and to hold that person "for ransom or reward or otherwise," if the defendant or the victim moves in interstate commerce. 18 U.S.C. 1201(a)(1). Courts of appeals have determined that kidnapping could only qualify as a "crime of violence" under Section 924(c)(3)(B). See, e.g., United States v. Jenkins, 849 F.3d 390, 392-394 (7th Cir.), cert. denied, No. 16-9166, 2017 WL 2189105 (June 19, 2017); United States v. Green, 521 F.3d 929, 932-933 (8th Cir. 2008); cf. United States v. Taylor, 848 F.3d

476, 491 (1st Cir.) (noting government concession that kidnapping does not qualify as a "crime of violence" under Section 924(c)(3)(A)), cert. denied, No. 16-9137, 2017 WL 2119452 (June 12, 2017).

Even if this Court were to hold in Dimaya that Section 16(b) is unconstitutional, this case would not be a suitable vehicle for considering whether Section 924(c)(3)(B) is likewise unconstitutional, nor would a GVR be warranted. A decision in petitioner's favor concerning Section 924(c)(3)(B) would affect his conviction and sentence on only one count. He would remain subject to valid death sentences on the other three counts. This Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties. Supervisors v. Stanley, 105 U.S. 305, 311 (1882); see The Monrosa v. Carbon Black Exp., Inc., 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the [c]ourts of [a]ppeals is judicial, not simply administrative or managerial.").[5]

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[5] Even if petitioner could identify a practical reason to vacate his conviction and sentence on Count 4 but not his death sentences on the remaining counts, denying review in this case would not leave petitioner without a remedy. If this Court were to hold in a future case that Section 924(c)(3)(B) is unconstitutional, petitioner could seek post-conviction relief under 28 U.S.C. 2255 on the ground that he was convicted of an

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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offense that is not prohibited by Section 924(c). See Bousley v. United States, 523 U.S. 614, 617-618, 621 (1998) (holding that Bailey v. United States, 516 U.S. 137 (1995), which narrowed the scope of another provision of Section 924(c), applied retroactively on collateral review).