No. 16-6392

IN THE
SUPREME COURT OF THE UNITED STATES

REJON TAYLOR,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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A. The Future-Dangerousness Rebuttal Issue

A divided Court of Appeals approved the exclusion of petitioner's expert testimony that he would not pose a danger in federal prison, saying it would not have rebutted prosecutorial arguments that petitioner was likely to cause others to engage in violence. See Pet. 22-23; Pet. App. 13a, 21a, 22a. That holding contradicted this Court's precedents, particularly Kelly v. South Carolina, 534 U.S. 246 (2002), under which petitioner was also entitled to rebut the unmistakable implications from the government's evidence and arguments that he is likely to be violent *himself* in prison. See Pet. 25-27, 29-30; Pet. App. 46a-48a.

The government's brief says little about Kelly other than to repeat the Court of Appeals' cramped view that it authorizes rebuttal only of a prosecutor's specific arguments on dangerousness. See Gov. Br. 22. Instead, the government defends the exclusion of petitioner's expert testimony on two other grounds, neither of which was adopted by the Court of Appeals.[1] See Pet. 23. Both are easily refuted by the record.

[1] The government also notes that the district court cited several alternative theories it said would have justified excluding the second expert's testimony, including that it was too speculative and that he lacked sufficient expertise. Gov. Br. 8, 11, 19. But the government does not advance any of those as reasons to deny review, wisely so, for it abandoned them in the Court of Appeals, which did not rely on any any of them, and they are all plainly meritless. See CA.239:106-112.

1. The government's presentation, including its evidence, unquestionably implied to jurors that petitioner would be personally violent in federal prison, thus putting that at issue and entitling petitioner to rebut it.

The government first argues that, even under a broadened view of what was at issue, and thus subject to rebuttal, the prosecution's entire presentation to the jury, including its evidence, "related" only to petitioner's ability to "influence" and "communicate instructions and threats" to other inmates and "people outside" of prison. Tracking the district court's ruling, the government insists that "no evidence had been introduced from which a reasonable jury" could have inferred a risk that petitioner "would engage in acts of violence *himself*" in federal prison.[2] Gov. Br. 18-19 (emphasis added). Thus, as the district court commented, petitioner's experts would have been rebutting a "chimera." Id.

But the Court of Appeals dissent rightly characterized that as a "flatly incorrect" account of what was before the jury, especially because it discounts petitioner's personal conduct in kidnapping and murdering the victim and later participating in a violent attempt to escape from jail. Pet. App. 47a. See also Kelly, 534 U.S. at 253 (lower court's holding, that prosecution had not put future dangerousness "generally" at issue, overlooked implications of defendant's "violent behavior in prison" and "the [capital] crime").

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[2] The government's brief confirms the novelty of this theory: Like the courts below, it cites no other capital case from any jurisdiction that has purported to slice the familiar aggravating factor of future dangerousness, see Pet. 30, into "vicarious" versus "personalized" dangerousness, let alone to limit a defendant to rebutting one but not the other.

The government dismisses the escape attempt as "a single instance" that was "scant" indication petitioner posed any personal danger. Gov. Br. 21. But the jury heard and saw extensive evidence not only that he tried to take an injured officer's keys and radio and drag him into a cell, but also that he and his fellow escapees had secreted and planned to use potential weapons such as homemade knives ("shanks"), pipes, and a set of handcuffs. See Pet. 7-8; Pet. App. 47a.

The government also dismisses the evidence that petitioner personally kidnapped and later killed the victim (by shooting him in the face), noting that the prosecution never argued petitioner "would be capable of obtaining a firearm . . . in prison." Gov. Br. 20. It also emphasizes that the jury could see that, at 5 feet 8 inches and 140-150 pounds, petitioner had a relatively "slight build."[3] See id. 8, 10, 21. (The Court of Appeals too suggested his "physique" would have made any suggestion that petitioner "was personally dangerous . . . patently absurd." Pet. App. 21a). But the government never says how those things would have eliminated the perceived risk that petitioner would personally engage in serious, even lethal, violence in prison, especially since jurors heard how he had gained access to homemade knives while incarcerated and personally assaulted an injured jail guard

[3] Recent social science research casts doubt on the government's assumption that the nearly all-white jury would have inferred from his build (even were that all they knew about him) that petitioner, a young African-American man, posed no physical danger. See Nicholas O. Rule, Racial Bias in Judgments of Physical Size and Formidability, 113 J. of Personality and Soc. Psychol. 59, 67 (2017) (reporting on numerous studies that "consistently found that non-Black perceivers rate Black men as physically larger, more muscular, stronger, and more capable of causing physical harm than White men").

by acting in concert with other inmates.

Nor did anything the jurors were allowed to hear from the defense about U.S. Penitentiaries (USP's) neutralize that inference. Testimony that the chance of a successful escape was remote, see Gov. Br. 20, citing R.901:7421-24, 7435, did not suggest that, in such institutions, shanks are not available or that groups of inmates do not have physical access to guards.[4]

The government also claims that the prosecution "argu[ed] in closing that petitioner was not physically dangerous." Gov. Br. 17. This echoes the Court of Appeals' view. Pet. App. 21a ("the Government neither suggested nor implied that [petitioner] would be directly dangerous to others while in prison — indeed, the Government did the very opposite"). But it too is disproven by the record.

Both the government and Court of Appeals invert the plain meaning of the prosecutor's comment that petitioner was dangerous not because he appeared to be "a big, powerful physical presence," but rather because he "looks" like a "high-school" student, is "not scary-looking," and thus "you don't see him coming." Pet. App. 21a, quoting R.902:7753-54. The prosecutor did not say there that petitioner was, in fact, "not physically dangerous," but rather that he did not "look" as if he was, yet, like "Dr. Jekyll," his looks were deceiving.

Moreover, the government, like the Court of Appeals, simply ignores the rest of the prosecutors' extensive summation comments, including ones immediately

[4] Moreover, the court told jurors that the limited testimony they heard about USP security was irrelevant and improper. See Pet. 14, 18.

following the passage it focuses on. As the dissent recognized, those comments "described [petitioner's] dangerousness in generalized terms," and also mentioned how he had murdered the victim. Pet. App. 47a n.10. See Pet. 19-20; R.902:7711 (prosecutor tells jurors that "future dangerousness" means petitioner "cannot adapt his behavior" and is "dedicated to a life of crime").

Perhaps most tellingly, as the dissent noted, the prosecutors "emphasized . . . the escape attempt and [petitioner's] role in" it, Pet. App. 47a n.10, focusing almost entirely on the aspects evidencing his *personal* dangerousness. Thus, for example, they told jurors that petitioner "handled his business on this escape" by trying to "grab" the guard "and throw him into the cell," and also that "[h]e escaped, with other parties, and in the escape attempt procured shanks." R.902:7709-10, 7752.

Equally contradicted by the record, as the dissent also understood, Pet. App. 47a n.10, is the government's suggestion that the court's dangerousness instruction would have kept jurors from considering any perceived risk of personal violence by petitioner. The government claims that the instruction somehow "accord[ed]" with only a theory of vicarious violence because it mentioned the escape attempt and a supposed threat about a cooperator, but not the murder. Gov. Br. 17, 20. But, again, jurors would naturally have considered the escape to be evidence of personal dangerousness since, as the prosecutors reminded them, petitioner had procured homemade knives and assaulted a guard. Moreover, the government disregards that the instruction also listed petitioner's generalized "failure to adapt to social norms," as another category of evidence "in support of" dangerousness "the

government introduced." That broad, catch-all category embraced the murder, which was central to the trial and which jurors would have thought it absurd to ignore. Furthermore, the instruction intentionally avoided discouraging jurors from considering any evidence they wished to on dangerousness. Indeed, the court crafted it in that open-ended fashion at the prosecutors' own urging. R.902:7639-45, 7672-80. For the whole notion that the prosecution's case was limited to "vicarious" dangerousness was an after-the-fact rationale that the court invented on its own and the prosecutors never endorsed. See Pet. 11, 18-19.

In short, the government inaccurately recounts the evidence, argument, and instructions related to dangerousness. Plainly, the record shows that the prosecution's presentation gave jurors ample reason to infer that petitioner posed a serious threat of committing violence himself in federal prison.[5]

[5] And the district court's plainly mistaken view — that all this evidence would not imply personal dangerousness, even if the prosecutors argued to jurors that it did, Pet. App. 18a., quoting R.744:2241 — more than satisfies the abuse-of-discretion standard the government invokes to try to shield the court's ruling. See Cooper v. Hartmarx Corp., 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence"); Skipper v. South Carolina, 476 U.S. 1, 3, 5 & n.1 (1986) (erroneous exclusion of rebuttal evidence on prison dangerousness violated due process); id. at 9-10 (Powell & Rehnquist, JJ., & Burger, C.J., concurring); Pet. 29-30.

2. The very limited testimony the jury heard from one defense expert did not mitigate the court's exclusion of the rest of the proffered rebuttal, especially since the court repeatedly told jurors the testimony it heard was irrelevant and improper.

The district court ruled in advance that petitioner's expert James Aiken could inform jurors only that petitioner would be housed in the BOP under "better security" than the county jail and that no one knew what institution that would be. See Pet. 14. In opposing certiorari, the government notes that the court did not always cut Aiken off right away when he strayed beyond those bounds and the prosecution did not object. And the government suggests that what the jury never heard from Aiken and the other expert, Mark Cunningham, whose dangerousness testimony the court barred completely, would not have added all that much. Gov. Br. 9-10, 15, 17-18, 20. But this argument too was not adopted by the Court of Appeals, and it inaccurately represents the record.

The government mischaracterizes the proffered but unheard testimony as involving just a few additional facts about "specific prison facilities." Gov. Br. 16, 18-19. Actually, it would have presented the jury with significant new rebuttal points about petitioner's prison dangerousness, including that: rather than manipulating other prisoners, petitioner would be vulnerable to being preyed on in a USP; the BOP employs specific measures to safeguard government witnesses that would prevent petitioner from posing any threat to his cooperating codefendant (as the prosecution was claiming he would); BOP security would be highly effective with petitioner as evidenced by the rarity of violence among other comparable

federal capital offenders in USP's, including prisoners with an escape record; and Aiken's ultimate expert opinion, based on a range of information about petitioner, that the BOP could safely manage him. See Pet. 12-13, 15-17. The dissent also recognized the importance of this unheard testimony. See Pet. App. 48a.

The government disregards almost all these key elements of the unheard testimony, and flatly fails in its effort to minimize one of them. Thus, while it notes that Aiken was able to include petitioner's "age" and "build" in the long list of factors he told jurors the BOP would consider in classifying him, Gov. Br. 10, citing R.901:7419, the government omits that the court then cut off any testimony about how those characteristics and petitioner's youthful appearance would be considered, let alone how they would affect his likelihood of violence in a USP. See Pet. 14, citing R.901:7424-27. The government also minimizes the unheard testimony by noting Aiken's proffer did not say petitioner would require protection from other inmates "for the rest of his life." Gov. Br. 21. But the government misses the point: Its prosecutors warned jurors that petitioner would be dangerous in federal prison, in part, because he would be a "controlling" and "manipulating" presence who would "influence" and "recruit" other inmates. Pet. App. 21a. Aiken's expert testimony would have painted a completely different picture of petitioner's likely interactions in a USP.[6]

[6] As the dissent below recognized, because this and other elements of the unheard testimony would also have rebutted the government's specific summation arguments about petitioner's "vicarious" dangerousness, their exclusion was error independent of the fact the government's presentation also raised, and thus entitled

In addition, the government ignores that the district court negated even the limited information Aiken was able to give, about some security features of USP's, by repeatedly advising jurors that "no one" including Aiken knew in what kind of facility petitioner would be housed or what security he would face, and thus that "most" of Aiken's opinions about "what might happen in the future" were "not relevant" and fell "beyond the scope" of what the jurors could consider. See Pet. 11, 14-15, 18.

B. The § 924(c) Issue

The government does not deny that a petition presenting petitioner's second question, whether, the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, would ordinarily deserve to be held pending this Court's decision in Sessions v. Dimaya, No. 15-1498 (restored June 26, 2017, to calendar for reargument). That is because Dimaya involves the same question about another statute with identical language, 18 U.S.C. § 16(b), and thus it would appear that an affirmative answer to the question in Dimaya might make a "GVR" appropriate here to allow the Court of Appeals to reconsider whether § 924(c)(3)(B) is also invalid. See Pet. 33-34.

The government nonetheless resists that course by arguing that most of petitioner's convictions and his death sentence do not depend on § 924(c)(3)(B), and, therefore, that a decision in Dimaya invalidating an identically-worded statute

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petitioner to rebut, "personal" dangerousness. See Pet. App. 48a; Pet. 28-29.

would have no "practical" effect on petitioner's case. Gov. Br. Br. 26-29. This argument fails because it rests, yet again, on a misaccounting of the record.

First, the government, while correctly noting that petitioner was convicted on two other capital counts (for kidnapping and carjacking) in addition to the two § 924(c) counts, wrongly claims that he received a separate death sentence "on each count." Gov. Br. 27. From this, the government reasons that Dimaya would not affect petitioner's ultimate punishment, even were it to ultimately prompt the Court of Appeals to invalidate his § 924(c) convictions. Id. (asserting that petitioner's "death sentences" on kidnapping and carjacking counts do not depend on § 924(c)).

In fact, though, petitioner did *not* receive a separate death sentence "on each" of the four capital counts. Rather, the jury was instructed to make one, unitary sentencing decision for the case as a whole, rather than to select a sentence for each count. R.902:7768-69. And, as the verdict form clearly shows, the jury did so, directing a single death sentence, R.760:2298, which is what the court then imposed.[7] R.790:2563. Thus, as petitioner explained to the Court of Appeals, the jury's unitary death verdict may have been influenced either by doubling the

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[7] The completed verdict form recorded the jury's findings of aggravating and mitigating factors, also for the case as a whole, then, under the heading "DETERMINATION," said that, based on weighing those factors:

> We determine, by unanimous vote, that the sentence to be imposed shall be:
> ____ Life imprisonment without possibility of release
> __X__ Death

R.760:2298.

number of capital convictions from two to four, or by the particular "culpable" features of the § 924(c) convictions. See CA.287:19-22, citing, e.g., United States v. Causey, 185 F.3d 407, 423 (5th Cir. 1999) (reversing federal defendant's unitary death sentence for three capital convictions because it may have been influenced by the one conviction the court was vacating). The government's answering brief did not dispute that, nor did it otherwise contest petitioner's claim that, if § 924(c)(3)(B) is unconstitutional, then his two convictions under that statute as well as his death sentence would have to be vacated. CA.295. And the Court of Appeals (after noting the jury recommended "a" death sentence) rested its denial of relief solely on its conclusion that § 924(c)(3)(B) is constitutional. Pet. App. 6a, 36a-40a.

Thus, in addition to lacking any merit, this argument is waived because the government never presented it below, and the Court of Appeals never addressed it. See, e.g., United States v. Jones, 565 U.S. 400, 413 (2012); Glover v. United States, 531 U.S. 198, 205 (2001). So too is waived the government's second theory for why petitioner's judgment does not rest on the validity of § 924(c)(3)(B), the statute's "residual clause," namely, that one of his convictions is allegedly supportable under the alternative definition of a "crime of violence" in the statute's "force clause," § 924(c)(3)(A).[8] Gov. Br. 27-29. In the Court of Appeals, petitioner explained why neither of his § 924(c) convictions qualified under the force clause. CA.287:9-16.

[8] According to the government, that is because, while kidnapping, the underlying crime for one of the § 924(c) convictions, does not qualify under the force clause, carjacking, the underlying crime for the other, does. Gov. Br. 27-29.

Again, the government's brief never disputed that, but only defended the constitutionality of the residual clause. CA.295. The Court of Appeals followed suit, validating the § 924(c) convictions solely based on the residual clause, without even mentioning the force clause.

Accordingly, if this Court's decision in Dimaya were to cast doubt on the Court of Appeals' reasoning and conclusion about § 924(c)'s residual clause on which its disposition of petitioner's appeal rested, a GVR would be appropriate to allow the Court of Appeals to reconsider its decision. Petitioner's case should therefore be held for Dimaya.[9]

CONCLUSION

The demanding standard for summary reversal is met by this racially freighted federal death-penalty case, in which an 18-year old African-American youth with no prior history of violence was sentenced to die for a spur-of-the moment killing based on a questionable dangerousness finding that he was hamstrung from challenging. The government's failed efforts to muddy otherwise clear waters do not make this obvious, fundamental error too fact-bound or otherwise inappropriate for review. The ruling below also should not be allowed to

[9] That is the course the Court has followed in a similar case, Prickett v. United States, No. 16-7373. There, another Court of Appeals rejected a federal defendant's vagueness challenge to the constitutionality of § 924(c)(3)(B), and he petitioned this Court for review on the question. Prickett, Pet. ii. The government opposed a hold for Dimaya, arguing that the petitioner's § 924(c) conviction was valid under the force clause (an argument that, unlike here, it had at least preserved in the Court of Appeals). Id., Gov. Br. 7. Nevertheless, it appears from this Court's docket that it has agreed to hold Prickett's petition for Dimaya.

stand because it calls into question this Court's repeated promise that capital juries, faced with the difficult task of predicting dangerousness, will have all relevant information including contrary evidence from the defendant, see Pet. 30, as well as the commitment of the federal courts generally that, "whatever flaws do exist in our system" of capital punishment "can be tolerated only by remaining faithful to our Constitution's procedural safeguards." Elmore v. Holbrook, 137 S. Ct. 3, 11 (2016) (Sotomayor & Ginsburg, JJ., dissenting from denial of certiorari).

Alternatively, the Court should hold the petition on the second question pending its decision in Dimaya.

Respectfully submitted,

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