No. _____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Petitioner, a black teenager whose victim was white, was federally sentenced to die based on the aggravating factor of future dangerousness after the District Court excluded his expert rebuttal testimony that he was highly unlikely to engage in violence if sentenced to life imprisonment. A divided Court of Appeals approved the ruling on a theory that the testimony would not have rebutted the prosecutors' "specific arguments" on petitioner's future dangerousness. Did that decision, as the dissent complained, both flout Kelly v. South Carolina, 534 U.S. 246 (2002), which recognized a capital defendant's broad due process right to rebut any "implication" or "inference" of dangerousness "from the [government's] evidence," and misread the record, which plainly shows that petitioner's expert testimony would have rebutted not only the government's evidence but also its summation arguments?

2. Under this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), invalidating the definition of a "violent felony" in the residual clause of the Armed Career Criminal Act, is the similar definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(B) also impermissibly vague in violation of the Due Process Clause of the Fifth Amendment?

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I. Summary reversal is appropriate because, as the Court of Appeals dissent laid out, the majority upheld the exclusion of petitioner's expert testimony rebutting future dangerousness by applying a rule directly at odds with this Court's precedent and by misreading the plain record of his capital-sentencing hearing. 25

II. The Court should hold Petitioner's case for Lynch v. Dimaya, or, alternatively, should grant certiorari on the constitutionality of 18 U.S.C. § 924(c)(3)(B), the statute underpinning two of petitioner's capital convictions and his death sentence, and which the government acknowledges is "materially identical" to the one at issue in Dimaya.. 32

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rejon Taylor respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his capital convictions and death sentence on direct appeal.

OPINION BELOW

The majority and dissenting opinions of the divided panel of the Court of Appeals are published at United States v. Taylor, 814 F.3d 340 (6th Cir. 2016), and included in petitioner's appendix ("App.") at 1a-40a (majority opinion of Rogers & McKeague, JJ.) and 40a-59a (dissenting opinion of White, J.).

JURISDICTIONAL STATEMENT

The Court of Appeals entered judgment on February 11, 2016. App. 1a. On May 9, 2016, it denied petitioner's timely petition for rehearing *en banc* after the petition was circulated and less than a majority of active judges voted to grant it. App. 60a. On July 21, 2016, this Court granted petitioner an extension of time until October 6, 2016, to file this petition. App. 61a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, 18 U.S.C. § 3595(a), and 18 U.S.C. § 3742.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life [or] liberty . . . without due process of law.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 924(c)(3)(B) provides, in pertinent part:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and . . . 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. § 3593(c) provides, in pertinent part:

> The . . . defendant shall be permitted to rebut any information received at [a federal capital sentencing] hearing.

STATEMENT OF THE CASE

A. The Crime

Petitioner, an 18-year old African-American, along with his two teenaged friends, attempted a robbery that went badly wrong and caused the shooting death of Guy Luck, a white restaurant owner. App. 6a, 29a-30a, 51a-54a; R.760:2292.[1] Petitioner was a slight, skinny figure who, even five years later at the time of his trial, weighed only about 140 pounds. R.874:5631. Before this crime, there was no

[1] District Court filings and transcripts (under docket number 1:04-CR-160) are referred to by "R," followed by the filing number and Page ID number. Selected trial and sentencing exhibits contained in an appendix filed with the Court of Appeals (filing numbers 222 and 223 on its docket) are referred to by "A," followed by the page number. Briefs and other filings in the Court of Appeals (under docket number 09-5517) are referred to by "CA," followed by the filing number and page number.

evidence that he had any history of violence. And though he had started engaging in some property crimes, he had no convictions, adult or juvenile.

On the morning of August 6, 2003, petitioner, using his mother's car, went with his codefendants, Joey Marshall and Sir Jack Matthews, to Luck's home in a wealthy neighborhood in Atlanta, Georgia. About two years before, when petitioner was 16, he and Marshall had started stealing from mailboxes and breaking into unoccupied houses, including Luck's, taking credit-card applications and checkbooks and using them to obtain money and consumer goods under others' names. Now, having learned that Luck owned what appeared to be a fancy restaurant, they hoped to rob him of the proceeds at gunpoint before he could go to the bank that morning. But they were stymied when they found Luck at home with only a relatively small amount of cash. Petitioner asked Luck to give them the PIN numbers to his credit cards, but Luck could not. So petitioner, joined by the third participant, Matthews, decided to make Luck go with them in Luck's van. Marshall followed in petitioner's car. After driving for about two hours and crossing into Tennessee, petitioner exited the highway onto a rural side road. But as he prepared to pull over, Luck attacked Matthews and tried to overpower him. While the two struggled for Matthews' gun and after it discharged, petitioner turned and, trying to steer the van with one hand, fired three shots. One struck Luck in the mouth and proved fatal. App. 6a, 29a-30a, 51a-54a.

The jury found the statutory aggravating factor that Luck's murder involved substantial planning and premeditation. While the Court of Appeals majority

deemed this adequately supported ("[m]ost significantly" by the two-hour drive), App. 6a, 29a-30a, the dissent disagreed, identifying evidence that the killing was a spur-of-the-moment act. In addition to how the incident unexpectedly unfolded and petitioner's lack of any violent history, his friends, who cooperated with the government, said that there was never any talk of harming Luck and that, before petitioner stopped the van, he had told them he was looking for a place to drop Luck off and leave him. App. 51a-53a.

B. The Charges and Trial

Though Luck's kidnapping and the killing occurred in jurisdictions with substantial black populations, petitioner stood trial for this cross-racial crime before a jury of 11 whites and one older black woman, drawn from a nearly all-white jury pool.[2] That happened because, while petitioner was initially charged in state court in Chattanooga, Tennessee, almost a year later the federal government obtained an indictment against him, leaving the state case unpursued. And the jury pool in the Eastern District of Tennessee, where he was prosecuted, had a much lower percentage of African-Americans than the pools in state court in Chattanooga or in state or federal court in Atlanta.[3] App. 36a; R.581:1067, 795:2607; CA.239:196-204,

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[2] Moreover, the surrounding community was rife with racial issues and tensions, as was described for the Court of Appeals in an *amicus* brief filed on behalf of a group of local citizens. CA.237:2-14

[3] See Glossip v. Gross, 135 S. Ct. 2726, 2762 (2015) (Breyer & Ginsberg, JJ., dissenting), citing Cohen & Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425, 447 (Aug. 2010) ("federal prosecutors are able to dilute minority-concentrated populations (obtaining far whiter jury pools) simply by

223-31.

At his trial in 2008, petitioner was convicted by this federal jury on all four capital counts arising from the crimes against Luck, including two for use of a firearm during a "crime of violence" under 18 U.S.C. § 924(c). The "crime of violence" element requires an underlying federal felony that "by its nature" involves a "substantial risk that physical force may be used . . . in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Based on (then still valid) circuit decisions applying that definition to each of the underlying offenses here, kidnapping and carjacking, the District Court treated this element as established, as a matter of law, for each § 924(c) count.[4] See App. 36a-37a; CA.287:2. The court also denied petitioner's motion under Fed. R. Crim. P. 29 for a judgment of acquittal on the § 924(c) counts, CA.287:17, thus undisputedly preserving his appellate challenge to them. See id.; CA.295; App. 36a-40a.

Between the trial and sentencing, the prosecutor announced, in open court, that in recordings of jail conversations, petitioner had "call[ed] the jurors racist rednecks" for convicting him. Petitioner had confided to his family he thought race had influenced the speed of the verdict, but the prosecutor inaccurately characterized his remarks. Though the government did not try to introduce them,

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prosecuting the same case in federal rather than state court.").

[4] Although the statute alternatively qualifies a felony as violent if physical force is an element, see § 924(c)(3)(A), it is undisputed that the underlying offenses here do not satisfy that requirement, and thus that these two convictions hinge on the validity of § 924(c)(3)(B). See App. 36a-40a, 54a-59a; CA.287:14-21, 295:8-22.

the local media picked up on the prosecutor's charge and it became a focus of print and broadcast coverage, as well as a popular topic of conversation. When the jurors were individually asked if they had been exposed to any publicity during the break, most volunteered that they had heard about the prosecutor's charge. Among them was the foreperson, a 64-year old white woman. She said some people had told her about the "redneck" accusations against the jury and she "assumed it was either the defendant or some of his friends" who made them. She also expressed "concern" that petitioner and his "friends" knew her name and there might be "repercussions" if they found her, adding that she and her husband had discussed this and were "thinking about getting a weapon." As the Court of Appeals dissent recognized, these comments were worrisome, especially in a cross-racial capital case (and even more so given the prominent role the issue of petitioner's dangerousness would play at sentencing, as discussed below). Yet the District Court sent the foreperson back to the jury room without asking whether she could remain impartial or set aside what she had heard or discussed with her husband.[5] See App. 6a-12a, 41a-46a & n.7.

C. The Capital-Sentencing Hearing

At petitioner's sentencing hearing under the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591 *et seq.*, the central aggravating factor alleged by the government and found by the jury was that he "would be a danger in the future to

[5] The divided Court of Appeals panel also denied relief on this issue. App. 6a-12a (panel majority), 41a-46a (panel dissent).

the lives and safety of other persons" if sentenced to life imprisonment, the only alternative to a death sentence. R.902:7767, 760:2286, 2288. This aggravator was one of only three the jury found (the other two being that the killing was substantially premeditated and that it involved a kidnapping). R.760:2286, 2288. It was also the only one the government presented evidence about at sentencing, and it consumed critical portions of the prosecutors' summations. R.902:7710-12, 7751-57. That is not surprising, since verdict sheets in other federal capital trials as well as empirical studies of capital jurors demonstrate that their views on whether the defendant will commit violence in the future often dictate how they vote.[6]

To support this aggravating factor, the government relied on trial evidence of not only petitioner's kidnapping and murder of Luck but also his effort to escape from the county jail while awaiting trial. That attempt was conceived and led by an older inmate who enlisted several others to join in, including petitioner and his codefendant, Marshall. The plan called for them to ultimately flee from a window down a rope made of about 70 bedsheets, which they had somehow managed to

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[6] See, e.g., Cunningham, Sorensen & Reidy, Capital Jury Decision-Making: The Limitations of Predictions of Future Violence, 15 Psychol., Pub. Policy & L. 223, 234-35, 244-45 & Table 1 (2009) (over 13-year study period, 82.4 percent of federal defendants who were found to constitute a future danger were sentenced to death, while 81.6 percent of those who were not so found were spared); Sundby, War and Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103, 117 (Nov. 2010) (in post-trial interviews, capital jurors "consistently expressed the view – even those who were strongly moved by the defendant's case for life – that they would vote for a death sentence if they were not assured that the defendant would be safely locked away").

obtain and secrete along with various potential weapons such as homemade knives ("shanks"), pipes, and a set of handcuffs. (The prosecutors introduced enlarged color photographs of each weapon). In describing how the prisoners had accumulated such contraband, one government witness, a participant in the plot who testified pursuant to a cooperation agreement, said that jail "security was so weak, it was ridiculous."[7] R.898:7051, 7056, 7065, 7078-80, 7094-96. On the day of the attempt, petitioner tried to help grab hold of one guard, as the plan had called for, and take the guard's walkie-talkie and keys and force him into a cell. A group of other officers who just happened to be down the hallway heard the commotion, came running, and foiled the escape.[8] App. 6a, 13a, 47a; R.896:6627-31, 6641-44, 898:7041-85, 7097, 7100-08, 900:7295, 7316-17, 7324-25, 874:5646.

The government also presented dangerousness testimony from the FBI case agent. He relayed excerpts from petitioner's telephone calls and letters to his family members and friends that supposedly demonstrated a lack of remorse for his

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[7] The government presented the jury with additional evidence of the jail's inadequate security, including that officials had inexplicably housed petitioner and Marshall together in the same unit for more than a year though Marshall was a government cooperator, R.902:6717-18, and that, even after petitioner's escape attempt, they misclassified him because they mistakenly scored his escape history as zero, R.874:5583, and housed him with his other codefendant, Matthews, though he too was a government cooperator, R.866:4929-48, 900:7274-75, 7279, 902:7615-18, 7621-22.

[8] Petitioner did not end up hurting that guard (which jurors noted as a mitigating factor, R.760:2296), though a second guard on the unit was punched and slightly injured by another participant in the escape attempt. R.898:7097-99, 7106-08.

identity-theft crimes as a juvenile and for the grief of the victim's business partner. App. 13a, 18a; R.900:7275-82, 7286; A.216-25, 228. The agent also read aloud a portion of petitioner's letter to a young woman in a nearby jail, which the government cast as a threat to retaliate against Marshall, his cooperating codefendant. In it, petitioner discussed his plan to appeal his convictions and obtain a retrial at which he would be acquitted, adding: "So many people want to do something to [Marshall]. Next time I go to trial, I bet he won't testify against me." The prosecutors also elicited that petitioner had sent a subsequent letter to the woman using another inmate's name to try to avoid monitoring. App. 13a, 18a; A.218-221, 226; R.900:7277-79, 7283-87.

Finally, the FBI agent testified over objection that, according to Marshall, petitioner had remarked soon after the killing that he was "robbing drug dealers to try to raise money" to get out of town. But when Marshall was questioned outside the presence of the jury, he did not recall that petitioner had ever made, or that he had ever reported, such a remark. And the agent provided no corroboration that any robbery actually occurred. He also testified over objection that Marshall's "either grandmother or godmother" had recently called to tell him that she thought someone had tried to break into her Atlanta home because the alarm had gone off several times, and that another unnamed relative who lived near petitioner's family had reported having her windows broken. The agent never confirmed these incidents, let alone connected them to petitioner. Nonetheless, the District Court turned aside objections that such vague hearsay was too unreliable, saying that

there was a "relaxed standard of evidence" at the sentencing hearing.[9] App. 13a, 18a, 24a-25a, 48-49a; R.900:7270-74, 7298-99.

This liberal approach, though, did not extend to petitioner's rebuttal evidence on prison dangerousness. To counter the government's case on this aggravating factor, Petitioner called two experts to testify that he could be safely managed and very likely would not cause violence in a U.S. Penitentiary (USP), where he would serve any life sentence. James Aiken was a former prison warden and administrator with more than three decades of correctional experience, including working with the BOP. He had reviewed petitioner's county jail records, toured the jail, and received information about petitioner and the capital crime. Mark Cunningham, a Ph.D. psychologist, was one of the nation's leading experts on predicting violence in prison, including the BOP. He had published extensively on this subject in peer-reviewed journals, and conducted supervised inspections of various BOP facilities. Both Aiken and Cunningham had testified at numerous federal death-penalty trials, and had never been prevented from doing so when, as here, the government was asserting prison dangerousness as an aggravating factor.[10] See App. 12a-13a; R.547:952-53, 681:1713-16, 681-1:1717-21, 874:5650,

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[9] The divided Court of Appeals panel denied relief on a challenge to that ruling too. App. 24a-25a (majority), 48a-49a (dissent).

[10] In federal capital cases, the government too often calls a former BOP warden or other correctional expert to testify on this subject. See, e.g., United States v. Snarr, 704 F.3d 368, 395 (5th Cir. 2013); United States v. Caro, 597 F.3d 608, 616-18 (4th Cir. 2010); United States v. Battle, 979 F. Supp. 1442, 1463-64 (N.D. Ga. 1997).

901:7410-18, 7420, 7538-43, 7569, 744:2238 n.11; A.230-36.

But, acting largely *sua sponte*, the District Court kept out nearly all of this expert testimony, as detailed below. Cunningham was completely prevented from testifying on prison dangerousness.[11] And while Aiken managed to give some very limited information about USP security features, the court negated even that when it repeatedly advised jurors that "no one" including Aiken knew what kind of facility petitioner would be housed in or what security he would face, and that "most" of Aiken's opinions about "what might happen in the future" were thus "not relevant" and "beyond the scope" of what the jury could consider from him. And the court made a similar comment in front of the jury with Cunningham on the stand. As a result, the jurors were left to think that petitioner could end up in a facility little better than the apparently ill-secured and poorly managed county jail.

Before the sentencing hearing, the government had moved to exclude only evidence about the security procedures at ADX Florence, the BOP's super-maximum facility for terrorists and the like in Colorado, because petitioner was "unlikely to be housed" there. R.681:1713-15; 691:1853. But the District Court, on its own, went far beyond that and initially prohibited Aiken from testifying at all. R.726:2046. Petitioner sought reconsideration and, before resting at sentencing, called the expert to proffer his testimony outside the jury's presence. R.728:2055,

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[11] The Court of Appeals majority recounted testimony the jury did receive from Cunningham about subjects other than future dangerousness, namely mitigating factors involving petitioner's family history and childhood psychological development. App. 14a-16a; R.901:7452-53, 7460-7530.

729:2057-58, 691:1843-56, 874:5621-22.

Aiken proffered significant rebuttal testimony on prison dangerousness that the District Court kept out and the jury never heard:

- *Petitioner would be vulnerable to being preyed upon in federal prison and, as a result, would likely be segregated from the general prison population*.

Aiken observed that petitioner was "skinny," with a "[s]lender build, 140 [pounds] or so. About 5 [feet] 8 [inches]." He had "classified thousands and thousands of inmates," and said that petitioner's build together with his youthful, boyish facial features would have "a direct relationship to vulnerability and safety and security issues" in the BOP. If serving a life sentence, petitioner would be housed with long-term convicts who are "well-seasoned. They know the ins and outs and games that go on within prisons . . . . And if you let them, they know how to control other people." Moreover, because petitioner was not physically strong and not part of a gang, some would target him for the slightest perceived disrespect. As a result of all this, he would "have to be more protected than anything else," especially from "predator" inmates, who would view him as "fresh meat." Thus, BOP officials would probably place him in "protective custody," a "segregation" unit that provided especially "close supervision." R.874:5630-39.

- *BOP measures to segregate and safeguard government witnesses and monitor petitioner's communications would prevent him from posing any danger to his cooperating codefendant, Marshall.*

In response to the FBI agent's testimony suggesting that petitioner would seek revenge on Marshall for testifying against him, Aiken would have alerted

jurors that such a government witness is carefully classified and housed by the BOP in different institutions than the defendant he testified against "for years and years and years," and that "systems are designed to keep these inmates from ever crossing paths." These systems are "sophisticated," and also ensure that petitioner's "friends are separated" from the witness. Moreover, the BOP monitors all prisoners' outside communications specifically to detect possible risks to such witnesses. R.874:5643-44.

- *In Aiken's overall expert judgment, the BOP could safely manage petitioner.*

Having reviewed petitioner's records and his case, Aiken's ultimate expert opinion was that the BOP "can, within reason, safely control, manage, and contain him in confinement for the remainder of his life without causing undue risk to staff or harm to staff, inmates, as well as the general community." R.874:5645.

After the proffer, the court modified its ruling only slightly, to allow Aiken to testify that petitioner would go to a BOP facility where "the security will be different than what's at the Hamilton County Jail." R.874:5669-74. When Aiken appeared before the jury the next day, he went a bit further than that, testifying that, if petitioner were sentenced to life, he would be carefully controlled and monitored in a high-security setting in the BOP, to which the county jail did not compare and where the probability of a successful escape would be extremely remote.[12] App.13a-14a; R.901:7419-24, 7434-38.

[12] In its brief cross-examination, the government elicited from Aiken that the BOP likely would not house petitioner at ADX Florence. App.14a; R.901:7430-33.

And in the midst of that testimony, when defense counsel tried to ask how the BOP separates and safeguards government witnesses like Marshall, the court interjected, "we're beyond the scope of this witness's testimony now. Let's move on to another subject." When counsel then tried to ask about the implications of petitioner's slender build and youthful features for his dangerousness in prison, the court sustained the government's objection, saying, in front of the jury:

> I think you've gone much further than the parameters of this witness's testimony. He was called to the stand to testify that [petitioner] would be transferred from Hamilton County Jail to a federal prison facility someplace — *no one knows what facility he will be going to*; the Court has no control over that; that is done by the Bureau of Prisons — and that whatever facility he goes to will have better security than the Hamilton County Jail. And I think we've gone far beyond that . . . . What the defendant looks like has nothing to do with the security in the Hamilton County Jail.

R.901:7424-26 (emphasis added). The court repeated, again before the jury, that Aiken could only testify that petitioner would go to a BOP institution with "better security" than the jail, but that "no one knows what institution that will be at this point, that is unknowable." R.901:7426.

Petitioner's counsel protested that Aiken should be allowed to testify to "the type of security" petitioner would face in the BOP. The court, speaking directly to the jury ("Ladies and gentlemen"), responded that, "yesterday, we did have a hearing, and the Court had an opportunity to listen to this witness extensively give testimony about his expertise and about his opinions as to what might happen in the future. And based upon that, the Court indicated that *most of what he had to say was not relevant to these proceedings*." R.901:7427 (emphasis added).

The next witness was the other defense expert on prison dangerousness, Cunningham. A Ph.D. psychologist, he described for the jury his extensive work, research, and publications on "rates of violence in prison and factors that predict violence in prison," including among federal capital offenders. R.901:7448-50, 7454, 7531-32; A.230-36. As soon as the questioning turned to gauging petitioner's "likelihood of . . . being involved in violence" — based in part on the BOP's "effectiveness" in "limiting violence" by comparable "capital offender[s]" — the court sustained a government objection. R.901:7530-34. When the defense asked to make an offer of proof, the court told jurors this meant Cunningham would answer questions outside their presence and that "after the Court listens to the witness's testimony, the Court will make a determination as to *whether his testimony is relevant* to any issues at all in this case . . ." R.901:7535 (emphasis added).

As with Aiken, Cunningham proffered significant testimony on prison dangerousness that the jurors never heard. R901:7535-70; A.237-53.

- *Petitioner would be incarcerated in a USP and almost certainly remain there until he died.*

Contrary to the District Court's admonitions to jurors that no one knew what kind of facility would house petitioner, Cunningham explained that BOP regulations dictated that, with a life sentence, petitioner would be sent to a USP and would remain there indefinitely. He cited the relevant BOP manual and regulation, then quoted it: "'A male inmate with more than 30 years remaining to serve, including non-parolable life sentences, shall be housed in a high security

level institution,' that is, a U.S. Penitentiary . . ."[13] R.901:7537-38; A.237-38.

- *Petitioner would be under intensive security conditions in a USP.*

From BOP materials and his supervised inspections of USP's, Cunningham described the security arrangements petitioner would face if sentenced to life, and showed photographs, diagrams, and videos of some of the "features . . . that are representative of all the U.S. Penitentiaries." These included gun towers, unbroken double fencing, double cells in which inmates are locked down from night until morning, and protocols for dealing with unruly inmates. R.901:7538-43, 7569; A.238-53.

- *Neither petitioner's capital crime, his history of identify theft, nor his escape attempt are predictive of future violence in federal prison.*

Cunningham explained that empirical studies of prison violence, including ones of federal capital offenders, show that neither the nature of the capital offense, prior crimes in the community, nor an escape history (all characteristics the prosecutors attributed to petitioner and would cite in their dangerousness arguments to the jury) is associated with an increased likelihood of violence or poor adjustment in federal prison. Nor is the fact that an inmate is serving a life sentence or has been convicted of murder; in fact, such prisoners display *lower* rates of misconduct. R.901:7553-54, 7559-67; A.237-53.

- *BOP security is highly effective, as evidenced by the rare incidence of violence*

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[13] Only under an exception determined by a regional administrator and rarely granted could he ever even be considered for a medium-security prison. R.901:7537-38, 7547-48.

in USP's, including among federal capital offenders.

Finally, Cunningham described studies based on BOP data, which he helped conduct, that show exceedingly low rates of significant misconduct, including among federal capital offenders. R.901:7546-48, 7556.

When Cunningham completed his proffer, the court ruled that his testimony on prison dangerousness was inadmissible as rebuttal because it was "not relevant," and overruled the defense's subsequent objection.[14] R.901:7572-77. Before sentencing reconvened, the court issued written opinions denying a defense motion to reconsider and explaining its rulings excluding Aiken's and Cunningham's rebuttal testimony. R.731:2065-66, 732:2067-82, 733-741:2104-2210, 744:2238-49. It said petitioner's "right to rebut relates to information or evidence, not allegations." The court thought the government's evidence "could support a conclusion that [petitioner] might . . . influence others to commit harm to others, including prison staff and inmates," for example, "in efforts to pose a risk of danger to Marshall." But the court believed that "no rational factfinder could conclude" that petitioner "is likely to personally injure someone while in custody" ("especially" since the jury could see his "slight build") — and thus that the defense had no need to rebut that, as Aiken's and Cunningham's testimony would have done. Had the

[14] Though the District Court also said that Cunningham's testimony was too speculative and that he was not a qualified expert because he had never worked for the BOP, App. 19a-21a, on appeal the government has abandoned those rationales, CA.249:81-86, no doubt because they were baseless, see CA.239:107-110 & n.26. And the Court of Appeals majority did not rely on them. App. 13a, 21a.

government presented such evidence that petitioner was likely to "personally injure" others, "then obviously the Court's decision would be different." R.744:2239 n.13, 2239-42, 2245-49 n.21, 2259.

Nor, said the court, was Aiken's or Cunningham's testimony admissible to rebut the government's evidence of vicarious dangerousness, because neither expert could guarantee against any such risk to a 100-percent certainty: "Appropriate rebuttal to the government's evidence in this case would be information that it would be impossible for Defendant to ever communicate with anyone outside of prison for the rest of his life or that he would not be able to influence any other inmates while in prison." R.744.2242.

The court reconvened the proceedings with the jury in the box, for Cunningham to be cross-examined about the testimony he had given on other topics. Petitioner's counsel sought to first clarify the court's written opinion, which they had just received, and to do so outside the presence of the jury. But the court ignored the latter request, and plunged forward with a discussion of its ruling. R.902:7583. Thus, with the jurors listening, the court said that Cunningham's testimony about prison dangerousness was "irrelevant," the same label they had heard the court attach to Aiken's testimony. The jury, the court said, can "reach the appropriate decision . . . . without irrelevant information being presented to it." R.902:7583-84, 7586, 7587.

In its instructions at the conclusion of the sentencing hearing, the court defined the aggravator broadly for the jury, as whether petitioner "would be a

danger in the future to the lives and safety of others." The court identified petitioner's general "failure to adapt to social norms," as well as the escape attempt and the threat against Marshall and vandalism against his relatives, as examples of the government's evidence "in support of" dangerousness.[15] But, at the prosecutor's urging, it did not restrict the jury from considering any additional government evidence in determining this aggravator. R.902:7766-67. See R.902:7642-45, 7678.

While some of the government's summation discussed petitioner's supposed ability to "influence" or "manipulat[e]" others, see App. 21a, the prosecutors also painted his dangerousness in more expansive, generalized terms, see App. 47a n.10; see also App.26a-28a, just as they had in their opening statement, R.900:7246-47. Petitioner posed a threat, they urged, because of his escape attempt involving "shanks" in which he had tried to grab a guard, and because he "continues to try to escape today"; because he had killed Guy Luck; because he had pursued "a life of crime" before that; and because "he's not scary-looking" and thus "you don't see him coming." Calling him a "Dr. Jekyll" - "Mr. Hyde" "monster," a "remorseless and relentless hunter" who had "stalked" Luck, the prosecutor implored jurors to impose a death sentence to protect future victims: "When it comes to Rejon Taylor . . . . You are the ones who have the obligation to be the sheep dog that protects the sheep,

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[15] While enumerating each government aggravating factor and summarizing the evidence supporting it, the court refused to list petitioner's mitigating factors let alone summarize the mitigating evidence. The Court of Appeals acknowledged that this disparate treatment was "questionable," but it concluded that petitioner had not proven that it actually prejudiced the jury. App. 25a-26a.

and even sometimes the wolves, from the wolf."[16] R.902:7708-12, 7740-42, 7751-57.

Federal juries rarely vote death on facts like those in petitioner's case, see CA239:189-95, and thus it is not surprising that, even with all that had happened to unfairly imbalance the scales against him, at least one juror struggled with her decision: The jury sent two notes indicating they might be deadlocked and only returned a death verdict late on the second day of deliberations after the court told them to try to "work out" their differences. The lone black juror, a 67-year old woman, was reportedly the final holdout. App. 32a-35a; CA239:37, 171-74.

In their findings on the verdict sheet, the jurors factually accepted the largely unchallenged defense mitigation case that petitioner was a quiet, generous child who fell into stealing as a teenager under the corrupting influence of a father and older brother that were career criminals.[17] See R.900:7350-7403, 901:7460-7530. Yet the jurors concluded that this mitigation, along with the fact petitioner was just 18 at the time of the crime, was outweighed by their prediction that he would be violent in prison, together with the substantial-premeditation and kidnapping

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[16] Though finding some of these animal and monster epithets "close to the edge," the Court of Appeals panel also rejected petitioner's claim that attaching them to a young male African-American defendant in an inter-racial capital case evoked implicit racist images and courted a dangerousness finding based on emotion and bias. App. 26a-27a.

[17] All or most jurors found that petitioner was exposed to violence in his home as a child (9 jurors), that his father subjected him to emotional abuse (12 jurors), that his parents were inadequate (12 jurors), and that he lacked positive role models because his father and brother were criminals who served time in prison (12 jurors). Five jurors also found that he had shown kindness and concern for others. (R.760:2292, 2294).

aggravators. R.760:2292, 2294.

The jury's verdict directed and the District Court imposed one aggregate death sentence on petitioner for all four of his capital convictions. Thus, it is undisputed that, if his two § 924(c) convictions are invalid as asserted in this petition, his other two capital convictions would remain undisturbed but a new capital-sentencing hearing would be required. See CA.287:19-22, 298:4; App. 41a n.1, 59a.

D. The Court of Appeals Decision

The dissenting judge on the Court of Appeals panel agreed with petitioner that the proceedings below were riddled with serious errors, and suggested that his death sentence owed to emotion and other improper influences rather than any reasoned judgment that his culpability was "extreme" and his crime among "the most serious." Thus, the dissent would have reversed petitioner's death sentence on any of *five* separate errors. App. 40a-59a. But the Court of Appeals majority found that, while a number of the District Court's rulings (or the prosecutor's actions they licensed) were "questionable," "inadvisable," lacking an abundance of "caution," not "preferable," "close to the edge," or "tread[] on thin ice," each fell within that court's broad "discretion." App. 6a-41a.

1. The Future-Dangerousness Rebuttal Issue

Among the claims on which the panel sharply divided was the District Court's exclusion of petitioner's expert rebuttal testimony on whether he would cause violence in prison if sentenced to life. The majority upheld this ruling based

on its view that the expert testimony was "not responsive to the government's *arguments* about [petitioner's] future dangerousness."[18] App. 13a (emphasis added). See also App. 21a (Aiken's excluded testimony "was not relevant rebuttal evidence on future dangerousness, because none of it rebutted any of the government's future dangerousness *arguments*") (emphasis added); App. 22a ("the inability to respond to *arguments* made by prosecutors regarding future danger is not present . . .") (emphasis added).

Like the District Court, the majority acknowledged that Aiken's and Cunningham's testimony would have been relevant to show that petitioner would not be "personally" or "directly dangerous" in prison, and for that reason would be "admissible" as rebuttal "in many scenarios."[19] App. 21a-24a. Looking to the

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[18] The majority also believed that the defense experts' testimony would not have been "individualized" to petitioner, but, like the District Court, it relied on that only as a reason for excluding the testimony as mitigation, not as rebuttal. App. 13a, 21a-23a; R.744:2247-48. See also App. 48a n.11. That non-reliance at least was correct, since the degree to which the testimony was individualized did not bear on its admissibility as rebuttal. This Court has recognized that a capital defendant may disprove dangerousness with relevant information about his future custody status even if that status is generally applicable to other capital offenders. Simmons v. South Carolina, 512 U.S. 154, 165 (1994) (plurality); id. at 177 (O'Connor & Kennedy, JJ., & Rehnquist, C.J., concurring). See also O'Dell v. Netherland, 521 U.S. 151, 165 (1997) (relevant rebuttal of dangerousness may relate to "extant legal regime" or defendant's individual "character or the nature of his crime"). And, in any event, the panel majority mischaracterized the excluded testimony, which was amply individualized since it focused not on the risk every inmate poses, but rather on how petitioner's own history and characteristics in the context of a USP made him unlikely to cause violence there.

[19] While the majority did not address the District Court's statements to the jurors that "most" of the limited testimony they heard from Aiken was "irrelevant," it did not question that reversal would be required if the District Court had erred by

prosecutors' summations, though, it believed that their "specific arguments . . . went exclusively to the notion that [petitioner] could be vicariously dangerous if given a life sentence" — for example (quoting the prosecutor) that petitioner might "'conspir[e]'" with or "'recruit'" others to commit violence. Never in the prosecutors' summation arguments, said the majority, did they "seriously contend — or even intimate — that [petitioner] was personally dangerous." App. 21a-22a.

While the majority quoted at length from the District Court's order canvassing the evidence it thought persuasive and saying that no rational juror could conclude from it that petitioner would be "personally" dangerous, App.16a-21a, the majority eschewed any such reasoning in its ruling, and never denied that Aiken's and Cunningham's testimony would have rebutted the implications of the government's dangerousness evidence. See App. 13a-24a.

2. The § 924 Issue

The Court of Appeals panel also diverged over petitioner's claim that his § 924(c) convictions and his death sentence should be set aside because § 924(c)(3)(B)'s definition of a crime of violence is unconstitutional under Johnson v. United States, 135 S. Ct. 2551 (2015), in which this Court invalidated a similar definition in the residual clause of the Armed Career Criminal Act (ACCA).[20] See

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excluding the bulk of Aiken's dangerousness testimony and all of Cunningham's. See App.21a-22a.

[20] The parties submitted supplemental briefs to the Court of Appeals on this issue after Johnson was decided. See CA.287, 295, 298.

App. 36a-40a, 54a-59a.

The ACCA's residual clause defined a "violent felony" as one that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In assessing whether a given offense qualifies, Congress required a court not to look at how the defendant "committed it on a particular occasion," or just at its statutory elements, but rather "to picture the kind of conduct that the crime involves in the 'ordinary case.'" Johnson, 135 S. Ct. at 2557-62. But because this cannot be done with any certainty, let alone predictability, the Court in Johnson concluded that the residual clause is unconstitutionally vague. Id. at 2558-59. It attributed this vagueness to "[t]wo features" of the residual clause: the "grave uncertainty about how to estimate the risk" posed by "a judicially imagined 'ordinary case' of a crime" in the first place, coupled with the difficulty of "apply[ing] an imprecise 'serious potential risk' standard" to such a "judge-imagined abstraction." Id. at 2557-58.

A provision similar to the residual clause underlies two of petitioner's capital convictions. Section 924(c)(3)(B) defines a "crime of violence" as a 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." Identical language appears in another statute, 18 U.S.C. § 16(b), which, before the Sixth Circuit decided petitioner's case, the Seventh and Ninth Circuits had struck down as unconstitutional under Johnson. See Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2016), cert. granted, ___ U.S. ___, 2016 WL 3232911 (Sept. 29, 2016); United States

v. Vivas-Ceja, 808 F.3d 719 (7th Cir. 2015). Both those circuits reasoned that, because Congress had also required the same hopelessly vague "ordinary case" analysis for § 16(b), it suffered from the same two "features" that doomed the ACCA's residual clause. See Dimaya, 803 F.3d at 1115-16, 1118 n.12; Vivas-Ceja, 808 F.3d at 721-23.

Here the Court of Appeals majority acknowledged that § 924(c)(3)(B) necessitates the same "ordinary case" appraisal as the ACCA's residual clause. But it denied petitioner's claim solely because it disagreed with the Seventh and Ninth Circuits that difficulties with that appraisal were primarily what led the Court to invalidate the residual clause in Johnson. Instead, the majority accepted several distinctions the government claimed between the residual clause and § 924(c)(3)(B). The government had urged these same distinctions on the Seventh and Ninth Circuits, but those courts had rejected them as either non-existent or immaterial in assessing § 924(c)(3)(B)'s identical twin, § 16(b). See Dimaya, 803 F.3d at 1115-16, 1118 n.12; Vivas-Ceja, 808 F.3d at 721-23. Here, the Court of Appeals dissenter would have followed suit, and held § 924(c)(3)(B) unconstitutional. App. 54a-59a.

REASONS FOR GRANTING THE WRIT

I. Summary reversal is appropriate because, as the Court of Appeals dissent laid out, the majority upheld the exclusion of petitioner's expert testimony rebutting future dangerousness by applying a rule directly at odds with this Court's precedent and by misreading the plain record of his capital-sentencing hearing.

In deeming Aiken's and Cunningham's testimony "irrelevant" as rebuttal on whether petitioner would cause violence in prison, the Court of Appeals majority

looked only to whether the testimony would have countered the prosecutor's "specific arguments" in summation. But as the dissent observed, see App. 47a-48a, that test contravenes the governing decision by this Court, Kelly v. South Carolina, 534 U.S. 246 (2002). There, the lower court had similarly approved preventing a capital defendant from rebutting a theory of future dangerousness, that he would be dangerous to society, because the prosecutor did not specifically argue it. This Court reversed because the prosecution's *evidence* had raised an "implication" that the defendant posed a threat to society (because he might eventually be released and re-offend). And the evidence's "relevance to that point does not disappear merely because it might support other inferences or be described in other terms." Id. at 254-55. Thus, the Court held that the defendant's due process right of rebuttal extended not just to the prosecution's express assertions about dangerousness, but, more broadly, to any "logical inference from [its] evidence." Id. at 252 (internal quotation omitted). In federal capital cases, Congress has also expressly recognized that the defendant's right of rebuttal extends beyond the prosecution's arguments.[21] 18 U.S.C. § 3593(c) ("defendant shall be permitted to

[21] So have other circuits. Thus, for example, in United States v. Troya, 733 F.3d 1125, 1135 (11th Cir. 2013), the Eleventh Circuit held that it was constitutional error to exclude a defense correctional expert's testimony though the government was not even asserting the aggravating factor of prison dangerousness, because Kelly "held that a capital defendant is entitled to rebut future dangerousness even when it is merely implied by the evidence presented at trial, rather than explicitly argued." See also United States v. Johnson, 223 F.3d 665, 671 (7th Cir. 2000) ("the defendant was of course entitled to counter the government's evidence that he would be a continued menace to society while in prison" with defense expert's description of BOP "security arrangements").

rebut *any information* received" by the jury in support of a death sentence) (emphasis added).

The dissent here zeroed in on this conflict, protesting that "[t]he majority's 'unrealistically limited' view" of the government's dangerousness case "echoes the same 'fallacy' the Supreme Court rejected in Kelly." App. 47a-48a, quoting Kelly, 534 U.S. at 254-55. As the dissent noted, petitioner's jury had heard evidence that, among other things, he had "personally" kidnapped and killed Luck, and "personally" tried to help grab a jail guard during an escape attempt involving homemade knives and other weapons (not to mention "personally" robbing drug dealers after Luck's murder). Like the lower court in Kelly, the majority's stunted test "overlooked" that this and other "evidence" clearly implied to jurors that petitioner might be "personally" dangerous in prison.[22] App.47a-48a. Contrary to the majority's view, see App. 21a, that inference was not negated simply because the prosecutors acknowledged petitioner's "slight stature," particularly since they also emphasized to jurors that inmates could gain access to deadly weapons even while incarcerated.

Furthermore, as the dissent also flagged, even if one ignores the evidence and focuses just on the summations, the prosecutors did not, as the majority thought, confine themselves to predicting that petitioner would manipulate or recruit others

[22] The majority included a "cf." cite to Kelly, but in the next breath, mistakenly dismissed it as a case involving a defendant's "inability to respond to arguments" about dangerousness. App. 22a.

to commit violence. Rather, they also repeatedly described his dangerousness in broad, generalized terms; reminded jurors of his personal involvement in violence in kidnapping and killing Luck and in trying to help grab a guard during the escape attempt; and suggested that petitioner's unimposing appearance would make him *more* dangerous in prison because "you don't see him coming." (Moreover, at the prosecutors' urging, the District Court's instructions licensed the jury to consider petitioner's dangerousness without limitation, and specifically mentioned the escape as an example of supporting evidence.). See App.47a & n.10. Thus, because the government's arguments (fueled by the instructions) embraced "personal," "direct" dangerousness, Aiken's and Cunningham's testimony constituted relevant rebuttal, even under the majority's constrained standard.

Finally, as the dissent recognized too, even had the government's arguments (or, indeed, its entire case) gone "exclusively to the notion that [petitioner] could be vicariously dangerous," as the majority thought they had, the excluded testimony still would have provided relevant rebuttal. Jurors would have learned how, in a USP, "the BOP would . . . control [petitioner's] ability to influence other inmates and persons in the public — for example, by monitoring his communications." App. 48a. That would help thwart, among other things, any effort to solicit harm to a government witness housed in a different prison or a witness's family member in the community. The dissent understood that such testimony would have been "relevant to rebut negative inferences from [petitioner's] alleged threat against Marshall, his use of other [county jail] inmates to communicate with persons

outside a detention facility, and the alleged damage to Marshall's grandmother's home." Id. Even more important, Aiken's description of how a young, skinny inmate with boyish facial features and no gang connections like petitioner would be vulnerable to being preyed upon in a USP and need to be segregated for his own protection would have rebutted the prosecutor's argument that he would be an "influential leader" in prison, and would recruit, manipulate, and control other inmates to do his bidding.[23] R.902:7752-55.

This Court has granted relief to other capital defendants who, like petitioner, were prevented from rebutting future dangerousness. See Kelly, 534 U.S. at 248-52; Shafer v. South Carolina, 532 U.S. 36, 52-55 (2001); Simmons v. South Carolina, 512 U.S. 154, 165 (1994) (plurality); id. at 177 (O'Connor & Kennedy, JJ., & Rehnquist, C.J., concurring); Skipper v. South Carolina, 476 U.S. 1, 3, 5 & n.1 (1986); id. at 9-10 (Powell & Rehnquist, JJ., & Burger, C.J., concurring). That is because "due process plainly requires that" such a defendant "be allowed to bring . . . to the jury's attention" information "to 'deny or explain' the showing of future dangerousness" Simmons, 512 U.S. at 169, quoting Gardner v. Florida, 430 U.S.

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[23] The Court of Appeals majority ignored whether the experts' testimony would have rebutted the government's arguments about petitioner's "vicarious[]" dangerousness. And the District Court's theory for why the testimony was inadmissible on this point, because the experts could not guarantee against any risk to a 100-percent certainty, was obviously faulty. The government, not petitioner, bore the burden of proof on future dangerousness, and beyond a reasonable doubt, as the court instructed. R.902:7767. If jurors had heard Aiken's and Cunningham's testimony and agreed that petitioner very likely would not cause violence in a USP, including through communications with other inmates or outsiders, they could well have rejected that aggravating factor as unproven.

349, 362 (1977) (plurality). It is also because the Court only allowed prosecutors to rely on this controversial aggravating factor in the first place on the premise that capital defendants would enjoy a robust right of rebuttal. In its earliest decisions on future dangerousness, the Court assumed that the jury, faced with such a difficult, predictive assessment, would "have before it all possible relevant information," Jurek v. Texas, 428 U.S. 262, 275-76 (1976) (joint opinion of Stewart, Stevens & Powell, JJ.), including "contrary evidence" from the defendant. Barefoot v. Estelle, 463 U.S. 880, 897-99 (1983). See also Ake v. Oklahoma, 470 U.S. 68, 84 (1985).

The Court should similarly step in here because, as the dissenting judge laid out, a divided Court of Appeals flouted this Court's clear precedent on rebutting dangerousness and plainly misread the record, resulting in affirmance of an unconstitutional and aberrational death sentence.[24] Moreover, the Sixth Circuit's decision threatens to unsettle the law by requiring district courts to anticipate summation arguments in order to rule on the scope of rebuttal evidence, a difficult if not impossible task.

This Court has "not shied away from summarily deciding" even fact-intensive "capital case[s], when circumstances so warrant." Wearry v. Cain, 136 S. Ct. 1002,

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[24] The government did not argue and the Court of Appeals majority did not suggest that the exclusion of petitioner's rebuttal evidence, if error, might be harmless. CA.249:81-86; App. 12a-24a. Moreover, the record shows that dangerousness was a critical issue at the sentencing hearing, at least one juror regarded this as a very close case, and there was more than ample basis for that view.

1007-08 (2016). See also White v. Wheeler, 136 S. Ct. 456, 462 (2015) (summarily reversing Sixth Circuit's grant of relief to state capital defendant, and citing four other recent Sixth Circuit cases where it had done the same). And this case involves a federal direct appeal, which falls more squarely under the Court's authority than do habeas proceedings involving state-court judgments.

Furthermore, because this case involves an inter-racial crime and additional racially-freighted circumstances, there is a special risk that some on petitioner's nearly all-white jury, deprived of critical, objective evidence, may have been unconsciously inclined to fill the gap by treating his race as a proxy for future dangerousness. The Court recognized this unfortunate tendency in Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality) (acknowledging prevalence of uniquely pernicious stereotype that "blacks are violence prone"), and has recently been reminded of it in Buck v. Stephens, 136 S. Ct. 2409 (2016), which the Court has agreed to review because the African-American defendant's race may have improperly influenced his capital jury's finding of future dangerousness. See Buck v. Davis, No. 15-8049, Brief of Petitioner, at 50, 2016 WL 4073689 (July 28, 2016) (empirical "research shows that the perceived link between race and dangerousness persists and continues to jeopardize the fundamental fairness of the criminal justice system"); id., Brief of National Black Law Students' Ass'n as *Amicus Curiae*, at 18-21, 2016 WL 4073688 (July 29, 2016) ("The most notable and extreme unconscious biases that social scientists have discovered are enduring stereotypes of Black people as dangerous, less-than-human criminals"). Here, as in Buck, a death

sentence resting on a skewed, unreliable finding of dangerousness is not only disturbing enough by itself, but, under the circumstances of petitioner's case, threatens to undermine public confidence in the broader fairness of the federal courts and the administration of capital punishment.

II. The Court should hold Petitioner's case for Lynch v. Dimaya, or, alternatively, should grant certiorari here on the constitutionality of 18 U.S.C. § 924(c)(3)(B), the statute underpinning two of petitioner's capital convictions and his death sentence, and which the government acknowledges is "materially identical" to the one at issue in Dimaya.

Last week, the Court granted certiorari in Lynch v. Dimaya, No. 15-1498, which presents the question "[w]hether 18 U.S.C. § 16(b) . . . is unconstitutionally vague." Id., Petition for Writ of Certiorari of United States, at I, 2016 WL 3254180 (June 10, 2016); id., ___ U.S. ___, 2016 WL 3232911 (Sept. 29, 2016). Section 16(b) defines a "crime of violence" as a felony that "by its nature" involves a "substantial risk" of "physical force." In Dimaya, the Court will be reviewing a Ninth Circuit decision invalidating that statutory definition under Johnson v. United States, 135 S. Ct. 2551 (2015), which struck down, as unconstitutionally vague, a similar definition of "violent felony" in the ACCA's residual clause. See Dimaya, 803 F.3d at 1115.

Section 16(b)'s definition of a "crime of violence" is identical to the one used in 18 U.S.C. § 924(c)(3)(B), the statute underlying two of petitioner's convictions and his death sentence. In this case, the divided Court of Appeals panel upheld the definition in response to petitioner's constitutional challenge to its vagueness under

Johnson. The government in Dimaya has acknowledged to this Court that the two statutes are "materially identical" and must rise or fall together.[25] See id., Reply Brief of United States, at 1, 3, 6, 11, 2016 WL 4578842 (Aug. 31, 2016). And it has argued that review is warranted because, among other things, "the Ninth Circuit's decision" striking one "conflicts with the Sixth Circuit's decision" in petitioner's case upholding the other. Id., Petition for Writ of Certiorari, *supra*, at 11.

In petitioner's case, moreover, the Court of Appeals majority agreed that § 924(c)(3)(B) operates just like § 16(b) by using the "categorical approach" to try to identify an offense's "ordinary case" in order to determine if it qualifies as a "crime of violence." App. 39a. See also CA.295:6 (government concedes this). And the majority further held § 924(c)(3)(B) constitutional under Johnson by accepting the same supposed distinctions, between the ACCA's residual clause and the §§ 16(b)-924(c)(3)(B) definition, that the Ninth Circuit had rejected as non-existent or immaterial and that the Court will consider in Dimaya.[26] App. 36a-40a, 54a-59a; Dimaya, 803 F.3d at 1115-16, 1118 n.12; id., Petition for Writ of Certiorari, *supra*, at 17-25.

Thus, if in Dimaya the Court affirms the Ninth Circuit's ruling that § 16(b) is

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[25] The government expressed the same view in the Court of Appeals in petitioner's case. See CA295:8 n.4, 10-14, 17.

[26] Those supposed distinctions include that § 924(c)(3)(B) involves a narrower risk inquiry, does not consider conduct beyond the underlying crime's elements, does not include a prefatory list of enumerated offenses, and had not previously generated dissension among judges. App. 36a-40a.

unconstitutionally vague, such a decision might well make it appropriate to grant certiorari here, vacate the judgment below, and remand for reconsideration (GVR). For it could constitute an "'intervening development[]' giving rise to a 'reasonable probability' that" the Court of Appeals majority in petitioner's case "would reject a legal premise on which it relied and which may affect the outcome of the litigation." Tyler v. Cain, 533 U.S. 656, 666 n.6 (2001), quoting Lawrence v. Chater, 516 U.S. 163, 167 (1996) (*per curiam*).

It does not detract from this that a different panel of the Sixth Circuit later held § 16(b) unconstitutional in Shuti v. Lynch, 828 F.3d 440, 446 (6th Cir. 2016). Shuti reached that conclusion by rejecting the 'legal premise' of the panel majority's decision in petitioner's case, namely the government's claimed distinctions between the ACCA's residual clause and the §§ 16(b)-924(c)(3)(B) definition. Shuti, 828 F.3d at 448-50. While, unfortunately, that rejection did not allow, let alone require, petitioner's panel to reconsider its ruling, a decision by this Court in Dimaya rejecting those distinctions, followed by a GVR here, would.[27] Similarly, Shuti's explanation for why invalidating § 16(b) need not disturb the ruling here, namely that § 924(c)(3)(B) does not employ the "categorical approach," also conflicts with the 'legal premise' for the panel majority's decision in petitioner's case. Moreover, that theory is simply wrong, as other circuits have recognized and as the

[27] Petitioner moved for leave to file a second petition for *en banc* rehearing so he could ask the full Court of Appeals to resolve the conflict between his case and Shuti, CA.324, but the panel denied his motion, again over Judge White's dissent, CA.328-1.

government itself has told this Court in disavowing it. See Reply Brief of United States, at 10-11 & n.1, Lynch v. Dimaya, *supra*. See also Petition for Rehearing *En Banc* of United States, at 2, Shuti v. Lynch, No. 15-3835 (6th Cir. Sept. 9, 2016).

Accordingly, the Court should hold petitioner's case pending its decision in Dimaya since that decision could well make a GVR appropriate here. Alternatively, the Court should grant certiorari in petitioner's case on whether, in light of Johnson, the "crime of violence" definition in § 924(c)(3)(B) is unconstitutionally vague under the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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