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

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Court held Petitioner Rejon Taylor's petition for certiorari — along with about a dozen others challenging convictions under the residual "crime of violence" definition in 18 U.S.C. § 924(c) — for almost a year pending its decision in *Dimaya v. Sessions*, 138 S. Ct. 1204 (2018). It then GVR'd all but one of the other cases, but denied certiorari here. *See* Order List (May 15, 2018). Other than a factual mistake, there is no discernible reason for the disparate treatment of Taylor's case compared with the others remanded. Based on this substantial ground not previously presented, *see* Sup. Ct. Rule 44, the Court should grant rehearing, and GVR his case too.

Taylor was tried for a single homicide, and convicted on two counts of using or carrying a firearm during a "crime of violence," under § 924(c)(3)(B). For one count, the alleged crime of violence was kidnapping, 18 U.S.C. § 1201, and for the other carjacking, 18 U.S.C. § 2119. He was also convicted on two other counts, for carjacking and kidnapping independently. On direct appeal, the Sixth Circuit rejected his constitutional challenge to the vagueness of 924(c)(3)(B)'s residual "crime of violence" definition. The Sixth Circuit distinguished it from the definition in the Armed Career Criminal Act (ACCA) invalidated by this Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016); *id.* at 393-94 (White, J., dissenting).

In his petition for certiorari, Taylor asked this Court to hold his case for

Dimaya, since it involved a vagueness challenge to a residual "crime of violence" definition identical to 924(c)'s, the one in 18 U.S.C. § 16(b). The government opposed on the theory that *Dimaya* would not affect Taylor's case. While conceding that his § 924(c) conviction based on kidnapping would fall if the residual clause were invalidated, the government offered an argument not made to or passed on below: namely, that carjacking was a "crime of violence" under the statute's alternative "force" clause, § 924(c)(3)(A), and so Taylor's other § 924(c) conviction would remain intact, and his sentence would not be affected if either or both of those convictions were reversed because he received a separate death sentence for each of his four convictions.[1] Gov. Br. 26-29.

In his reply, Taylor noted that the government had made a critical factual mistake: He was *not* sentenced separately on each count. Rather, his jury was instructed to and did return a single aggregate sentence, death, for all his convictions. *See* Pet. Reply. 7 & n.10. And if even one of them was invalid, including it in their deliberations may have affected the jurors' sentencing decision. *See 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 one conviction court was vacating). Taylor also noted that

[1] The government did not question that the issue is whether the statutory offenses of kidnapping or carjacking qualify under § 924(c)(3)'s definition of a "crime of violence." It did not argue, and the law does not support, that the definition may be applied to the incident as a whole or satisfied because a different element of the charge required that Taylor have caused the victim's death, *see* 18 U.S.C. § 924(j).

he had argued below and still maintained that carjacking did not qualify as a "crime of violence" under the statute's force clause, and thus that both his § 924(c) convictions were infirm. Pet. Reply. 9-12.

Last month in *Dimaya*, this Court found unconstitutional the residual "crime of violence" definition in § 16(b). It did so by rejecting the very reasoning the Sixth Circuit relied on in Taylor's case to distinguish the definition from the ACCA one invalidated in *Johnson*. *Dimaya*, 138 S. Ct. at 1213-15, 1218-22. *See also id.* at 1232-34 (Gorsuch, concurring in part and in the judgment). Earlier this week, the Court GVR'd a dozen cases challenging convictions under the same residual definition in § 924(c), for reconsideration in light of *Dimaya*. *See* Order List (May 15, 2018).

In at least three of those cases, like Taylor's, the government had opposed a hold for *Dimaya* by arguing the convictions could be sustained under the force clause. *See Winters v. United States*, No. 17-5495, Gov. Br. 5-6 (Nov. 6, 2017); *McCoy v. United States*, No. 17-5484, Gov. Br. 6-7 (Nov. 6, 2017); *(Brannon) Taylor v. United States*, No. 16-8996, Gov. Br. 3 (July 31, 2017). Indeed, one of those, (Brannon) Taylor's, involved carjacking, the same underlying crime as in this case.

If the Court denied certiorari here based on the government's unpreserved argument that carjacking qualifies under § 924(c)'s force clause, it has arbitrarily treated like cases dissimilarly. *See Roper v. Weaver*, 550 U.S. 598, 601 (2007) (*per curiam*) (granting relief "to prevent these three virtually identically situated

litigants from being treated in a needlessly disparate manner"). And if it did so based on the government's (also unpreserved) argument that the invalidity of either or both of Taylor's § 924(c) convictions does not matter because he was sentenced separately on each count, it has made an obvious factual mistake.

For these reasons, Petitioner Rejon Taylor respectfully requests that the Court grant this petition for rehearing, grant his petition for certiorari, vacate the judgment below, and remand for reconsideration in light of *Dimaya*.

Respectfully submitted,

s/ Barry J. Fisher
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CERTIFICATION OF COUNSEL

As counsel of record for Petitioner Rejon Taylor, I hereby certify, as required by Supreme Court Rule 44, that this petition for rehearing is presented in good faith and not for delay, based on substantial grounds not previously presented.

s/ Barry J. Fisher