No. 17-1189

# In the Supreme Court of the United States

JORGE AVILA TORREZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**CAPITAL CASE**

## QUESTIONS PRESENTED

1. Whether a jury's determination in capital sentencing proceedings that a previous conviction qualifies as a statutory aggravating factor under 18 U.S.C. 3592(c)(2), requires a categorical approach that looks only to the legal definition of the prior crime.

2. Whether a conviction can qualify as a statutory aggravating factor under 18 U.S.C. 3592(c)(2) and (4) in capital sentencing proceedings where it predates the capital sentencing proceedings but postdates the underlying murder.

3. Whether this case should be remanded to allow the court of appeals to consider, on plain-error review, petitioner's forfeited claim that the district court was required to apply the exclusionary rule to historical cell-site location information that the government obtained pursuant to a court order issued under 18 U.S.C. 2703(d) and Va. Code Ann. 19.2-70.3 (Supp. 2010).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-93a) is reported at 869 F.3d 291. Relevant orders of the district court (Pet. App. 95a-100a, 101a-111a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 28, 2017. A petition for rehearing was denied on September 25, 2017 (Pet. App. 113a). On November 30, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 22, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of first-degree murder, in violation of 18 U.S.C. 1111(a) and 7(3). The district court, following the jury's unanimous penalty-phase recommendation, imposed a capital sentence. C.A. App. 5258. The court of appeals affirmed. Pet. App. 1a-93a.

1. Petitioner is a serial murderer and rapist who, in May 2005, murdered two young girls aged eight and nine and sexually assaulted the younger child; in July 2009, murdered Petty Officer Amanda Snell in her bedroom on a military base after which his semen was found on her bedsheet (the murder in this case); and in February 2010, kidnaped, raped, and repeatedly sodomized a female graduate student (J.T.), and then attempted to murder her. C.A. App. 4602, 5235-5237 (jury findings); see Pet. App. 3a-9a. Petitioner's role in the murders remained unknown until his final victim, J.T., survived and provided information leading to his arrest. That arrest led to investigatory efforts that resulted in petitioner's recorded jailhouse confessions and DNA testing linking him to the murders.

a. On the morning of July 13, 2009, military personnel found Snell, a 20-year-old Navy Intelligence Specialist, dead in her bedroom at Joint Base Meyer in Arlington, Virginia. Snell had been pushed inside a closed, narrow wall locker in her room in an unnatural position with her knees pressed into her torso, her feet pushed against a drawer, and her head covered by a pillow case and pushed down to her chest. Shoeprints were discovered in front of the locker, but the room was otherwise clean: a vacuum cleaner was sitting out, and Snell's bed was made with only a fitted sheet and comforter, with

her flat sheet and pillow cases missing. Snell's cause of death was suffocation. Pet. App. 3a-4a; Gov't C.A. Br. 4-9.

Petitioner was a corporal in the Marine Corps at the time and lived a few doors down from Snell. Gov't C.A. Br. 9. He twice told military investigators that he did not know Snell; completed a questionnaire stating that he had never been in her room; provided a DNA sample; and consented to a search of his room, which was exceptionally clean. Pet. App. 4a-5a; Gov't C.A. Br. 9-10. But after petitioner was arrested and held in pretrial detention for his later February 2010 offenses, petitioner told an incarcerated confidential informant, Osama El-Atari, in recorded conversations that he had murdered Snell by suffocating her in her room. Pet. App. 8a-9a.

Petitioner told El-Atari that he had put Snell's body in the wall locker, explaining "[s]he wouldn't fit lying flat" and "I had to bend her f***ing knees and make her like she's sitting down, 'cause it's a small closet." Pet. App. 9a (citation omitted). Petitioner also bragged to El-Atari that it was the "'perfect crime'": petitioner said that he had left no visible wounds on Snell; had put into a pillowcase, and had then disposed of, everything that might link him to her murder (including a flat bedsheet, a pillowcase with blood from her nose, and everything else he had touched); and had "left the fitted sheet," "made the bed," and "thoroughly cleaned the room" for two hours. *Id.* at 8a-9a (citation omitted); see Gov't C.A. Br. 14. As it turned out, however, petitioner had left a semen stain on the fitted sheet matching his DNA profile with a random-match probability of only one in 590 quadrillion in the Hispanic population. C.A. App. 3468-3469. Petitioner's shoes were also consistent with the impressions in front of Snell's locker. Pet. App.

9a-10a. By trial, the evidence of petitioner's guilt was so powerful that the court of appeals determined that, even if the shoeprint analysis testimony had been erroneously admitted, any error would have been harmless. *Id.* at 18a. Petitioner nonetheless never "displayed [any] remorse" for Snell's murder. C.A. App. 5238.

b. Investigators were able to link petitioner to Snell's murder, and the May 2005 murders of two young girls, when petitioner was apprehended for other crimes in February 2010.

i. On the night of February 4 to 5, 2010, petitioner drove his Dodge Durango around Arlington "stalk[ing] females for sexual assault." C.A. App. 5235 (jury finding). The following day, petitioner purchased a Glock semiautomatic pistol "to use in abducting, robbing and sexually assaulting" women, and he returned to stalking women by vehicle that night (February 5 to 6). *Ibid.* Arlington officers observed on those days someone matching petitioner's description stalking women from a Durango. Pet. App. 6a n.2.

On February 10, 2010, petitioner attempted to abduct and assault a 26-year-old woman (M.N.). Petitioner grabbed M.N.'s jacket from behind while she was walking in Arlington, brandished his gun, told her to keep quiet and keep walking, and pushed her toward his Durango. When petitioner pulled a knife and urged M.N. to enter the Durango, she dropped her bag and fled. Police responded but did not find petitioner. Pet. App. 5a.

Just over two weeks later, on February 27, 2010, petitioner accosted two female graduate students—J.T. and K.M.—in front of K.M.'s house, brandished his gun, demanded their wallets, and forced them inside the house, where he bound their hands and moved them to

a bedroom. J.T. managed to grab her cell phone and call 911 when petitioner left the room, but he returned and threw her phone against the wall. Petitioner then grabbed J.T., forced her into his Durango, and drove away. Pet. App. 5a-6a.

After driving for some time, petitioner pulled over, got in the back seat with J.T., and forced her to perform fellatio on him. Pet. App. 6a. Petitioner then put on a condom to avoid leaving semen (telling her, "I'm not an idiot") before raping J.T. *Ibid.* (citation omitted). Petitioner then forced J.T. to perform fellatio again, covered her face with packing tape, and drove to a secluded wooded area near a highway. *Ibid.* After forcing J.T. to perform fellatio a third time, *ibid.*, petitioner "attempted to kill J.T. by strangulation" by wrapping and tightening her scarf around her neck. C.A. App. 5237 (jury finding). When J.T. blacked out, petitioner "discarded her body in the woods," "[t]hinking that she was dead." *Ibid.* Fortunately, J.T. survived, later awoke face down in the snow, and crawled to a nearby road to obtain the help of a passerby. Gov't C.A. Br. 20.

ii. Based on J.T's description of petitioner's vehicle, which an Arlington officer recognized as matching the women-stalking Durango, police located the Durango at Joint Base Meyer and promptly arrested petitioner as he was driving out of a parking garage. Gov't C.A. Br. 20-21. In the Durango, officers found J.T.'s university identification and earring, packing tape, and a stun gun. Pet. App. 6a. In petitioner's barracks room, they recovered a loaded Glock semiautomatic pistol and petitioner's laptop, which contained dozens of videos and images depicting rapes and sexual assaults, many of which were "sleeping rape" videos in which a sleeping victim is attacked or raped. *Id.* at 6a-7a.

While detained pending trial on state charges for his February 2010 offenses, petitioner "plotted to have the victim witnesses against him killed" and "drew a map to one of the victim's homes for the person who was to kill [her]." C.A. App. 5237 (jury finding). Officers who suspected that petitioner was attempting to intimidate witnesses arranged for El-Atari to act as a confidential informant and to record his conversations with petitioner over six days, yielding petitioner's confession about Snell's murder. Pet. App. 8a-9a; Gov't C.A. Br. 10-11.

In December 2010, petitioner was convicted in Virginia state court on 14 felony counts for his offense conduct on February 10 (abduction with intent to defile, robbery, and use of a firearm in a felony) and February 27 (abduction, abduction with intent to defile, rape, three counts of forcible sodomy, three counts of use of a firearm in a felony, robbery, and breaking and entering while armed). Pet. App. 7a; C.A. App. 4541-4568. The state court sentenced petitioner to five life sentences to be followed by 168 years of consecutive imprisonment. Pet. App. 7a. The Virginia convictions would later form the basis for the statutory aggravating factors found by the sentencing jury beyond a reasonable doubt in this case. C.A. App. 4604-4607.

c. Petitioner also confided to El-Atari that, four years before he murdered Snell, he had murdered Laura Hobbs and Krystal Tobias in Zion, Illinois, when he was 16 years old. Pet. App. 7a, 9a n.4. On May 8, 2005, petitioner had sexually assaulted eight-year-old Laura and had murdered Laura and her nine-year-old friend, Krystal, in a park near their homes, stabbing Laura about 20 times, including in both eyes, and stabbing Krystal 11 times, causing significant hemorrhaging in her neck. C.A. App. 5235 (jury findings); Pet.

App. 7a. Petitioner recounted the murders to El-Atari in "excruciating detail," providing facts matching the information from the girls' autopsies. Pet. App. 9a n.4; see Gov't C.A. Br. 29-31. Semen inside Laura's vagina and on her clothing was later matched to petitioner's DNA with a one in 985 quadrillion random-match probability. Pet. App. 8a. Petitioner told El-Atari that he felt no emotion or remorse after killing the girls. Gov't C.A. Br. 31. Petitioner's sexual assault of Laura and his murders of the girls were later found by the sentencing jury in this case as non-statutory aggravators supporting a capital sentence. C.A. App. 5235.[1]

2. In May 2011, a federal grand jury indicted petitioner for Snell's murder. Pet. App. 10a. The government noticed its intent to seek a capital sentence. *Ibid.*

Under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, a jury may recommend a capital sentence for most capital offenses—including murder under Section 1111(a)—only if it finds beyond a reasonable doubt one of the intent factors in Section 3591(a)(2) and at least one of the statutory aggravating factors in Section 3592(c). 18 U.S.C. 3593(c), (d), and (e)(2). If the jury makes both findings, it may consider non-statutory aggravating factors that it unanimously finds beyond a reasonable doubt, and each individual juror must weigh all aggravating factors found by the jury against the mitigating factors that the juror finds to exist by a

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[1] Before sentencing in this case, petitioner was indicted in Illinois state court for murdering the eight- and nine-year-old girls. Pet. App. 8a n.3. In September 2018, petitioner pleaded guilty and was sentenced to 100 years of imprisonment. See Gregory Harutunian, *Zion double murder still resonates for prosecutors*, Lake County Chronicle, Jan. 2, 2019, http://chronicleillinois.com/news/lake-county-news/zion-double-murder-still-resonates-for-prosecutors/.

preponderance of the information. 18 U.S.C. 3593(c) and (d). The jury may then recommend a capital sentence if it unanimously concludes that the aggravating factors sufficiently outweigh all mitigating factors to justify a capital sentence. 18 U.S.C. 3593(e).

Section 3592(c) defines the FDPA's statutory aggravating factors by providing, as relevant here:

> In determining whether a sentence of death is justified for an offense * * * , the jury * * * shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:
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> * * * * *
>
> (2) PREVIOUS CONVICTION OF VIOLENT FELONY INVOLVING FIREARM.—For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.
>
> * * * * *
>
> (4) PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES.—The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

18 U.S.C. 3592(c).

The jury found petitioner guilty of first-degree murder and, after a bifurcated penalty-phase hearing in which petitioner presented no mitigating evidence, found petitioner eligible for a capital sentence and recommended that a capital sentence be imposed. Pet. App. 11a. The district court sentenced petitioner accordingly. *Id.* at 11a-12a.

The government had relied on petitioner's state-court convictions for his February 2010 offenses to satisfy the statutory aggravators in Section 3592(c)(2) and (4). Pet. App. 10a-11a, 24a. Petitioner moved to strike both statutory aggravators on the ground that the Virginia convictions do not qualify as "previous[]" convictions referenced by Section 3592(c)(2) and (4), because his conduct underlying those convictions occurred after Snell's July 2009 murder for which he was charged. The district court denied the motion. *Id.* at 104a-110a. The court explained that Section 3592(c) "speaks in terms of those things that must be considered [by the jury] when the death sentencing hearing is conducted" and that Section 3592(c)(2) and (4)'s aggravating factors are "concerned with the characteristics of the offender as of the time that he is sentenced," such that their reference to "previous[]" convictions refers to "*all* predicate convictions occurring prior to sentencing." *Id.* at 105a-106a (citation omitted).

Petitioner also filed a supplemental motion (C.A. App. 2937-2940) to strike the Section 3592(c)(4)—but not the Section 3592(c)(2)—aggravating factor on the ground that his Virginia convictions do not satisfy Section 3592(c)(4) under the "categorical approach" in *Taylor* v. *United States*, 495 U.S. 575 (1990). The district court denied the motion, reasoning that the Section 3592(c)(2) aggravator requires an "individualized

assessment" of petitioner's actual conduct, not a categorical-approach analysis of the statute of conviction. Pet. App. 98a-99a.

3. The court of appeals affirmed. Pet. App. 1a-93a.

a. The court of appeals first rejected petitioner's challenges to his conviction. Pet. App. 12a-21a. As relevant here, the court determined that it would "not address" petitioner's Fourth Amendment challenge to the government's use of cell-site location information—which petitioner acknowledged was subject to only plain-error review because he had raised it for the first time on appeal (Pet. C.A. Br. 168)—because petitioner recognized that it was foreclosed by circuit precedent. *Id.* at 12a & n.5.

The court of appeals then rejected petitioner's challenges to his sentencing. Pet. App. 21a-61a. First, as relevant here, the court agreed with the district court that petitioner's post-offense conduct can satisfy the statutory aggravators in Section 3592(c)(2) and (4). *Id.* at 22a-40a. Citing precedent, the court explained that "convictions occurring after the murder but before capital sentencing" satisfy those aggravators because they "qualify as 'previous[]' convictions." *Id.* at 29a (brackets in original) (following *United States* v. *Higgs*, 353 F.3d 281, 318 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004)); see *id.* at 27a-34a. The court reasoned that Congress's reference to "previous[]" convictions that can constitute statutory aggravators if the "defendant has previously been convicted" of certain offenses, 18 U.S.C. 3592(c)(2) and (4), must be read in light of Section 3592(c)'s prefatory text, which specifies the relevant timing by "speak[ing] in terms of those things that must be considered when the death sentencing hearing is conducted." Pet. App. 28a (citation omitted). The

court also observed that such aggravating factors are designed not to focus on the specific offense giving rise to the capital case but "on the defendant" in order to "justify the imposition of a more severe sentence on [him] compared to others found guilty of murder." *Id.* at 36a (citation omitted). In a footnote, the authoring judge alone stated that petitioner's contrary arguments had some merit because "one could read" the text as ambiguous and invoke the rule of lenity. *Id.* at 39a n.10; see *id.* at 63a (concurring opinion disagreeing with footnote 10).

Second, the court of appeals determined that a finding by the jury of the statutory aggravator in Section 3592(c)(2) does not require a categorical approach. Pet. App. 40a-55a. The court noted that petitioner on appeal had argued that the categorical approach applied to both Section 3592(c)(2) and (4), but "[b]ecause only one statutory aggravator is necessary to render [petitioner] death eligible," the court "focus[ed] on (c)(2)," *id.* at 40a, 55a, the construction of which petitioner had not challenged in district court. See pp. 9-10, *supra* (district court argument).

The court of appeals found that Section 3592(c)(2)'s text—which references a defendant who has been "'convicted'" of an "'offense * * * involving the use or attempted or threatened use of a firearm (as defined in [18 U.S.C. § 921]) against another person,'" Pet. App. 40a (brackets in original)—and the FDPA's context show that Section 3592(c)(2) requires consideration of the circumstances surrounding the offense, not a categorical analysis of the offense elements. *Id.* at 46a-55a. Section 3592(c)(2)'s "use of the word 'involves,'" the court stated, is "a signal that a fact-based approach [i]s warranted," because Congress passed the FDPA just

after *Taylor* and "*Taylor* itself distinguished" provisions that refer to an offense "using the word 'involves'" as "likely refer[ring] to 'the facts of each defendant's conduct.'" *Id.* at 48a (citation and brackets omitted). The court also explained that, unlike the Armed Career Criminal Act of 1984 (ACCA), where a categorical approach prevails, the "key" in the FDPA "is facts, not elements," as reflected in statutory "procedures aimed at [producing] a specific, individualized, fact-based conclusion" about a "particular defendant['s]" appropriate sentence. *Id.* at 47a-48a. The court additionally observed that the Sixth Amendment concerns that animate the *Taylor* approach are absent under the FDPA, where "Congress intended that the jury not only do the weighing process, but also initially find which statutory aggravating factors apply." *Id.* at 49a-50a. And the court reasoned that the categorical approach, which requires a judge to "'presume' that the prior conviction 'rested upon nothing more than the least of the acts criminalized' under the criminal statute at issue," is out of step with the FDPA process, which must ensure that the "death penalty is reserved 'for the must culpable defendants committing the most serious offenses." *Id.* at 52a (citations omitted).

b. Judge Floyd dissented in relevant part. Pet. App. 64a-93a. In his view, Section 3592(c)(2) and (4) require application of a categorical approach, *id.* at 65a-86a, and the statutory elements of the Virginia offenses for which petitioner was convicted do not match the requirements of those provisions, *id.* at 86a-92a.

**ARGUMENT**

Petitioner contends (Pet. 11-22) that, under 18 U.S.C. 3592(c)(2), courts must use the categorical approach in *Taylor* v. *United States*, 495 U.S. 575 (1990), to

determine whether a previous conviction qualifies as a statutory aggravating factor supporting a capital sentence. Petitioner further contends (Pet. 23-31) that, to constitute statutory aggravators under 18 U.S.C. 3592(c)(2) and (4), prior convictions must predate the capital offense in question. Finally, petitioner seeks (Pet. 33-35) a remand to the court of appeals on his contention, subject to plain-error review, that evidence reflecting historical cell-site location information should have been suppressed at trial. The court of appeals correctly rejected those contentions, and its judgment does not conflict with any decision of this Court or any other court of appeals or state court of last resort. No further review is warranted.

1. Petitioner contends (Pet. 11-22) that finding an aggravating factor under Section 3592(c)(2) requires a categorical approach that would consider only the legal elements of a defendant's prior offense to determine if it qualifies as an aggravating factor. The court of appeals correctly rejected that contention, which petitioner raised for the first time on appeal, determining instead that Section 3592(c)(2) requires the jury to look at the actual factual circumstances of the defendant's prior offense that are proven beyond a reasonable doubt. That decision implicates no division of authority, would be subject only to plain-error review, and does not warrant certiorari.

a. Whether Congress's use of "words such as 'crime,' 'felony,' 'offense,' and the like" in a statutory provision "refer[s] to a generic crime" or "to the specific acts in which an offender engaged on a specific occasion" is a question of statutory interpretation that turns on the statutory text and surrounding context. See *Nijhawan* v. *Holder*, 557 U.S. 29, 33-34 (2009). In *Taylor*, for

instance, the Court held that a sentencing enhancement in Section 924(e) of the ACCA "mandates a formal categorical approach" for determining whether prior convictions constitute qualifying offenses, "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 495 U.S. at 600. *Taylor* rested that determination on textual and contextual grounds: (1) "it comport[ed] with ACCA's text and history"; (2) "it avoid[ed] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries"; and (3) "it avert[ed] 'the practical difficulties and potential unfairness of a factual approach.'" *Descamps* v. *United States*, 570 U.S. 254, 267 (2013) (quoting *Taylor*, 495 U.S. at 601). Similar considerations have formed the basis for the Court's categorical-approach interpretation of certain provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and 18 U.S.C. 16(b) as incorporated into that Act. See, *e.g.*, *Moncrieffe* v. *Holder*, 569 U.S. 184, 188, 200-201 (2013); *Leocal* v. *Ashcroft*, 543 U.S. 1, 7 (2004). But unlike those provisions, Section 3592(c)(2)'s text and statutory context show Congress's intent that Section 3592(c)(2)'s aggravating factor be determined based on the actual factual circumstances of a defendant's prior offense.

i. Under Section 3592(c)(2), a jury establishes the provision's statutory aggravator at the penalty phase of a capital case if it unanimously finds beyond a reasonable doubt (see 18 U.S.C. 3593(c) and (d)) that "the defendant has previously been convicted of a Federal or State [felony] offense * * * involving the use or attempted or threated use of a firearm (as defined in section 921) against another person." 18 U.S.C. 3592(c)(2).

In that context, Congress's textual focus on a defendant who has previously been convicted of an offense "involving" specified conduct indicates that the jury is charged with determining whether the factual circumstances of the offense satisfy Section 3592(c)(2)'s criteria. In *Taylor*, this Court specifically contrasted an ACCA provision that defined the term "'violent felony'" as a crime "that 'has as an element' * * * the use or threat of force"—which warranted a categorical (elements-focused) inquiry—from a "crime that, in a particular case, *involves*" such circumstances. 495 U.S. at 600 (quoting 18 U.S.C. 924(e)(2)(B)(i)) (emphasis added); see *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1255-1256 (2018) (Thomas, J., dissenting) (listing examples of criminal and immigration provisions in which word "involves" reflects a circumstance-specific approach). Congress enacted the FDPA just four years after *Taylor*, and its requirement that the sentencing jury find an offense "*involving* the use or attempted or threatened use of a firearm (as defined in section 921) against another person," 18 U.S.C. 3592(c)(2) (emphasis added), reflects Congress's intent that, unlike the ACCA in *Taylor*, the jury determine the circumstances of a defendant's prior offense when determining if it qualifies as an aggravating factor.

Petitioner contends (Pet. 11-15) that Section 3592(c)'s reference to a "defendant [who] has previously been convicted of a Federal or State offense," 18 U.S.C. 3592(c)(2), signals an intent to use *Taylor's* categorical approach because, petitioner argues, this Court has construed statutes using the term "conviction" in that manner. But this Court's decisions show that reference to a "defendant" who has been "convicted" does not in itself require application of the categorical approach. In

*Nijhawan*, for instance, the Court held that an immigration statute that, like Section 3592(c)(2), turned on whether an individual has been "'*convicted* of'" an "'*offense* that . . . *involves*'" a specified type of conduct, 557 U.S. at 32 (quoting statute) (emphasis added), called for a circumstance-specific, not a categorical, approach with respect to a particular feature of the prior offense of "conviction." *Id.* at 42 (citation omitted); see also *Kawashima* v. *Holder*, 565 U.S. 478, 483-485 (2012) (applying a categorical approach to evaluate a different aspect of such an offense). The Court similarly held in *United States* v. *Hayes*, 555 U.S. 415 (2009), that the criminal prohibition against a person possessing a firearm if he "'has been *convicted* * * * of a misdemeanor crime of domestic violence'" required that the government prove the defendant's "domestic relationship" to the victim of the prior offense beyond a reasonable doubt, but that that relationship need not be a "defining element of the predicate offense." *Id.* at 418, 420 (quoting 18 U.S.C. 922(g)(9)) (emphasis added).[2]

Congress's use of similar language in Section 3592(c)(2) likewise does not require application of a categorical approach particularly because, under such an approach, no federal offense would appear to qualify as such an aggravator, and it similarly appears doubtful that any (or any significant number of) state offenses

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[2] Petitioner relatedly contends (Pet. 16-17) that Congress's use of the word "involving" does not foreclose application of the categorical approach. The government does not disagree, and the court of appeals did not hold otherwise. The court of appeals here correctly recognized that Congress's use of the word "involving" does not alone "resolve the issue," Pet. App. 55a (citation omitted), resting its decision instead on Section 3592(c)(2)'s overall text and context, *id.* at 42a-52a.

would either. To qualify as an aggravator under Section 3592(c)(2) using petitioner's categorical approach, the statute underlying a defendant's prior conviction would be required to have as elements (1) the "use of a firearm (as defined in [18 U.S.C.] 921)" and (2) the use of the firearm "against another person." 18 U.S.C. 3592(c)(2). But federal criminal statutes that involve the use of a firearm generally apply to broader categories of "weapon[s]" and are not textually limited just to firearms. See, *e.g.*, 18 U.S.C. 36(b), 111(b), 112(a), 113(a)(3), 242, 249(a)(1) and (2)(A), 930(c) and (g)(2), 1959(a)(3) and (6), 2113(d), 2114(a), 2118(c)(1), 2231(b), 2261(b)(3), 2262(b)(3); 49 U.S.C. 46503, 46504. Furthermore, the federal criminal provisions that prohibit use or possession of a firearm (or weapon) do not require that a firearm actually be used "against another person," even in contexts in which such a person is injured or killed, but instead simply require some unspecified type of "use" of a firearm.[3] And any statute satisfying those two

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[3] See, *e.g.*, 18 U.S.C. 249(a)(1) and (2)(A) (hate crime of "attempt[] to cause bodily injury" "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device"), 924(c)(1)(A) and (3)(A) ("us[ing] or carr[ying]" a firearm "during and in relation to" a "crime of violence" or drug trafficking crime, where a "crime of violence" includes an offense having as an element the use, or attempted or threated use, of "physical force"), 924(j) ("caus[ing]" the death of a person "through the use of a firearm" in the course of Section 924(c) offense), 930(c) (killing a person in the course of "an attack on a Federal facility involving the use of," or in the course of possessing or causing to be present in a Federal facility, "a firearm or other dangerous weapon"), 1752(a)(4) and (b)(1)(A) (using or carrying "a deadly or dangerous weapon or firearm" "during and in relation to" an "act of physical violence against any person" in the White House or its grounds, the Vice President's residence or grounds, or some other restricted building or grounds). Cf., *e.g.*, 26 U.S.C. 5685(a) and (b); 40 U.S.C. 5104(e)(1)(A), 5109(a), 6134.

requirements would not necessarily incorporate the definition of "firearm" in Section 921, see 18 U.S.C. 3592(c)(2), which applies by its own terms only to 18 U.S.C. 921-931. See 18 U.S.C. 921(a). We have found no federal statute that would satisfy Section 3592(c)(2) under a categorical approach.

Section 3592(c)(2)'s requirement that the firearm be a firearm "as defined in [18 U.S.C.] 921" also would be inapplicable for many state offenses. That federal definition expressly excludes from the term "firearm" any "antique firearm," *i.e.*, a firearm "manufactured in or before 1898," certain "replica[s]" thereof, and "muzzle loading" firearms "designed to use black powder." 18 U.S.C. 921(a)(3) and (16). Even if a state criminal statute were to include as elements the "use of a firearm" "against another person," 18 U.S.C. 3592(c)(2), petitioner's position would call into question whether the state statute would also need to apply only to firearms as defined in Section 921, by excluding all federally defined "antique" firearms. We have found no state criminal provision with the requisite elements that appears to qualify as a Section 3592(c)(2) aggravator under petitioner's approach. And petitioner's failure to identify *any* "Federal or State offense," 18 U.S.C. 3592(c)(2), that would qualify as a Section 3592(c)(2) aggravating factor under the categorical approach underscores the textual error of his position.

This Court has previously declined to apply a categorical approach when doing so would substantially curtail a statute's applicability. See *Nijhawan*, 557 U.S. at 39-40 (concluding that the categorical approach is inapplicable where no "widely applicable federal," or relevant "major" state, statute apparently satisfied that approach and only "three federal statutes" appeared to

apply); *Hayes*, 555 U.S. at 427 (concluding that, based on the "paucity of state and federal statutes" that would satisfy the categorical approach, it is "highly improbable that Congress meant to extend [Section] 922(g)(9)'s firearm-possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense"). The same result follows here, where petitioner's interpretation would exclude most, if not all, of the "Federal or State offense[s]," 18 U.S.C. 3592(c)(2), referenced in the statutory text.

ii. The statutory death-penalty context and the role of the sentencing jury under the FDPA reinforce in multiple ways that Section 3592(c) requires a circumstance-specific approach to evaluating a prior offense as a statutory aggravator under Section 3592(c)(2).

The FDPA makes clear that, in a case tried before a jury, "the jury"—not a judge—"shall consider * * * and *determine* which, if any, [statutory aggravating factors] *exist*." 18 U.S.C. 3592(c) (emphases added). That jury determination must be made "beyond a reasonable doubt" by unanimous vote and be memorialized in "special findings identifying any [statutory] aggravating factor or factors set forth in section 3592 found to exist." 18 U.S.C. 3593(c) and (d). It is that jury determination on the existence of one or more statutory aggravators that makes the defendant eligible for a capital sentence, 18 U.S.C. 3593(d), and only after the jury has found that at least one statutory aggravator exists can the jury proceed to determine whether to recommend a capital sentence by considering whether all (statutory and non-statutory) aggravators "sufficiently outweigh" the mitigating factors, 18 U.S.C. 3593(e).

That FDPA framework makes sound sense when the jury itself considers the factual circumstances of each offense to determine if it qualifies as a statutory aggravator. But under the categorical approach that petitioner advocates, a defendant's prior offense will qualify as a statutory aggravator only if the *elements* of the statutory offense satisfy the statutory language in Section 3592(c)(2), a purely legal determination inappropriate for a jury. See Pet. 20. Under that approach, the only question reserved for the sentencing jury discharging its statutory duty under 18 U.S.C. 3592(c) would be the mere fact of a prior conviction, a task that does not require a jury and is regularly assigned to a judge. See, *e.g.*, 21 U.S.C. 851(b)-(d); *Taylor*, 495 U.S. at 600-601; see also *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). That result would effectively "usurp[]" the jury's "statutorily mandatory function" of determining under Section 3592(c) "which statutory aggravating factors apply." Pet. App. 50a.

Applying the categorical approach would also require the judge to "presume that [a defendant's prior] conviction rested upon nothing more than *the least of the acts criminalized*" by the statute of conviction and ignore the actual "facts underlying the case" when determining whether the prior offense constitutes a statutory aggravator. *Moncrieffe*, 569 U.S. at 190-191 (emphasis added; citation, internal quotation marks, and brackets omitted). That approach is fundamentally at odds with the FDPA's core function, which is to ensure, as the Eighth Amendment requires, that the federal "death penalty is reserved only for the *most culpable* defendants committing the most serious offenses." *Miller* v. *Alabama*, 567 U.S. 460, 476 (2012) (emphasis added). This Court has made clear that each statutory

aggravating factor "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the capital offense]." *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983). But if the Section 3592(c)(2) aggravating factor turned only on the statutorily defined elements of the relevant federal or state offense, as petitioner argues, the result would be that defendants who had previously been convicted for the *same conduct* would be treated *differently* for capital sentencing purposes based on happenstance surrounding how, for example, the prosecuting jurisdiction defined the statute of conviction.

The central role of the sentencing jury under the FDPA also eliminates two central justifications for *Taylor's* categorical approach: "avoid[ing] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries" and "avert[ing] 'the practical difficulties and potential unfairness of a factual approach.'" *Descamps*, 570 U.S. at 267 (quoting *Taylor*, 495 U.S. at 601). No Sixth Amendment concerns exist because, under a circumstance-specific approach, the sentencing jury—not a sentencing judge—must "unanimous[ly]" find the relevant factual circumstances of a prior offense "beyond a reasonable doubt." 18 U.S.C. 3593(c) and (d). Nor does the circumstance-specific approach pose the "practical difficulties" of sentencing courts having to "determine what [the defendant's actual] conduct was." *Taylor*, 495 U.S. at 601. The FDPA specifically requires fact-intensive penalty-phase hearings to determine all "matter[s] relevant to the sentence," 18 U.S.C. 3593(c), in order to ensure that the sentence is appropriate to the specific circumstances of the particular defendant.

A circumstance-specific approach would not unfairly subject a defendant to punishment based on statements in records of prior convictions concerning facts that are prone to error, as petitioner suggests (Pet. 18). The FDPA is designed to bring to the jury all information about such prior offenses, not merely information in paper records, and to test the reliability of that information in the adversarial process. See 18 U.S.C. 3593(c). The very point of the penalty-phase hearing is put before the jury all relevant information about the defendant and his offense so as to permit an accurate sentencing determination. And because the government has the burden of establishing the facts relevant to all aggravating factors "beyond a reasonable doubt," *ibid.*, any uncertainty about the factual context of a prior offense would simply redound to the defendant's benefit.

b. Petitioner ultimately acknowledges (Pet. 33) that the "courts of appeals have not reached disparate answers" on the application of the categorical approach to Section 3592(c)(2). The only other court of appeals to have addressed a similar FDPA question likewise recognized that Section 3592(c)(4) requires a circumstance-specific (not categorical) approach, and this Court denied certiorari in that case on that question. *United States* v. *Rodriguez*, 581 F.3d 775, 804-807 (8th Cir. 2009), cert. denied, 562 U.S. 981 (2010); see Pet. at i, 9-23, *Rodriguez*, *supra* (No. 09-11360). And decisions concerning other statutes in other contexts do not suggest that those courts would reach a different result here.[4]

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[4] It is thus unnecessary to hold the petition in this case pending the disposition of *United States* v. *Davis*, No. 18-431 (argued Apr. 17, 2019), which concerns the application of a categorical approach

This case would also be a poor vehicle for the Court to consider petitioner's categorical-approach contentions regarding Section 3592(c)(2), because that contention would be subject to review only for plain error. In district court, petitioner argued that the aggravating factor in Section 3592(c)(4) required a categorical approach, but he did not raise any categorical-approach argument with respect to the Section 3592(c)(2) aggravator. See pp. 9-10, *supra*. Given the absence of any precedent suggesting that Section 3592(c)(2)'s aggravator —or any similar Section 3592(c) aggravator—demands application of *Taylor's* categorical approach, petitioner cannot carry his burden of showing that any purported error in this regard was "plain," *i.e.*, "clear or obvious, rather than subject to reasonable dispute." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted). Accordingly, even if the categorical-approach question that petitioner presents might warrant review in some case, the Court should await a case in which the issue is properly preserved.

2. Petitioner separately contends (Pet. 23-31) that to constitute a statutory aggravator under 18 U.S.C. 3592(c)(2) and (4), a prior conviction must predate the capital offense in question. The court of appeals correctly rejected that contention because those provisions direct the jury to account for the defendant's prior convictions up to the time of the jury's sentencing determination. Pet. App. 28a. That decision does not conflict

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in 18 U.S.C. 924(c)(3)(B). Indeed, the court below has held that Section 924(c)(3)(B) requires a categorical approach, see *United States* v. *Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc), petition for cert. pending, No. 18-1338 (filed Apr. 24, 2019), even though Section 3592(c)(2) does not.

with any decision of this Court or any other court of appeals and warrants no further review.

Section 3592(c) itself makes clear that a prior conviction can qualify as an aggravating factor so long as it predates the capital sentencing proceeding. The provision's prefatory text instructs that the sentencing jury's role is to consider whether any aggravating factors "exist" (present tense) "[i]n determining whether a sentence of death is justified." 18 U.S.C. 3592(c). An aggravator that "exists" at the time of the sentencing proceeding is thus properly considered, even if it came into existence after the defendant's commission of the capital offense. That conclusion is reinforced by the verb tense within the aggravating-factor provisions at issue here, which ask whether the "defendant *has* previously *been convicted*" of relevant offenses. 18 U.S.C. 3592(c)(2) and (4) (emphases added). Congress's use of the present perfect tense ("has been convicted") reflects that the qualifying action (the defendant's conviction) need simply have occurred before the (present) sentencing proceeding at which the jury determines whether any aggravators "exist." See *Barrett* v. *United States*, 423 U.S. 212, 216-217 (1976) (explaining that Congress's use of "present tense" in conjunction with "the present perfect tense" shows that the latter "denot[es] an act that has been completed" before the former). And contrary to petitioner's suggestion (Pet. 23-24) that such a construction would render the word "previously" redundant, "previously" in fact clarifies that the relevant aggravating convictions include convictions distinct from those in the capital prosecution that itself triggers the FDPA sentencing proceedings. Pet. App. 106a-108a. Section 3592(c)'s text accordingly "speaks in terms of those things that must be considered *when* the death

sentencing hearing is conducted" and thereby encompasses "*all* predicate convictions occurring prior to sentencing." Pet. App. 28a (citation omitted; first emphasis added).

Section 3592(c)'s context confirms that its aggravating factors account for convictions resulting until the capital sentencing proceeding. As previously noted, statutory aggravating factors "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the capital offense]." *Zant*, 462 U.S. at 877. Although some focus on the "characteristics of the capital offense" (Pet. 24), see 18 U.S.C. 3592(c)(1), (5)-(9), (13)-(14), and (16), petitioner is wrong in his view (Pet. 24) that their focus cannot be "the offender." Statutory aggravators may address either characteristics of the capital "crime *or the defendant*." *Tuilaepa* v. *California*, 512 U.S. 967, 973 (1994) (emphasis added). Several provisions of Section 3592(c) thus properly focus on the defendant by addressing his criminal history independently from the capital offense. See, *e.g.*, 18 U.S.C. 3592(c)(2)-(4), (10), (12), and (15). As the court of appeals explained, the aggravators here "do[] not concern matters directly related to the death penalty offense"; they instead are "concerned with the characteristics of the offender as of the time that he is sentenced." Pet. App. 37a (citation omitted; brackets in original).

It makes good sense for Congress to define eligibility for a capital sentence in part on the nature of other offenses for which the defendant has been convicted, because those offenses speak to the defendant's relevant characteristics. A defendant who had been convicted of an entirely unrelated felony offense involving the use of a firearm against another one month before he committed

a capital murder is a defendant for whom more serious punishment may be warranted. But the same holds true where the defendant is convicted for such an unrelated offense one month after he has committed a capital murder. The relative timing of the court convictions does not in itself suggest that the latter defendant has a better character or is less deserving serious punishment. The FDPA accordingly authorizes the government to amend its notice of intent to seek a capital sentence for "good cause," 18 U.S.C. 3593(a), a mechanism consistent with incorporating new information to support an aggravating factor. See, *e.g.*, *United States* v. *Battle*, 173 F.3d 1343, 1347 (11th Cir. 1999) (holding that government showed good cause to amend notice, where, *inter alia*, "[a]t least one of the instances of violence added to the notice occurred after the filing of the original notice and certainly had a bearing on the factor of [the defendant's] future dangerousness"), cert. denied, 529 U.S. 1022 (2000).

Petitioner's reliance (Pet. 24, 29-31) on decisions interpreting the ACCA and state recidivist provisions is misplaced. The text and context of those distinct statutory provisions are materially different from Section 3592(c)'s. Petitioner's reliance (Pet. 25-29) on the rule of lenity, constitutional avoidance, and the remarks of a single Senator in a prior Congress is equally unavailing. The rule of lenity "applies only if, after using the usual tools of statutory construction," "'a grievous ambiguity or uncertainty [exists] in the statute.'" *Robers* v. *United States*, 572 U.S. 639, 646 (2014) (citation omitted). Petitioner does not analyze Section 3592(c)'s relevant text defining the timing of the aggravating-factor inquiry, let alone identify ambiguity, much less grievous ambiguity. The constitutional-avoidance canon is also

inapplicable. No significant Eighth Amendment question is presented by linking a murderer's eligibility for a more severe sentence to his full criminal history as evidenced by convictions incurred by the time of sentencing. See *Zant*, 462 U.S. at 877 (concluding that statutory aggravators must "reasonably justify" a more serious sentence "compared to others found guilty of murder"). Sentencing is routinely conducted in that manner, see Sentencing Guidelines §§ 4A1.1, 4A1.2(a)(1) & comment. (n.1) (calculating criminal history based on each "prior sentence," *i.e.*, each sentence "imposed prior to sentencing on the instant offense"), and petitioner identifies (Pet. 27-28) no case involving an aggravator even arguably resulting from prosecutorial manipulation. Finally, petitioner's reliance (Pet. 28-29) on the isolated 1991 remarks of single Senator who sponsored an earlier bill in an earlier Congress provides no sound basis for disregarding Section 3592(c)'s 1994 text and context.

Petitioner acknowledges (Pet. 33) that the "courts of appeals have not reached disparate answers to the [FDPA] questions presented" in his petition. Although petitioner asserts (Pet. 32) that similar issues can arise in other capital cases, his inability to identify any FDPA decision supporting his interpretation of Section 3592(c)(2) and (4) confirms that no further review is warranted.

3. Petitioner lastly challenges (Pet. 33-35) his conviction in this case on the ground that the government's acquisition of cell-site location information (CSLI) during its investigation violated the Fourth Amendment. Petitioner acknowledges (Pet. 34) that he did not raise this issue in district court and that it is subject to plain-error review. Petitioner nevertheless asks the Court to

grant certiorari, vacate the judgment of the court of appeals, and remand (GVR) in light of the Court's decision *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018). No such action is warranted.

As an initial matter, petitioner relinquished this suppression claim by failing timely to seek suppression of CSLI records in district court. At the time of trial, Rule 12(b)(3)(C) of the Federal Rules of Criminal Procedure provided that "a motion to suppress evidence" "must be raised before trial." Amendments to Federal Rules of Criminal Procedure, 535 U.S. 1157, 1197 (2002). Rule 12(e) further provided that a party "waives any Rule 12(b)(3) defense, objection, or request" that he does not timely raise, but that "the court may grant relief from the waiver" for "good cause." *Id.* at 1198. Under this Court's interpretation of an earlier version of Rule 12(e) (then Rule 12(b)(2)), "a claim once waived pursuant to that Rule may not later be resurrected * * * in the absence of the showing of 'cause' which that Rule requires." *Davis* v. *United States*, 411 U.S. 233, 242 (1973). Because petitioner has never claimed—much less shown—good cause for his omission, Pet. C.A. Br. 167-177; Pet. C.A. Reply Br. 85, his Rule 12 waiver prohibits even plain-error review of his suppression claim. See *United States* v. *Burke*, 633 F.3d 984, 988 (10th Cir.), cert. denied, 563 U.S. 951 (2011).

In any event, "the burden of establishing entitlement to relief for plain error is on the defendant," *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004), and petitioner cannot carry it here. To do so, he must establish that, *inter alia*, (1) the district court erred in admitting CSLI evidence, (2) the error was "plain," and (3) it "affected the outcome of the district court proceedings." *Marcus*, 560 U.S. at 262 (citation omitted). In

this case, it was not error to admit CSLI evidence because suppression was unwarranted under the good-faith exception to the exclusionary rule; any suppression error would not have constituted "plain" error; and the admission of CSLI evidence was harmless.

First, the district court did not err in admitting the CSLI in this case into evidence. The Arlington police acquired over 300 days of historical CSLI for petitioner's cell phone after obtaining a July 2010 state-court order that directed petitioner's cellular carrier to furnish that information pursuant to Section 2703(d) of the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.*, and Va. Code Ann. § 19.2-70.3. See C.A. Doc. 71, at JN20-JN21 (Apr. 25, 2016) (court order). The SCA authorized state (and federal) governmental entities to compel an electronic-communication-service provider to "disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications)" by "obtain[ing] a court order for such disclosure under [Section 2703](d)." 18 U.S.C. 2703(c)(1)(B). Section 2703(d), in turn, provided that the order "shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that * * * the records or other information sought[] are relevant and material to an ongoing criminal investigation," 18 U.S.C. 2703(d). Virginia law similarly authorized the Arlington police to obtain non-content records of electronic communications by court order issued upon a "show[ing] that there is reason to believe the records or other information sought are relevant and material to an ongoing criminal investigation." Va. Code Ann. § 19.2-70.3(A)(3) and (B) (Supp. 2010). The police complied with those statutory requirements. C.A. Doc.

71, at JN22-JN23. And although this Court's subsequent June 2018 decision in *Carpenter*, 138 S. Ct. at 2221-2223, now shows that the relevant CSLI was obtained in violation of the Fourth Amendment notwithstanding such statutory authorization, it does not call into question the admission of the CSLI into evidence. Suppression would have been unwarranted because the police acted in objectively reasonable reliance on the SCA and Virginia statutory law.

The exclusionary rule is a "'judicially created remedy'" designed for the sole purpose of "deter[ing] police misconduct" that violates the Fourth Amendment. *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984) (citation omitted); see *Davis* v. *United States*, 564 U.S. 229, 236-237 (2011). The exclusionary rule "applies only where it 'result[s] in appreciable deterrence,'" *Herring* v. *United States*, 555 U.S. 135, 141 (2009) (quoting *Leon*, 468 U.S. at 909) (brackets in original), and therefore permits "the harsh sanction of exclusion only when [police practices] are deliberate enough to yield 'meaningful' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Davis*, 564 U.S. at 240 (citation and brackets omitted). Thus, in *Illinois* v. *Krull*, 480 U.S. 340 (1987), this Court held that the good-faith exception to suppression applies where "officers act in objectively reasonable reliance upon a *statute* authorizing warrantless administrative searches," even though that statute was later held to violate the Fourth Amendment. *Id.* at 342, 349.

It necessarily follows that the officers here acted reasonably in relying on multiple statutes that authorized the acquisition of records pursuant to an order issued by a neutral judge, and that the good-faith exception to the exclusionary rule therefore applies. See

*Krull*, 480 U.S. at 342, 349; see also *Davis*, 564 U.S. at 246, 239, 241 (suppression is not warranted to "punish the errors of judges") (citation omitted). At the time the CSLI records were obtained, no decision of any court of appeals had suggested, much less held, that the SCA (or Va. Code Ann. § 19.2-70.3) was unconstitutional as applied to CSLI records. See *United States* v. *Graham*, 824 F.3d 421, 428 (4th Cir. 2016) (en banc) (discussing prior decisions), cert. denied, 138 S. Ct. 2700 (2018).

Second, even if the exclusionary rule were deemed to apply, any evidentiary error would not be plain. A plain error is "clear or obvious, rather than subject to reasonable dispute." *Marcus*, 560 U.S. at 262 (citation omitted). In light of *Krull*, *Davis*, and the absence of any contemporaneous precedent calling into question the ability to obtain CSLI under the SCA and Virginia law, any evidentiary error would be, at the very least, subject to reasonable dispute.

Third, petitioner fails to carry his burden of showing that the CSLI evidence altered the outcome at trial. The government adduced overwhelming evidence of petitioner's guilt, including petitioner's detailed confessions to El-Atari, the undisputed presence of his semen on Snell's bedsheet, see pp. 2-4, *supra*, and testimony from a witness that petitioner returned with him to the barracks around 1 a.m. on the night of Snell's murder, C.A. App. 3747-3749. Petitioner's own counsel told the jury that petitioner himself admitted that "he went in the room" and that "[petitioner's] DNA on the bed sheet clearly indicates something sexual in nature happened" "in that room." *Id.* at 3996-3997. Although CSLI evidence also put petitioner in the general vicinity of the barracks where petitioner himself was quartered, no

reasonable probability exists that its admission affected the jury's verdict.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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