No. _____

In the

Supreme Court of the United States

October Term, 2017

_____

RAMIAH JEFFERSON, Petitioner

v

UNITED STATES OF AMERICA, Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HAROLD GUREWITZ (P14468)
GUREWITZ & RABEN, PLC
333 W. FORT STREET, SUITE 1400
DETROIT, MI 48226
(313) 628-4733
Attorney for Petitioner

QUESTIONS PRESENTED

I. In this case, the district court denied Petitioner's pre-trial motion to suppress numerous photos and social media seized from his cell phone in an examination by a government agent carried out pursuant to a search warrant. The photos and social media were used by prosecutors at trial as evidence to prove Petitioner's role in a neighborhood street gang charged as a RICO enterprise. The agent's affidavit in support of his application for the search warrant contained no information that the cell phone had ever been used by Petitioner or by anyone. The district court instead relied on the agent's opinions that Petitioner was a gang member and that gang members use cell phones to communicate about gang criminal operations. A unanimous panel of the Sixth Circuit affirmed.

The lower courts' decisions in this case are contrary to the rules in *Riley v. California*, 134 S Ct 2473, 2484 (2014), which requires law enforcement officers to get a warrant based on probable cause before searching the contents of a cell phone seized incident to an arrest, and *Zurcher v. Stanford Daily*, 436 US 547 (1978), that requires a search warrant to be based on probable cause to believe that "the specific "things" to be searched for and seized are located on the property to which entry is sought;" *Id.* at 556. The lower courts' rulings eliminate the *Zurcher* requirement in the case of a cell phone examination search warrant and permit unlimited searches of cell phones seized incident to any arrest because, as this Court has recognized, a significant majority of the population regularly use cell phones for communications and to store the privacies of their lives. *Riley,* at 2484. These decisions join a division among lower courts on this important issue.

The Question Presented is:

> Whether an application for a search warrant to examine the contents of a cell phone seized incident to an arrest must show more to establish probable cause that evidence of criminal conduct will be found in the cell phone than only an opinion that criminal gang members commonly use cell phones to communicate about their plans?

II. Petitioner was sentenced to a total term of 30 years custody, 25 years for RICO conspiracy and a mandatory consecutive 5 years for possession of a firearm in relation to a crime of violence pursuant to the language of 18 USC §924(c), defining crimes of violence. This Court has recently found the same language, appearing in 18 USC §16, unconstitutionally vague in *Sessions v. Dimaya*, 138 S Ct 1204 (2018).

The Question presented is:

Whether the § 924(c) residual clause is unconstitutionally vague?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Evan Alexander Johnson was a defendant-appellant below and was represented by separate counsel. Ramiah Jefferson, Petitioner is an individual and has no corporate affiliations.

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Appendix:

TABLE OF CITED AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ramiah Jefferson respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit. entered on March 2, 2018. Petitioner Jefferson filed a Petition for Rehearing and Rehearing En Banc. The Petition for Rehearing was denied on April 19, 2018. (Appendix B, Pet. App. 30-31).

OPINIONS BELOW

The Sixth Circuit's Opinion and Order is unpublished but appears at 2018 WL 1137518. A copy of the unpublished Opinion and Order is attached as Appendix A. (Pet. App. 1-29). The Opinion and Order of the district court denying Jefferson's motion to suppress, is unpublished, but appears at 2015 WL 3576035. A copy of the unpublished Opinion and Order is attached as Appendix C. (Pet. App. 32-46).

JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1) and Rule 10(a) of the Supreme Court. The instant Petition is timely filed within 90 days of April 19, 2018, the date the US Court of Appeals denied Petitioner's Petition for Rehearing En Banc.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

US Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 USC §16. Crime of Violence defined

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other 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 USC § 924. Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

> **(i)** be sentenced to a term of imprisonment of not less than 5 years;
>
> **(ii)** if the firearm is brandished, be sentenced to a

term of imprisonment of not less than 7 years; and

18 USC § 1962 Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this

section.

STATEMENT OF THE CASE

1. A federal grand jury in Detroit, Michigan, returned a six count indictment on March 5, 2014, charging nine individuals, including Petitioner, with offenses relating to a Detroit street gang called the Bounty Hunters. The charges include RICO conspiracy, murder, robbery, arson and drug violations as RICO conspiracy overt acts, and weapons possession in furtherance of a crime of violence. (Pet. App. 32-33). Petitioner is named as a defendant in two of those charges: RICO conspiracy, 18 USC §1962(d)(Count 1), and aiding and abetting possession of firearms in connection with a crime of violence charged as the Count One RICO conspiracy, in violation of 18 USC §924(c)(Count Six). (Pet. App. 8-9).

2. Agents arrested Petitioner two weeks later in the living room of a house on Grandville Avenue in Detroit owned by Angelo Sentimille. The agents searched the house at the time of Petitioner's arrest with consent of Mr. Sentimille and seized a cell phone that Petitioner identified as belonging to him. (Pet. App.35). Agents seized ten additional cell phones during contemporaneous arrests of co-defendants at other locations. (Pet. App. 33).

3. ATF Special Agent Nether, who was in charge of the Detroit Bounty Hunter investigation, applied for one omnibus search warrant for authorization to examine the contents of all eleven seized cell phones. (Pet. App. 33). Agent Nether's Affidavit of support includes general allegations about his investigation of the

Bounty Hunters, the Bounty Hunter indictment and the general use of cell phones by gang members. It also includes specific allegations pertaining to Petitioner's cell phone and separately about each of the of the other ten cell phones.

The information in the Agent's affidavit relating generally to all the cell phones falls into four categories: **(1)** a description of Agent Nether's investigative background as the affiant, such as his prior involvement in investigations of drug and firearm offenses, and his opinion based on his training and experience that "members of criminal organizations 'utilize cellular phones and computers to facilitate their activities and store information related to their criminal organization;'" (Pet. App. 33-34); **(2)** a description of the Bounty Hunters, that it derives income from drug and gun sales and robberies, engages shootings, homicides, and other crimes of violence, and like other gangs, uses cell phones, computers and social media to communicate; (Pet. App. 34); **(3)** that Bounty Hunter members, including Petitioner, had already been indicted; (Id); and, **(4)** based on his training and experience, his opinion that "persons involved in gang-related activities utilize cellular telephones to further the objectives of the gang's enterprise" (Id), and that cell phones have the capability to store video images, to function much like computers, and to serve as a means to communicate with co-conspirators by e-mails, text messages or social media. (Id).

As to Petitioner's cell phone, Agent Nether's affidavit states that agents found and seized it at Angelo Sentimille's house where Petitioner said it was his,

and that they found and seized marijuana plants and three firearms during Petitioner's arrest at the Sentimille residence. (Pet. App. 35).

The Affidavit provides no information describing the purchase or use of the cell phone in question by Petitioner or by anyone. Allegations concerning each of the other ten cell phones covered by the application are similarly set out in separate numbered paragraphs. (Pet. App. 45). The warrant was authorized by a federal Magistrate Judge. (Pet. App.36).

4. Following the agent's examination of the eleven cell phones pursuant to warrant, the Government superseded the indictment on March 4, 2015. (Pet. App. 9). The Superseding Indictment added RICO conspiracy overt acts referring to social media posts corresponding to evidence the agent found in the examination of Petitioner's cell phone and the other cell phones: e.g. screen shots Jefferson had taken of posts and messages on social media related to gang activity. (Pet. App. 36). The government offered many of the images found in Petitioner's cell phone as evidence at trial. (Id).

5. Petitioner moved before trial to suppress the results of Agent Nether's cell phone examination. He argued that the agent's affidavit of support lacked facts establishing that the cell phone seized from Petitioner was particularly used in any criminal activity alleged in the affidavit. (Pet. App. 38). The district court rejected Petitioner's argument and concluded that when viewed in a "practical, common sense" light, (Pet. App. 41), it was sufficient that "Agent Nether knew the Bounty

Hunters gang specifically used cell phones to coordinate criminal activity." (Pet. App. 40). The court also concluded that even if the warrant affidavit was lacking in indicia of probable cause, it was not so lacking as "to render official belief in its existence entirely unreasonable." (Pet. App. 41).

6. After a month-long trial, the jury found Petitioner and two co-defendants guilty of RICO conspiracy and possession of a firearm in furtherance of a crime of violence. He was sentenced to a term of 300 months in prison for RICO conspiracy and 60 months for the firearms charge, to be served consecutively. (Pet. App. 2).

The trial court denied Petitioner's motion for acquittal by concluding that there was sufficient evidence to allow the jury to conclude that Petitioner was a member of the Bounty Hunters and a gang leader ("Original General")(Pet. App. 54-55), that he engaged in marijuana transactions (Pet. App. 55), and that he loaned guns to other members who were known to engage in robberies and other violent acts. (Pet. App. 56-57). The trial court's ruling relied on trial evidence that allowed the jury to find Petitioner guilty, including photos and text messages found on Petitioner's cell phone. (Pet. App. 55).

7. The Sixth Circuit also rejected Petitioner's argument on appeal that the cell phone examination search warrant applied for by Agent Nether failed to provide sufficient facts to support a finding of a nexus between alleged criminal acts and the cell phone as the place to be searched. (Pet. App. 15)("Contrary to

Jefferson's argument, the affidavit does" establish a nexus between the place to be searched and the thing to be seized such that there is a substantial basis to believe that the things to be seized will be found in the place searched. *Ellison v. Balinski*, 625 F3d 953, 958 (6th Cir. 2010)"). Although the court cited to no allegation in the affidavit that the seized cell phone had been used by Petitioner or anyone, it relied on the affidavit's connections of Petitioner to allegations of criminal activity, and to the cell phone – that Petitioner said to the agent at the time of his arrest that the phone was his. According to the Court, the affidavit provided a link for "Jefferson to the cell phone and to criminal activity"; (Pet. App. 16)("Jefferson admitted that the phone belonged to him." (Id); "[at]the residence where Jefferson and his phone were found, officers also found a marijuana grow operation and three firearms" (Id); and, Jefferson "had been indicted for RICO conspiracy and possession of a firearm in furtherance of a crime of violence.")(Id). The Court also affirmed on the alternative ground of "good-faith" because the affidavit contained facts "which support a connection between Jefferson and criminal conduct." (Pet. App. 17-18).

8. The Court of Appeals also rejected Petitioner's separate argument that his conviction for violating 18 USC §924(c)(Count Six), raised for the first time on his appeal, should be reversed, because the §924(c)(3)(B) residual clause is unconstitutionally vague, and because RICO conspiracy is not a crime of violence within the meaning of the §924(c)(3)(A) force clause. (Pet. App. 22-23). The Court rejected the former argument based on its decision in *United States v. Taylor,* 814

F3d 340, 375-76 (6th Cir. 2016), holding that the §924(c) residual clause is not unconstitutionally vague. It rejected the later argument on plain error review because in its opinion, there was neither binding case law that answers the question or a circuit split. (Pet. App. 23).

REASON FOR GRANTING THE PETITION

I. THIS CASE PRESENTS THE IMPORTANT AND RECURRING QUESTION ON WHICH LOWER COURTS ARE DIVIDED CONCERNING SEARCH WARRANTS FOR FORENSIC CELL PHONE EXAMINATIONS, WHETHER AN AFFIANT'S OPINION THAT CELL PHONES' ARE COMMONLY USED BY PARTICIPANTS IN A CRIMINAL ENTERPRISE TO COMMUNICATE ABOUT THEIR ACTIVITIES IS SUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR A SEARCH WARRANT TO EXAMINE THE CONTENTS OF A CELL PHONE SEIZED INCIDENT TO AN ARREST.

This Court held in *Riley v. California*, 134 S Ct 2473 (2014), that the answer to the question about what the government must do in order to examine the contents of a cell phone seized by law enforcement officers incident to an arrest, is: "get a warrant." *Id* at 2495. The rationale for that seemingly straight forward rule recognizes the uniquely integral role that modern cell phones have come to play in the lives of an overwhelming majority of Americans. As explained in *Riley*, cell phones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 2485. The vast amounts of information they store can allow a reconstruction of the record of one's private life; *Id.* at 2490 ("a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house") *Id.* at 2491; that is, they "are not just another technological convenience

. . . they hold for many Americans "the privacies of life." *Id.* at 2494-95 .

What divides lower courts in the use of this easily stated rule, however, is application of one of the basic principles of search and seizure law, that "a warrant to search for recoverable items is reasonable only when there is "probable cause" to believe that they will be uncovered in a particular [place]." *Zurcher v. Stanford Daily*, 436 US 547, 555 (1978); *Illinois v. Gates*, 462 US 213, 238 (1983). According to *Zurcher*, "The critical element in a reasonable search is not that the owner of the property is suspected of a crime but that there is reasonable cause to believe that the specific "things"' to be searched for and seized are located on the property to which entry is sought." 436 US at 556. In this case, however, the lower courts relied on the affiant's connection of Petitioner to criminal or gang activity – that he had been charged in an indictment – and on the affiant's opinions that cell phones are commonly used in gang conduct to communicate or coordinate activities, in order to attempt to satisfy the *Zurcher* nexus requirement.

In Petitioner's case, the lower courts found probable cause that evidence of criminal conduct would be found in an examination of his phone based on (1) allegations that Petitioner had a cell phone in his possession that he admitted was his when he was arrested on an indictment, and on (2) Agent Nether's opinions that "gang members' use [] cell phones." (Pet. App. 16)("Agent Nether's affidavit specifically linked Jefferson to the cell phone and to criminal gang activity.") (Pet. App. 17).

The lower courts' rationale in Petitioner's case is much the same as the government's proposal for examination of cell phone contents seized incident to arrest without a search warrant that was rejected by this Court in *Riley*. ("The United States first proposes that the *Gant* standard be imported from the vehicle context, allowing a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest.") *Riley*, *supra*, 134 S Ct at 2492. *Riley* rejected that approach because it had no limit. The lower courts in Petitioner's case take a view analogous to the government's proposal in *Riley*, that probable cause to support a cell phone examination search warrant is reasonably supported by opinions that cell phones are used to communicate about gang activity, without any facts to show that the cell phone to be examined was itself ever used in any criminal activity.

This Court rejected the government proposal in *Riley* to search a cell phone without a warrant whenever it is *reasonable* to believe a phone contains evidence of criminal activity because it "would prove no practical limit at all when it comes to cell phone searches." *Id.* at 2492.

> It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone. Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone. An individual pulled over for reckless driving might have evidence on the phone whether he was texting while driving. The sources of potential pertinent information are virtually unlimited , so applying the *Gant* standard to cell phones would in effect

> give "police officers unbridled discretion to rummage at will among a persons' private effects." *supra.*

The lower courts' holdings in Petitioner's case reinvigorates the government's open-ended approach to cell phone searches it unsuccessfully argued for in *Riley*. The lower courts in this case allow probable cause for a search warrant to be established without facts whenever an opinion about cell phone common usage would make it reasonable to believe that evidence of criminal conduct would be found in its examination. Replacing *Zurcher's* standard that requires facts with one that substitutes opinions about cell phone usage when, as this Court has recognized in *Riley*, it can be readily opined in most circumstances that individuals use cell phones to communicate about their daily activities – criminal or legitimate – proves no practical limit for cell phone examination search warrants. This particularly becomes the case when a cell phone has been seized incident to an arrest, whether the arrest is on a traffic stop or on an arrest warrant for a serious crime. If the lower courts' holdings control, then the *Riley* search warrant requirement becomes only a formality when a search warrant is requested for a cell phone seized incident to an arrest.

The lower courts' alternative suggestions in Petitioner's case that good faith applies depends on the same rationale – that opinions support probable cause (Pet. App. 17-18), and it fails from the same fundamental defect – that opinions of cell phone usage do not provide a substantial basis on which to find probable cause. Good faith cannot be found from "a warrant based on an affidavit that does not

"provide the magistrate with a substantial basis for determining the existence of probable cause." *United States v. Leon*, 468 US 897, 915 (1984)(That is, deference should not be accorded to a warrant that is invalid because it "reflect[s] an improper analysis of the totality of the circumstances."*) Id.* Where a search warrant affidavit presents no more than opinions about how cell phones are used or what their contents are generally, when the individual in possession of the phone at the time it was seized was charged with criminal offenses, exclusion serves the purpose of deterrence because the totality of circumstances do no provide a substantial basis for a finding of probable cause. *United States v. Griffith*, 867 F3d 1265, 1278 (DC Cir. 2017)(Good faith is not shown by an affidavit which "observed only that gang members often stay in contact about their activities.").

Other courts have reached different conclusions on the issue presented in Petitioner's case. Lower courts are divided on this issue.

Courts that require phone-specific facts

In *Griffith*, 867 F3d at 1271-74, the court invalidated a warrant to search the defendant's residence and cell phone (and refused to apply the good faith exception) where the search warrant affidavit only established the defendant's involvement in a crime, with no other representation other than the officer's opinion based on his experience to establish that the cell phone seized at the time of the defendant's arrest would contain incriminating information. *Id*. at 1274 ("because a cell phone, unlike drugs or other contraband, is not inherently illegal, there must be reason to

believe that a phone may contain evidence of the crime.").

A similar result was reached in *United States v. Mathis*, 767 F3d 1264, 1276 (11th Cir. 2014)(holding that the required "connection between defendant and property to be searched" was established when the warrant application to search a cell phone included evidence that defendant and alleged victim had communicated via cell phone); *Commonwealth v. White*, 59 NE 3d 369, 376-78 (Mass. 2016) (finding no probable cause nexus to a cell phone when the affidavit only stated that defendant was suspected of a crime, owned a cell phone, and such crimes often involve cell phone coordination); *United States v. Ramirez*, 180 F Supp 3d 491, 493-94 (WD Ky 2016)(holding that the affiant's "boilerplate" statement that 'individuals may keep text messages or other electronic information stored in their cell phones which may relate them to the crime" was insufficient to establish a probable cause nexus, and rejecting the theory that drug conspiracy crimes, which typically involve phone coordination, always establish nexus).

See also: *United States v. Nieto,* 76 MJ 101 (C.A.A.F. 2017)("Therefore, in this age of "smart phones," SA Sandefur's generalized profile about how service members "normally" store images was technologically outdated and was of little value in making a probable cause determination."); *United States v. Morales*, 77 MJ 567 (A. Ct. Crim. App. 2017).

Courts that do not require phone specific facts

In addition to Petitioner' s case, the following circuit decisions have affirmed cell phone examination search warrants based on affidavits which rely on opinions that drug dealers commonly use cell phones to communicate: *United States v. Barron-Soto*, 820 F3d 409, 413, 416 (11th Cir. 2016)("people involved in the distribution and sale of drugs . . . commonly communicate with customers or sources of supply through the ext or 'SMS' system of their cellular phones."); *United States v. Lowe*, 676 Fed Appx 728, 733 (9th Cir. 2017). *See also*: *Stevenson v. State*, 168 A3d 967, 978 (Md. 2017)(holding generalized officer experience that cell phones sometimes contain evidence of crimes, together with *Riley's* recognition that cell phones contain "a digital record of nearly every aspect of their [owner's] lives," establishes a probable cause nexus to issue a search warrant for a cell phone.)

Guidance from this Court is necessary to resolve these conflicts.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION ON WHICH LOWER COURTS ARE DIVIDED CONCERNING WHETHER THE § 924(C) RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE.

This case presents much the same question decided by this Court in *Sessions v. Dimaya*, 138 S Ct 1204 (2018), whether virtually the same language that appears in the §16(b) residual clause, examined in *Dimaya*, is also unconstitutionally vague as it appears in another statute, the one at issue in this case, 18 USC § 924(c)(3)(B).

Petitioner was sentenced by the district court to a total term of 30 years. Five years of that term is based on Petitioner's conviction for a violation of 18 USC

§924(c) (Use and Carrying of a Firearm During and in Relation to a Crime of Violence; Aiding and Abetting), charged in Count Six of the Indictment. The crime of violence predicate offense alleged in Count Six is the RICO conspiracy charged in Count One of the indictment in violation of 18 USC §1962(d). (Pet. App. 24).

On appeal, the Sixth Circuit rejected Jefferson's argument that the 18 USC §924(c)(3)(B) residual clause is unconstitutionally vague, and that RICO conspiracy is not a crime of violence within the meaning of §924(c) force clause. (Pet. App. 22-23). According to the court's Opinion, the holding in *Johnson v. United States*, 135 S Ct 2551 (2015), that the residual clause of 18 USC §924(e)(2)(B) is unconstitutionally vague, does not control under §924(c), as applied to Petitioner, because the Sixth Circuit decided the validity of the §924(c)(3)(B) residual clause in *United States v. Taylor*, 814 F3d 340, 376-79 (6th Cir. 2016). It also rejected Jefferson's RICO conspiracy argument because, it finds, there is no binding Sixth Circuit case law that controls, and because two other circuits have ruled that RICO conspiracy is a crime of violence.

Petitioner has also argued in the Court of Appeals that his conviction for RICO conspiracy cannot constitute a crime of violence under the elements clause of § 924(c) because the offense requires only proof of an agreement. Proof of an overt act is not required. *United States v. Saadey,* 393 F3d 669, 676 (6th Cir. 2005)("In order to obtain a conviction for RICO conspiracy, the government does not need to prove that the defendant committed or agreed to commit to two predicate acts

himself; or even that any overt acts have been committed."); *Salinas v. United States*, 522 US 52, 63 (1997)("There is no requirement of some overt act or specific act in the statute before us.").

Based on this Court's very recent decision in *Sessions v. Dimaya*, 138 S Ct 1204 (2018), holding that the language of the §16(b) residual clause, materially identical to the language of the §924(c) residual clause is impermissibly vague, this Court should now hold that §924(c)(3)(B), is similarly impermissibly vague, reverse the decision of the Court of Appeals, and remand Petitioner's case for resentencing.

In *Dimaya*, this Court affirmatively answers the question whether the "crime of violence" clause of the Immigration and Nationality Act (INA), 8 USC §1101(a)(43)(F) ("a crime of violence (as defined in section 16 of Title 18, but including a purely political offense) for which the term of imprisonment at least one year"), is impermissibly vague. *Id.* at 24. The INA adopts the definition of the term "crime of violence" as it appears in the criminal code at 18 USC §16. According to the INA, a crime of violence, which has a term of imprisonment of least one year, is an "aggravated felony" and may render an alien deportable.

18 USC §16 has two parts, referred to as the elements clause and the residual clause:

> (a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other 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.

This Court in *Dimaya*, follows its earlier decision in *Johnson* to resolve the question before it concerning §16(b):

> *Johnson* tells us how to resolve this case. That decision held that "[t]wo features of [ACCA's] residual clause conspire[d] to make it unconstitutionally vague." 576 US __, 135 S Ct at 2557. Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily "devolv[ed] into guesswork and intuition," invited arbitrary enforcement, and failed to provide fair notice. *Id.*, at __, 135 S Ct at 2559. Section 16(b) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes any real difference. So just like ACCA's residual clause, § 16(b) "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*, at __, 135 S Ct at 2558. We accordingly affirm the judgment of the Court of Appeals.

Id., 138 S Ct at 1223.

This Court should now follow its decision in *Dimaya* to conclude that the residual clause in §924(c) is similarly impermissibly vague. The language in §16(b) is materially the same as that in §924(c) ("§16 is replicated in the definition of "crime of violence" applicable to §924(c)") *Id.,* at 1241, (Roberts, J. dissenting).

Lower courts, contrary to the Sixth Circuit decision in *Taylor*, 84 F3d at 376-79, have held that the §924(c)(3)(B) residual clause is unconstitutionally vague. *United States v. Cardena*, 842 F3d 959, 996 (7th Cir. 2016) cert. den., 138 S Ct 247 (2017); *United States v. Baires-Reyes*, 191 F Supp 3d 1046, 1053 (ND Cal. 2016); *United States v. Smith*, 215 F Supp 3d 1026, 1035 (D Nev. 2016). Other courts have

agreed with the outcome in *Taylor*: *United States v. Hill*, 832 F3d 136, 145-49 (2nd Cir, 2016); *United States v. Prickett*, 839 F3d 697, 699 (8th Cir, 2016).

When *Dimaya v. Lynch*, 803 F3d 1110 (9th Cir. 2015) was binding law in the Ninth Circuit, before this Court affirmed in *Sessions v. Dimaya*, district courts in the Ninth Circuit were split on whether the §16(b) holding extended to §924(c)(3)(B). *Compare United States v. Baires-Reyes*, 191 F Supp 3d 1046, 1053 (ND Cal. 2016)(holding §924(c)(3)(B) unconstitutional in light of *Dimaya* and *Johnson*); *United States v. Smith*, 215 F Supp 3d 1026, 1035 (D Nev. 2016)(same); *United States v. Lattanaphom,* 159 F Supp 3d 1157, 1164 (ED Cal. 2016)(same); *United States v. Bell*, 158 F Supp 3d 906, 922-23 (ND Cal. 2016)(same); with *United States v. Tavarez-Alvarez*, No. 10-CR-3510-BTM-5, 2017 WL 2972460 at *4 (SD Cal. July 11, 2017)(holding that § 924(c)(3)(B) remains constitutional after *Dimaya* and *Johnson*.

A similar split will likely form in the wake of *Sessions* v. *Dimaya, supra.* Recently, a panel of the Tenth Circuit concluded that "the §924(c)(3)(B) provision defining a 'crime of violence' for the purpose of his conviction, is unconstitutionally vague." *United States v. Salas*, 889 F3d 681 (10th Cir, 2018). Although the court in *Ovalle v. United States*, 861 F3d 1257, 1262-65 (11th Cir, 2017) initially followed *Taylor*, *Hill* and *Prickett*, it granted rehearing en banc on May 18, 2018 at 889 F3d 1259.

This Court should take this opportunity to resolve this issue remaining after

its Opinion in *Sessions v. Dimaya*, or, in the alternative remand for re-sentencing in light of that Opinion.

CONCLUSION

Petitioner respectfully requests this Court issue a Writ of Certiorari to the Sixth Circuit Court of Appeals to review its judgment in this case, or, in the alternative, grant this petition, vacate Petitioner's sentence for violation of 18 USC §924(c), and remand for resentencing.

Respectfully submitted,

GUREWITZ & RABEN, PLC

By: /s/Harold Gurewitz (P14468)
Attorney for Petitioner Jefferson
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 628-4733

Date: July 17, 2018