No. 18-5306

In the

**Supreme Court of the United States**

**October Term, 2018**

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**RAMIAH JEFFERSON, Petitioner**

**v**

**UNITED STATES OF AMERICA, Respondent**

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

# REPLY TO MEMORANDUM OF THE UNITED STATES

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Petitioner has asked this Court to review the pressing question which has divided circuits in the wake of *Sessions v. Dimaya*, 138 S Ct 1204; 200 LEd 2d 549 (2018), whether the 18 USC §924(c)(3)(B) residual clause is unconstitutionally vague. (Pet. 15-20). This Court's guidance is required to resolve these significant differences. His Petition provides a compelling basis on which to resolve them. The Response suggestion that Petitioner's case should be held pending resolution of its petitions in *Davis* and *Salas* is misplaced for the reasons discussed below.

1. Several circuits have rejected vagueness challenges to the §924(c)(3)(B) residual clause both before and after this Court's decision in *Dimaya*. Before *Dimaya*, the Sixth Circuit in *United States v. Taylor*, 814 F3d 340 (6th Cir. 2016), concluded that the language of §924(c)(3)(B) is considerably narrower than the §16(b) residual clause this Court found unconstitutionally vague in *Johnson v. United States*, __US__, 135 S Ct 2551; 192 LEd 2d 569 (2015). The Sixth Circuit then held in Petitioner's case, that its decision in *Taylor* controlled the outcome of his challenge to the constitutionality of §924(c)(3)(B) on vagueness grounds. (Pet. App. 22)("A panel of this Court may not overturn binding precedent.")

The defendant in *Taylor* had been sentenced to death on two convictions for violating §924(j) "which authorizes the death penalty where a person violates §924(j) and causes the death of another person." 814 F3d at 376. The court in *Taylor* first acknowledged that the language of the §924(c)(3)(B) residual clause defining a crime of violence "is not materially distinguishable from the ACCA residual clause, which the Supreme Court invalidated in *Johnson* as unconstitutionally vague." *Id.*

But it went on to identify four distinguishing factors: (1) the statutory language of §924(c)(3)(B) is considerably narrower; (2) unlike §924(c)(3)(B), the "ACCA residual clause is linked to a confusing set of examples," *Id.* at 376; (3) the Supreme Court reached its conclusion in *Johnson* "after struggling mightily for nine years to come up with a coherent solution;" and, (4) *Johnson* clearly limits its holding to a particular set of circumstances, only some of which apply to §924(c)(3)(B). *Id*.

The Sixth Circuit has since relied on its *Taylor* decision to reject another vagueness challenge to the §924(c)(3)(B) residual clause, but this time, after *Dimaya* and after its decision in *Shuti v. Lynch*, 828 F3d 440 (6th Cir. 2016) in which holds that the definition of crime of violence in the Immigration and Nationality Act is unconstitutionally vague. It now squarely acknowledges that *Taylor* "stands on uncertain ground." *United States v. Richardson*, __F3d__ (6th Cir. 2018), 2018 WL 4924782 ("[W]e leave the continuing viability of *Taylor* to another day"). *Id.* at *5. On this basis, however, Petitioner's outcome is controlled by the holding of the Sixth Circuit in *Taylor, supra*, that the §924(c)(3)(B) residual clause is narrower than the §16(b) residual clause and is not unconstitutionally vague.

Prior to *Dimaya*, the Seventh Circuit, reached a conclusion opposite to the Sixth Circuit in *Taylor*. *United States v. Cardena*, 842 F3d 959, 996 (7th Cir. 2016) In *Cardena*, the Seventh Circuit found that the §924(c)(3)(B) residual clause was "the same residual clause contained in [§16(b)]" and accordingly held that "§924 (c)(3)(B) is also unconstitutionally vague." *Salas*, *Id* at 685.

After *Dimaya,* three other circuits rejected vagueness challenges to the §924

(c)(3)(B) residual clause, but on a "conduct-specific" approach to §924( c)(3)(B), *United States v. Barrett*, 903 F3d 166 (2nd Cir. 2018); *United States v. Douglas*, __F3d__ (1st Cir. 2018), 2018 WL 4941132; and, *United States v. Ovalles*, __F3d__ (11th Cir. 2018), 2018 WL 4830079 (en banc), (William Pryor, Ed Carnes, Tjoflat, Newsom and Branch, Circuit Judges, concurring and advising of a need for Congressional action), *Id.* at *18-37, (Jill Pryor, Wilson, Martin and Jordan, Circuit Judges, dissenting), at *37-55, (a textual analysis of §924(c)(3)(B) cannot plausibly "support a conduct based approach rather than a categorical one"). *Id.* at *45.

Three other circuits have followed *Dimaya's* conclusion that the language of the §16(b) residual clause is unconstitutionally vague, to hold that the almost identical language in the §924(c)(3)(B) residual clause is also unconstitutionally vague. *United States v. Salas*, 889 F3d 681, 686 (10th Cir. 2018)("Ultimately, §924 (c)(3)(B) possess the same features as the ACCA's residual clause and §16(b) that combine to produce "more unpredictability and arbitrariness than the Due Process Clause tolerates"); *United States v. Davis*, 903 F3d 483 (5th Cir. 2018)("Because the language of the residual clause here and that in §16(b) are identical, this court lacks the ability to say that under the categorical approach, the outcome would not be the same."); *United States v. Eshetu*, 898 F3d 36, 37 (DC Cir. 2018).

2. Petitioner's appeal follows his jury conviction on two counts, aiding and abetting possession of a firearm in relation to a crime of violence in violation of §924(c), and RICO conspiracy in violation of 18 USC §1962(d). It was the prosecution's theory at Petitioner's trial that he was responsible for the RICO

conspiracy as a crime of violence by exercising leadership over the street gang that was the RICO enterprise, not by engaging in any violent act himself, and by his sales of marijuana. (Pet. App. 52-57). Based on this record, Petitioner argued that his RICO conspiracy conviction could only qualify as a "crime of violence" under the §924(c) residual clause. (Pet. 17-20). Respondent does not dispute this contention. Resp. 2. *See also*, *United States v. Davis*, 903 F.3d 483, 482 (5th Cir. 2018) (Government concedes that Hobbs Act conspiracy could only be considered under the residual clause).

The Sixth Circuit entered its Opinion in Petitioner's case on March 2, 2018, affirming Petitioner's conviction and rejecting his unconstitutional vagueness argument. (Pet. App. 1-28). It held that *Taylor* is binding precedent and "forecloses Jefferson's argument." 726 Fed App'x at 407. (Pet App. 21-23). It also rejected Petitioner's argument that RICO conspiracy is not a crime of violence under the §924(c) elements clause, a position with the conclusion in *Davis* that the Hobbs Act conspiracy charged in that case is not a crime of violence under the elements clause and the Government's concession in that case to that effect. (Pet. App. 22).

3. The fact that the Sixth Circuit's Opinion in Petitioner's case was not selected for publication is not of significance to consideration of his Petition as is suggested in the Response. (Resp. Mem. 3). There is no steadfast rule disfavoring unpublished opinions. 16 AA Wright, et. al., *Federal Practice and Procedure and Related Matters*, § 3978.10 (4th Ed. 2008). To the contrary, non-publication should not serve as a means to prevent review. "An unpublished opinion may have a

lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion." *Smith v. United States*, 502 US 1017 (199)(Blackmun, J., dissenting from denial of certiorari on other grounds)(N.1). *See also*, Songer, Criteria for Publication of Opinions in the U.S. Court of Appeals: Formal Rules Versus Empirical Reality, 1990, 73 Judicature 307, 313. Neither is the plain error standard of review on appeal of any significance to the merits of his Petition. *Salas*, *Id* at 686-687.

4. Application of the residual clause is surely an important question to the courts as evidenced by the volume of opinions addressing its constitutional efficacy since *Dimaya* and before. But these expositions of the law are more than "a purely academic exercise," *Ovalles*, Jill Pryor, Circuit Judge dissenting, *Id.* at *38, because [p]eople are serving sentences of five years to life under §924(c)(3)(B) will get no relief from this Court though the Supreme Court held that an *identically-worded statute* was so vague that its enforcement violated the right to due process under law." Id.

Respectfully submitted,

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