No. 18-7835

IN THE SUPREME COURT OF THE UNITED STATES

IOURI MIKHEL, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a conviction for hostage-taking by a foreign national in the United States, in violation of 18 U.S.C. 1203, requires proof of a nexus to international terrorism.

2. Whether Congress had the authority under the U.S. Constitution to enact Section 1203.

3. Whether the court of appeals erred in determining that petitioner's motion seeking the recusal of the district judge only during the trial's penalty phase, based on a no-longer active circumstance that the judge had disclosed without objection several weeks earlier during the trial's guilt phase, was untimely and did not require the judge to step aside.

4. Whether, on the facts of this case, the district court erred in failing to order a hearing sua sponte to determine whether petitioner was competent to stand trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 889 F.3d 1003.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2018. A petition for rehearing was denied on September 7, 2018 (Pet. App. 58a). On November 13, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 4, 2019, 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 Central District of California, petitioner was convicted on one count of conspiracy to take hostages resulting in death, in violation of 18 U.S.C. 1203; three counts of hostage taking resulting in death, in violation of 18 U.S.C. 1203; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and one count of conspiracy to escape from custody, in violation of 18 U.S.C. 371. Judgment 1; Pet. App. 20a. After the jury recommended that petitioner be sentenced to death, the district court imposed a capital sentence on each of the Section 1203 counts and a sentence of 240 months of imprisonment on the remaining counts. Judgment 1-2; Pet. App. 20a. The court of appeals affirmed. Pet. App. 1a-57a.

1. In late 2001 and early 2002, petitioner (a Russian national) and co-defendant Jurijus Kadamovas (a Lithuanian national) abducted five people in Southern California, held them captive, murdered them, and dumped their bodies in a reservoir outside Yosemite National Park. Pet. App. 17a-19a.

a. In October 2001, petitioner, Kadamovas, and Ainar Altmanis hatched a plan to kidnap real-estate developer Meyer Muscatel. Pet. App. 17a. Petitioner, posing as a businessman, asked Muscatel to view a property with him, and when Muscatel

agreed, they drove together to the property, which was actually petitioner's house. Ibid. When Muscatel entered, Kadamovas and Altmanis grabbed him, handcuffed his arms behind his back, and bound his legs with plastic ties. Ibid.

Petitioner then duct-taped Muscatel's eyes and pistol-whipped his head, drawing blood. Pet. App. 17a. Petitioner and Kadamovas took Muscatel's wallet and credit cards, quizzed him about his finances, and unsuccessfully tried to withdraw money from his bank account. Ibid. When petitioner and Kadamovas realized that they would not get money from Muscatel, they injected him with Dimedrol (an antihistamine with sedative properties) and held him to the ground. Ibid. Petitioner then placed a plastic bag over Muscatel's head and pinched his nose shut until Muscatel suffocated and died. Ibid. Petitioner and Kadamovas loaded Muscatel's body into Kadamovas's van and drove to the New Melones Reservoir outside Yosemite National Park, where they tossed Muscatel's body off the Parrots Ferry Bridge and into the reservoir. Ibid.

b. Petitioner and Kadamovas next came up with a scheme to kidnap wealthy Russian businessman George Safiev. Pet. App. 17a. The first step was to abduct Safiev's financial advisor, Rita Pekler, and use her as bait. Ibid. In December 2001, Kadamovas pretended to be interested in Pekler's advice on a real-estate transaction and convinced her to drive him to a property that he claimed to be interested in buying, but which was actually his own home. Ibid. When Pekler arrived at the house, petitioner

restrained her and told her that, if she brought Safiev to them, they would inject her with Dimedrol or get her drunk with vodka and then leave her unharmed in a motel. Ibid.

Pekler initially resisted, explaining that she was pregnant and feared that the drugs or alcohol would harm the baby, but ultimately relented and called Safiev. Pet. App. 17a. After Safiev told Pekler that he was too busy to meet, petitioner and Kadamovas "decided Pekler had outlived her usefulness," and they injected her with Dimedrol, strangled her, and threw her body off the Parrotts Ferry Bridge. Ibid. Petitioner later told Altmanis that Pekler had been difficult to kill, "like a snake," because "she was holding [on] for her life." Gov't C.A. E.R. 1462.

c. Later that month, at the suggestion of another co-conspirator, petitioner and Kadamovas targeted automobile-shop owner Alexander Umansky. Pet. App. 17a. Posing as a customer, petitioner lured Umansky to Kadamovas's house, where Kadamovas seated Umansky in a chair, handcuffed him, and bound his legs with plastic ties. Id. at 17a-18a. Petitioner and Kadamovas took Umansky's wallet, questioned him about his finances, and used his debit card to withdraw money from an ATM. Id. at 18a. They kept Umansky trapped in Kadamovas's home for three days, forcing him to call his brother and beg for money to secure his release. Ibid. Petitioner and Kadamovas also sent Umansky's family a ransom note demanding nearly $235,000; Umansky's family wired part of the ransom to a bank account in the United Arab Emirates that

petitioner had designated and later paid the rest after receiving a call threatening harm to other family members. Ibid.; Gov't C.A. E.R. 1544. The ransom money was laundered abroad and then deposited in accounts held by petitioner and Kadamovas. Pet. App. 18a.

When petitioner and Kadamovas "decided they no longer needed Umansky alive," petitioner shoved plastic bags in Umansky's mouth, duct-taped his mouth, and placed a bag over his head while Kadamovas held him down and pinched his nose shut. Pet. App. 18a. When those efforts failed to kill Umansky, petitioner and Altmanis strangled Umansky from behind with a rope. Ibid. Petitioner, Kadamovas, and Altmanis then loaded Umansky's body into Kadamovas's van and, after a stop for dinner with petitioner's girlfriend, drove to the New Melones Reservoir and threw Umansky's body off the Parrotts Ferry Bridge. Ibid.

d. In January 2002, petitioner and Kadamovas devised a new plan for trapping Russian businessman Safiev, this time through his business partner, Nick Kharabadze. Pet. App. 18a. After Kadamovas's girlfriend persuaded Kharabadze to come to a store that petitioner and Kadamovas owned, petitioner handcuffed Kharabadze to a chair, and petitioner and Kadamovas forced Kharabadze to call Safiev and lure him there. Ibid.; Gov't C.A. E.R. 1614-1616. When Safiev entered the store, petitioner handcuffed him, and petitioner and Kadamovas then transported both Safiev and Kharabadze to Kadamovas's house, where they remained

imprisoned for four days. Pet. App. 18a. During that time, petitioner and Kadamovas forced Safiev to contact a business partner abroad and beg him to transfer $940,000 to a foreign account. Ibid. In addition, Kadamovas recorded Safiev's voice to enable the conspirators to extort more money after Safiev was dead. Ibid.

After petitioner confirmed receipt of the $940,000, petitioner, Kadamovas, and other co-conspirators plied Kharabadze and Safiev with alcohol and drove them in separate cars to the New Melones Reservoir. Pet. App. 18a. The conspirators killed Safiev first, and petitioner later stated that Safiev, like Pekler, had been difficult to kill because he was "strong as a snake." Id. at 18a-19a. After the conspirators threw Safiev's body off the Stevenot Bridge and into the reservoir, petitioner killed Kharabadze by placing a plastic bag over his head and tightening a plastic tie around his throat. Id. at 18a. As they had done with Safiev, the conspirators threw Kharabadze's body off the Stevenot Bridge and into the reservoir. Ibid.

e. Over the course of their activities, petitioner and Kadamovas obtained more than $1 million in ransom money. Pet. App. 19a. At one point, Kadamovas told a co-conspirator that he planned to continue abducting people and throwing their bodies into the reservoir until he had $50 million, even if it meant piling bodies up to the surface of the water. Id. at 18a.

2. After federal investigators uncovered evidence of petitioner's and Kadamovas's involvement in the crimes described above, petitioner, Kadamovas, and a third co-conspirator were arrested and jailed in the same detention facility in Los Angeles. Pet. App. 19a. They promptly began trying to escape. Ibid.

Petitioner devised an escape plan that called for the three to bore holes through their cell walls to reach an adjacent stairwell, where they would use a hydraulic pump to push open a window's bars, climb through the window, and rappel to the ground. Pet. App. 19a. "In accordance with the plan, [petitioner] successfully smuggled a veritable hardware store into his cell, including hacksaw blades, wrenches, screwdrivers, fishing line, paint, work gloves, bolt cutters, and a camcorder." Ibid. Petitioner attempted to recruit another inmate to join the escape conspiracy, warning him that they would have to kill any guards they encountered during the escape. Id. at 20a. That inmate informed jail officials about the plan. Ibid.

After petitioner's first failed escape attempt, he was transferred to a high-security section of a different detention center and isolated from other inmates. Pet. App. 20a. While there, petitioner devised a "detailed" and "very feasible" escape plan and promised $1 million to an alleged member of the Mexican Mafia in exchange for assistance. Ibid. In January 2004, shortly after his second escape plan was discovered, petitioner attempted suicide by cutting an artery in his ankle. Id. at 33a; Joint C.A.

E.R. 2233. Petitioner later explained that this attempt was an impulsive, unplanned act that he committed at a time when he was feeling hopeless about his case. Pet. App. 33a.

Following that incident, petitioner was transferred to a different detention center, where he received treatment from psychiatrist Dr. Inderpal Dhillon. Pet. App. 33a. Dr. Dhillon initially diagnosed petitioner with major depression, and during three early meetings with petitioner, she noted that he suffered from auditory hallucinations, which she attributed to a medication she had prescribed. Id. at 33a & n.15. Dr. Dhillon later concluded that petitioner suffered from bipolar disorder and revised his treatment plan, including his medications, accordingly. Id. at 33a. "[N]othing indicates that [petitioner] suffered from any form of hallucination" after early 2004. Ibid.

3. a. In 2004, a grand jury in the Central District of California returned a second superseding indictment charging petitioner and Kadamovas with one count of conspiracy to take hostages resulting in death, in violation of 18 U.S.C. 1203; three counts of hostage taking resulting in death, in violation of 18 U.S.C. 1203, based on the kidnapping and murder of Umansky, Kharabadze, and Safiev; one count of conspiracy to launder money, in violation of 18 U.S.C. 1956(h); and one count of conspiracy to escape from custody, in violation of 18 U.S.C. 371. Pet. App. 20a; Joint C.A. E.R. 174-213.

Section 1203(a) by its terms provides that

> whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

18 U.S.C. 1203(a). Section 1203(b)(2) then provides that

> [i]t is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

18 U.S.C. 1203(b)(2). Congress first enacted Section 1203 in 1984 to satisfy the United States' obligations under the International Convention Against the Taking of Hostages (Hostage-Taking Convention), done Dec. 17, 1979, T.I.A.S. No. 11,081, 1983 WL 144724 (entered into force June 3, 1983), to which the United States is a party. See Act for the Prevention and Punishment of the Crime of Hostage-Taking, Pub. L. No. 98-473, Tit. II, Ch. XX, Pt. A, §§ 2001-2003, 98 Stat. 2186 (enacting 18 U.S.C. 1203 (Supp. II 1984)).

b. The government filed a notice of intent to seek the death penalty against both petitioner and Kadamovas. Joint C.A. E.R. 3044. In April 2005, petitioner attempted suicide again, this time by hoarding his prescribed medications and taking them all at once. Pet. App. 33a. Petitioner later stated that he took that step because he was again feeling hopeless about his case. Ibid.

After the attempt, Dr. Dhillon continued to treat petitioner and observed that he was showing signs of hypomania. Ibid.

In May 2006, petitioner was transferred back to the detention center in Los Angeles in anticipation of trial. Pet. App. 33a. The medical staff at that facility diagnosed petitioner with depression and prescribed anti-depressants. Ibid. At the request of petitioner's counsel, psychiatrist Dr. William Vicary examined petitioner and concluded that petitioner's "demanding and irritable behavior was 'largely due to his untreated Bipolar Disorder.'" Ibid. Although Dr. Vicary stated in a letter that petitioner's competency would be "enhanced" with proper treatment, he offered no opinion regarding petitioner's competency to stand trial. Ibid.

c. Petitioner and Kadamovas proceeded to trial together, with the United States Attorney's Office for the Central District of California prosecuting the case. Pet. App. 20a. During the trial's five-month guilt phase, the government presented "overwhelming" evidence of petitioner's and Kadamovas's guilt, including "the detailed testimony of three cooperating coconspirators," testimony from other witnesses who linked petitioner and Kadamovas to the victims' disappearances, DNA and fingerprint evidence, and other physical evidence. Id. at 40a; see id. at 17a-20a.

At the beginning of trial, the district court addressed concerns about petitioner's mental health. Just before opening

statements for the guilt phase, petitioner attempted suicide for a third time by trying to hang himself with a sheet. Pet. App. 33a. Once again, petitioner said that he did so because he felt hopeless about his case. Ibid. After petitioner insisted on appearing in court in his jail clothes with a visible ligature mark on his neck, the district court addressed the matter with petitioner's counsel outside the presence of government counsel. Id. at 33a-34a; Gov't C.A. Br. 315. Petitioner's counsel stated, "[W]ith [petitioner's] suicidal frame of mind, I don't know that he's competent," but did not move for a competency hearing. Pet. App. 34a. At the suggestion of petitioner's counsel, the court ordered a psychiatric evaluation of petitioner. Ibid.

Pursuant to the court's order, Dr. Ralph Ihle, the detention center's chief forensic psychologist, interviewed petitioner, spoke to petitioner's attorneys, and reviewed petitioner's personal history and prior treatment. Pet. App. 34a. Dr. Ihle found that, although petitioner was suffering from depression, he had no significant deficits in attention, concentration, or memory; showed no signs of odd or bizarre behavior; and did not appear to be experiencing hallucinations, delusions, or confusion. Ibid. Dr. Ihle also tested petitioner's intellectual functioning and determined that petitioner was "most likely functioning in the high to above average range of intelligence," which "support[ed] his having the present ability to understand the nature and consequences of the charges brought against him, or to properly

assist in his defense." Ibid. Dr. Ihle also found that petitioner could clearly articulate the charges against him; knew that they were serious felonies and that he could face the death penalty; understood the different types of pleas and their legal consequences; and had an adequate understanding of courtroom participants and procedures. Ibid. In addition, petitioner told Dr. Ihle that he was willing to cooperate with an attorney but lacked confidence in his present attorneys because they did not follow his suggestions. Ibid.

Dr. Ihle reported his findings to the district court and informed the court that, in his view, petitioner was competent to stand trial because the symptoms of petitioner's depressive disorder "d[id] not impair his present ability to understand the nature and consequences of the court proceedings against him, or his ability to properly assist counsel in his defense." Pet. App. 34a. Dr. Ihle also informed the court that "[a]ny difficulties [petitioner] exhibits with respect to legal counsel are volitional, and a reflection of his perception that his defense against the charges is hopeless at this point." Id. at 35a.

After receiving Dr. Ihle's report, the district court convened a hearing with the parties and found that petitioner was "competent to stand trial." Pet. App. 35a; Sealed Joint C.A. E.R. 164-167. Petitioner's counsel did not ask to call witnesses, present evidence, or otherwise contest the findings in Dr. Ihle's report. See Sealed Joint C.A. E.R. 164-167. Petitioner's counsel

reported that petitioner was now receiving appropriate medication and added, "As long as those drugs are working then I think we don't have a problem." Id. at 165-166; see also id. at 167.

A few months into the guilt phase of trial, petitioner sent the district court a letter requesting new counsel. Pet. App. 35a. In the letter, petitioner complained that his attorneys were unwilling to implement his suggestions regarding trial strategy. Ibid. The court rejected petitioner's request, and petitioner's counsel asked the court to order that Dr. Ihle examine petitioner again. Ibid. The court denied the request, explaining that oral reports from jail officials were keeping the court "fully abreast" of petitioner's mental condition and that the court saw no indication that petitioner was "slipping or failing in any way." Ibid. Petitioner later filed a second request for new counsel based on disagreements with his attorneys about whether he should testify, and the court again denied the request. Ibid.

Petitioner initially chose not to testify during the trial's guilt phase, but he changed his mind after he and Kadamovas had rested their cases, and the district court allowed them to reopen their cases. Pet. App. 20a. Petitioner testified on direct examination for three days and "carefully developed a theme that he was a wealthy white-collar criminal operating at the margins of the law and thus had no reason to engage in the comparatively high-risk, low-reward violent hostage takings he was charged with committing." Id. at 36a. Petitioner blamed Altmanis for the

kidnappings and killings, see id. at 38a, and attempted "to exculpate himself by offering an alternative narrative for the government's overwhelming evidence against him," id. at 39a. The story petitioner told was consistent with a line of defense he had laid out in a letter found in his cell following his first escape attempt in March 2003. Gov't C.A. Br. 330-331; Pet. App. 37a-38a; Gov't C.A. E.R. 7020A-7020S. In addition, his "testimony clearly demonstrated the native intelligence identified by Dr. Ihle, as well as the ability to understand and respond to questions, convey a narrative, and recall details from events spanning decades." Pet. App. 36a.

At the close of petitioner's direct examination, petitioner refused to be cross-examined, and the district court struck his testimony on Kadamovas's motion. Pet. App. 20a. Petitioner declined to attend the rest of the trial, except for the reading of the guilt-phase verdicts, but monitored the proceedings in a cell close to the courtroom via a video feed. Id. at 35a-36a; Gov't C.A. Br. 331-332.

d. At a hearing on December 28, 2006, near the end of the guilt phase, the district judge informed the parties that he had recently submitted materials in response to an inquiry from a search committee for the position of United States Attorney for the Central District of California. Pet. App. 24a. After noting that he had previously announced his plans to retire from the bench when this case was over, the district judge stated:

> A couple of weeks ago I received a telephone call from a search committee that's looking to replace the United States Attorney and they asked me to submit my name for that position. The search committee is not associated with the Justice Department nor is it associated with the administration. They make recommendations and they asked me to submit my name. Whether anything comes of it I don't know, but I thought I should disclose this to you. I'm not doing it for any financial gain, because I made it very clear that if I do take the position that I would do it for a dollar a year, because of the fact that I'm on a * * * judicial pension, and I don't believe in double dipping. So I do make this disclosure to you. Again, I don't know if anything is going to come of it. I haven't been contacted by the administration. I haven't been contacted by anybody in Washington.

Ibid.

No one raised any objection. Pet. App. 24a. The guilt phase of trial continued, and a few weeks later, on January 17, 2007, the jury found petitioner and Kadamovas guilty as charged. Id. at 20a, 24a. The trial's penalty phase began the following week, and the government rested its case in chief in the penalty phase on January 25, 2007. Id. at 20a; Gov't C.A. E.R. 5850.

On January 29, 2007, petitioner filed a motion to recuse the district judge under 28 U.S.C. 455(a), which requires a judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." Pet. App. 26a (citation omitted); see Joint C.A. E.R. 2066-2071. Petitioner asked that the district judge "declare a mistrial as to the penalty phase of this case, and then * * * recuse [him]self from presiding any further over this litigation." Joint C.A. E.R. 2068. The judge denied the motion. Pet. App. 24a-25a; Joint C.A. E.R. 2133-2137. The judge

explained that he had "submitted a form application" for the United States Attorney position and had been interviewed only by a "screening committee," and not by "anyone [at] the Department of Justice o[r] White House counsel's office." Pet. App. 25a (second set of brackets in original); Joint C.A. E.R. 2134. The judge further stated that he had since "withdrawn [his] name from consideration" and had been informed that neither the Department of Justice nor the White House had considered his application "on the merits." Pet. App. 25a; Joint C.A. E.R. 2136-2137.

Petitioner and Kadamovas filed a petition in the court of appeals for a writ of mandamus compelling the recusal of the district judge and granting a mistrial limited to the trial's penalty phase. Pet. App. 25a; Gov't C.A. E.R. 7260-7269. The court of appeals denied the petition, stating in part that petitioner and Kadamovas had "arguably filed their motion to recuse the district judge too late." Pet. App. 25a; Gov't C.A. E.R. 7287.

e. During the trial's penalty phase, petitioner's counsel presented testimony from Drs. Dhillon and Vicary regarding petitioner's mental health. Pet. App. 36a. Because Dr. Dhillon had not seen petitioner since April 2006, she did not offer an opinion on petitioner's current mental condition. Joint C.A. E.R. 2258. Dr. Vicary stated in part that petitioner was "crazy" and "irrational" because he pretended that his situation was "rosy," a common tactic for patients who sought to avoid treatment. Pet. App. 36a.

Days after that testimony, petitioner filed another request for new counsel. Pet. App. 36a. At the hearing on that request, petitioner's counsel stated that petitioner wanted to submit to a psychological evaluation "to show that he has no mental problems" and "is totally competent in everything he does." Ibid. Counsel stated that he himself had "a question as to [petitioner's] competency" and did not "object to [petitioner] being submitted to an independent, psychological or mental evaluation." Ibid. The district court responded, "[B]ased upon all the reports that I have received, he is competent to stand trial." Ibid. After hearing from petitioner himself, who "extensively criticized" his counsel's trial strategy, the court denied petitioner's request for new counsel and declined to order additional psychological testing. Ibid.

In February 2007, the jury returned penalty-phase verdicts in petitioner's and Kadamovas's cases. Pet. App 20a. The jury unanimously found all nine aggravating factors proposed by the government against both petitioner and Kadamovas, and no juror found any mitigating factor as to either petitioner or Kadamovas. Ibid. The jury unanimously recommended that both petitioner and Kadamovas be sentenced to death, and the district court imposed that sentence as to both petitioner and Kadamovas on each of the four Section 1203 counts. Ibid. The court sentenced petitioner and Kadamovas to 240 months of imprisonment on the remaining counts and ordered over $1 million in forfeiture. Id. at 20a-21a.

4. After receiving more than 1700 pages of briefing and hearing more than three hours of oral argument, the court of appeals affirmed. Pet. App. 21a; see id. at 1a-57a.

a. The court of appeals rejected petitioner's contention, raised for the first time on appeal, see Gov't C.A. Br. 77-79, that a conviction under Section 1203 requires "proof of a nexus to international terrorism." Pet. App. 22a; see id. at 21a-22a. The court explained that Section 1203 "makes no mention of international terrorism" and determined that petitioner's construction of Section 1203 was "infirm as a matter of statutory interpretation" and foreclosed by circuit precedent. Id. at 22a.

The court of appeals next rejected petitioner's contention, again raised for the first time on appeal, see Gov't C.A. Br. 77-79, that Congress exceeded its constitutional authority in enacting Section 1203. Pet. App. 22a-23a. The court determined that Section 1203 "was a valid exercise of Congress's power under the Necessary and Proper Clause together with the Treaty Power," reasoning that the Hostage-Taking Convention was "well within the President's Treaty Power" and that Section 1203 fulfills the United States' obligations under the Convention, "tracks the [Convention's] language in all material respects," and "clearly bears a rational relationship to" the Convention. Id. at 23a. In light of that determination, the court found that it "need not consider whether there might be other sufficient constitutional

bases for [Section 1203] as well, such as the Define and Punish Clause * * * or the Commerce Clause." Id. at 23a n.3.

The court of appeals further determined that Congress had acted within its authority in amending Section 1203 to authorize the death penalty. Pet. App. 23a-24a. "If Congress has the power to criminalize conduct," the court explained, "it also has the power to prescribe a constitutionally permissible punishment for that conduct." Id. at 23a. The court observed that the Hostage-Taking Convention, which "is not self-executing," "explicitly leaves it to each signatory to" decide on an appropriate punishment for hostage taking that "'take[s] into account the grave nature of those offences.'" Id. at 24a (quoting Hostage-Taking Convention art. 2, T.I.A.S. No. 11,081, at 5, 1983 WL 144724, at *2).

b. The court of appeals also rejected petitioner's claim that the district judge abused his discretion under 28 U.S.C. 455(a) and violated petitioner's due-process rights in declining to recuse himself. Pet. App. 24a-26a. As a threshold matter, the court of appeals found that petitioner and Kadamovas "filed their recusal motion too late." Id. at 25a. The court explained that "a recusal motion must be made in a timely fashion" and "should be filed with reasonable promptness after the ground for such a motion is ascertained." Ibid. (quoting E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1295 (9th Cir. 1992)). The court observed that, despite receiving "clear[] notifi[cation]" that the district judge had responded to a request for a submission to a

United States Attorney search committee, petitioner and Kadamovas "withheld their motion while trial was ongoing and waited to file until after the jury's verdicts against them, and after the government rested its penalty-phase case." Ibid. In addition, the court of appeals noted that petitioner and Kadamovas "did not seek a mistrial as to the guilt phase" and "likely recognized that the evidence of guilt was overwhelming." Ibid. Based on those circumstances, the court saw "a heightened risk" that petitioner and Kadamovas were using the recusal motion "for strategic purposes." Ibid. (quoting Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991)).

The court of appeals also determined that the recusal motion "fails on its merits" because "'a reasonable person with knowledge of all the facts'" would not have questioned the district judge's impartiality. Pet. App. 26a (citation omitted). The court based that determination on several factors, including the judge's "prompt[] and clear[] disclos[ure of] the alleged grounds for recusal," the fact that the judge's application was never considered on the merits, and the judge's "immediate[]" withdrawal of his application upon the filing of the recusal motion. Ibid. And because the court found no abuse of discretion under Section 455(a), which it described as "more stringent than due process," it also found that the district judge's failure to recuse did not violate petitioner's rights under the Due Process Clause. Id. at 26a n.6.

c. The court of appeals additionally determined that the district court did not plainly err in failing to order a hearing on petitioner's competency sua sponte. Pet. App. 32a-37a. The court noted, but did not resolve, the parties' dispute over whether the proceedings at the outset of trial constituted such a hearing. Id. at 32a-33a, 35a. The court of appeals instead assumed without deciding that no competency hearing occurred and reviewed petitioner's challenge for plain error because his counsel never moved for a competency hearing. Id. at 33a & n.14. The court explained that under those circumstances, its inquiry was whether "the evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence" -- that is, whether there was "substantial evidence that, due to a mental disease or defect, [petitioner was] either unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." Id. at 33a (citations and emphases omitted).

Applying that standard, the court of appeals concluded that the district court did not plainly err in failing to convene a competency hearing sua sponte. Pet. App. 33a-37a. The court of appeals explained that "Dr. Ihle's opinion respecting [petitioner's] competency and the absence of any clinical evidence of incompetence" differentiated petitioner's case from ones in which the court had found reversible error. Id. at 35a. The court determined that, although petitioner's suicide attempts were

"naturally concerning," neither those attempts nor petitioner's "decision to wear his jail garb in court" required the district court to sua sponte order a competency hearing at the beginning of trial. Ibid.

In addition, the court of appeals determined that "the final months of the guilt phase," when petitioner requested new counsel and refused to appear in court after the district court struck his direct testimony, "provided the district court little or no reason to question [his] competency." Pet. App. 36a. "[T]o the contrary," the court of appeals observed, petitioner's requests for new counsel "evinced his intelligence, his firm grasp of the proceedings and the legal system, and his own strong views on the best strategy for his defense." Ibid. The court also found that "[petitioner's] stricken testimony, though perhaps ill advised, was not irrational" because "[t]he evidence against him was overwhelming, and he had nothing to lose in this 'Hail Mary' attempt to exculpate himself and Kadamovas." Ibid.

Finally, the court of appeals rejected petitioner's contention that, by the end of trial, "the cumulative evidence of his purported incompetency" required the district court to order a competency hearing. Pet. App. 36a. The court of appeals determined that the evidence demonstrated that petitioner understood "the nature and object of the trial" and was "familiar[] with his appellate rights." Id. at 37a. The court acknowledged that, during the penalty phase, petitioner was "recalcitrant and

acted in ways that were detrimental to his case," but the court found that petitioner's "interactions with the trial judge indicated that he understood what was at stake during the penalty phase and could make informed decisions." Ibid. (citation omitted). The court thus found that "the penalty phase yielded no genuine doubt of [petitioner's] competency." Ibid.

ARGUMENT

Petitioner renews his argument (Pet. 25-33), raised for the first time on appeal, that 18 U.S.C. 1203 requires proof of a nexus to international terrorism and that Congress lacked authority to enact Section 1203. Petitioner further argues (Pet. 34-37) that 28 U.S.C. 455(a) and the Due Process Clause required the district judge's recusal.[1] For the reasons set forth in the government's brief in opposition to certiorari in Kadamovas v. United States, No. 18-7489 (June 10, 2019), a copy of which is being served on petitioner, the court of appeals' decision rejecting those arguments is correct and does not conflict with any decision of this Court or another court of appeals, and petitioner's case would be an unsuitable vehicle for further review of those questions in any event.

[1] All three questions are presented in the petition for a writ of certiorari filed by petitioner's co-defendant. See Kadamovas v. United States, No. 18-7489 (filed Jan. 14, 2019). The first two questions are also presented by the petition for a writ of certiorari in Noel v. United States, No. 18-7485 (filed Jan. 16, 2019).

Petitioner separately contends (Pet. 13-25) that the district court erred in failing to order a competency hearing sua sponte and that this Court should grant review "to clarify the standard of proof necessary to require a competency hearing," Pet. 13 (emphasis omitted). The court of appeals, however, applied the standard that is prescribed by statute and that petitioner himself urged, and petitioner's fact-bound disagreement with the court's application of that standard does not warrant further review.

1. Due process prohibits the prosecution of a defendant who is incompetent. Drope v. Missouri, 420 U.S. 162, 171 (1975); Pate v. Robinson, 383 U.S. 375, 384-385 (1966). A criminal defendant is competent to stand trial if he has both "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam); see also Drope, 420 U.S. at 171. This Court has explained that "[t]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings." Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993) (emphasis omitted); see id. at 402 ("Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.").

Congress has provided in 18 U.S.C. 4241 that a defendant is entitled to a competency hearing (on motion of a party or on a court's sua sponte motion) "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant" "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. 4241(a). Section 4241 thus embodies the principle that "a competency determination is necessary only when a court has reason to doubt the defendant's competence." Godinez, 509 U.S. at 401 n.13; see also Drope, 420 U.S. at 180-181; Pate, 383 U.S. at 385.

As this Court has explained, "no fixed or immutable signs * * * invariably indicate the need for further inquiry to determine fitness to proceed." 420 U.S. at 180. Instead, "the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." Ibid.; see also Indiana v. Edwards, 554 U.S. 164, 177 (2008) ("[T]he trial judge * * * will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."). Accordingly, in the context of federal habeas review, this Court has recognized that a state trial court's determination that no further inquiry into a defendant's competence is required is a "factual conclusion[]."

Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam). Application of Section 4241's reasonable-cause standard likewise turns on "the unique circumstances of [each] case" and is not subject to a "predetermined formula." United States v. Leggett, 162 F.3d 237, 242 (3d Cir. 1998), cert. denied, 528 U.S. 868 (1999); cf. McManus v. Neal, 779 F.3d 634, 656 (7th Cir. 2015) ("Whether a competency hearing is warranted is necessarily an individualized determination.").

2. When it determined that the district court did not plainly err in failing to hold a competency hearing sua sponte, the court of appeals applied the foregoing principles and conducted the inquiry that petitioner had urged in his appellate briefs.[2] See Pet. C.A. Br. 57-59; Pet. C.A. Reply Br. 2-3. Specifically, reciting the same standard that appeared in petitioner's own brief, the court of appeals "look[ed] to see 'if the evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence.'" Pet. App. 33a (quoting United States v. Dreyer, 705 F.3d 951, 960 (9th Cir. 2013)) (emphasis omitted); see Pet. C.A. Br. 59 (quoting the same language from Dreyer). The court further stated that, "[t]o raise a genuine doubt, there must be substantial

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[2] Petitioner does not now challenge the court of appeals' determination that plain-error review applied, and he informed the court of appeals that "the standard of review makes no difference" in light of circuit precedent regarding plain-error review in this context. Pet. C.A. Reply Br. 2-3 (citing United States v. Dreyer, 705 F.3d 951, 960 (9th Cir. 2013)).

evidence that, due to a mental disease or defect, the defendant is either unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." Pet. App. 33a (quoting United States v. Garza, 751 F.3d 1130, 1134 (9th Cir. 2014)) (emphasis omitted). The court then reviewed the record to determine whether the trial judge "should have held a genuine doubt as to [petitioner's] competency," ibid., at the start of trial, at the end of the guilt phase, or during the penalty phase. Id. at 35a-37a.

Contrary to petitioner's contention, the court of appeals articulated no rule that "shifts the burden to the defendant to rule out competency" (Pet. 19) in order to obtain a competency hearing. Nor would it have made sense for that court to announce or apply a burden-shifting framework in petitioner's case, where the question was whether the district court was required to order a competency hearing sua sponte, rather than on a party's motion. Petitioner's objections to the court of appeals' decision on this issue (Pet. 14-19) are ultimately a fact-bound disagreement with the court of appeals' application of the standard that petitioner himself urged. That disagreement provides no basis for this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

For example, petitioner renews his contention (Pet. 15-16) that the district court should have doubted his competency at the

start of trial based on his suicide attempts and his decision to appear in court in prison garb rather than civilian clothes. But as this Court has recognized, suicide attempts do not necessarily indicate that a defendant lacks the present ability to understand the proceedings against him or assist counsel in those proceedings. See Drope, 420 U.S. at 181 n.16. And here, the district court had before it Dr. Ihle's "comprehensive report," Pet. App. 34a, issued at the court's request after petitioner's most recent suicide attempt, that petitioner suffered from depression but was competent to stand trial. Id. at 35a. The court also knew that "[e]very doctor to examine [petitioner] after a suicide attempt" -- including Dr. Dhillon, who later testified for petitioner during the penalty phase -- "reported that he tried to take his life because he regarded his future as hopeless" in light of his pending criminal case. Ibid.; see id. at 33a-34a. If anything, petitioner's feelings of hopelessness about his case indicate that he had a firm understanding of both the proceedings against him and the "overwhelming" evidence of his guilt. Id. at 36a. Petitioner's pre-trial suicide attempts thus did not cast doubt on petitioner's ability "to perceive reality accurately, to reason logically," or otherwise to assist in his defense, Drope, 420 U.S. at 181 n.16 (citation omitted), so as to compel a sua sponte competency hearing.

Petitioner's decision to appear before the jury in jail attire similarly provided the district court no reason to doubt his

"capacity to understand the proceedings and to assist counsel." Godinez, 509 U.S. at 402. As this Court recognized in Estelle v. Williams, 425 U.S. 501 (1976), "instances frequently arise where a defendant prefers to stand trial before his peers in prison garments," and "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." Id. at 508. Petitioner's trial testimony indicated that he wore prison attire at least in part for that reason. Joint C.A. E.R. 1334-1335 ("We're in prison, so * * * it would be pretend to wear the clothes which we are putting on while we are coming into the courtroom and taking off one hour after that.").

In addition, petitioner's jail attire was unlikely to prejudice him with the jury because petitioner was on trial for attempting to escape from custody (among other offenses), which meant that the jury "would learn of his incarceration in any event." Estelle, 425 U.S. at 507 (citation omitted); see ibid. (explaining that courts have refused to find error in the practice of presenting defendants in jail clothes where the defendants were "being tried for an offense committed in confinement, or in an attempted escape," because "'[n]o prejudice can result from seeing that which is already known'" (citation omitted)). Accordingly, even assuming arguendo that the confluence of petitioner's jail attire and earlier suicide attempts might have made a competency hearing "prudent," those circumstances did not give rise to a doubt

about his competency that would require a hearing. Pet. App. 35a; cf. United States v. Gonzalez-Ramirez, 561 F.3d 22, 26-28 (1st Cir.) (no competency hearing required where defendant refused to wear civilian clothes to court and attempted suicide by slitting his wrists), cert. denied, 558 U.S. 1004 (2009).

Contrary to petitioner's contention (Pet. 17-18), petitioner's guilt-phase testimony gave the district court no reason to question the competency finding it had made at the start of trial. Pet. App. 35a. Petitioner and his attorneys had "disagreements * * * over whether he should testify" that prompted petitioner to request new counsel, but as the court of appeals found, petitioner's requests for new counsel "evinced [petitioner's] intelligence, his firm grasp of the proceedings and the legal system, and his own strong views on the best strategy for his defense." Id. at 35a-36a. In addition, the district court received "oral reports" from officials at petitioner's jail that kept the court "'fully abreast'" of petitioner's mental state, and "'nothing'" in those reports indicated that petitioner was "'slipping or failing in any way.'" Id. at 35a.

In addition, when petitioner did exercise his constitutional right to testify, "he carefully developed a theme that he was a wealthy white-collar criminal operating at the margins of the law and thus had no reason to engage in the comparatively high-risk, low-reward violent hostage takings he was charged with committing." Pet. App. 36a. During that testimony, petitioner

pursued a defense strategy he had developed years earlier, blaming a co-conspirator (Altmanis) for the kidnappings and killings and attempting "to exculpate himself by offering an alternative narrative for the government's overwhelming evidence against him." Id. at 39a; see id. at 36a, 38a-39a; Gov't C.A. Br. 330-331; Gov't C.A. E.R. 7020A-7020S. That testimony may have been "incredible" (Pet. 17) and was "perhaps ill advised" (Pet. App. 36a), but petitioner's decision to deliver it did not "create[] a sufficient doubt of his competence to stand trial to require further inquiry on the question," Drope, 420 U.S. at 180. To the contrary, and as the court of appeals found, the testimony "clearly demonstrated the native intelligence identified by Dr. Ihle, as well as [petitioner's] ability to understand and respond to questions, convey a narrative, and recall details from events spanning decades." Pet. App. 36a.

Finally, the penalty-phase testimony of two defense experts and petitioner's behavior during that period did not suggest that a competency hearing was required. Neither defense expert testified that petitioner was incompetent at that stage. See Joint C.A. E.R. 2258; Pet. App. 36a; cf. Pet. 19 (asserting only that "Dr. Vicary effectively," not actually, "testified [p]etitioner was incompetent"). And as the court of appeals found, petitioner's interactions with the district court during the penalty phase demonstrated his "understanding of the nature and object of the trial and his familiarity with his appellate rights." Pet. App.

37a. For example, the district court presided over a hearing at which petitioner, in requesting new counsel, argued that his current counsel had failed to challenge some of Dr. Vicary's cross-examination testimony because counsel planned to use that testimony later to fend off a future claim of ineffective assistance of counsel. Id. at 36a; see ibid. (noting counsel's earlier assertion, and the district court's agreement, "that [petitioner] was merely 'attempting to put appellate issues into the record'"). And although petitioner "voluntarily absented himself" from trial during the penalty phase, the "court held two hearings with him in lock-up and thus had the ability to observe his demeanor, comprehension of the risks, and ability to respond to questions." Id. at 37a. As the court of appeals recognized, the totality of the information before the district court "yielded no genuine doubt of [petitioner's] competency" and did not require the district court to hold a competency hearing sua sponte. Ibid.

3. Contrary to petitioner's contention (Pet. 20-21), the court of appeals' application of the reasonable-cause standard on the facts here does not conflict with decisions from the Fourth Circuit, the Iowa Supreme Court, or the Third Circuit, all of which involved distinctly different circumstances.

Petitioner principally relies (Pet. 20) on United States v. Mason, 52 F.3d 1286 (4th Cir. 1995), in which the defendant attempted suicide at the end of the first phase of trial "by plunging a ten-inch butcher knife into his chest" in a van outside

the courthouse. Id. at 1287. After the district court denied defense counsel's request for a competency hearing to determine petitioner's competence during the trial's first phase, the Fourth Circuit reversed. Id. at 1288-1294. The Fourth Circuit determined in part that the district court had committed "a fundamental error of law" because that court had failed to apply "the reasonable cause standard in [18 U.S.C.] 4241" and instead applied a "strict[er] standard" that the court of appeals determined was "inapposite." Id. at 1290. Applying "the proper reasonable cause standard," the Fourth Circuit found that the information before the district court in Mason "clearly" warranted a competency hearing because, among other things, defense counsel had submitted affidavits "stating that [the] defendant's treating physicians believed him incompetent during the first phase of the trial." Id. at 1293. Here, in contrast, petitioner has failed to establish that the lower courts applied an incorrect legal standard, see pp. 26-32, supra, and the record in petitioner's case, which included Dr. Ihle's opinion that petitioner was competent, lacked "any clinical evidence of incompetence." Pet. App. 35a.

The Iowa Supreme Court's decision in State v. Einfeldt, 914 N.W.2d 773 (2018), is likewise inapposite. Although the court in that case characterized the "threshold" for ordering a competency hearing as "relatively low," id. at 782, it reversed the denial of such a hearing in factual circumstances far different from the ones at issue here. In particular, the defendant in Einfeldt, who

had been diagnosed with paranoid schizophrenia, told the trial court during the trial proceedings that she "want[ed] to stab her lawyer in the neck and kill him," "believe[d] her lawyer [wa]s turning written notes over to the prosecution," "recently ha[d] heard buzzing noises," "claim[ed] to have been told by the FBI [that] she did nothing wrong," and "was non-compliant with prescribed drug therapy" despite the schizophrenia diagnosis. Id. at 781. The Iowa Supreme Court determined that those circumstances should have given the trial court "at least * * * some doubts as to the defendant's competency," ibid., but the circumstances of petitioner's case are not analogous.

Finally, United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), did not address the standard for ordering a competency hearing; the district court in that case held a multi-day competency hearing. Id. at 986. Rather, the question in DiGilio was whether the district court misallocated the burden of proof at that competency hearing. Id. at 988. The Third Circuit has since explained that a district court must conduct a competency hearing only if "reasonable cause" exists to believe that the defendant is incompetent. United States v. Gillette, 738 F.3d 63, 76 (2013), cert. denied, 572 U.S. 1157 (2014). No conflict exists between that standard and the standard that the court of appeals applied below.

4. In any event, this case would be an unsuitable vehicle for resolving any question regarding the standard for ordering a

competency hearing sua sponte because the court of appeals did not resolve a threshold question about whether the district court in fact held such a hearing. See Pet. App. 32a-33a (declining to "resolve [the parties'] dispute" over "whether the district court held a competency hearing in this case"); Gov't C.A. Br. 339-344. At the September 2006 proceeding that the district court convened after receiving Dr. Ihle's report, petitioner was represented by counsel, and his counsel could have presented evidence, elicited testimony from petitioner, or sought the testimony of other witnesses. The government accordingly maintained below that the proceeding satisfied the procedural requirements of Section 4241. Gov't C.A. Br. 339-344; see 18 U.S.C. 4241(c) (requiring that a competency hearing "be conducted pursuant to the provisions of [18 U.S.C.] 4247(d)"); 18 U.S.C. 4247(d) (providing that, at a Section 4241 competency hearing, a defendant "shall be represented by counsel" and "shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing"). If that is correct, it would provide even further reason to find no error by the district court here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2019