RECORD NO._____

In The
Supreme Court of the United States

KEVIN VENTURA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner Kevin Ventura submits this Reply in support of his Petition for Certiorari and in opposition to the Government's Response, filed on June 12, 2019. The Court should decline the Government's invitation to leave the important questions presented by Ventura's petition unanswered and should take this case to resolve the circuit split as to the importation of 18 U.S.C. § 924(c)'s penalty scheme into 18 U.S.C. § 924(j).

POINT I: The Imposition of Two Life Sentences Without an Explicit Jury Finding that Death Resulted from Mr. Ventura's Conduct in Commission of the Murder-For-Hire Scheme Violated This Court's Ruling in *Apprendi*.

The Government argues that Mr. Ventura's argument is "factbound." Gov't. Opp. 9. But the Government errs, misapprehending Mr. Ventura's argument as factual one when it is, to the contrary, an argument based in the elements of 18 U.S.C. § 924(j) as opposed to the elements of 18 U.S.C. § 1958. Mr. Ventura has argued that the evidence in the record combined with the insufficient jury charge as to the "death results" element of § 1958 is insufficient to determine whether the jury in fact found that any conduct of Mr. Ventura's that violated that statute was, in fact, the cause of the victims' death as alleged in Counts Two and Three. For the reasons stated in the Petition, this Court should grant review.

POINT II: Importation of the Penalties of 18 U.S.C. § 924(c) Into 18 U.S.C. § 924(j) Flies In the Face of Congress's Constitutional Authority to Make the Law

The Government acknowledges the split in the circuits as to whether § 924(j) incorporates the penalty provisions of § 924(c) (Govt Opp. at 14.), yet argues that it represents a "narrow conflict" that "has limited practical importance and does not warrant this Court's review." Govt Opp. at 14. But the Government is wrong—the question of penalties appropriately imposed on an individual who violates § 924(j) arises not infrequently and the need for this Court's review is repeatedly invoked, as evidenced by the series of petitions filed in cases including this one, *Bran v. United States*, 136 S.Ct. 792 (2016) (No. 15-5096), and *Berrios v. United States*, 568 U.S. 1143 (2013) (No. 12-381).

That circuits including the Fourth, Third, Eighth, Ninth, and Second have concurred in the importation of § 924(c)'s penalties into convictions under § 924(j) and that the First Circuit has suggested its agreement (see Govt Opp. at 14, referencing *United States v. Bran*, 776 F.3d 276, 280-282 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 792 (2016); *United States v. Berrios*, 676 F.3d 118, 140-144 (3d Cir. 2012), *cert. denied*, 568 U.S. 1143 (2013); *United States v. Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010), *cert. denied*, 562 U.S. 1248 and 562 U.S. 1263 (2011); *United States v. Battle*, 289 F.3d 661, 667-669 (10th Cir. 2002); *United States v. Staggs*, No. 97-10282, 1998 WL 447943, at *3 (9th Cir. July 10, 1998); *United States v. García-Ortiz*, 657

F.3d 25, 31 (1st Cir. 2011)) does not eliminate or even ameliorate the conflict. Rather, it draws the circuits' disagreement into sharp relief because the Eleventh Circuit disagrees (see *United States v. Julian*, 633 F.3d 1250, 1252-57 (11th Cir. 2011)) and because the Government chose not to seek this Court's review of the Eleventh Circuit's holding. Indeed, until this Court accepts a case presenting this issue, offenders in the Eleventh Circuit will be sentenced under a different interpretation of Federal law than offenders elsewhere in the United States, resulting in a disparity in the application of the law and inconsistent justice. This Court should take this case to resolve the conflict.

The Government then argues that § 924(j) represents "an aggravated version" of § 924(c) and thus, that the "most natural reading" of § 924(j) is to conclude that "a sentence for violation of the aggravated offense is 'imposed on a person under' both Section 924(c) and Section 924(j), because those provisions work together to identify the elements necessary for imposition of the sentence." But again, the Government errs. Although it is true that conduct that violates § 924(j) incorporates a violation of § 924(c)(1)(A)(iii) (that is, the discharge of a firearm), the result of that conduct—the causing of death—is a distinct offense, separated by paragraphs within 18 U.S.C. § 924, and carrying its own distinct punishment provisions—"any term of years or" "life". *See* Govt. Opp. at 12-13; 18 U.S.C. § 924(j). The Government's argument that "[a] person who is found guilty of Section 924(j)(1) has

necessarily committed murder (as defined by federal law) and has violated Section 924(c)" (Govt Opp at 13) is accurate but incomplete.

Certainly, in drafting § 924(c), if Congress had intended to require a mandatory minimum and/or mandatory consecutive sentence for the discharge of a firearm causing death, it could have added a subparagraph (iv) to § 924(c)(1)(A) and avoided drafting § 924(j) at all. It did the opposite. This Court should not permit the lower courts to substitute their analysis for Congress's words.

As the Court recently wrote in *Davis v. United States*, 588 U.S. __ (June 24, 2019) (Slip. Op. at 18-19), "Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." The same could be said of the Government's preferred interpretation of the interplay between § 924(c) and § 924(j), urging the Court to construe the phrase "any term of imprisonment" to mean, not "any" but "any term above the mandatory minimum in § 924(c)." Govt Opp. at 13. The Court should not countenance a statutory construction that ignores the separate penalty provisions that Congress wrote into § 924(j) to impose harsher, or even merely different, penalties than Congress intended. The chance that an individual convicted of causing the death of another through the discharging a firearm would, in any event, be sentenced to a term of less than 10 years of imprisonment is remote. Nonetheless,

sentencing discretion belongs in the first instance to the district court and should not be constrained by statutory constructions that defy Congressional directives.

Indeed, the Government's position on this point is self-contradictory. The Government concedes that a district court retains the discretion to impose a consecutive sentence for a § 924(j) offense, yet this very argument renders its insistence on the necessity of imposing the penalty provisions of § 924(c) into that statute. If the district court retains discretion to impose a consecutive sentence, then the district court is not really obliged to import all of the penalty provisions of § 924(c), which *require* the imposition of a consecutive rather than a concurrent penalty.

Similarly, the Government's footnote 5 (Govt. Opp. at 15 n5) makes plain the Government's unsustainable position. In stating that the Government "will . . . not seek to 'double stack' Section 924(c) and Section 924(j) sentences for the same conduct on top of other sentences," the Government is admitting that § 924(j) sentences must be treated differently from § 924(c) sentences, because the latter require stacking, even though doing so may result in shockingly lengthy terms of imprisonment.

In sum, if Congress had wanted to write a clear application of the § 924(c) penalties into § 924(j), they would have done so. Because they did not, and because the Court presumes that Congress intends its statutes as written, the Government's argument that this Court should read into § 924(j)

a penalty that is self-evidently at odds with that statute's text substitutes this Court's discretion for Congress's statute-making authority and is wrong.

It is true that the clarification of the interplay between § 924(c) and § 924(j) would not result in a reduction in Ventura's term of incarceration *unless* this Court simultaneously hears his challenge to the use of the elements of § 924(j) to find proved the charged violations of § 1958. However, as discussed above, those arguments have merit and this case should not be dismissed without this Court's careful attention.

CONCLUSION

For the foregoing reasons as well as those set forth in his Petition for Certiorari, the Court should hear this case.

Dated: New York, NY
June 26, 2019

Respectfully submitted,

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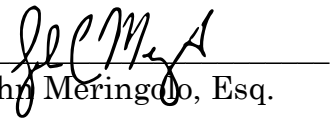

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