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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is Mr. Ventura is serving two life sentences imposed in violation of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the district court's charge erroneously removed an element of the offense from the jury's consideration and then erred as a matter of fact and of law by finding that same element proved at sentence, thereby imposing a penalty higher than the maximum allowed by the jury's verdict in violation of *Apprendi*?

Should this Court resolve the circuit split as to whether 18 U.S.C. § 924(j) incorporates the mandatory minimum penalties of 18 U.S.C. § 924(c)—a question that is answered in the affirmative by the Second Circuit and in the negative by the Eleventh and Sixth Circuits?

PARTIES TO THE PROCEEDINGS BELOW

The parties are Petitioner Kevin Ventura (Defendant-Appellant in the courts below) and Respondent United States of America (Plaintiff-Respondent in the courts below).

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PETITION FOR A WRIT OF CERTIORARI

Kevin Ventura respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *United States v. Ventura*, 15-2675, --- Fed.Appx.--- (2d Cir. Aug. 10, 2018) (Summary Order) (Appendix A1-A5). The order denying Ventura's motion for rehearing en banc and for reconsideration was issued on November 14, 2018 and is unreported (A6).

JURISDICTION

The final judgment of the United States Court of Appeals for the Second Circuit denying rehearing en banc and reconsideration was entered on November 14, 2018. This petition is timely filed within the 90-day statutory time limitation. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

(1) Section 1958(a) of United States Code Title 18 provides in relevant part:

> Whoever . . . uses or causes another (including the intended victim) to use . . . any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be . . . imprisoned for not more than ten years . . . and if death results, shall be punished by death or life imprisonment . . . .

(2) Section 924(j)(1) of United States Code Title 18 provides in relevant part:

A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall— if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; . . .

(3) Section 924(c) of United States Code Title 18 provides in relevant part:

> (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
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

Kevin Ventura stands convicted after a jury trial of all five counts with which he was charged—three violations of 18 U.S.C. §§ 924(j) and 2 resulting in the deaths of Noel Montanez, Eugene Garrido, and Carlos Penzo (Counts One, Four, and Five), and two violations of 18 U.S.C. §§ 1958(a) and 2 with respect to the deaths of Garrido and Penzo—murder-for-hire and a conspiracy to commit murder-for-hire (Counts Two and Three). As a result of these convictions, Mr. Ventura is serving a sentence of life imprisonment (two concurrent life sentences on Counts Two and

Three) plus 45 years (five years on Count One, 20 years on Count Four, and 20 years on Count Five, all run consecutively).[1]

With respect to Counts Two and Three, the facts at trial, in the light most favorable to the Government, were that Ventura decided that Jorge Lafontaine should kill Garrido (JA-666-67)[2] and that the Lafontaine brothers, Jorge and Jose, agreed to kill Garrido for $10,000. JA-679. Jorge asked Jose to be the shooter and Jose agreed.[3] JA-1164-65. Although the testimony was inconsistent, there was evidence that Jorge rented a car before the shooting (JA-1005-06; JA-1093-94) and that Ventura gave Jorge a revolver some time before the murder (JA-1003; JA-1097). Jose—the admitted shooter—testified that Jorge first gave him a revolver (from Ventura) and then later gave him a second gun and told him to use that second weapon instead. JA-1146-47; *see also* JA-1230-31 (Jose used the second, smaller gun).

Jorge testified that Ventura called Jorge on the date of the murders and told him "today is the day." JA-1006. Ventura was out of the country on that date. JA-682-85. On the date in question, Jose shot Garrido in the lobby of his apartment building. JA-1150. In a brief struggle following the shooting, Jose unintentionally shot Garrido's companion Penzo as well. JA-1151. Garrido died from a gunshot wound to his head above his left eyebrow. JA- 910. Penzo died from complications of

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[1] The district court's sentence imposed the penalties under 18 U.S.C. § 924(c) as they existed in 1995 and 1996, when the victims were killed.
[2] "JA" citations refer to the pagination of the Joint Appendix filed with Appellant's opening brief on July 10, 2017.
[3] For clarity, the Lafontaine brothers are referred to by the first names.

a gunshot wound to his torso. JA-916; JA- 920. No ballistics evidence was recovered. JA-938.

Evidence concerning the circumstances of the payments made to Jorge and Jose as compensation for the murders was inconsistent (*see*, *e.g.*, JA-679; JA-1009; JA-1011; JA-1083; JA-1103; JA-1157; JA-1178-80); JA-1235; JA-1241), but in the light most favorable to the Government, Ventura offered to pay Jorge $10,000. JA-1083.

In its instruction to the jury on Counts Two and Three, the district court omitted the statute's penalty enhancing elements, "if personal injury results," and "if death results." *See* JA-1641. The district court instructed the jury that the elements it must find proved in order to convict Ventura on the substantive murder-for-hire count (Count Three) were only:

> First, that the defendant traveled in interstate or foreign commerce, or used a facility of interstate or foreign commerce, or caused another to travel in interstate or foreign commerce, or to use a facility of interstate or foreign commerce.
>
> Second, that this interstate or foreign conduct was done with the intent to help bring about the murder of another person; and
>
> Third, that the defendant agreed to pay money or anything else of value to have this murder carried out.

JA-1641-42.

No special interrogatory was provided to the jury; nor was the jury otherwise asked to determine whether the deaths of Garrido and Penzo had resulted from the conduct charged in Counts Two and Three.

Although trial counsel did not object to the district court's insufficient jury instruction during the charge conference or at the time it was given, counsel argued before sentencing that the lack of a specific jury finding that death had resulted from the acts charged in Counts Two and Three meant that a statutory sentence of life imprisonment could not be imposed. (JA-43 at Dkt. No. 337). The district court, while recognizing the possible insufficiency of the jury verdict (JA-1731), nonetheless found any error harmless, adopting the Government's argument (JA-43 at Dkt. No. 336) that the jury's finding that "the defendant's conduct was a 'but for' cause and 'a substantial factor in causing' the deaths of Garrido and Penzo," due to his conviction on the § 924(j) counts, meant that "the jury necessarily found beyond a reasonable doubt that Garrido's and Penzo's 'deaths resulted' from the defendant's conduct and therefore the mandatory life sentence under Section 1958 applied to Counts Two and Three." JA-1732-33.

As to the § 924(j) violations (Counts One, Four, and Five), the district court concluded that the penalty provisions of 18 U.S.C. § 924(c) should be applied. JA-1734-35 (referencing *United States v. Young*, 561 Fed.Appx. 85 (2d Cir. 2014)). Accordingly, the district court found that "the mandatory minimum sentence on Counts One, Four and Five is a total of 45 years which must run consecutively to any other sentence imposed." JA-1735.

However, the district court remarked that its conclusion that the mandatory minimum penalties were legally required did not mean that it found those penalties to be appropriate, noting that they "effectively take away a Court's discretion to

impose a sentence which is consistent with" the mandate of 18 U.S.C. §3553(a). JA-1736. In fact, the district court noted, as a result of the mandatory minimums that it had found applicable, "the Court has never been asked, applying all of the 3553(A) factors, what the appropriate sentence is in this case" and cautioned that, "I haven't been asked to arrive at exactly that conclusion whether life was appropriate or not in this case. And so there's nothing that I've said which the parties should take away from as indicating what my decision would be if I had to reach that decision." JA-1739-40.

On appeal to the Second Circuit, the Panel agreed with Ventura's argument that the district court had erred in its charge to the jury but declared the error harmless, writing:

> Ventura was convicted on all counts. The evidence tended to show that Ventura arranged to have his cousin murdered, and that the hired hitmen killed both the cousin and a friend that happened to be with the cousin. While it was error to omit the specific instruction that 'death resulted' in the context of the jury charge on Counts Two and Three (the murder for hire counts), the evidence was overwhelming that the deaths did result from Ventura's murder for hire conduct. Indeed, the jury convicted Ventura of causing the death (through the use of a firearm) of those two victims when it convicted him of Counts Four and Five. Further, Ventura's defense centered on showing that he was not involved in any plot against his cousin at all. The jury rejected this theory wholesale. In light of the record evidence, and the jury's verdict convicting Ventura on all charges, it is clear that the jury also found that 'death resulted' from Ventura's actions constituting the murder for hire counts, Counts Two and Three.

Id., 15-2675 (Slip. Op.) at 4-5 (A4-A5).

In response to Ventura's challenge to the mandatory minimum sentences on his § 924(j) convictions, the Panel followed its prior non-precedential summary order in *Young*, 561 Fed.Appx. 85, concluding that the district court's importation of

the penalty provisions in § 924(c) to enhance Ventura's § 924(j) convictions had been appropriate. *See United States v. Ventura*, 15-2675-cr (Slip. Op.) at 3 (A3).

The motion for reconsideration and for rehearing *en banc* was denied without opinion. (A6).

REASONS FOR GRANTING THE WRIT

Summary of the Argument

This Court should grant the petition for a writ of certiorari to resolve both questions presented.

First, the Court should grant the petition because Ventura's two life sentences on Counts Two and Three were imposed in violation of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The jury instruction on Counts Two and Three and Ventura's subsequent conviction on each count constituted an inadequate basis for imposition of the enhanced penalty of life imprisonment because the jury was not asked to consider whether the deaths of Garrido and Penzo had resulted Ventura's violation of the murder-for-hire statute (18 U.S.C. § 1958(a)). The district court's post hoc conclusion that the jury had "necessarily decided" that the deaths had resulted from Ventura's conduct erroneously equated satisfaction of the elements of the 18 U.S.C. § 924(j) offense—that Ventura had caused (or aided and abetted the causing of) the deaths of Garrido and Penzo through the use of a firearm during the course of a drug trafficking crime or a crime of violence—with proof beyond a reasonable doubt that Ventura's travel in interstate commerce and/or use of the facilities of interstate commerce and/or

promise to pay the Lafontaine brothers $10,000 had resulted in the deaths of Garrido and Penzo. This conclusion was factually unsupported and legally erroneous. Therefore the Court should grant Ventura's petition and remand his case for resentencing on Counts Two and Three without application of the enhanced penalty.

Second, this Court should grant the petition to resolve the circuit split concerning the pressing question of whether 18 U.S.C. § 924(j) incorporates the mandatory minimum penalties of 18 U.S.C. § 924(c). The Second Circuit's affirmative answer to this question and consequent importation of § 924(c)'s mandatory consecutive sentencing scheme into § 924(j) eviscerates the statutory text of § 924(j), which provides for a term of imprisonment "for *any* term of years or for life" (emphasis added). The Second Circuit's approach is shared by the Third, Fourth, Eighth, Ninth, and Tenth Circuits.[4] It conflicts with the approach of the Sixth and Eleventh Circuits[5], meaning that an individual such as Ventura, who is convicted in the Second Circuit of an offense under ¶ 924(j) faces a mandatory minimum term of imprisonment while an individual convicted of the same offense in the Eleventh Circuit does not. This Court's guidance is required to resolve this split.

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[4] *See*, *e,g.*, *United States v. Berrios*, 676 F.3d 118, 140–41 (3d Cir. 2012); *United States v. Bran*, 776 F.3d 276, 281 (4th Cir. 2015); *United States v. Allen*, 247 F.3d 741, 769 (8th Cir. 2001); *United States v. Charley*, 417 Fed. Appx. 627, 629 (9th Cir. 2011) (nonprecedential opinion); *United States v. Battle*, 289 F.3d 661, 669 (10th Cir. 2002).

[5] *See*, *e.g.*, *United States v. Galan*, 436 Fed.Appx. 467, 471 (6th Cir. 2011); *United States v. Julian*, 633 F.3d 1250, 1254–55 (11th Cir. 2011).

The errors of which Ventura complains were not harmless because the district court indicated that its sentence was statutorily required and did *not* find that the same sentence would have been appropriate in the absence of mandatory minimum penalties. There is, therefore, a grave danger that Ventura is serving an illegally imposed life sentence, and a sentence that the district court would not have imposed, had it believed it possessed the discretion to do otherwise.

Argument

POINT I:
This Court Should Grant Certiorari Because Ventura Is Serving Two Concurrent Life Sentences In Violation of *Apprendi*.

A. Applicable Law

In *United States v. Frampton*, 382 F.3d 213, 217-18 (2d Cir. 2004), this Court wrote that the murder-for-hire statute, 18 U.S.C. § 1958(a), specifically "proscribes a very limited category of behavior; only those instances in which one party agrees to commit a murder in exchange for another party's provision (or future promise) of payment are punishable under § 1958." *Id.*, 382 F.3d at 217 (citation omitted). Relatedly, as the Eighth Circuit has noted, "The nature of the crime of murder-for-hire focuses on 'the use of the facilities of interstate commerce or of the mails with the requisite intent[.]'" *United States v. Mueller*, 661 F.3d 338, 346 (8th Cir. 2011) (internal citation omitted). There must, therefore, be some "nexus" between the interstate commerce element and the murder-for-hire scheme. *Id.* Further, conviction under § 1958(a) does not require that a murder occur; only that it be intended.

An individual convicted under the murder-for-hire statute faces distinct levels of punishment based on the severity of injury to the intended victim—a maximum of ten years for anyone who "travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so," an enhanced maximum of twenty years "if personal injury results," and a further enhanced sentence of "death or life imprisonment" "if death results." 18 U.S.C. § 1958(a).

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S.Ct. 2531 (2004) (emphasis in original).

In *Blakely* and again in *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856 (2007), this Court reaffirmed that sentencing schemes that permit the imposition of enhanced sentences based on judicial fact-finding rather than on jury verdicts beyond a reasonable doubt violate the Sixth Amendment of the Constitution. In *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), the

Court followed *Apprendi*'s rule to strike down the mandatory United States Sentencing Guidelines system, thereby rendering the Guidelines advisory only. *Booker*, 245-246, 125 S.Ct. 738. Thirteen years later, *Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013) extended *Apprendi* to facts that increase the prescribed statutory minimum as well.

Following *Apprendi*, this Court has considered statutes with similar penalty enhancements "if death results," construing the "death results" language as an element that must be submitted to the jury and proved beyond a reasonable doubt. In *Burrage v. United States*, 134 S.Ct. 881, 884 (2014), the Court applied *Alleyne*, 133 S.Ct. at 2162-63, holding that, "[T]he 'death results' enhancement [in 21 U.S.C. § 841]. . . is an element that must be submitted to the jury and found beyond a reasonable doubt." Similarly, in *Jones v. United States*, 526 U.S. 227, 252 (1999), the Court held that 18 U.S.C. § 2119, which provides an enhanced penalty for the taking of a motor vehicle from another by force and violence "if death results" established "three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." The Second Circuit reached the same conclusion with respect to the "death results" provision of 18 U.S.C. §1952(a)(3)(B) in *United States v. Friedman*, 300 F.3d 111, 127 (2d Cir. 2002).

In contrast to the tiered penalty system of § 1958(a), 18 U.S.C. § 924(j) provides for imposition of a sentence (as applicable here) "of imprisonment for any term of years or for life" for an individual who, in the course of a crime of violence or

drug trafficking crime, "causes the death of a person through the use of a firearm." *See* 18 U.S.C. §§ 924(c)(1)(A) and (j).

B. Discussion

The lower courts violated the rule of *Apprendi* in imposing and then upholding two life sentences following Ventura's conviction on Counts Two and Three without a jury finding that the deaths of Garrido and Penzo had resulted from Ventura's violation of 18 U.S.C. § 1958(a). This Court's intervention is required because the district court erroneously concluded that, even without being asked, the jury had "necessarily decided" that the deaths had resulted from Ventura's violation of 18 U.S.C. § 924(j) and two life sentences were, therefore, statutorily mandated. *See* JA-1732-33. Not only is this holding factually unsupported, it is legally insufficient.

In deliberating on Counts Two and Three, the jury was asked to find only whether Ventura traveled in interstate or foreign commerce or used facilities of interstate or foreign commerce "with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value," or that he caused another individual to do so, or that he conspired to do so. *See* 18 U.S.C. § 1958(a). It was not asked to determine whether the deaths of Garrido and Penzo had resulted from this conduct. Under *Blakely*, the maximum sentence that could have been imposed on Counts Two and Three as a result of this jury verdict was 10 years of imprisonment. *See Blakely*, 542 U.S. at 303-304 ("[T]he relevant

'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."); 18 U.S.C.§ 1958(a).

The district court's erroneous conclusion at sentencing that an enhanced sentence was required because the jury had "necessarily decided" that § 1958(a)'s penalty enhancing element was satisfied (a conclusion that the Second Circuit erroneously approved under a "weight of trial evidence" analysis on appeal), improperly elided the distinction between the statutory requirements of § 1958 and § 924(j), reasoning that the fact of the shooting deaths permitted the inference that those deaths had resulted from Ventura's travel in interstate commerce and/or his use of the telephone in connection with the murder-for-hire scheme. *See* JA-1732-33; A4-A5. But this finding goes too far.

There was no question that Garrido and Penzo had been killed. Indeed, Jose Lafontaine admitted that he had shot them to death (JA-1150-51). Although it was logical to find that the same discharge that killed Garrido and Penzo in satisfaction of the elements of §924(j) necessarily also "resulted in" their deaths, in satisfaction of the enhanced penalty element of §1958(a), logic alone does not satisfy §1958(a)'s separate statutory requirements. Contrary to the Second Circuit's conclusion, the evidence was not overwhelming that Ventura's violation of § 1958(a) had resulted in the deaths of Garrido and Penzo. That is, the evidence was overwhelming that Garrido and Penzo had been killed "through the use of a firearm" in violation of § 924(j); it was not overwhelming that Ventura's alleged international phone call on

the date of the murders or his promise to pay $10,000 (both of which he denied during his own testimony [JA-1406-07; JA-1404]) were the operative factors giving rise to the deaths. Indeed, trial testimony established the existence of longstanding enmity between cooperating witness Edwin Torrado and Garrido (JA-680-82; JA-842-43; JA-1385-92) as well as between Jorge and Garrido (JA-998-99; JA-1076-80; JA-1392-95), and evidence that Jose was scared of his brother Jorge (JA-1244). Tellingly, in discussing how he came to be involved in the murders, Jorge testified that "Ed [Torrado] was telling me the plan – I mean Kevin [Ventura] was telling me the plan." JA-1092.

Under the circumstances, it would certainly have been possible that the jury found that the discharge of the weapon (which, *arguendo*, Ventura aided and abetted by providing a weapon, albeit not the one that was actually used) killed Garrido and Penzo, without finding that Ventura's international phone calls or offer of payment caused the discharge of the gun. That is, the jury could logically have concluded that Ventura committed murder-for-hire and conspiracy to commit murder-for-hire—that is, that he called Jorge Lafontaine and promised to pay him $10,000 with the intent that a murder be committed—but *simultaneously* concluded that Ventura's conduct was tangential to the actual deaths and that Garrido and Penzo were killed through the use of a firearm due to a personal dispute between Jorge Lafontaine and Garrido only. The lower courts' substitution of judicial reasoning for a jury verdict beyond a reasonable doubt flies in the face of *Apprendi*, *Blakely*, and *Cunningham*. *See Cunningham*, 549 U.S. at 290 (citing *Blakely*, 542

U.S. at 308 and n.8) ("If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment [jury trial] requirement is not satisfied.").

For these reasons, it was reversible *Apprendi* error to conclude that Ventura's convictions on Counts Two and Three required imposition of enhanced sentences of life imprisonment rather than the otherwise applicable ten-year maximum.

Finally, the error was not harmless because the district court indicated that it was displeased with the statutory mandatory minimum sentences that it believed were required in the case (JA-1736), noting that neither party should take the life sentence imposed as evidence that the district court viewed it as appropriate. JA-1739-40. But for its erroneous conclusion that the jury's verdict on the § 924(j) counts satisfied the "death results" penalty enhancement of § 1958(a), the district court might not have imposed sentences of life imprisonment on Counts Two and Three. Accordingly, the error was not harmless, the sentences of life imprisonment were legally impermissible and contrary to this Court's precedent, and the case should be remanded for reconsideration and for resentencing with application of the ten-year maximum on Counts Two and Three in accordance with *Apprendi*.

POINT II:
This Court Should Grant Certiorari to Resolve the Circuit Split Concerning Application of the Penalty Provisions of 18 U.S.C. § 924(c).

This Court should grant certiorari because the Second Circuit's conclusion that 18 U.S.C. § 924(j) incorporates the penalty provisions of 18 U.S.C. § 924(c) is

unsupported by fundamental principles of statutory construction and conflicts with decisions of the Eleventh and Sixth Circuits.

A. Applicable Law

In relevant part, § 924(j)(1) provides that, "A person, who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall – (1) if the killing is a murder . . . be punished by death or by imprisonment for *any* term of years or for life . . . ." (emphasis supplied). Section 924(c), in turn, contains mandatory minimum terms of imprisonment for the "use," "brandishing," or "discharge" of a firearm and for "second or subsequent conviction[s]" of such conduct, each of which must run consecutively to any other sentence imposed and to each other. Incorporating the penalty provisions of § 924(c) into § 924(j) renders Congress's express grant of authority to impose imprisonment for "*any*" term of years meaningless. *See Williams* v. *Taylor*, 529 U.S. 362, 404 (2000).

In holding to the contrary, the Second Circuit cited decisions of the Third, Fourth, Eight, Ninth, and Tenth Circuits incorporating the § 924(c) penalties into § 924(j), as well as its own non-precedential opinion in *United States v. Young*, 561 Fed. Appx. 85, 93 (2d Cir. 2014) (summary order). *See Ventura*, 15-2675 (Slip. Op.) at 3 (collecting cases). In contrast, the Eleventh Circuit has concluded that §924(c)'s prohibition on concurrent sentences "applies only to 'a term of imprisonment imposed on a person under this subsection,' which does not extend to Section 924(j)." *United States* v. *Julian*, 633 F.3d 1250, 1253 (11th Cir. 2011) (quoting 18 U.S.C. § 924(c)(1)(D)(ii)). Similarly, the Sixth Circuit noted, in a related context,

that § 924(j)(1) permits "the judge to sentence the defendant to a term of years." *United States v. Galan*, 436 Fed.Appx. 467, 471 (6th Cir. 2011) (internal alternations omitted).

B. Discussion

Although the Second Circuit saw "no reason to depart from *Young*," (*Ventura*, 15-2675 [Slip. Op.] at 3), Appellant respectfully urges this Court to hear Ventura's case and to resolve the Circuit split on this issue in his favor because the contrary reasoning of the Eleventh Circuit is persuasive when viewed through the lens of well established principles of statutory construction.

"[T]he starting point for interpreting a statute is the language of the statute itself.'" *Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Id.* (citation omitted). Similarly, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Robinson*, 702 F.3d 22, 31 (2d Cir. 2012) (quoting *Duncan v. Walker*, 533 U.S. 167, 173 (2001)) (internal quotation marks omitted).

Concurrently, it is a "cardinal principle of statutory construction that [a court] must give effect, if possible, to every clause and word of a statute." *Williams*

v. Taylor, 529 U.S. 362, 404 (2000) (citation omitted). *See also TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 449, 151 L.Ed.2d 339 (2001) (same). Whether § 924(j) by its language requires a mandatory minimum term of imprisonment or, instead, a sentence of imprisonment of "any term of years," therefore, turns on the purpose and meaning of the word "any." As the Eleventh Circuit wrote in *Julian*, "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Julian*, 633 F.3d at 1256 (quoting *United States v. Saunders*, 318 F.3d 1257, 1264 (11th Cir. 2003) [quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983)]).

Here, Congress specifically differentiated between the strictly tiered system of punishments set forth in § 924(c) and the more general grant of judicial discretion in § 924(j). The Second Circuit's substitution of the § 924(c) penalties in place of Congress' express grant of judicial discretion in § 924(j) ignores this differentiation and, in so doing, limits the punishments for a violation of § 924(j) beyond Congress's statutory direction. Although it is understandable that the courts find strict punishment desirable for violations of § 924(j), the statutory text does not prohibit the imposition of strict penalties. Indeed, by its terms, §924(j) permits punishment of "any term of years" that the courts find appropriate. In light of this grant of discretion, any alteration of the penalty scheme within § 924(j) through importation of the tiered system of penalties in § 924(c) should be made by Congress, and not by

courts ignoring the express language with which Congress has chosen to act. This Court's guidance concerning the penalties applicable to a violation of § 924(j) is required, and Ventura's petition for certiorari should be granted on this issue.

POINT III:
This Case Presents an Ideal Vehicle for the Court to Decide Both Issues Presented.

Unless this Court accepts his case, it is very likely that Kevin Ventura will spend the rest of his natural life in prison. Even then, arguably, his life-plus-45-year sentence will not have been satisfied. This outcome is legally wrong.

Moreover, it is not one that the district court, had it appropriately applied this Court's precedential ruling in *Apprendi*, would have chosen. The district court imposed this draconian sentence because it believed that it was statutorily mandated to do so, but strongly indicated that it would have imposed a lesser sentence if its discretion had not been statutorily curtailed. *See* JA-1736 (noting that mandatory minimum penalties ""effectively take away a Court's discretion to impose a sentence which is consistent with" the mandate of 18 U.S.C. §3553(a)"); JA-1739-40 ("the Court has never been asked, applying all of the 3553(A) factors, what the appropriate sentence is in this case". . . "I haven't been asked to arrive at exactly that conclusion whether life was appropriate or not in this case. And so there's nothing that I've said which the parties should take away from as indicating what my decision would be if I had to reach that decision.").

The questions presented for this Court's consideration are important not just for Ventura but also for every defendant who faces sentencing after conviction of

violations of 18 U.S.C. §§ 924(j) and/or 1958(a). This Court's guidance is required to clarify that the "if death results" provision of § 1958(a) must be charged to the jury and found beyond a reasonable doubt before a sentence of life imprisonment can be imposed. This Court's guidance is required to clarify the appropriate penalties for a violation of § 924(j) and the statutory interplay between § 924(j) and § 924(c). The answers to these questions will not only clarify important legal principles for the criminal bar and defendants convicted of these offenses. They have the potential to transform Mr. Ventura's certainty that he will die in jail to a hope that he will someday rejoin his family and society.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari and permit briefing on the merits to consider the questions raised herein.

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Respectfully submitted,

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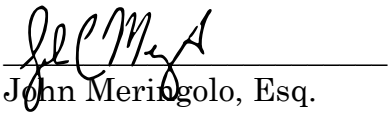

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