No. 14-1069

In the Supreme Court of the United States

ANDREW ZAYAC, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's refusal to instruct the jury on a duress defense because petitioner had a reasonable opportunity to escape during his participation in ongoing kidnapping and robbery offenses, in violation of 18 U.S.C. 1201(a) (2006) and 18 U.S.C. 1951(a) (2006).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 765 F.3d 112. The order of the district court denying petitioner's motion for a new trial and for a judgment of acquittal (Pet. App. 23a-34a) is not published in the Federal Supplement but is available at 2011 WL 5238823.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2014. A petition for rehearing was denied on December 2, 2014 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on March 2, 2015. 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 District of Connecticut, petitioner was convicted of a series of crimes relating to his involvement in the kidnapping, robbery, and murder of a marijuana dealer. The charges of conviction included kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (2006); felony murder through the use of a firearm, in violation of 18 U.S.C. 924(c) and (j)(1) (2006); interference with commerce by robbery (Hobbs Act Robbery), in violation of 18 U.S.C. 1951(a) (2006) and 18 U.S.C. 2 (2006); multiple counts of destruction or concealment of evidence, in violation of 18 U.S.C 1519 (2006) and 18 U.S.C. 2; and related drug and firearms charges. See Judgment 1.

Petitioner was sentenced to life imprisonment; the court did not impose a term of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-20a.

1. On the evening of February 8, 2009, petitioner drove to the Bronx, New York, in his girlfriend's Jeep, where he picked up Heriberto Gonzalez. Petitioner and Gonzalez then drove to the residence of Edward Rivera, a drug dealer who had previously sold petitioner large quantities of marijuana for resale. Pet. App. 3a. On this occasion, petitioner agreed to purchase over $100,000 worth of marijuana from Rivera. *Ibid.* Petitioner offered an above-market price to Rivera for the marijuana and told Rivera not to involve any associates in the transaction. *Id.* at 8a-9a.

After placing two duffel bags containing approximately 68 pounds of marijuana into the trunk of the Jeep, Rivera got into the back seat, and the men drove off. Pet. App. 3a. Sometime later, Rivera was shot

and killed while in the Jeep. *Ibid.* Petitioner and Gonzalez drove to a reservoir in Danbury, Connecticut, where Rivera's body was dragged and pushed to the bottom of a nearby hill off the road. *Ibid.*

Afterwards, petitioner and Gonzalez drove from Connecticut to the house of petitioner's girlfriend in New Rochelle, New York, and transferred the drugs to a different vehicle. Pet. App. 3a. They then drove the Jeep to Gonzalez's residence in the Bronx and, shortly thereafter, set the Jeep on fire; both men suffered severe burns. *Id.* at 3a-4a.

On March 1, 2009, federal law enforcement officers executed a search warrant at the home of petitioner's parents and found three large bags of marijuana hidden behind wall panels, medical supplies for treating burns, and documents showing that petitioner had consulted a plastic surgeon. Pet. App. 4a.

Petitioner subsequently met several times with investigators, and after giving different versions of events, he ultimately placed the blame for the murder and the subsequent destruction of evidence on Gonzalez. Pet. App. 4a. In particular, according to petitioner's fourth account of events, sometime after Rivera got into the Jeep, Gonzalez pulled out a handgun and zip ties; ordered Rivera at gunpoint to put the zip ties on himself; shot Rivera in the chest as petitioner drove; and told petitioner to be happy that Gonzalez did not also shoot petitioner. *Id.* at 4a-5a. Petitioner later asserted that after he turned down a secluded road near the reservoir in Connecticut and stopped along the shoulder, Gonzalez insisted that petitioner help him remove Rivera's body from the car. Petitioner stated that he waited in the driver's seat of the Jeep for several minutes while Gonzalez disposed of

Rivera's body down the hill by the reservoir. *Id.* at 5a. The murder weapon and the marijuana, petitioner said, remained with him in the Jeep while he waited for Gonzalez to return. *Id.* at 14a. When Gonzalez returned to the Jeep, his statement continued, the men drove to petitioner's girlfriend's house, left the drugs, and later burned the Jeep. *Id.* at 3a-4a.

2. Petitioner and Gonzalez were tried separately on several counts relating to Rivera's kidnapping, robbery, and murder and the subsequent destruction of evidence. See Pet. App. 5a.[1] Toward the close of trial, petitioner asked for a duress instruction on the kidnapping, robbery, and destruction of evidence counts. Pet. App. 6a. The district court declined to give it, concluding, as relevant here, that petitioner failed to avail himself of a reasonable opportunity to escape during the minutes he was left alone with the murder weapon in the driver's seat of the Jeep—during which time, the court found, both the kidnapping and the robbery crimes were still ongoing. See *id.* at 6a, 14a-15a.

3. The district court adhered to these findings in denying petitioner's post-trial motion for a new trial or a judgment of acquittal. Pet. App. 32a-33a. Citing Second Circuit precedent, the court explained that a defendant is entitled to a duress instruction only if

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[1] A jury convicted Gonzalez on the possession with intent to distribute marijuana and the evidence-destruction counts but acquitted him on the firearm, robbery, kidnapping, and murder counts. See Second Superseding Indictment, Judgment, Judgment of Acquittal. The district court subsequently vacated the evidence-destruction counts under *Yates* v. *United States*, 135 S. Ct. 1074 (2015). See No. 15-cv-471 Docket entry No. 7 (D. Conn. Apr. 3, 2015).

there is "a foundation in the evidence" to support each element of the duress defense: "(1) a threat of force directed at the time of the defendant's conduct; (2) a threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and (3) a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity." *Id.* at 32a (internal quotation marks omitted). The court noted that under petitioner's own version of events, "a reasonable juror could not find that [petitioner] lacked a reasonable opportunity to escape while he waited alone in the Jeep for Gonzalez, at a time when both the kidnapping and robbery crimes were ongoing." *Id.* at 32a-33a.

4. The court of appeals affirmed. Pet. App. 1a-20a. As relevant here, the court agreed with the district court "that [petitioner] had, as a matter of law, a reasonable opportunity to escape the scene while Gonzalez was engaged in disposing of Rivera's body." *Id.* at 15a. Based on the trial testimony relating petitioner's account of events, the court explained that "no rational juror could have found that [petitioner] lacked a reasonable opportunity to escape" when petitioner's own version of events "placed him alone with the murder weapon, in the driver's seat of a vehicle, while Gonzalez was out of sight, down a hill, struggling to dispose of a 232-pound body." *Ibid.*; see *id.* at 20a.

The court of appeals also agreed with the district court that petitioner "was participating in the [robbery and kidnapping crimes] as an accomplice during the period in which he had an opportunity to escape." Pet. App. 16a. The court explained that the "definition of 'engaging' in illegal activity for the purposes of a duress defense" is the same definition used to "de-

scribe the liability of an ordinary accomplice, aider, or abettor." *Ibid.* The court cited precedent from this Court explaining that the aiding and abetting statute applies to "all assistance rendered by words, acts, encouragement, support, or *presence*—even if that aid relates to only one (or some) of a crime's phases or elements." *Ibid.* (quoting *Rosemond* v. *United States*, 134 S. Ct. 1240, 1246-1247 (2014)) (internal ellipses and quotation marks omitted). "In other words, when an offense is ongoing, a defendant's continued presence at the scene constitutes ongoing participation absent some fact indicating that he has disassociated himself from the crime." Pet. App. 17a. Therefore, the court stated, the question in this case is "whether the relevant offense[s]"—kidnapping and robbery—were "ongoing at the time the defendant's opportunity to escape arose." *Ibid.*

The court of appeals first explained that kidnapping is a "unitary crime" which, "once begun, does not end until the victim is free." Pet. App. 17a (quoting *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 281 (1999)). Without determining the precise time that a kidnapping offense ends when the victim has been killed, the court held that here, "the *earliest* the kidnapping of Rivera could have been complete was at the point when Gonzalez—according to [petitioner's] version of events—finally abandoned the body at the bottom of the hillside near the road." *Id.* at 18a. And "[b]ecause the unlawful holding of the victim was ongoing at a time when [petitioner] could reasonably have fled the scene, he was not entitled to an instruction regarding the defense of duress as to the kidnapping offense." *Id.* at 18a-19a.

The court of appeals reached a similar conclusion for the robbery offense, explaining that "a robbery involves both a taking and a carrying away, so that the escape phase of a crime is not an event occurring after the robbery but is *part of the robbery*." Pet. App. 19a (internal quotation marks and ellipsis omitted). Here, "the escape phase continued at least until [petitioner] and Gonzalez returned to New Rochelle, where they transferred the stolen marijuana to another vehicle together." *Ibid.*

ARGUMENT

Petitioner challenges (Pet. 17-22) the court of appeals' conclusion that he was precluded from asserting a duress defense because he had a reasonable opportunity to escape during his participation in the kidnapping, robbery, and murder of Edward Rivera. The court of appeals held that petitioner's duress defense was legally foreclosed because of this opportunity to escape during the relevant offenses, and that conclusion does not conflict with any other decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. "[T]he defense of duress * * * allows the defendant to avoid liability because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Dixon* v. *United States*, 548 U.S. 1, 7 (2006) (internal citation, ellipsis, and quotation marks omitted); *id.* at 7 n.5. To be entitled to a jury instruction on duress, a defendant must make "some showing" that, "at the time of his criminal conduct, (1) he faced a threat of force (2) sufficient to induce a well-founded fear of impending death or serious bodily injury, and (3) he lacked a reasonable opportunity to escape harm other than by en-

gaging in the illegal activity."[2] Pet. App. 13a-14a (internal quotation marks omitted); see *United States* v. *Bailey*, 444 U.S. 394, 410 (1980) ("[I]f there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense[] will fail.") (internal citation and quotation marks omitted).

Courts have set a "high bar" for defendants seeking to mount a duress defense, holding that the defense is precluded, as a matter of law, if a defendant fails to avail himself of even a narrow opportunity to escape or to seek law enforcement assistance. See *United States* v. *Nwoye*, 663 F.3d 460, 463 (D.C. Cir. 2011). Therefore, "[a] defendant who has the opportunity to avoid committing a crime, either by contacting police or by otherwise removing [himself] from a threatening situation, cannot seek to excuse [his] criminal conduct by claiming to have acted under duress." *Id.* at 462-463.

2. Petitioner does not dispute the elements of a duress defense. Instead, he claims (Pet. 10-16) that the kidnapping and robbery offenses ended with Rivera's murder, which was before his opportunity for escape arose. Petitioner is incorrect. The court of appeals correctly held that the kidnapping and robbery offenses were ongoing, with petitioner's participation, at the time he was presented with an opportunity to escape.

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[2] To establish a duress defense, some courts have also required that the defendant show he "had not recklessly or negligently placed [him]self in a situation in which it was probable that [he] would be forced to perform the criminal conduct." *Dixon*, 548 U.S. at 4 n.2 (presuming the accuracy of the elements of the duress defense, including the lack of recklessness requirement).

This case, in any event, presents a poor vehicle to address petitioner's claim because even accepting, *arguendo*, petitioner's theory that Rivera's murder ended the kidnapping and robbery, a duress defense would nonetheless be foreclosed because Gonzalez did not allegedly threaten petitioner until after Gonzalez shot Rivera. If that were the case, no duress was applied to petitioner during the course of either offense.

a. The federal kidnapping statute, 18 U.S.C. 1201(a)(1), makes it a crime to "unlawfully * * * kidnap[] any person * * * when * * * the person is willfully transported in interstate * * * commerce, *regardless of whether the person was alive when transported across a State boundary*." (emphasis added). The statute was originally enacted to prevent kidnappers from misusing the channels of interstate commerce by taking their victims across state lines to places where state law enforcement officers had no authority to investigate the crimes and to pursue the kidnappers. See *Perez* v. *United States*, 402 U.S. 146, 150 (1971); *Chatwin* v. *United States*, 326 U.S. 455, 462-463 (1946).

A 1998 amendment—which added the emphasized language above—was enacted to relieve the government of the difficult task of proving the exact events that take place between the time when the kidnapper seizes and begins to transport the victim and the time when the victim's body is found in another State. See, *e.g.*, *United States* v. *Singh*, 483 F.3d 489, 493 (7th Cir. 2007); *United States* v. *Horton*, 321 F.3d 476, 479-480 (4th Cir.), cert. denied, 540 U.S. 839 (2003).[3]

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[3] In 2006, the statute was again amended, principally to add that the interstate element can be satisfied if the offender travels

Two principles govern here. First, as set forth above, Section 1201(a) makes clear that liability can attach and continue even when the victim was killed before state lines were crossed. Second, this Court and several courts of appeals have concluded that the federal kidnapping offense is a continuing offense that "does not end until the victim is free." *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 281 (1999). See *United States* v. *Seals*, 130 F.3d 451, 462 (D.C. Cir. 1997), cert. denied, 524 U.S. 928, and 525 U.S. 844 (1998); *United States* v. *Godinez*, 998 F.2d 471, 473 (7th Cir. 1993); *United States* v. *Garcia*, 854 F.2d 340, 344 (9th Cir. 1988), cert. denied, 490 U.S. 1094 (1989). These two well-settled principles demonstrate the error in petitioner's proffered rule (Pet. 13) that a "kidnaping continues and is an ongoing offense, but only as long as the victim remains alive and is held against his will."[4]

As the court of appeals explained, "[n]othing in the language of the [kidnapping] statute suggests that Congress intended that a victim be considered 'free' once dead, and the text of the statute implies the contrary." Pet. App. 18a (citing Section 1201(a)(1) and noting that "the law applies when a victim is transported across state lines 'regardless of whether the person was alive' at the time); see also, *e.g.*, *Horton*,

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across state lines or "uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense." See 18 U.S.C. 1201(a)(1) (2006).

[4] Petitioner argues in response (Pet. 12) that "crossing the interstate boundary is a jurisdictional requisite, but is not otherwise germane to the crime of kidnaping." But this does not change the critical fact that a federal kidnapping offense can continue for at least some period of time after the kidnappers murder their victim.

321 F.3d at 481 n.3 ("We see no reason why Congress would not have intended the statute to reach such a misuse by a kidnapper of interstate commerce channels to cover up his trail by moving evidence of his crime into a different state's jurisdiction.").

Petitioner does not identify any case law that conflicts with the court of appeals' decision, and none of the authority cited by petitioner (Pet. 13-14) involved a murdered victim or turned on when the kidnapping crime ended. *Chatwin*, 326 U.S. 455, for example, reversed a kidnapping conviction because there was no evidence that the victim was held against her will. 326 U.S. at 460-461. But unlike *Chatwin*, where the dispute was whether any kidnapping occurred, here there is no dispute that Rivera was kidnapped. *Chatwin* says nothing about whether the murder of a kidnapping victim concludes the offense. Petitioner's reliance (Pet. 11) on the Ninth Circuit's decision in *Garcia* is equally misplaced. *Garcia* explained that kidnapping "is a continuing offense" and that the statute of limitations "d[oes] not begin to run"—*i.e.*, the offense did not end—until "the victim ceased to be held." 854 F.2d at 344. *Garcia* did not address whether a murdered kidnapping victim ceases to be "held" the moment he is killed nor did it address whether any subsequent effort to conceal the kidnapping and murder extends the offense.

b. The court of appeals was also correct that the robbery offense was ongoing when petitioner was left alone in the Jeep with an opportunity to end his involvement in ongoing criminal activity. Pet. App. 19a-20a.

It is well settled that the crime of robbery continues through and including the escape phase. See, *e.g.*,

Pet. App. 19a ("[A] robbery involves 'both a taking and a carrying away,' so that the 'escape phase of a crime is not an event occurring 'after the robbery' but is '*part of the robbery*.'") (quoting *United States* v. *Reid*, 517 F.2d 953, 965 (2d Cir. 1975)) (internal ellipsis omitted); *United States* v. *Williams*, 344 F.3d 365, 372-373 (3d Cir. 2003) ("The other courts of appeals that have considered whether escape is part of the bank robbery also have determined that it is.") (citing cases from the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits), cert. denied, 540 U.S. 1167 (2004); *United States* v. *Barlow*, 470 F.2d 1245, 1253 (D.C. Cir. 1972) (asportation continues until the stolen item is "placed * * * where it will be securely hidden, and where [the thief] can afterwards get it and appropriate it to himself and convert it to his own use").

Petitioner offers no authority to support his contrary conclusion (Pet. 15-16) that the robbery of Rivera "was completed and was not ongoing at the reservoir" because "there was nothing from which [petitioner] and Gonzalez were attempting to escape." When petitioner and Gonzalez arrived at the reservoir, the stolen marijuana was still inside the Jeep. They promptly acted to secret the drugs and burn the Jeep to cover their tracks and safeguard the robbery's fruits from an anticipated law enforcement pursuit. The court of appeals was therefore correct that, "[i]n this case, the escape phase continued at least until [petitioner] and Gonzalez returned to New Rochelle, where they transferred the stolen marijuana to another vehicle altogether." Pet. App. 19a.

c. Petitioner is incorrect (Pet. 9-10) that he did not "affirmatively further or facilitate the charged crime[s]," at the time his chance to escape arose.

Rather, the court of appeals correctly held that petitioner "was participating in the [kidnapping and robbery] as an accomplice during the period in which he had an opportunity to escape." Pet. App. 16a. Even if he did nothing else, petitioner aided and abetted the robbery and kidnapping by waiting alone with the murder weapon and stolen marijuana while Gonzalez disposed of the body and by later assisting Gonzalez in hiding the marijuana and setting fire to the Jeep. See Pet. App. 16a ("engaging" in illegal activity for purposes of the duress defense includes "the liability of an ordinary accomplice, aider, or abettor"); see 18 U.S.C. 2 (one who aids or abets the commission of a crime "is punishable as a principal").

The disposal of Rivera's body, the asportation and concealment of the marijuana, and the torching of the Jeep were necessary steps to completing the main objective of the kidnapping and robbery—to take the valuable marijuana from Rivera. By petitioner's own account (see Pet. 4), he continued to assist Gonzalez in these concealment activities, and thus his role in the offense was ongoing when his escape opportunity arose. See Pet. App. 16a-17a (holding that petitioner's "continued presence at the scene constitutes ongoing participation absent some fact indicating that he has disassociated himself from the crime"); cf. *Grunewald* v. *United States*, 353 U.S. 391, 405 (1957) ("[A]cts of concealment" may further a conspiracy where the concealment advances the conspiracy's "*main* criminal objectives.").

d. Petitioner's claim also suffers from a fatal logical fallacy that renders it a poor vehicle to review the question whether a robbery and kidnapping terminate with the murder of the victim.

Petitioner argues (Pet. 10-16) that the murder of Rivera ended the kidnapping and robbery offenses. But, under petitioner's version of events, it was not until *after* Gonzalez shot and killed Rivera that Gonzalez allegedly threatened petitioner. See Pet. 3; see also Pet. App. 4a-5a. Petitioner provides no explanation why the kidnapping and robbery should be viewed as ongoing when Gonzalez threatened petitioner in the moments after the shooting, but had nonetheless concluded upon reaching the reservoir, shortly thereafter, when petitioner could have escaped. See Pet. 10-16. Therefore, even if this Court accepted petitioner's position that Rivera's murder marked the conclusion of the kidnapping and robbery, petitioner's duress defense would still fail because, under petitioner's reasoning, the threatened harm did not arise until *after* the crimes' completion. See *Dixon*, 548 U.S. at 4 n.2 (describing the requirement that a defendant be "under an unlawful and *imminent* threat" at the time he engaged in the criminal conduct) (emphasis added).

3. Petitioner contends (Pet. 22-27) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *Contento-Pachon*, 723 F.2d 691 (1984), on whether the reasonableness of any escape opportunity is a jury question.[5] There is no conflict.

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[5] Petitioner also contends (Pet. 23-25) that the court of appeals' decision conflicts with the Second Circuit's prior decision in *United States* v. *Paul*, 110 F.3d 869 (1997). Any such intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, no conflict exists, because *Paul* addressed not the reasonableness of a defendant's escape opportunity but rather whether any escape opportunity presented itself before the defendant was purportedly forced into committing the crime. 110 F.3d at 871-872.

To assert duress, a defendant must meet the strict requirement that he seize any reasonable avenue of escape or police assistance, or be foreclosed from asserting a duress defense as a matter of law. See, *e.g.*, *United States* v. *Ibarra-Pino*, 657 F.3d 1000, 1006 (9th Cir. 2011) (holding duress defense unavailable where a defendant was reasonably able to surrender safely to authorities, but failed to do so, "even where the defendant has essentially completed the crime"), cert. denied, 132 S. Ct. 1942 (2012);[6] *United States* v. *Alicea*, 837 F.2d 103, 104 (2d Cir.) (holding duress defense unavailable where defendants failed to seek law enforcement assistance after smuggling cocaine into the United States), cert. denied, 488 U.S. 832 (1988); *United States* v. *Jennell*, 749 F.2d 1302, 1306 (9th Cir. 1984) (no duress defense where defendant failed to approach police for help during "times of inactivity" in the conspiracy and during "a period when [defendant] was out of the organization"), cert. denied, 474 U.S. 837 (1985).

Contento-Pachon did not, as petitioner suggests, establish a contrary legal principle that defendants are always entitled to a jury determination on the reasonableness of their escape opportunity; rather the Ninth Circuit and other courts of appeals have expressly distinguished *Contento-Pachon* and limited that decision to its specific facts.[7] See, *e.g.*, *Ibarra-*

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[6] The Ninth Circuit has not, however, required as an element of the duress defense that a defendant "surrender to authorities after reaching a place of safety, except in prison escape cases." *United States* v. *Chi Tong Kuok*, 671 F.3d 931, 949 (9th Cir. 2012).

[7] In *Contento-Pachon*, the court determined that it was a jury question whether the Bogota, Columbia-based defendant had a reasonable opportunity to escape, rather than participate in a drug

Pino, 657 F.3d at 1007 ("Unlike the defendant in *Contento-Pachon*, Ibarra did not proffer any evidence indicating that he could not escape the threatened harm either by contacting the authorities prior to the commission of the crime or cooperating with the authorities at the first opportunity."); *United States* v. *Moreno*, 102 F.3d 994, 997 (9th Cir. 1996), cert. denied, 522 U.S. 826 (1997) ("Unlike the defendant in *Contento-Pachon*, however, Moreno presented no evidence that he could not flee from his gang's reach, or that he could not seek help from local law enforcement agencies because they were corrupt and controlled by gang members."); see *Alicea*, 837 F.2d at 106-107 (finding no jury question on the reasonableness of an escape opportunity where defendants faced no "special circumstances" like those presented in *Contento-Pachon*).

These decisions are wholly consistent with the court of appeals' conclusion here that "no rational juror could have found that [petitioner] lacked a reasonable opportunity to escape," where petitioner's "own express recollection placed him alone with the murder weapon, in the driver's seat of a vehicle, while Gonzalez was out of sight, down a hill, struggling to dispose of a 232-pound body." Pet. App. 15a. Petitioner not only failed to avail himself of the first (or any) opportunity to withdraw from these criminal activities, but he retained possession of the marijuana

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trafficking scheme, given (i) the defendant's belief that the Bogota police were paid informants for drug traffickers, and (ii) the defendant's assertion that, to flee, he would need move his house, job, wife, and young child beyond the reach of drug traffickers. 723 F.2d at 694.

at his parents' house.[8] Petitioner's continued role in the concealment of the offenses and retention of the marijuana are inconsistent with the strictures of a duress defense.

4. Petitioner was convicted on Counts 8-11 of destruction of evidence and conspiracy to destroy evidence, in violation of 18 U.S.C. 1519, 18 U.S.C. 2, and 18 U.S.C. 371. Judgment 1. The evidence at issue in those counts related to Rivera's body (Count 8), a baseball hat (Count 9), the Jeep (Count 10), and the body, hat, and Jeep (Count 11). Second Superseding Indictment 6-8. In *Yates* v. *United States*, 135 S. Ct. 1074, 1079 (2015) (plurality opinion), this Court held that for purposes of 18 U.S.C. 1519, a "tangible object * * * must be one used to record or preserve information." See *id.* at 1089-1090 (Alito, J., concurring). The government agrees with petitioner (Pet. 5 n.2) that, in light of *Yates*, neither Rivera's body, the hat, or the Jeep constitute a "tangible object" under Section 1519. Accordingly, the government will move to dismiss those counts under Federal Rule of Criminal Procedure 48.

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[8] And far from seeking police assistance, petitioner failed to tell law enforcement agents his current version of events until his fourth meeting with investigators in December 2010—approximately 22 months after Rivera's murder and kidnapping—and only after police discovered substantial evidence implicating petitioner in Rivera's kidnapping, robbery, and murder. Pet. App. 4a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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