No._____

IN THE SUPREME COURT OF THE UNITED STATES

DION JOHNSON,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. This Court has consistently held that a "categorical approach" applies when determining whether an offense qualifies as a predicate for purposes of various federal criminal provisions. The Third Circuit has seriously deviated from this approach, and ruled in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016), that courts need not apply the categorical approach to determine whether an offense has, as an element, the use or threatened use of force and therefore qualifies as a "crime of violence" for purposes of 18 U.S.C. § 924(c). Although this approach conflicts with that of ten other Circuits, the Third Circuit held in this case that it is not debatable among jurists of reason and declined to issue a certificate of appealability as to whether Petitioner's conviction under § 924(c) for brandishing a firearm during a Hobbs Act robbery is unconstitutional in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2557–60 (2015). The question presented is:

> Does the categorical approach apply in determining whether an offense is a "crime of violence" for purposes of 18 U.S.C. § 924(c)?

2. The Third Circuit also noted that irrespective of whether the categorical approach applies, one of the predicate offenses for Petitioner's § 924(c) charge, a Hobbs Act robbery under 18 U.S.C. § 1951(b), may still constitute a crime of violence. This Court recently held in *Sessions v. Dimaya* that a "straightforward application" of *Johnson* to the residual clause in 18 U.S.C. § 16(b)—worded identically to the residual clause in 18 U.S.C. § 924(c)—compels the determination that that provision is unconstitutionally vague. 138 S. Ct. 1204, 1213 (Apr. 7, 2018). The question presented is:

> In light of *Johnson v. United States* and *Sessions v. Dimaya*, can a Hobbs Act robbery under 18 U.S.C. § 1951(b) categorically constitute a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A), if juries in three circuits are routinely

instructed according to those circuits' pattern instructions the offense may be committed by simply causing the victim to "fear harm" which includes "*fear of financial loss* as well as fear of physical violence"?

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IN THE SUPREME COURT OF THE UNITED STATES

DION JOHNSON,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dion Johnson respectfully requests that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on May 18, 2018.

OPINION BELOW

The order of the court of appeals denying Mr. Johnson's request to expand the certificate of appealability in this case is attached as Appendix A. The court of appeals' non-precedential opinion affirming the district court's judgment is attached as Appendix B.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231 and jurisdiction over the motion to set aside, vacate, or correct the sentence pursuant to 28 U.S.C. § 2255(a). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 924(c)(1)(A)(ii) prohibits the brandishing of a gun "during and in relation to any crime of violence or drug trafficking crime." "Crime of violence," in turn, is defined as any felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

28 U.S.C. § 2255(a) provides that federal prisoners "may move the court which imposed the sentence to vacate, set aside or correct the sentence" on "the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a)

28 U.S.C. § 2253(c)(1) provides that "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1). Certificates of appealability, in turn, "may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

STATEMENT OF THE CASE

In *Johnson v. United States*, 135 S. Ct. 2551, 2557–60 (2015), this Court held the so-called residual clause in the Armed Career Criminal Act (18 U.S.C. § 924(e)) to be unconstitutionally vague. This Court recently held in *Sessions v. Dimaya* that a "straightforward application" of *Johnson* to the residual clause in 18 U.S.C. § 16(b)—worded identically to the

residual clause in § 924(c)—compels the determination that that provision is unconstitutionally vague. 138 S. Ct. 1204, 1213 (2018).

Here, however, the court of appeals declined to engage that question. Instead, Mr. Johnson's challenge was rejected under the novel approach adopted by the Third Circuit in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). There, the circuit held that the "categorical approach"—the established methodology whereby courts determine whether an offense qualifies as a predicate by looking strictly to its statutorily defined elements—does not apply under § 924(c). Instead, the circuit crafted a new approach whereby courts rely upon facts found by the jury or admitted by the defendant in order to determine whether the alleged predicate was a "crime of violence." In doing so, the Third Circuit broke with ten other circuits, all of which apply the categorical approach dictated by this Court's precedent. Certiorari should be granted to reestablish a uniform methodology for determining what offenses qualify as predicates supporting the steep mandatory penalties provided by § 924(c).

Pursuant to an agreement with the government, Mr. Johnson entered a guilty plea to conspiracy to commit Hobbs Act robbery and possession of a firearm in furtherance of a crime of violence: Hobbs Act robbery.[1] The District Court held a sentencing hearing on April 23, 2010, and sentenced Mr. Johnson to 48 months of imprisonment on the Hobbs Act conspiracy count and a mandatory consecutive sentence of 84 months of imprisonment on the § 924(c) count. The total sentence imposed was 132 months.

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[1] Mr. Johnson was also charged with additional counts that were withdrawn as part of the plea agreement. Although Mr. Johnson's § 924(c) charge listed both Hobbs Act robbery and carjacking as predicate offenses, it is clear in light of the unambiguous statements during Mr. Johnson's plea hearing, that his § 924(c) plea related to Hobbs Act robbery only. Tr. 9/01/2009 at 8 ("The Defendant is going to enter a guilty plea to . . . Count 5 of the indictment, which charges brandishing a firearm in furtherance of a crime of violence, the Hobbs Act Robbery.").

On January 30, 2012, Mr. Johnson, proceeding *pro se*, filed a letter-motion requesting permission to file a motion pursuant to 28 U.S.C. § 2255 out of time. Among other things, he claimed that his prior counsel had failed to file an appeal despite being directed to do so, and that he had not learned of that failure until January 2012. The District Court denied the motion, and the Third Circuit reversed, holding that additional findings of fact were necessary to determine whether Mr. Johnson's motion was untimely and deserving of equitable tolling. *United States v. Johnson*, 590 F. App'x 176 (3d Cir. 2014). On remand, Mr. Johnson amended his § 2255 motion to raise a claim that his § 924(c) conviction was unconstitutional in light of the Supreme Court's decision *Johnson*.

Mr. Johnson challenged his § 924(c) conviction on the grounds that Hobbs Act robbery no longer qualifies as a predicate triggering § 924(c), because it is not categorically a crime of violence after *Johnson*. Section 924(c)(1)(A)(ii) prohibits the brandishing of a gun "during and in relation to any crime of violence or drug trafficking crime." "Crime of violence," in turn, is defined as any felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Subsection (A) is known as the element-of-force clause, and subsection (B) is known as the residual clause.

Based on *Johnson*, Mr. Johnson argued that § 924(c)'s residual clause is unconstitutionally vague—leaving Hobbs Act robbery to qualify as a § 924(c) predicate, if at all, under the element-of-force clause. Mr. Johnson further contended that Hobbs Act robbery

cannot qualify under that clause, because it does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another.

On January 11, 2017, the District Court denied Mr. Johnson's request to file his § 2255 motion out of time and dismissed his ineffective assistance of counsel claim as time barred. The Court further determined that his *Johnson* claim was timely but denied it on its merits. App. C. at 19–25. The Court granted a certificate of appealability with respect to Mr. Johnson's ineffective assistance of counsel claim only, and Mr. Johnson timely appealed. *Id.* at 25–26.

On April 21, 2017, Mr. Johnson filed a motion to expand the certificate of appealability to challenge the District Court's denial of his *Johnson* claim. [2]

Mr. Johnson recognized that the Third Circuit had held that Hobbs Act robbery was a crime of violence for the purposes of § 924(c) once a jury has found at trial (or a defendant has admitted in pleading guilty) that a firearm was brandished. *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). However, he argued that that decision was itself debatable among jurists of reason. At the time of Mr. Johnson's motion to expand the certificate of appealability, a petition for a writ of certiorari in *Robinson* was pending before this Court. In light of that petition's pendency, Mr. Johnson requested that the Third Circuit hold his request to expand the certificate of appealability in abeyance pending this Court's certiorari decision.

On August 8, 2017, the Third Circuit denied Mr. Johnson's request to expand the certificate of appealability, holding that jurists of reason would not debate that Mr. Johnson's

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[2] The District Court characterized Mr. Johnson's conviction as "brandishing a firearm in furtherance of specific crimes of violence: (1) Hobbs Act robbery; and (2) carjacking." App. C. at 24. The Court determined that carjacking is categorically a crime of violence notwithstanding *Johnson*, and therefore denied the *Johnson* claim without determining whether Hobbs Act robbery is a crime of violence. *Id.* at 21. In his motion to expand the certificate of appealability, Mr. Johnson contended that this determination was debatable among jurists of reason.

"plea of guilty for violating 18 U.S.C. § 924(c) in connection with a Hobbs Act robbery establishes that the Hobbs Act robbery qualifies as a 'crime of violence' under the elements clause of § 924(c)." App. B at 1 (applying *Robinson*, 844 F.3d at 144).

The *Robinson* majority opinion, upon which the panel relied in denying Mr. Johnson's request to expand the certificate of appealability, held that the categorical approach simply does not apply in the § 924(c) context. 844 F.3d at 141–44. That approach is "not necessary," the majority reasoned, because a predicate and § 924(c) offense are contemporaneously tried to a jury, and as a consequence "the record of all necessary facts [is] before the district court" such that any § 924(c) conviction "unmistakably shed[s] light" on whether the predicate offense was committed forcibly. *Id.* at 141. The majority recognized, though, that *Taylor v. United States*, 495 U.S. 575 (1990), and § 924(c)'s element-of-force clause prohibit a judicial inquiry into whether the predicate was, as a factual matter, committed forcibly. *Id.* at 143–44.

The majority therefore crafted a new approach. Courts are no longer to make a purely legal inquiry into the elements of the predicate offense to determine if it is a crime of violence, but should consider any facts found by the jury (or admitted by the defendant) with respect to the gun portion of the § 924(c) offense to determine whether the predicate offense was committed in a forcible way. 844 F.3d at 143–44. Thus, according to the majority,

> [t]he question . . . is not "is Hobbs Act robbery a crime of violence?" but rather "is Hobbs Act robbery *committed while brandishing a firearm* a crime of violence?"

Id. at 144 (emphasis in original). Once a jury has found (or the defendant has admitted) that he brandished a firearm, "[t]he answer to [the question of whether the predicate offense is a crime of violence] must be yes." *Id.* Thus, in the majority's view, the certainty of a jury finding (or defendant admission) of brandishing obviates the categorical approach and permits a court to

"unmistakably" conclude that the Hobbs Act robbery was committed in a forcible way. *Id.* at 141.

The majority viewed this as a permissible extension of the modified categorical approach to the situation of contemporaneous offenses. 844 F.3d at 143. The majority acknowledged that Hobbs Act robbery can be committed without force, and did not contend that the statute is divisible. Nonetheless, the majority viewed the modified categorical approach as "inherent[ly]" applicable in the contemporaneous offense situation "because the relevant indictment and jury instructions are before the court." *Id.* But instead of being used to identify the set of alternative elements under which the defendant was convicted, *Mathis*, 136 S. Ct. at 2251–54, the majority's version of the modified categorical approach is designed to "shed light on the means by which the predicate offense was committed" and thereby "elucidate[s]" an "otherwise ambiguous element" in a predicate statute. *Id.* at 143, 144.[3]

The Third Circuit also denied Mr. Johnson's request to hold his application for an expanded certificate of appealability in abeyance pending this Court's resolution of the petition for certiorari in *Robinson*, noting that "even if the United States Supreme Court were to grant certiorari and disturb our decision in *Robinson*, that would not necessarily mean that Hobbs Act robbery is not a crime of violence under the elements clause. . . . [I]t appears that every Court of

[3] Judge Fuentes disagreed with this entire analysis. In an opinion concurring only in the judgment on the § 924(c) issue, he concluded that the categorical approach applies and that the modified categorical approach has no bearing here because Hobbs Act robbery is not divisible. 844 F.3d at 147–50 (Fuentes, J., concurring in part and concurring in the judgment). Those conclusions are compelled, Judge Fuentes reasoned, by this Court's decisions in *Taylor* and *Mathis*, and by the text and legislative history of § 924(c). *Id.* Moreover, Judge Fuentes explained that applying the categorical approach avoids the "circularity and ambiguity" of the majority's approach, which looks to the gun portion of a § 924(c) conviction to determine whether a predicate offense is a crime of violence. *Id.* at 148–49.

Appeals to have considered the issue has concluded that it does." App. B at 2 (citations omitted).[4]

On May 18, 2018, the Third Circuit issued an opinion affirming the District Court's denial of Mr. Johnson's ineffective assistance of counsel claim without addressing the *Johnson* claim. App. A. at 6 n.2.

REASONS FOR GRANTING THE PETITION

The Third Circuit's approach to determining whether a predicate offense is a crime of violence for purposes of § 924(c) is contrary to this Court's precedent; contrary to the holdings of the other courts of appeals; and contrary to the statute's text, leading to absurd results. If left uncorrected, it threatens to wreak doctrinal havoc in this already complicated area of the law. Additionally, the Circuit's intimation that Hobbs Act robbery continues to be a viable predicate offense for a § 924(c) conviction even under the categorical approach is incorrect.

A. The Third Circuit's approach is contrary to this Court's precedent regarding the categorical and modified categorical approaches.

This Court has expressly held that the statutory text "has as an element"—the language at issue in § 924(c)—compels the categorical approach. *See Taylor v. United States*, 495 U.S. 575, 600 (1990) (addressing 18 U.S.C. § 924(e)); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (addressing 18 U.S.C. § 16(a)). The Third Circuit disregarded that straightforward holding because a tertiary rationale for the categorical approach discussed in *Taylor*—the practical and Sixth Amendment problems with judicial fact-finding about prior convictions—is supposedly not implicated when a court looks to a jury's brandishing finding in a contemporaneous offense. *Robinson*, 844 F.3d at 141–43. But *Taylor*'s primary and independently sufficient rationale for the categorical

[4] Mr. Robinson's petition for a writ of certiorari was denied on October 2, 2017. *Robinson v. United States*, 138 S. Ct. 215 (2017).

approach was statutory text—indeed, classifying an offense by its elements is the very definition of a "categorical approach."

This Court has also expressly barred extending the modified categorical approach to determine the means by which an indivisible predicate statute was violated. *See Descamps v. United States*, 570 U.S. 254, 260–64; *Mathis v. United States*, 136 S. Ct. 2243, 2251–54 (2016). The Third Circuit disregarded that straightforward holding because, in the contemporaneous offense situation, "the indictment and jury instructions are before the court," and because there is supposedly no Sixth Amendment problem when a defendant admission or jury finding is relied upon. *Robinson*, 844 F.3d at 141–43. But those documents are before courts in prior-conviction cases as well, and *Descamps* specifically held that it is irrelevant whether a defendant admits the means of violation:

> [W]hether [the defendant] ever admitted to [the relevant means] is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [the predicate offense] not (as here) overbroadly, but instead alternatively, with one [set of elements] corresponding to the [qualifying] crime and another not.

570 U.S. at 265. The Third Circuit's extension of the modified categorical approach is thus no more sound than were the extensions this Court rejected in *Mathis* and *Descamps*, and it should meet the same fate.

B. The federal courts of appeals are now split 10-1 over whether the categorical approach applies to § 924(c).

The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits apply the categorical approach to determine whether an offense is a predicate for a contemporaneously charged § 924(c) offense.[5] No circuit has held otherwise.[6] The Ninth

[5] *See United States v. Hill*, 832 F.3d 135, 139 (2d Cir. 2016); *United States v. Fuertes*, 805 F.3d 485, 497–99 (4th Cir. 2015); *United States v. Jennings*, 195 F.3d 795, 797–98 (5th Cir. 1999); *United States v. Rafidi*, 829 F.3d 437, 444–45 (6th Cir. 2016), *cert. denied*, 137 S. Ct.

Circuit's decision in *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995), is instructive. There, the court explained that the categorical approach is compelled by the text and legislative history of § 924(c), and rejected the view applied by the Third Circuit here that the categorical approach is unnecessary given any factual confidence surrounding contemporaneous offenses. 68 F.3d at 1225. The Third Circuit addressed neither *Amparo* nor any of the other precedents applying the categorical approach to decide if an offense is a predicate "crime of violence" under § 924(c). This split of authority is intolerable and calls for review on certiorari.

Robinson is already lending complexity to the identification of § 924(c) predicates by suggesting that, insofar as an offense does not categorically qualify, there follows an additional inquiry under a "modified" approach. In *United States v. St. Hubert*, 883 F.3d 1319, 1334–36 (11th Cir. 2018), the Eleventh Circuit volunteered extended *dictum* endorsing *Robinson*'s innovation. That court read *Robinson* to have adopted a newly expanded "modified" approach inasmuch as the defendant is adjudged guilty of "a contemporaneous federal crime charged in the same indictment." *Id.* The Eleventh Circuit added that this rule might call for divergent applications of identical statutory language in § 16(b) and § 924(c). *Id.* Meanwhile, in the only circuit with jurisdiction over criminal appeals where the question remains open, a district court

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2147 (2017); *United States v. Williams*, 864 F.3d 826, 828 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 272 (2017); *Prickett II*, 839 F.3d at 698, *cert. denied*, 138 S. Ct. 1976 (2018); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Serafin*, 562 F.3d 1105, 1107–08 (10th Cir. 2009); *United States v. McGuire*, 706 F.3d 1333, 1336–37 (11th Cir. 2013); *United States v. Kennedy*, 133 F.3d 53, 56–57 (D.C. Cir. 1998).

[6]One circuit's cases are in internal discord, but the weight of its precedent follows the categorical approach. *Compare United States v. Rafidi*, 829 F.3d 437, 444–45 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2147 (2017) (applying categorical approach to identify § 924(c) predicates), *and United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 1975 (2018) (same), *with Shuti v. Lynch*, 828 F.3d 440, 449–50 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 1977 (2018) (decision issued after *Taylor*, but before *Rafidi*, suggesting categorical approach does not apply in § 924(c) context).

has followed *Robinson* to "conclude that categorical analysis is not appropriate" for purposes of identifying § 924(c) predicates. *United States v. Hernandez*, 228 F. Supp. 3d 128, 132 (D. Me. 2017) (alternative holding).

C. The Third Circuit's approach is contrary to the text of § 924(c) and leads to absurd results.

Section 924(c) is simple: it prohibits the brandishing of a gun during a limited and statutorily defined set of crimes, namely "crimes of violence" and "drug trafficking crimes." 18 U.S.C. § 924(c)(1)(A)(ii). In other words, § 924(c) prohibits "the temporal and relational conjunction of two separate acts"—the underlying crime of violence or drug trafficking crime and the use of a gun. *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014). "Crime of violence" is defined as a felony offense with an element of force. 18 U.S.C. § 924(c)(3)(A). As such, an offense's status as a crime of violence has always been a purely legal issue for courts to determine pretrial, and at trial the jury must be instructed that the predicate offense is, as a matter of law, a crime of violence. *See, e.g.*, Third Cir. Model Crim. Jury Instr. 6.18.924A.[7]

The Third Circuit's approach upends this statutory structure. Now, it cannot be determined pretrial (or pre-plea) whether an offense is a crime of violence, because that will depend on a jury finding or plea admission. And § 924(c) model instructions given throughout the country are now inaccurate, because juries can no longer be told that an offense is a crime of violence as a matter of law—instead, they will determine its status based on their brandishing finding. An offense is now both a crime of violence and not, depending on how the case turns out—*i.e.*, many predicate offenses will only be considered crimes of violence if a defendant is

[7] *Accord* Fifth Cir. Pattern Crim. Jury Instr. 2.48; Sixth Cir. Pattern Crim. Jury Instr. 12.02; Seventh Cir. Pattern Crim. Jury Instr. 18 U.S.C. § 924(c)(1)(A); Eighth Cir. Model Crim. Jury Instr. 6.18.924C; Ninth Cir. Model Crim. Jury Instr. 8.71; Tenth Cir. Pattern Crim. Jury Instr. 2.45; Eleventh Cir. Pattern Crim. Jury Instr. 35.2.

convicted of violating § 924(c), but if a defendant is acquitted of that charge, his predicate offenses will not be considered a crime of violence for sentencing purposes under the identical definition provided by U.S.S.G. § 4B1.2.

This is absurd. By making the crime of violence determination turn on brandishing, the Third Circuit has disregarded the statute's (and this Court's) denomination of the crime of violence a "separate act" distinct from the use of a gun, and instead imposes § 924(c) liability whenever the predicate offense plus brandishing involves force. And that will, of course, always be the case, rendering § 924(c) a tautology (or in Judge Fuentes's words, a "circularity"). *Robinson*, 844 F.3d at 148 (Fuentes, J., concurring in part and concurring in the judgment). Once the predicate offense itself need not have an element of force, every offense becomes a potential crime of violence. To paraphrase the Third Circuit, it is not whether mail fraud is a crime of violence, but whether mail fraud committed while brandishing a firearm is a crime of violence. Indeed, all drug trafficking offenses involving gun brandishing are now crimes of violence, rendering half of § 924(c) surplusage.[8]

D. The Third Circuit's approach is contrary to the position the United States took before this Court in *Sessions v. Dimaya*, as well as its longstanding position before lower courts.

In its new approach to crime-of-violence determinations under § 924(c), the Third Circuit has not only broken with ten circuits, but rejected the position the government took itself in *Robinson* and before this Court in *Sessions v. Dimaya*. Indeed, the government continued to

[8] The Third Circuit tried to avoid the tautology by emphasizing that Hobbs Act robbery has an "ambiguous" force-type element. *Robinson,* 844 F.3d at 144. That is a fudge, or as this Court called it in *Descamps*, a "name game." 133 S. Ct. at 2292 (rejecting attempt to recast statute missing requisite element as one containing an "overbroad" element). A predicate offense either has an element of force, or it does not. By acknowledging that non-forcible scenarios can give rise to a Hobbs Act robbery conviction, the Third Circuit concedes that the statute lacks an element of force. *Robinson*, 844 F.3d at 144.

disavow *Robinson*'s approach in district courts within the Third Circuit. *See* Government's Supplemental Sent'g Mem., filed Dec. 13, 2017, at Dkt. No. 48 in *United States v. Raul Rodriguez*, E.D. Pa. Crim. No. 16-288, at 3 n.1 (explaining that "government does not agree with the reasoning of *Robinson*" and opposing *Robinson*'s extension to question of whether Hobbs Act robbery constitutes "crime of violence" under career offender sentencing guideline).

That is consistent with the government's position in the other courts of appeals. For instance, when a panel of the Eighth Circuit held that the categorical approach does *not* apply to § 924(c), *United States v. Prickett*, 830 F.3d 760 (8th Cir. 2016), the government itself—through the Appellate Section of the Justice Department—filed a rehearing petition seeking to overturn that ruling. The government correctly argued that § 924(c)'s "statutory text alone requires a categorical approach," and that any factual confidence surrounding contemporaneous offenses does not justify abandoning it.[9] The Eighth Circuit corrected its error, and held that the categorical approach applies to § 924(c). *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016) ("*Pricket II*").

The government took the same position before this Court in *Dimaya*. In its reply brief in the certiorari proceedings, the government explained that 18 U.S.C. § 16(b)'s residual clause is identical to § 924(c)'s, and that because the categorical approach applies to both §§ 16(b) and 924(c), conflicting circuit decisions in §§ 16(b) and 924(c) cases supported the granting of certiorari. *See* Reply Brief for Petitioner, filed Aug. 31, 2016, in No. 15-1498, at 9–10 & nn.1–2. The government again called upon the equivalence between § 16(b) and "its counterpart in § 924(c)" when *Dimaya* was reargued. *See* Transcript of Argument on Oct. 2, 2017, in No. 15-

[9]United States' Petition for Panel Rehearing in No. 15-3486 (8th Cir. Sept. 9, 2016), at 7 n.7 (addressing § 924(c)(3)(B)'s "by its nature" language, but equally applicable to § 924(c)(3)(A)'s "has as an element" language).

1498, at 58. Notably, the government *still* disagrees with the Third Circuit's holding in *Robinson* that the categorical approach does not apply under § 924(c)'s element-of-force clause. *See, e.g.*, *United States v. Barrett*, No. 14–2641, Supp. Br. of United States, at 12 (2d Cir. May 4, 2018) ("The categorical approach is well-suited to inquiries under the Force Clause.").

In the wake of *Dimaya*, however, the government has changed course and now takes the position that the categorical approach does *not* apply to crime-of-violence determinations *under § 924(c)'s residual clause*. *See, e.g.*, *United States v. Jenkins*, No. 17-97, Supp. Br. of United States on *certiorari*, at 3–4 (Apr. 24, 2018).[10]

E. Under *Johnson* and *Dimaya*, Hobbs Act robbery cannot categorically constitute a "crime of violence" and therefore support a conviction under 18 U.S.C. § 924(c).

In declining to hold Mr. Johnson's request for an expansion of the certificate of appealability in abeyance pending this Court's review of *Robinson*, the Third Circuit noted that "even if the United States Supreme Court were to grant certiorari and disturb our decision in *Robinson*, that would not necessarily mean that Hobbs Act robbery is not a crime of violence under the elements clause." App. B at 2. While the Circuit did not expressly hold that Hobbs Act robbery was a crime of violence under the elements clause, it noted that several other courts have so held. Mr. Johnson's case offers an opportunity for this Court to correct that erroneous determination, as Hobbs Act robbery cannot categorically constitute a crime of violence under the elements clause of § 924(c)(3) and therefore cannot support a conviction under 18 U.S.C. § 924(c).

[10] Three Justices of this Court and former Justice Kennedy have already expressed a willingness to address this issue. *See Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring); *id.* at 1254–59 (Thomas, Kennedy, and Alito, JJ., dissenting).

Although this Court has not specifically resolved whether § 924(c)'s residual clause is unconstitutionally vague, it recently held that a "straightforward application" of *Johnson* to the identically worded residual clause in 18 U.S.C. § 16(b) compels the conclusion that that residual clause is unconstitutional. *Dimaya*, 138 S. Ct. at 1213. Based on *Johnson* and *Dimaya*, § 924(c)'s residual clause is unconstitutional—leaving Hobbs Act robbery to qualify as a § 924(c) predicate, if at all, under the element-of-force clause. Accordingly, in order to sustain a conviction for violating § 924(c), Hobbs Act robbery must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Several circuits ostensibly applying the categorical approach have held that Hobbs Act robbery categorically satisfies that "crime of violence" definition;[11] guidance from this Court is necessary to ensure that to ensure that the categorical approach is correctly applied by the lower courts.

Hobbs Act robbery is defined as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." 18 U.S.C. § 1951(b)(1). The least culpable conduct necessary for conviction under this definition is taking something by placing someone in fear of future injury to his property—with "property" under the Hobbs Act including money and intangible things of value.[12] *See United States v.*

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[11] *See United States v. St. Hubert*, 883 F.3d 1319, 1331–33 (11th Cir. 2018) (citing *United States v. Gooch*, 850 F.3d 285, 291–92 (6th Cir. 2017); *United States v. Hill*, 890 F.3d 51, 56–60 (2d Cir. 2018); *United States v. Rivera*, 847, 848–49 (7th Cir. 2017); *United States v. Anglin*, 856 F.3d 954, 964–65 (7th Cir. 2017), *cert. granted & judgment vacated on other grounds*, 138 S. Ct. 126 (2017); *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016)).

[12] Because a statute's elements define the bare minimum conduct and mental state required for conviction, this Court and the courts of appeal identify elements by determining the least

Arena, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added) ("The concept of 'property' under the Hobbs Act is an expansive one" that includes "*intangible assets*, such as rights to solicit customers and to conduct a lawful business.") *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining extortion conviction under Hobbs Act when boss threatened "to slow down or stop construction projects unless his demands were met"); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (explaining that the Circuits "are unanimous in extending Hobbs Act to protect intangible, as well as tangible property."); *Leonard B. Sand et al., Modern Federal Jury Instructions - Criminal*, Instruction 50-4 ("The term 'property' includes money and other tangible and intangible things of value which are capable of being transferred from one person to another."); Third Cir. Model Crim. Jury Instr. 6.18.1951-5.

Thus, Hobbs Act robbery may be committed by threatening future pecuniary injury, such as threats to cause a devaluation of an economic interest such as a stock holding or a contract right, which does not involve physical force at all. *Cf. Iozzi*, 420 F.2d at 514 (4th Cir. 1970) (noting that "fear" as used in the Act includes "fear of economic loss"); *United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964). Indeed, even injury to tangible property does not require the threat of violent force. One can threaten to injure another's property by throwing paint on his house or spray painting his car. These actions obviously do not require the "violent force" demanded by this Court's decision in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). Because "the full range of conduct" covered by the Hobbs Act robbery statute does not

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culpable conduct necessary for conviction. *See, e.g., Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *United States v. Dahl*, 833 F.3d 345, 349–50 (3d Cir. 2016).

require "violent force" against persons or property, it does not qualify as a "crime of violence" under § 924(c)(3) s force clause.

But for its misclassification of Hobbs Act robbery as a crime of violence, the Third Circuit would have granted Mr. Johnson's certificate of appealability and permitted him to make a full challenge to his conviction for violating § 924(c) and the mandatory seven year sentence he received for that offense. Certiorari is warranted to correct the Third Circuit's failure to apply the categorical approach in § 924(c) cases and to clarify that Hobbs Act robbery no longer constitutes a crime of violence and cannot serve as a predicate offense for a § 924(c) conviction.

CONCLUSION

For all of the foregoing reasons, a writ of *certiorari* should issue to review the decision of the United States Court of Appeals for the Third Circuit denying Mr. Johnson's request to expand the certificate of appealability in this case to include Mr. Johnson's challenge to his conviction under 18 U.S.C. § 924(c), as well as the judgment entered in this case on May 18, 2018, which affirmed the denial of Mr. Johnson's motion to vacate without addressing that claim.

Respectfully submitted,

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