No._____

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR SOWELL,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

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

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals
Counsel of Record

LEIGH M. SKIPPER
Chief Federal Defender

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Suite 540 West - Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

Counsel for Petitioner

QUESTION PRESENTED

This Court has consistently held that a "categorical approach" applies when determining whether an offense has as an element the use of force, and thereby qualifies as a predicate for purposes of various federal criminal provisions. The lower federal courts have at times deviated from the categorical approach in other contexts, and this Court has intervened to correct matters. *See, e.g.*, *Descamps v. United States*, 133 S. Ct. 2276 (2013). This case presents the starkest deviation to date, where the Third Circuit held—in conflict with the holdings of at least ten other courts of appeals and the position of the United States itself—that the categorical approach does not apply when determining whether an offense has an element of force and thereby qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). The question presented is:

> Whether the categorical approach applies in determining whether an offense has an element of force and thereby qualifies as a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3)(A).

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR SOWELL,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lamar Sowell 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 August 28, 2018.

OPINION BELOW

The court of appeals summarily affirmed the district court's judgment by order dated August 28, 2018. The summary-affirmance order is attached as Appendix A, and was based on the Third Circuit's previous decisions in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016) and *United States v. Galati*, 844 F.3d 152 (3d Cir. 2016). The relevant district court opinion—denying Mr. Sowell's motion to dismiss Counts Three, Five, Seven, and Nine of the indictment—is attached as Appendix B.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. 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)-(iii) prohibits the brandishing or discharging 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).

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. Mr. Sowell's appeal questioned whether *Johnson*'s holding applies to the similarly worded residual clause in 18 U.S.C. § 924(c)—a question that has split the courts of appeals.[1]

But *Johnson*'s application to § 924(c) is not the subject of this petition, because the Third Circuit has avoided that question by holding that the "categorical approach"—the familiar

[1] *Compare United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016) (§ 924(c) residual clause constitutional); *United States v. Barrett*, 903 F.3d 166, 178-84 (2d Cir. 2018) (same); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (same) *with United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018) (§ 924(c) residual clause unconstitutional); *United States v. Cardena*, 842 F.3d 959, 995-96 (7th Cir. 2016) (same); *United States v. Salas*, 889 F.3d 681, 683 (10th Cir. 2018) (same); *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) (same).

methodology for determining whether an offense qualifies as a predicate for purposes of various federal criminal provisions—simply does not apply when determining whether an offense has as an element the use of force, thereby qualifying as a "crime of violence" under § 924(c)(3)(A). In its place, the Third Circuit has crafted a new approach for determining whether an offense is a predicate crime of violence: courts should examine not just the elements of the predicate, but also 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. In other words, courts should "combine" the elements of the § 924(c) offense and the underlying offense to determine whether, between them, an element of force exists. The Third Circuit views this as a permissible extension of the "modified categorical approach."[2]

Certiorari should be granted to correct this major deviation from the categorical approach and to resolve the resulting conflict among the courts of appeals. The Third Circuit's approach is contrary to this Court's holdings on the categorical and modified categorical approaches, and employs the latter for a purpose the Court has expressly forbidden: to "shed light on the means by which the predicate offense was committed." *United States v. Robinson*, 844 F.3d 137, 143 (3d Cir. 2016). In deviating from this Court's holdings, the Third Circuit has split with ten other courts of appeals, all of which hold that the categorical approach applies to § 924(c)(3)(A). The

[2] The modified categorical approach is nothing more than the categorical approach as applied to a predicate statute that is "divisible"—meaning a statute that defines multiple crimes (some qualifying predicates, some not) by reference to alternative elements. *See Descamps v. United States*, 133 S. Ct. 2276, 2283-86 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). Courts may examine a limited class of documents, including the indictment and jury instructions, to determine whether they specify the division of conviction. If they do, the categorical approach is then applied to the specified division.

new approach is irreconcilable with the text of § 924(c), as well, leading to absurd results such as the inability to determine pretrial whether an offense is a crime of violence, the voiding of obviously correct statements of law in the model jury instructions of nearly every circuit, the rendering of § 924(c) a tautology by which every offense is a potential crime of violence predicate, and the rendering of the same offense a crime of violence in one case but not the next.

1. This case arose from five convenience store robberies in the Philadelphia area between October 20, 2014 and April 5, 2016, four of which were armed robberies. In each of the armed robberies, Mr. Sowell entered the store, pointed or otherwise displayed a gun, and demanded money. In the final robbery, Mr. Sowell shot a store employee in the leg, shattering the man's femur.

Mr. Sowell was charged in the Eastern District of Pennsylvania with five counts of Hobbs Act robbery (in violation of 18 U.S.C. § 1951(a)) (Counts One, Two, Four, Six, and Eight); three counts of brandishing a firearm during a crime of violence (in violation of 18 U.S.C. § 924(c)) (Counts Three, Five, and Seven); and one count of discharging a firearm during a crime of violence (in violation of 18 U.S.C. § 924(c)) (Count Nine). He moved to dismiss the § 924(c) charges on the ground that Hobbs Act robbery is no longer a crime of violence after this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied that motion by order dated February 17, 2017. App. B.

Mr. Sowell thereafter entered into a guilty plea agreement with respect to all robbery charges and two of the § 924(c) charges—Count Seven (brandishing) and Count Nine (discharging). The government agreed to dismiss the remaining § 924(c) charges (Counts Three

and Five), and the parties stipulated to an aggregate custodial sentence of 420 months' imprisonment. Mr. Sowell preserved the right to appeal the denial of his motion to dismiss.

2. On appeal, Mr. Sowell challenged his brandishing and discharging convictions on the ground 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)-(iii) prohibits the brandishing or discharging 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. Sowell 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. He argued that Hobbs Act robbery does not qualify under that clause, because § 1951(a) does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another. Because the Third Circuit did not base its decision on this ground, the reach of Hobbs Act robbery is not before this Court.

3. The Third Circuit summarily affirmed Mr. Sowell's convictions based on its previous decisions in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016) and *United States v. Galati*, 844 F.3d 152 (3d Cir. 2016). In those decisions, involving § 924(c) brandishment and discharge respectively, the Third Circuit avoided the question of whether *Johnson* invalidates

§ 924(c)'s residual clause by holding that Hobbs Act robbery qualifies as a predicate crime of violence under the element-of-force clause. The court was deeply divided as to rationale, however.

a. The *Robinson* majority (Judge Roth and then-Chief Judge McKee) 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 141-43.

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 141-44. 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 gun, "[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 seems to have 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 relevant set of alternative elements, *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[e]" an "otherwise ambiguous element" in a predicate statute. *Id*. at 141, 144.

b. Judge Fuentes disagreed with this entire analysis. In an opinion in *Robinson* 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. 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. Judge Fuentes concluded, however, that Hobbs Act robbery

categorically qualifies as a predicate under the element-of-force clause, because it necessarily entails the use, attempted use, or threatened use of physical force. *Id*. at 150-51.

REASONS FOR GRANTING THE PETITION

The Third Circuit's approach to determining whether a predicate offense has as an element the use of force for purposes of § 924(c) is contrary to this Court's precedent; contrary to the holdings of at least ten 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. Mr. Sowell's case is a suitable vehicle for settling the categorical approach's application to § 924(c)(3)(A) and resolving the 10-1 circuit split, as there are no procedural hurdles to further review.[3]

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)(3)(A)—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 has 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 brandishment or discharge finding in a

[3] A petition for writ of *certiorari* similar to Mr. Sowell's is currrently pending in *Robinson* itself, docketed at No. 18-6292. The United States has been granted an extension of time to respond to the petition until December 14, 2018. *Certiorari* was denied on this issue at an earlier stage in the *Robinson* proceedings. No. 17-5139 (Oct. 2, 2017).

contemporaneous offense. *Robinson*, 844 F.3d at 141-44; *Galati*, 844 F.3d at 154-55. But *Taylor*'s primary and independently sufficient rationale for the categorical 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*, 133 S. Ct. 2276, 2283-86 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). The Third Circuit has 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. 844 F.3d at 141-42. 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.

133 S. Ct. at 2286.

Finally, this Court has made clear that an indivisible predicate offense cannot sometimes be a crime of violence and sometimes not. *See Descamps*, 133 S. Ct. at 2287. Yet, that is the result of the Third Circuit's approach—in *Robinson*, one Hobbs Act robbery was determined to be a crime of violence but another was not, as the jury acquitted on the § 924(c) charge with respect to the latter.

B. The federal courts of appeals are now split 10-1 over whether the categorical approach applies to § 924(c)(3)(A).

The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits apply the categorical approach to determine whether an offense has as an element the use of force for purposes of § 924(c).[4] No circuit has held otherwise.[5] The Ninth Circuit's decision in *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995), is particularly instructive. There, the court explained that the categorical approach is compelled by the text and legislative history of § 924(c), and rejected the view—advanced by the Third Circuit—that it is unnecessary given any factual confidence surrounding contemporaneous offenses. 68 F.3d at 1225. All of those decisions were cited to the Third Circuit in *Robinson*, but none was addressed by it.

This split of authority is intolerable. The very same offense will serve as a § 924(c) predicate in the Third Circuit, but not in other circuits, based on the fortuity of locale. As demonstrated by the denial of *en banc* review in *Robinson*, the Third Circuit has declined even to

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[4] *See United States v. Hill*, 832 F.3d 135, 139-40 (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 (6th Cir. 2016); *United States v. Williams*, 864 F.3d 826, 828 (7th Cir. 2017); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016) ("*Prickett II*"); *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).

[5] In *Shuti v. Lynch*, 828 F.3d 440, 449-50 (6th Cir. 2016), a panel of the Sixth Circuit suggested that the categorical approach does not apply to § 924(c). That would be contrary to the Sixth Circuit's prior decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) and its subsequent decision in *Rafidi*.

address the contrary holdings of the ten courts of appeals on the opposite side of the split, much less to harmonize the law. This Court's intervention is required to resolve the matter.

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 brandishment or discharge 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)-(iii). 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.[6]

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 brandishment

[6] *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.

or discharge finding. And as discussed above, an offense is now both a crime of violence and not, depending on how the case turns out.

This is absurd. By making the crime of violence determination turn on brandishing or discharge, 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 or discharge involves force. And that will, of course, always be the case, rendering § 924(c) a tautology (or in Judge Fuentes's words, a "circularity"). 844 F.3d at 148-49. 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 in *Robinson*, it is not whether mail fraud is a crime of violence, but whether mail fraud committed while brandishing or discharging a firearm is a crime of violence. Indeed, all drug trafficking offenses involving gun brandishment or discharge are now crimes of violence, rendering half of § 924(c) surplusage.[7]

D. The Third Circuit's approach is contrary to the position of the United States.

In following its new approach to crime-of-violence determinations under § 924(c)(3)(A), the Third Circuit rejected not just Mr. Sowell's position, but also the position of the United

[7] The Third Circuit in *Robinson* tried to avoid the tautology by emphasizing that Hobbs Act robbery has an "ambiguous" force-type element. 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 apparently concedes that the statute lacks an element of force. 844 F.3d at 144.

States as has been articulated in *Robinson* and various cases pending before the courts of appeals and this Court. *See, e.g.*, *Prickett*, 839 F.3d at 698 (granting the government's petition for rehearing and adopting its argument that the categorical approach applies to § 924(c)); *Sessions v. Dimaya*, No. 15-1498, Reply Br. of United States on *certiorari*, at 9-10 & nn.1-2 (Aug. 31, 2016) (reasoning that categorical approach applies to § 924(c)).

In the wake of this Court's decision in *Dimaya*, however, the government 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). But even now, the government continues to concede—as it must, given this Court's precedent and basic logic—that the categorical approach does 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.").[8]

E. This case is a suitable vehicle for settling the question presented.

Mr. Sowell's case is a suitable vehicle for settling the categorical approach's application to § 924(c)(3)(A) and resolving the 10-1 circuit split, as there are no procedural hurdles to further

[8] The courts of appeals are now split on the separate issue of whether the categorical approach applies under § 924(c)'s residual clause. *Compare, e.g.*, *United States v. Salas*, 889 F.3d 681, 684-686 (10th Cir.), petition for cert. pending (filed Oct. 3, 2018) (categorical approach applies, and ruling § 924(c)(3)(B) invalid under *Johnson*); *United States v. Davis*, 903 F.3d 483, 485-86 (5th Cir. 2018) (same); *United States v. Eshetu*, 898 F.3d 36, 37-38 (D.C. Cir.), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018) (same); *with United States v. Barrett*, 903 F.3d 166, 178-84 (2d Cir. 2018) (categorical approach does not apply); *Ovalles v. United States*, 905 F.3d 1231, 1240-44 (11th Cir. 2018) (*en banc*) (same); *United States v. Douglas*, 907 F.3d 1, 5-12 (1st Cir. 2018) (same).

review. Moreover, no better vehicles are likely to arise as nearly every other court of appeals has already held the categorical approach applicable to § 924(c)(3)(A), and the government agrees with those holdings.

CONCLUSION

For all of the foregoing reasons, a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 28, 2018.

Respectfully submitted,

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LEIGH M. SKIPPER
Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 540 West, Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100