No._____

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS GREER,
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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QUESTION PRESENTED

The district court violated the Speedy Trial Act in this case, as found by the Third Circuit, when the court, faced with its own calendar congestion, retroactively granted a moot government continuance request, excluding thirty-two days that bore no relationship to the government's lapsed request. Despite the flagrant nature of this violation, the Third Circuit did not remand the case for dismissal as the Speedy Trial Act requires. Instead, the Court applied plain error review, pursuant to Rule 52 of the Federal Rules of Criminal Procedure, because Mr. Greer's Speedy Trial Act motion to dismiss, which asserted that the district court failed to bring him to trial within the Act's seventy-day limit, did not specifically identify the particular offending continuance. The Third Circuit found that the issue was therefore not preserved and that Mr. Greer failed to satisfy the final prong of plain error review because he did not show how the Speedy Trial Act violation affected the outcome of his trial. In *Zedner v. United States*, 547 U.S. 489, 507 (2006), however, this Court held that the Speedy Trial Act has "implicit[ly] repeal[ed]" Rule 52 for Speedy Trial Act violations. As this Court recognized, the Act expressly provides that "when a trial is not commenced within the prescribed period of time, 'the information or indictment *shall be dismissed* on motion of the defendant.'" *Id*. at 508 (quoting 18 U.S.C. § 3161(a)(2) (emphasis added)).

The question presented is:

> What is the correct standard of review for a Speedy Trial Act violation where a motion to dismiss under the Act was filed, but the particular time period addressed on appeal was not specifically identified in the motion. The courts of appeals are divided on this issue. Four of the circuits, the D.C., First, Second, and Tenth hold that such claims are waived and are therefore not reviewable. Two circuits, the Third and Sixth, hold that such claims are merely forfeited and that plain error review applies, and four other circuits, the Fifth, Eighth, Ninth and Eleventh have applied plain error review even when no Speedy Trial Act motion to dismiss was filed at all. The question is whether any

of these approaches are correct or whether they are all wrong under the terms of the Act and *Zedner*.

This case also presents a sentencing issue that has divided the circuits:

> 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). The Third Circuit, in conflict with the holdings of at least ten other courts of appeals and the position of the government itself, has held that the categorical approach does not apply to this determination.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Julius Greer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court entered on May 16, 2018.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, issued on May 16, 2018, is attached as Appendix A.

JURISDICTIONAL GROUNDS

The district court exercised jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on May 16, 2018. The court vacated the judgment and reentered it on September 27, 2018 to allow Mr. Greer to submit this petition. This petition is timely filed within 90 days after the reentered judgment, plus two thirty-day extensions of time granted by Justice Alito. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDING

This petition arises from a criminal prosecution instituted by the United States against Julius Greer. There are no other parties to the proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Speedy Trial Act provides in relevant part:

> **3161**
> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment.
>
> (7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> **3162**
> (a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). . . . Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendre shall constitute a waiver of the right to dismissal under this section.

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).

STATEMENT OF THE CASE

This case commenced with the filing of an indictment on October 28, 2010, charging Mr. Greer with robbery and conspiracy to commit robbery, in violation of 18 U.S.C. § 1951(a), using or carrying a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c) and felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Mr. Greer was convicted by a jury on all four counts and he was thereafter sentenced to a total prison term of 180 months, 96 months on each of the felon in possession and Hobbs Act robbery counts and a consecutive 84 month sentence on the 924(c) count. After the Third Circuit affirmed his conviction and sentence, *see United States v. Greer*, 527 F. App'x 225 (3d Cir. 2013) ("Greer I"), this Court remanded the case to the Third Circuit for reconsideration in light of *Alleyene v. United States*, 133 S. Ct. 2151 (2013). *See Greer v. United States*, 134 S. Ct. 1875 (2014). The Third Circuit then vacated Mr. Greer's sentence and remanded for resentencing. *See United States v. Greer*, 645 F. App'x 205 (3d Cir. 2016) ("Greer II"). The district court resentenced Mr. Greer to 140 months of imprisonment, eighty months on the robbery and felon in possession counts and 60 months on the 924(c) count. The Third Circuit affirmed the conviction and sentence on May 16, 2018. 734 F. App'x 125 (3d Cir. 2018) ("Greer III").[1]

I. Procedural and Factual Background

Mr. Greer, who was imprisoned for two years in this case pending trial, repeatedly asserted his right to a speedy trial. Among other things, he represented that he would be willing to waive any conflict that his first court appointed attorney allegedly had, because his most important desire was to "enforce his speedy trial right" and avoid "any continuance." (A288).

[1] As noted above, Greer III is attached as appendix A.

Likewise, he opposed the government continuance request which the district court retroactively granted, again asserting his desire to "enforce [his] speedy trial right." (A66). Despite Mr. Greer's repeated pleas, however, the district court and the government, as determined by the Third Circuit, violated his right under the Speedy Trial Act to be tried within seventy days of his indictment.

The Speedy Trial Act clock commenced in this case with the filing of the indictment on October 28, 2010. A trial date was then set for December 20, 2010. Forty-five days on the clock elapsed before the first continuance request was made on December 13, 2010. The trial was subsequently rescheduled for May 9, 2011, by which point another twenty-three days had expired on the speedy trial clock, bringing the total to sixty-eight. See *Greer I*, 527 F. App'x at 231 (observing that "[t]wenty-three days elapsed on the speedy trial between April 4 and April 28, 2011 . . . . [a]s of April 28, 2011, sixty-eight days had elapsed on the speedy trial clock.").

A. The district court retroactively grants a moot government continuance request.

On April 28, with only two days remaining on the speedy trial clock, government counsel sought a continuance of the May 9 trial date because of another trial he had also scheduled for that date that would take about 4-5 days to complete. (A58, 72). A hearing on the government's motion was held on May 2nd, at the beginning of which the court inquired as to whether Mr. Greer opposed the motion. Mr. Greer's counsel represented that Mr. Greer did object, and that Mr. Greer was asserting his right to a speedy trial. Counsel explained that although he had immediately responded to the government's motion by submitting a written response indicating that the defense did not object, he had done so without consulting with Mr. Greer. (A66). ("Judge, that was my position at the time that I responded to the Government's motion, but it

was at a time before I had consulted with Mr. Greer. . . . He would like to enforce his Speedy Trial Right. It's his position that his trial was scheduled for May 9, and that it should go forward.").[2]

Having made clear Mr. Greer's opposition to the government motion, trial counsel advised the court that the motion was, in any event, going to be rendered moot because of a motion to suppress that he was about to file regarding a statement that the government had just disclosed. (A67). As the district court recognized, "the filing of that motion is going to obviate the need for the government's motion for a continuance." (A69). Government counsel agreed that the continuance motion would be rendered "moot" by Mr. Greer's motion to suppress. (A69).

The motion to suppress was filed and on May 24 a hearing was held, at the conclusion of which the court granted the motion. The judge then advised the attorneys, without Mr. Greer's presence, that he would not be able to try the case until the latter part of June. (A114) ("Right

[2] There is also a developing circuit split as to whether an objection such as this is sufficient to preserve a claim under the Speedy Trial Act or whether the issue must instead be raised in a formal motion to dismiss. *See United States v. Brown*, 819 F.3d 800, 82-23 (6th Cir. 2016) (recognizing the circuit split and "agree[ing] with the majority of circuits . . . that a defendant's oral objection to an alleged STA violation satisf[ies] § 3162(a)(2)'s motion requirement so long as the defendant brings to the court's attention his belief that his STA rights have been violated."); *see also United States v. Alvarez-Perez*, 629 F.3d 1053, 1060-61 (9th Cir. 2010) ("We agree that a court should entertain a motion to dismiss under the STA so long as the defendant 'br[ings] to the trial court's attention his belief that the STA ha[s] been violated.'") (quoting *United States v. Arnold*, 113 F.3d 1146, 1149 (10th Cir. 1997)) *contra*, *United States v. Spagnuolo*, 469 F.3d 39, 45 (1st Cir. 2006) ("[The defendant's] oral request to tack on an additional speedy indictment claim was not a motion . . . within the meaning of the statute."); Greer III, Appx A at 3 (holding that because Mr. Greer did not also identify the continuance in his motion to dismiss, the issue was not preserved).

now . . . I would -- my preference for -- for a trial date is June 20th. My backup trial date is June 27th. And we do have another case listed, criminal case, for June 20th. And if that case is ready, that case has to be tried, and then that would come before the Greer case. Now, I can list it for June 27th with the understanding that I may call the case for June 20th.").

The next day, May 25, the court issued the "ends-of-justice" order at issue, which is attached as Appendix B. The court rescheduled the trial for June 27 and excluded the thirty-two days between the date of its order and the new trial date by retroactively granting the government's moot continuance request from April 28, a motion which as discussed above had concerned the May 9 trial date and a 4-5 day scheduling conflict. The government never filed a continuance request asking that the trial be continued until June 27 and neither government counsel nor Mr. Greer's counsel ever represented to the court that the parties could not go to trial immediately upon the court's May 24 resolution of Mr. Greer's motion to suppress. The district court's May 25 order was thus an obvious end-run around the requirements of the Speedy Trial Act, necessitated by the court's own calendar congestion.

B. Greer's motion to dismiss and the district court's opinion.

On August 12, 2011, Mr. Greer's trial counsel filed a motion to dismiss asserting that the Speedy Trial Act had been violated. The motion generally reviewed the seven-month period between the indictment and the motion and asserted that the government and the court had failed to bring Mr. Greer to trial within seventy days as the Act requires. (A120-24). The motion, however, did not specifically refer to the court's May 25 ends-of-justice continuance order.

Five days after receiving Mr. Greer's motion, the district court issued a memorandum and order denying it. (A9). Without waiting for a government response, and without holding a

hearing, the court ruled that the Speedy Trial Act had not been violated. The court found that "it had entered seven orders that resulted in the exclusion of time from speedy trial calculations . . . and that because of those exclusions the only non-excludable time that has elapsed is the 48 days that passed between the filing of the indictment on October 28, 2010, and our December 15, 2010 Order granting Defendant's first Motion for a continuance." *(Id.*).[3]

C. *Greer III*

The Third Circuit has now concluded that the district court violated the Speedy Trial Act. As the court explained:

> The parties agree that this appeal centers on the district court's exclusion of the thirty-three days that elapsed from May 25, 2011 to June 27, 2011. The district court ostensibly excluded that time after granting the government's April 28th motion for a continuance. However, the government sought that continuance because the assigned prosecutor was scheduled to begin another trial on May 9th – the same day Greer's trial was to begin. That scheduling conflict was presumably resolved by the time the court granted the government's request on May 24th. Accordingly, the court erred in granting the government's continuance request based on a nonexistent scheduling conflict.

Appx A at 2.

Nevertheless, the Third Circuit denied Mr. Greer's appeal. The court held that Mr. Greer's original objection to the government's continuance motion did not preserve the issue and that Mr. Greer failed to satisfy the final prong of the plain error standard, which requires that "the error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial

[3] As discussed above, the Third Circuit, in *Greer I*, agreed with Greer concerning a twenty-three day period of time that the district court had erroneously excluded. The Third Circuit's most recent opinion agrees with Greer as to an additional thirty-three day period of time, bringing the total number of non-excludable days to 101.

proceedings.'" *Id*. at 4 (quoting *United States v. Vampire Nation*, 461 F.3d 189, 203 (3d Cir. 2006)). According to the Court, this requirement was not met because Mr. Greer failed to show the error impacted the trial of his case:

> There is nothing in the record to suggest that the district court's erroneous decision to grant the government's moot continuance request affected the outcome of this case. Greer does not allege, for example, that he was unable to present evidence or locate witnesses as a result of the delay. In fact, he does not proffer anything to suggest that the delay seriously affected the judicial proceedings. We therefore decline to find plain error and affirm the denial of his motion to dismiss.

Id. at 3.

The Third Circuit also rejected Mr. Greer's challenge to his 924(c) conviction and sentence. Mr. Greer argued, both to the district court and to the Third Circuit, that the Hobbs Act no longer qualifies as a predicate offense triggering 924(c), because it is not categorically a crime of violence after *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Third Circuit, following its decision in *United States v. Robinson*, 844 F.3d 137, 139 (3d Cir. 2016), elected not to apply the categorical approach, instead holding that "Hobbs Act robbery qualifies as a predicate crime of violence under 924(c)'s elements clause when a defendant is contemporaneously convicted of both crimes." Appx A at 5.

II. Legal Background

A. The Speedy Trial Act.

The Speedy Trial Act "is designed to protect a criminal defendant's constitutional right to a speedy trial and serve the public interest in bringing prompt criminal proceedings." *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009). To that end, the Act requires that "a

defendant be brought to trial within seventy days following his indictment or first appearance whichever occurs later. 18 U.S.C. § 3161(c)." *United States v. Brooks*, 697 F.2d 517, 520 (3d Cir. 1982).[4] "If this deadline is not met, the Act requires the district court to dismiss the indictment either with or without prejudice." *Id.*; 18 U.S.C. § 3162(a)(2) ("If a defendant is not brought to trial within the time limit . . . the information or indictment shall be dismissed on motion of the defendant.").[5]

The burden of bringing a defendant to trial within seventy days of his indictment rests entirely with the government and the district court. *Toombs*, 574 F.3d at 1273 ("It is the responsibility of not only the district court, but also the government, to protect the interests of the public by ensuring adherence to the requirements of the Speedy Trial Act."). "[D]efendants ha[ve] no obligation to take affirmative steps to insure that they [will] be tried in a timely manner." *United States v. Tunnessen*, 763 F.2d 74,79 (2d Cir. 1985).

Continuances under the Speedy Trial Act are limited. A court may exclude time for continuances, but only when the "ends-of-justice" require that the continuance be given and the court makes required findings to support that determination. The Act goes on to provide the factors that a court may appropriately consider in determining whether an "ends-of-justice"

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[4] In this case, Greer's indictment on October 28, 2010, occurred after his initial appearance of September 29, 2010. The running of the Speedy Trial clock thus commenced on the day following the indictment.

[5] The Act provides that the trial court, in determining whether to dismiss the case with or without prejudice, "shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3161(a)(2).

continuance is justified, and those which it may not. *See* 18 U.S.C. § 3161(h)(7)(B)(C). A factor which is not permitted is the "general congestion of the court's calendar . . . ." § 3161(h)(7)(C). Congress intended for the "ends-of-justice" continuance provision to be "rarely used," and "only in unusual cases," such as "antitrust cases and complicated organized crime conspiracy cases." *United States v. Carrasquillo*, 667 F.2d 382, 387 (3d Cir. 1981) (quoting S.Rep.No. 1021 at 39-41); *Toombs*, 574 F.3d at 1268 ("'Th[e] [ends of justice] exception to the otherwise precise requirements of the Act was meant to be a rarely used tool for those cases demanding more flexible treatment.'") (quoting *United States v. Doran*, 882 F.2d 1511, 1515 (10th Cir. 1989)); *Tunnessen*, 763 F.2d at 76 ("Congress intended that this exclusion be 'rarely used' . . . and sought to avoid its abuse by providing that no period of delay based on the 'ends of justice' may be excluded 'unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice [would be] served' by granting the excludable delay.") (quoting S.Rep.No. 1021 at 41).

While it is the government and district court's obligation to bring a defendant to trial within the Act's allotted time period, the defendant has "the burden of supporting a motion to dismiss under the Act. 18 U.S.C. § 3162(a)(2). But, once the motion is filed, it is the district court, "[i]n ruling on a defendant's motion to dismiss, [that] must tally the unexcluded days . . . [which] in turn, requires identifying the excluded days. *Zedner v. United States*, 547 U.S. at 507. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty constitutes a waiver of the right to dismissal. 18 U.S.C. § 3162(a)(1).

B. *Zedner* narrowly construes the Act's waiver provision and holds that Fed.R.Crim.P. 52 is inapplicable to the Speedy Trial Act.

In *Zedner*, defense counsel, seeking a lengthy continuance for trial preparation, agreed to

the district court's suggestion that the defendant execute a waiver of his rights under the Speedy Trial Act. 547 U.S. at 493-94. The district court believed that a prospective waiver was valid because the Act provides in subsection (a)(2) that a defendant waives the right to dismissal under the Act by not filing a motion to dismiss. This Court disagreed with the district court's expansive reading of (a)(2). Recognizing that the Speedy Trial Act is "designed with the public interest firmly in mind," this Court held that subsection (a)(2) of the Act does not permit prospective waivers. *Id*. at 500. Because the defendant was not brought to trial within the Act's required time period, the Act was violated and dismissal required. *Id*. at 509.

The government in *Zedner* sought to avoid this result by arguing that the error was harmless because, absent the defendant's prospective waiver, the district court would have made the necessary findings to justify the delay in bringing the defendant to trial. *Id*. at 506. This Court rejected that argument. While recognizing that "harmless error review under Federal Rule of Criminal Procedure 52(a) presumptively applies to all error where a proper objection is made," this Court found that the "provisions of the Act provide . . . support for an implied repeal of Rule 52." *Id*. at 507 (internal quotations and citation omitted). As this Court recognized, the Act is "unequivocal[ly]" written to provide that "[w]hen a trial is not commenced within the prescribed period of time, 'the information or indictment *shall be dismissed* on motion of the defendant.'" *Id*. at 508 (quoting 18 U.S.C. § 3162(a)(2) (emphasis added)).[6] Accordingly, this Court remanded the case, "leav[ing] it to the District Court to determine in the first instance whether dismissal should be with or without prejudice." *Id*. at 509.

[6] This Court also pointed to subsection (c)(1) of the Act, which provides that "[i]f a defendant pleads not guilty, the trial '*shall commence*' within 70 days 'from the filing date (and making public) of the information or indictment' or from the defendant's initial appearance, whichever is later." *Id*. at 508 (quoting 18 U.S.C. § 3161(c)(1)) (emphasis added)).

REASONS FOR GRANTING THE PETITION

This case presents two issues that have divided the federal courts of appeals, one related to the Speedy Trial Act and the other to the categorical approach's application to 18 U.S.C. § 924(c). As to the first of these issues, the Act, serving the public's interest in prompt criminal proceedings, requires dismissal of an indictment if a defendant is not brought to trial within seventy days of the indictment's filing. But, as this case illustrates, the Act's strict seventy-day requirement is not always being complied with and it is impossible to know how often this is occurring because several of the courts of appeals do not provide any review of alleged violations that are based on time periods not specifically identified in a defendant's Speedy Trial Act motion to dismiss. A well developed circuit split exists as to whether such claims are waived or merely forfeited. And, even the circuits on the forfeiture side of the divide have failed to recognize this Court's holding in *Zedner* that the Speedy Trial Act has implicitly repealed Fed. R. Crim. P. 52 and that under the strict terms of the Act, a violation of the seventy-day requirement must result in dismissal. 547 U.S. at 507. Accordingly, resolution of this important and recurring issue is needed from this Court. Because Mr. Greer's case squarely presents this issue, in a case where the Speedy Trial Act violation has already been judicially determined, he respectfully requests that the Court grant the petition for certioari and reverse the judgement of the district court.

I. The Courts of Appeals are Split as to Whether Time Periods Not Specifically Raised in a Defendant's Motion to Dismiss are Waived or Forfeited.

Four Circuits, the D.C., First, Second and Tenth, have held that time periods not specifically raised in a defendant's Speedy Trial Act motion to dismiss are waived. *See United States v. Taplet*, 776 F.3d 875, 879-81 (D.C. Cir. 2015); *United States v. Gates*, 709 F.3d 58, 68

(1st Cir. 2013); *United States v. Holley*, 813 F.3d117, 121 (2d Cir. 2016); *United States v. Loughrin*, 710 F.3d 1111, 1120-21 (10th Cir. 2013).[7]

The rationale of these circuits is that the Speedy Trial Act "provides that '[f]ailure of the defendant to move for dismissal prior to trial' constitutes waiver and imposes on the defendant 'the burden of proof of supporting such motion.'" *Holley*, 813 F.3d at 121 (quoting 18 U.S.C. § 3162(a)(2)). "Implicit in the requirement that a defendant 'move for dismissal,'" these circuits reason, "is the requirement that the defendant specify the reason for the motion." *Taplet*, 776 F.3d at 880. According to these circuits, therefore, "the text of the statute strongly suggests that Congress intended for the waiver provision to preclude the defendant from making new arguments on appeal." *Holley*, 813 F.3d at 121.[8]

The "waiver" circuits have also focused upon one particular sentence in *Zedner*, "that the STA 'assigns the role of spotting violations of the Act to defendants – for the obvious reason that they have the greatest incentive to perform this task.'" *Holley*, 813 F.3d at 121 (quoting *Loughrin*, 710 F.3d at 1121) (quoting *Zedner*, 547 U.S. at 502-03.). To "review arguments raised for the first time on appeal," according to these circuits, would shift to the district court the burden "to identify STA violations." *Id.* [9]

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[7] The Seventh Circuit, while "reserv[ing] ultimate judgment on the waiver-or-forfeiture question for another day," has nevertheless expressed the view that waiver is the correct approach. *United States v. O'Connor*, 656 F.3d 630, 638 (7th Cir. 2011).

[8] As discussed further below, this assessment of congressional intent is at odds with the Act's legislative history and this Court's assessment of Congress's intent in *Zedner*.

[9] As discussed further below, these circuits fail to recognize that this Court went on to state in *Zedner* that once a defendant files a motion to dismiss, it is incumbent upon the district court to "tally the unexcluded days which, in turn, requires identifying the excluded days." 547 U.S. at 507. Thus, while the Act assigns defendants the initial role of spotting violations, once a motion is filed alleging a violation, the district court bears the responsibility of correctly determining the amount of days that have expired on the Speedy Trial clock.

On the other side of the divide, six circuits review for plain error Speedy Trial Act time periods that were not specifically raised in a motion to dismiss. *See Greer III*, Appx A at 3-4; *United States v. Rice*, 431 F.App'x 289, 294-95 (5th Cir. 2011); *United States v. Dunn*, 723 F.3d 919, 928 (8th Cir. 2013); *United States v. Montgomery*, 395 F. App'x 177, 181 n.4, 184 n.7 (6th Cir. 2010); *United States v. Ramirez*, 694 F. App'x 548, 549 (9th Cir. 2017); *United States v. Flores-Sanchez*, 477 F.3d 1089, 1092 (9th Cir. 2007); *United States v. Alvarado-Linares*, 698 F. App'x 969 (11th Cir. 2010).[10]

The Third Circuit, in *Greer I*, explained why a finding of forfeiture, rather than waiver, is warranted:

> We hold that Greer has not waived his right to appeal on the grounds he raises before this Court. Greer moved for dismissal of the entire indictment below and objected to specific orders and excluded time periods that he again points to on appeal. The Speedy Trial Act specifies the conditions for a waiver: a failure to move for dismissal of the indictment below. We decline the Government's invitation to read an extra requirement into this plain statutory language: that a defendant must move for dismissal and raise identical arguments before the district court. Instead, we will adhere to the approach that we typically follow when a defendant raises new arguments on appeal: we will review for plain error.

527 F. App'x at 229.

II. **This Case is an Ideal Vehicle for Resolving the Question Presented.**

Mr. Greer's case is the ideal vehicle for answering the question presented because the Third Circuit has already determined that the Speedy Trial Act was violated here. The issue is thus presented in its starkest light; the validity of Mr. Greer's conviction turns on the appropriate standard of review. If his Speedy Trial Act claim is not waived and is properly reviewable then

[10] A motion to dismiss under the Speedy Trial Act was filed in only two of these cases, *Greer* and *Montgomery*.

the Third Circuit's determination that the Act was violated should, under the strict terms of the Act and this Court's decision in *Zedner*, automatically result in the case being remanded for dismissal of the indictment. Alternatively, a remand for dismissal would also follow from a correct application of the plain error standard.

III. Section 3162 and *Zedner* clearly cut against a finding of waiver.

As discussed above, the Speedy Trial Act provides for waiver in only one instance, if a defendant does not file a motion to dismiss under the Act. 18 U.S.C. § 3162(a)(2) ("Failure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section"). The Act does not provide for waiver when a motion to dismiss is actually filed, as it was here.

The circuits finding waiver have failed to recognize that Congress plainly intended that the Act's waiver provision be given the narrowest possible construction. The Act's legislative history, for example, provides:

> The Committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal . . . is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.

S. Rep No. 212, 96th Cong., 1st Sess. 28-29, *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 182 (Fed.Judicial Center 1980).

The "waiver" circuits have also failed to recognize that this Court in *Zedner*, citing the Act's legislative history and the Act's broader societal purposes, narrowly construed the Act's waiver provision, holding that the provision does not allow for prospective waivers by defendants. This Court declined to read anything into the waiver provision that Congress did not

actually write. *Zedner*, 547 U.S. at 503 ("It is significant that § 3162(a)(2) makes no mention of prospective waivers.").

As discussed above, the waiver circuits have ignored the actual holding of *Zedner* and have instead focused on one line of this Court's decision, "that the 'Speedy Trial Act assigns the role of spotting violations of the Act to defendants – for the obvious reason that they have the greatest incentive to perform this task.'" *O'Connor*, 656 F.3d at 637-38 (quoting *Zedner*, 547 U.S. at 502-03). That observation is plainly correct; the Act expressly places the burden of proof on defendants, with one exception not applicable here. *See* 18 U.S.C. § 3161(a)(2). But, this Court in *Zedner* also stated that, when a defendant files a Speedy Trial Act motion to dismiss, it is the district court "that *must* tally the unexcluded days . . . . [which], in turn, *requires* identifying the excluded days." 547 U.S. at 507 (emphasis added). Accordingly, *Zedner* certainly did not hold that if the district court erroneously tallies the days, an appellate court is barred from correcting that error, no matter how plain or egregious it may be, because the defendant failed to specifically identify the mistallied dates in his motion to dismiss. Such a holding would have been contrary to the public interest in speedy trials that is at the heart of the Act and Congress's clear intent that the Act's waiver provision be given the narrowest possible construction.

This interpretation of the Act and this Court's decision in *Zedner* are sensible. The Act's waiver provision is designed to prevent gamesmanship, precluding defendants from foregoing a meritorious motion to dismiss, and taking a shot at trial while knowing that they can still raise a winning Speedy Trial Act argument on appeal. *Zedner*, 547 U.S. at 503 n. 6. When, by contrast, a defendant files a motion to dismiss prior to trial, he has elected to proceed under the Act. The trial judge then "must tally the unexcluded days" and if the judge determines that the Act has

been violated the judge is required to dismiss the indictment, but with wide latitude to do so either with or without prejudice. Once the Act has been put into play by a defendant filing a motion to dismiss, there is no sound reason for an appellate court not to review the district court's decision. If a judge commits error in computing the days and fails to recognize an obvious violation of the Act, the rights of the public and the defendant to a speedy trial will only be further frustrated by a refusal of the appellate court to even consider the issue on appeal.

IV. Once a Speedy Trial Act Violation is Determined the Act Mandates Dismissal, a Result that is Alternatively Reached through a Correct Application of the Plain Error Standard.

The Third Circuit, like the other "forfeiture" circuits, was correct in its decision to review Mr. Greer's Speedy Trial Act claim, but the Court erred in its application of Fed. R. Crim P. 52(b) and the plain error standard. The Third Circuit failed to recognize that under the Speedy Trial Act, once a violation of the Act is determined, dismissal of the indictment is mandatory. Three provisions of the Act make this clear: First, the Act requires that a trial "*shall commence*" within 70 days "from the filing date (and making public) of the information or indictment," 18 U.S. C. § 3161(c)(1); second, the Act provides that "no . . . period of delay" from an ends-of-justice continuance *shall be excludable* . . . unless the court sets forth . . . its reasons for finding that such continuance outweighs the best interests of the public and the defendant in a speedy trial," 18 U.S.C. § 3161(h)(8)(A); and third, the Act mandates that when a trial is not commenced within the prescribed period of time, "the information or indictment *shall be dismissed* on motion of the defendant." 18 U.S.C. § 3162(a)(2) (emphasis added throughout). This Court in *Zedne*r recognized that a "straightforward reading of these provisions leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result

the trial does not begin on time, the indictment or information *must be dismissed*." *Zedner*, 547 U.S. at 508 (emphasis added).

Accordingly, this Court found that these three provisions of the Act supported an "implied repeal of Rule 52," and that the district court's violation in that case could therefore not be excused, under Rule 52(a), as harmless error. *Id*. For the exact same reasons, a violation of the Act cannot be excused by virtue of Rule 52(b) and the plain error standard. When a violation of the Act is determined, as it was by the Third Circuit, than the Act mandates a remand for dismissal.

But, even if the plain error standard were applicable, a correct application of that standard would achieve the same result. The Third Circuit denied relief under the fourth prong of plain error review, because the violation did not "affect[ ] the outcome of the case[,]" since Mr. Greer did not allege "that he was unable to present evidence or locate witnesses as a result of the delay." Appx A at 4. This reasoning is doubly flawed.

First, the error plainly did affect the outcome of the case. If the district court had properly counted the excludable days and recognized the Speedy Trial Act violation, then under the strict terms of the Act, the indictment would have had to have been dismissed, bringing the case to an end. While, of course, such a dismissal could have been made without prejudice and a new indictment possibly obtained, that would constitute a new proceeding. The result of the instant proceeding would still clearly have changed, it would have been dismissed. *See United States v. Palomba*, 31 F.3d 1456, 1466 (9th Cir. 1994) (vacating conviction for ineffective assistance of counsel for failure to make a Speedy Trial Act motion because attorney's deficient performance prejudiced the defendant since the motion would have led to dismissal of indictment).

Second, the fourth prong of the plain error review, upon which the Third Circuit purported to rule, does not concern prejudice to the defendant, but rather whether the error affects the fairness, integrity or public reputation of judicial proceedings. A Speedy Trial Act violation, such as the one here, undoubtedly does, given that the very purpose of the Act is "to serve the public interest" in speedy trials. *Zedner*, 547 U.S. at 501. Accordingly, when a district court, faced with its own calendar congestion, violates the Act by entering a continuance "based on a nonexistent scheduling conflict[,]" Appx A at 3, that is certainly an error that affects the integrity and reputation of judicial proceedings.

In sum, the circuits are thoroughly divided regarding the question of how to review Speedy Trial Act claims that were not specifically made in a defendant's motion to dismiss. None of the competing approaches is consistent with the terms of the Act or with this Court's decision in *Zedner*. A decision of this Court is needed.

V. The Third Circuit's Failure to Apply the Categorical Approach to § 924(c) Cases is Contrary to this Court's Precedent, the Decisions of Ten Other Circuits, the Text of § 924(c) and the Position of the United States.

As discussed above, the Third Circuit, relying upon its decision in *United States v. Robinson*, 844 F.3d 137, 139 (3d Cir. 2016), elected not to apply the categorical approach to the question of whether Mr. Greer's Hobbs Act robbery conviction qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(1)(A)(ii), which 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 courts 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 v. United States*, 135 S. Ct. 2551 (2015), Mr. Greer, like Mr. Robinson before him, 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.

The Third Circuit in *Greer*, as in *Robinson*, 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. In *Robinson*, the Third Circuit held that the categorical approach does not apply in the § 924(c) context. 844 F.3d at 141. That approach is "not necessary," the court 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 143. The court 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 142.

The court therefore crafted a new approach. Courts are no longer to make a purely legal inquiry into the elements of the predicate offenses to determine if it is a 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. *Id*. at 143. 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 court'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*.

The court viewed this as a permissible extension of the modified categorical approach to the situation of contemporaneous offenses. *Id*. at 143. The court seems to have acknowledged that Hobbs Act robbery can be committed without force, and did not contend that the statute is divisible. Nonetheless, the court 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*. at 143. But instead of being used to identify the relevant set of alternative elements, *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016), 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 144.[11]

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[11] Judge Fuentes, concurring in the judgment in *Robinson*, disagreed with the majority's entire analysis. He concluded that the categorical approach applies and that the modified categorical approach has no bearing here because Hobbs Act robbery is not divisible. *Id* at 150. 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

The Third Circuit's new 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. Greer's case is an ideal vehicle for settling the categorical approach's application to § 924(c)(3)(A) and resolving the 10-1 circuit split, because there are no procedural hurdles to further review.

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. at 600 (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 141-42. 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."

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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. 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.

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*, 136 S. Ct. at 2251-54. 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 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.

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 here: the Hobbs Act robbery will or will not be a crime of violence depending upon the jury's verdict as to the companion § 924(c) charge.

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 the purposes of § 924(c).[12] No circuit has held otherwise.[13] The Ninth Circuit's

[12] *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.

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 here—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, 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 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 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

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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); *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).

[13] 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*.

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.[14]

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. 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, 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. 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.[15]

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[14] *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.

[15] 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

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

In adopting its new approach to crime-of-violence determinations under § 924(c)(3)(A), the Third Circuit rejected not just Mr. Greer and Mr. Robinson's position, but also the position of the United States as was articulated in *Robinson* and various other 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.").[16]

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.

[16] This Court is set to determine this term in *United States v. Davis*, No. 18-431 (cert. granted Jan. 4, 2019) whether § 924(c)'s residual clause requires use of the categorical approach or instead can be read to allow a case-specific, factual approach. Accordingly, this Court may elect to hold Mr. Greer's petition pending the outcome in *Davis*. If the categorical approach is required under § 924(c)'s residual clause, it is inconceivable that it would not be required under its element-of-force clause, where even the government concedes it applies. That is because the

In sum, the Third Circuit's decision is contrary to this Court's precedent, the decisions of ten other circuits, the text of § 924(c) and the position of the United States. Accordingly, a decision of this Court is needed.

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argument in support of a case-specific approach is the same for both clauses, even though the element-of-force clause textually precludes such an approach. *Compare* U.S. Pet. for Cert., *United States v. Davis*, No. 18-431, at 12-13 (contemporaneous prosecution of predicate and § 924(c) offenses permits case-specific approach *with United States v. Robinson*, 844 F.3d 137, 143 (3d Cir. 2016) (same). Indeed, the government relied on *Robinson* to make its argument in *Davis*. *Id*. at 18-19.

If *Davis* requires the categorical approach, the Court could then grant Mr. Greer's petition, vacate the judgment, and remand to the Third Circuit for further consideration. On the other hand, if *Davis* approves a case-specific approach for the residual clause, Mr. Greer's petition will stand ready for disposition just as it is today—with a 10-1 circuit split, the reasoning of this Court's precedents (perhaps including *Davis*), and the government's concession all favoring application of the categorical approach to the element-of-force clause.

CONCLUSION

For all of the foregoing reasons, a writ of *certiorari* should issue to review the judgement of the United States Court of Appeals for the Third Circuit entered in this case on May 16, 2108.

Respectfully submitted,

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