No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL RODRIGUEZ, Julio Rivera-Lopez, Kristian Torres

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Petitioners were convicted of conspiring to commit Hobbs Act robbery and conspiring to possess a firearm in furtherance of crimes of violence. The district court held that these offenses did not satisfy the definition of a crime of violence under the force clause in 18 U.S.C. § 924(c)(3)(A), but that they did satisfy the definition in the residual clause in (c)(3)(B). The questions presented are thus:

1. Whether the residual clause in Section 924(c)(3)(B) is void for vagueness based on the holdings in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018);

2. and, if so, whether the unconstitutional vagueness of the residual clause in Section 924(c)(3)(B) can be cured by resort to a conduct-based approach instead of the categorical approach?

PARTIES TO THE PROCEEDINGS

Petitioners, the defendants-appellants below, are Daniel Rodriguez, Julio Rivera-Lopez, and Kristian Torres.

The Respondent, the appellee below, is the United States of America.

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PETITION FOR A WRIT OF *CERTIORARI*

The Petitioners, Daniel Rodriguez, Julio Rivera-Lopez, and Kristian Torres, petition this Court for a writ of *certiorari* to review the final order of the Court of Appeals for the Third Circuit, denying them a certificate of appealability.

OPINIONS BELOW

The Court of Appeals did not issue an opinion, but denied the request for a certificate of appealability. The orders denying those requests are reproduced in the appendix to this petition. (Petitioner's Appendix ("Pet. App.") 16a - 18a). The opinions of the district court both denying reconsideration and denying the Petitioners' motions to correct sentence are not officially reported, but are included in the appendix, (Pet. App. 1a - 15a).

JURISDICTION

The Court of Appeals for the Third Circuit issued its orders on February 7, 2019. (Pet. App. 1a – 3a). This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATUTORY PROVISIONS

§ 924 Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

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

* * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
(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).

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

18 U.S.C. § 924(o).

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means 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, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951.

INTRODUCTION

The constitutionality of the residual clause in Section 924(c)(3)(B) and the proper method for construing it, the categorical approach or a conduct-based approach, is currently before this Honorable Court in *Davis v. United States*, No. 18-431, 2019 WL 98544 (U.S. Jan. 4, 2019).

The same issues are presented in the Petitioners' cases and for this reason a writ of *certiorari* should be granted or these cases should be held pending the disposition in *Davis*.

STATEMENT OF THE CASE

A.

Petitioners, Daniel Rodriquez, Julio Rivera-Lopez, and Kristian Torres, were co-defendants in several home invasions, robberies of convenience stores, and carjackings. Ultimately, Petitioners each pleaded guilty to one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and one count of conspiracy to possess a firearm in furtherance of crimes of violence, in violation of 18 U.S.C. § 924(o).

Mr. Rodriguez's plea was under a binding plea agreement, in which the parties agreed that he would be sentenced to an 18-year term of imprisonment. In December 2008, the district court sentenced Mr. Rodriguez in accordance with the binding plea agreement to 216 months. Mr. Rivera-Lopez also pleaded under a binding plea agreement. Within the plea agreement the parties agreed that he would be "sentenced to a term of imprisonment of 12 years, a three-year term of supervised release, restitution and a $200 special assessment." In April 2009, the district court sentenced Mr. Rivera-Lopez consistent with the binding plea agreement to 144 months. Likewise, Mr. Torres pleaded under a binding plea agreement, with the parties agreed that he would be "sentenced to a term of imprisonment of 22 years, restitution, and a $200 special assessment." In February 2009, the district court sentenced Mr. Torres consistent with the binding plea agreement to 264 months.

B.

In May 2016, the Petitioners filed motions to correct their sentences, arguing that, based on this Court's ruling in *Johnson*, 135 S. Ct. 2551, conspiracy to commit Hobbs Act robbery no longer qualified as a crime of violence under Section 924(c). *See* (Pet App. at 2a – 3a). While Petitioners' motions were pending, the Third Circuit decided *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016) and *United States v. Galati*, 844 F.3d 152 (3d Cir. 2016). *See* (Pet. App. at 1a – 2a). In those cases, the Third Circuit declined to address the defendants' constitutional challenges to the residual clause in 18 U.S.C. § 924(c)(3)(B). *Robinson*, 844 F.3d at 141; *Galati*, 844 F.3d at 155. The Third Circuit held that the categorical approach, which directs a court to look only at the elements of the particular offense of conviction to determine whether it qualifies as a crime of violence, does not apply when a Section 924(c) conviction is contemporaneous with the crime of violence conviction. *Robinson*, 844 F.3d at 141; *Galati*, 844 F.3d at 154. In both cases, the Third Circuit concluded that a contemporaneous offense qualified as a crime of violence under the force clause or elements clause in 18 U.S.C. § 924(c)(3)(A). *Robinson*, 844 F.3d at 144; *Galati*, 844 F.3d at 155.

In April 2018, the district court issued a memorandum and order, denying Petitioners' motions to correct sentence and denying a certificate of appealability. *See* (Pet. App. at 1a – 9a). In so doing, the court applied *Robinson* and specifically held that conspiracy to commit Hobbs Act robbery and to possess a firearm in furtherance thereof does not qualify as a crime of violence under the force clause. *See* (Pet. App.

at 3a – 4a). The court acknowledged, however, Petitioners' argument that following *Johnson*, the residual clause of Section 924(c)(3)(B) is unconstitutionally vague. *See* (Pet. App. at 5a). But the court held that "the uncertainty that plagued Armed Career Criminal Act ("ACCA") is not present when, as here, the § 924(c) offense and the predicate offense occur contemporaneously." *See* (Peta App. at 6a). The Court further held that "the crime of conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under the residual clause of § 924(c)." *See* (Pet. App. at 8a).

A few days after the district court's memorandum and order, this Court decided *Dimaya*, holding that the residual clause in 18 U.S.C. § 16(b), which is identical to the residual clause in 18 U.S.C. § 924(c), was unconstitutionally void for vagueness. Based on *Dimaya*, Petitioners sought reconsideration. *See* (Pet. App. 10a – 11a). The cout denied reconsideration, finding that unlike the ACCA's residual clause or that in Section 16(b), Section 924(c)'s residual clause does not require reconstructing the conduct underlying a conviction. *See* (Pet. App. at 14a). Rather, the factfinder determines the predicate offense based on evidence produced at trial or the facts admitted by the defendant at the plea. *See id*. The court thus held that nothing in *Dimaya* altered its earlier holding. *See* (Pet. App. at 15a).

Petitioners appealed. Relying on *Robinson*, the Third Circuit denied certificates of appealability. *See* (Pet. App. 16a – 17a).

REASONS FOR GRANTING THE PETITION

A. The residual clause in Section 924(c)(3)(B) is unconstitutionally vague.

"The prohibition of vagueness in criminal statutes . . . is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'" *Dimaya*, 138 S. Ct. at 1212 (quoting *Johnson*, 135 S. Ct. at 2557). Under this principle, courts will invalidate a criminal law if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. This protection is vital, for "[v]ague laws invite arbitrary power" by "leav[ing] judges to their intuitions and the people to their fate." *Dimaya*, 138 S. Ct. at 1223-24 (Gorsuch, J., concurring).

This Court has held that two materially identical "residual clauses," in 18 U.S.C. § 16(b) and § 924(e)(1)(B)(ii), are – as construed to mandate the categorical approach – unconstitutionally vague. *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2557. This same holding should apply to the residual clause in Section 924(c)(3)(B). Yet here, the district court held that the residual clause in Section 924(c)(3)(B), despite identical wording to that in Section 16(b), could be salvaged from its vagueness problem by extending the holdings in *Robinson* and *Galati* and using a conduct-based approach. *See* (Pet. App. at 6a – 7a). This is precisely the issue before this Court in *Davis*, No. 18-431, 2019 WL 98544 (U.S. Jan. 4, 2019).

Two circuits have, however, adopted an exception similar to *Robinson* in the context of the residual clause of § 924(c)(3)(B). The Second and Eleventh Circuits,

in considering constitutional challenges to that provision, reasoned that because the residual clause would likely be unconstitutional under the categorical-approach interpretation, and because the clause does not (unlike the elements clause) by its terms require courts to consider only the "element[s]" of the crime, the residual clause should not – under the doctrine of constitutional avoidance – be construed as mandating application of the categorical approach. *See United States v. Barrett*, 903 F.3d 166, 175-77 (2d Cir. 2018); *Ovalles v. United States*, 905 F.3d 1231, 1251 (11th Cir. 2018) (*en banc*).

But at least eight other circuits have rejected this view, notwithstanding the doctrine of constitutional avoidance, on grounds that the language of the residual clause and of *Taylor v. United States*, 495 U.S. 575 (1990), unambiguously mandates the categorical approach. *See, e.g., United States v. Simms*, 914 F.3d 229, 239 (4th Cir. 2019); *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 290 (6th Cir. 2017); *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016); *United States v. Mendez,* 992 F.2d 1488, 1490 (9th Cir. 1993); *United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018); *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018).

For this reason alone, the Court should grant *certiorari* and hold Petitioners' cases pending the disposition of *Davis*.

B. The exception crafted by the district court that extends a conduct based-approach to Section 924(c)'s residual clause conflicts with this Court's holding in *Taylor*.

The "categorical approach," adopted in *Taylor*, represents a binding interpretation of statutory language – codified in several provisions of the U.S. Code, including Section 924(c)(3)(A) and Section 924(e)(2)(B)(i) – defining "crime of violence" and "violent felony" as any crime that "has as an element the use, attempted use, or threatened use of physical force against the person ... of another." 495 U.S. at 600-02; *see also, e.g.*, 18 U.S.C. § 16(a). The approach requires courts to consider only the elements of the crime at issue, not the particular facts surrounding the crime or the actual offense conduct, and a crime may be deemed a "crime of violence" or "violent felony" under the approach only if the statute governing the crimes sets forth as a necessary element the use or threat of physical force. *Taylor*, 495 U.S. at 600-02. This interpretation, the Court explained, flows from the express reference in the provisions to the "element[s]" of the crime, as well as the legislative history, which "shows that Congress generally took a categorical approach to predicate offenses." *Id.* In light of this, the Court concluded, "the only plausible interpretation of [this language] is that ... it generally requires the trial court to look only to the fact of conviction and the statutory definition of the ... offense." *Id.*

The district court's holding was, it seems, based primarily (if not solely) on straightforward dissatisfaction with the categorical approach adopted in *Taylor*. The court did not attempt to argue that its holding was required by the language of the statute, and it did not disagree that *Taylor* facially mandates a different reading of

the provision. *See* (Pet. App. at 6a – 7a). But a dissatisfaction with an outcome is no basis for ignoring this Court's holdings.

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari* or hold these cases pending the opinion in *Davis*.

Respectfully submitted,

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