No. _____

In The
Supreme Court of the United States

_____

HERICHIE PAUL,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

_____

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Whether the residual clause in 18 U.S.C. § 924(c)(3)(B), where the text and legislative history demand the categorical approach, is unconstitutionally vague in light of *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018)? Whether carjacking or attempted carjacking are crimes of violence under § 924(c)'s elements clause, in light of *Johnson v. United States*, 576 U.S. ___, 135 S.Ct.2551, 192 L.Ed.2d 569 (2015)?

List of Parties

Petitioner, Herichie Paul, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Herichie Paul, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit").

OPINION & ORDER BELOW

The Eleventh Circuit's Order of Dismissal was issued as the mandate of the appeals court and is provided in the Appendix. Pet. App. A. The Appendix includes the district court's order denying Mr. Paul's motion to dismiss. Pet. App. B.

JURISDICTION

The Eleventh Circuit issued its Order of Dismissal on April 16, 2019. *See* Pet. Appendix A. The Order was issued as the mandate of the appeals court. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment 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.

18 U. S. C. § 924(c)(3)(B) defines a crime of violence as a felony 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. § 2119 provides that "[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so", commits the offense of carjacking.

INTRODUCTION

This case presents a question upon which there is an irreparable rift between the courts of appeals: Whether the residual clause of § 924(c)'s "crime of violence" definition is void for vagueness under the Fifth Amendment's due process clause? In the months since this Court decided *Sessions v. Dimaya*, four circuits have

struck down this residual clause. But three circuits, including the Eleventh Circuit in the *Ovalles* case, have salvaged the clause by shifting suddenly from a categorical approach to a conduct-based review.

This Court recently granted a petition for a writ of certiorari on this very topic. In *United States v. Davis,* No. 18-431 (Jan. 4, 2019), the Court will choose between these irreconcilable paths. The Court ought to hold Mr. Paul's petition pending the decision in *Davis* and then dispose of the case in light of that decision.[1]

This case also presents a question upon which there is disagreement between the courts of appeals: Whether the elements clause of § 924(c)(3)(A)'s "crime of violence" definition is void for vagueness under the Fifth Amendment's due process clause? In *United States v. St. Hubert, petition for cert. filed,* No. 18-8025 (March 12, 2019), the Eleventh Circuit applied *Ovalles* and held that the defendant could not mount a constitution challenge to his conviction because § 924(c) requires the conduct-based approach, which is "a rule of statutory interpretation, not a rule of constitutional law." 909 F.3d 335, 344. Appellant conceded that this is the holding in *St. Hubert*, but argued that this interpretation of both § 924(c)(3)(A)

[1] Mr. Paul is not the first to suggest such a path. The Solicitor General has urged this Court to hold at least two similar cases pending the *Davis* decision. *Barrett v. United States,* No. 18-6985, *Memorandum* at 2 (Feb. 11, 2019); *United States v. Salas*, No. 18-428, *Reply Brief for the Petitioner* at 1 (Dec. 19, 2018).

and § 924(c)(3)(B) are wrong; *see Johnson v. United States,* 576 U.S. ___, 135 (2015). This Court will decide which interpretation is right.

STATEMENT OF THE CASE

Procedurally, the case below is relatively straight-forward and without complexity. A grand jury in Orlando, Florida, returned an Indictment charging Mr. Paul with numerous charges involving armed carjackings. Herichie Paul was charged in **Count One** with conspiracy to commit carjacking. **Count Two** charged him with conspiracy to use and carry a firearm during and in relation to, and possess a firearm in furtherance of, carjacking. **Counts Four and Eight** charged the defendant with carjacking. He was charged in **Count Nine** with using, carrying, and brandishing a firearm, during and in relation to, and knowingly possessing a firearm in furtherance of carjacking as alleged in Count Eight. **Count Ten** charged the defendant with attempted carjacking. In **Count Eleven**, the defendant was charged with using, carrying, and discharging a firearm, during and in relation to, and knowingly possessing a firearm in furtherance of the attempted carjacking alleged in Count Ten.

On May 30, 2018, the Appellant filed a Motion to Dismiss Counts Two, Nine, and Eleven, the charges involving firearms offenses, as being void for vagueness under the Due Process Clause of the United States Constitution. The district court denied the Appellant's Motion. *See* Opinion, Appendix B.

The Appellant then entered into a conditional plea agreement with the government, specifically preserving his right to appeal the denial of his Motion to Dismiss. The Appellant pled guilty to Counts One, Eight, Nine, Ten, and Eleven of the Indictment on June 27, 2018.

On December 7, 2018, the Appellant was sentenced to a total term of 192 months in prison: 60 months on Count One and terms of 87 months on each of Counts Eight and Ten, such terms to run concurrently; a term of 84 months on Count Nine, to run consecutively to Counts One, Eight, and Ten; and a term of 21 months on Count Eleven, to run consecutively to Counts One, Eight, Nine, and Ten. Counts Two and Four of the Indictment were dismissed.

The Appellant appealed the district court's sentence to the Eleventh Circuit, arguing that his Motion to Dismiss should have been granted because Title 18, United States Code, Section 924(c)(3)'s definition of "crime of violence" was unconstitutional, thus invalidating Mr. Paul's convictions and sentences on Counts Nine and Eleven. As such, his sentences on Counts Nine and Eleven would have been due to be set aside and vacated.

Mr. Paul conceded that binding precedent in the Eleventh Circuit was adverse to his position, and stated that he was seeking further review to overturn that precedent. The government moved for summary affirmance in the court of appeals, which Mr. Paul did not oppose, while maintaining his positions that

applicable precedent was incorrectly decided. The appellate court found that summary affirmance was warranted because binding precedent clearly resolved Mr. Paul's arguments on appeal, also stating that nothing in its order should be construed as prohibiting Mr. Paul from seeking further review. *See* Appendix A opinion, p. 4, and p. 5, fn. 1; *see also* the concurring opinion of J. Pryor, Jill, p. 6 of the opinion, in which she refers to her doubts that carjacking and attempted carjacking are categorically crimes of violence under § 924(c)'s elements clause.

Mr. Paul did not file a petition for rehearing or a petition for rehearing *en banc* in the appellate court; rather, the mandate from the panel decision issued on April 16, 2019, and this petition for a writ of certiorari followed. Mr. Paul remains incarcerated serving his 16-year prison sentence.

REASONS FOR GRANTING THE WRIT

Introduction

Mr. Paul acknowledges that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. But he would humbly submit that the issues raised by his case merit this Court's attention, time, and resources. Indeed, this case does not involve any "asserted error consist[ing] of erroneous factual findings or the misapplication of a properly stated rule of law." *Id*. Mr. Paul's position is that the Eleventh Circuit Court of Appeals "has decided an important question of federal law [as well as deciding] an important federal question in a way

that conflicts with relevant decisions of this Court." *Id*. Thus, Mr. Paul appeals to this Court for its intervention.

As a procedural matter, the instant case is an excellent vehicle to entertain the question presented, one for which may potentially affect thousands of federal criminal defendants each year. Mr. Paul comes to this Court after a direct criminal appeal and on a question in the context of Title 18, United States Code, Section 924(c). There are no factual questions to address, and the matter involves only a legal analysis and application of the Court's jurisprudence.

The Appellant acknowledges that the trial court was bound by the Eleventh Circuit's precedent in denying his Motion to Dismiss, and acknowledges that the Eleventh Circuit has previously ruled against the positions being advanced by the Appellant herein. However, the Appellant argues that the appellate court's holdings are erroneous in light of recent rulings by this Court in *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018) ("*Dimaya*"), and *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) ("*Johnson*"), as well as *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

Context and the Current Landscape

The appellant filed a Motion to Dismiss in the trial court, seeking dismissal of Counts Two, Nine, and Eleven of the Indictment, arguing that the definition of

"crime of violence" contained in Section 924(c), which prohibits the use, carrying, or possession of a firearm in connection with a crime of violence or drug trafficking crime, is void-for-vagueness in violation of the Due Process Clause of the United States Constitution. The appellant cited the court to *Dimaya* and *Johnson* in support of his Motion. The appellant's position is that, although the trial court was bound by the precedent of this Court, that precedent is erroneous, so that it was error for the district court to deny his Motion to Dismiss.

At issue, then, are Counts Nine and Eleven of the Indictment, counts to which the appellant entered a guilty plea and was convicted and sentenced upon. The appellant was sentenced to 84 months in prison on Count Nine, to run consecutively to Counts One, Eight, and Ten, and 21 months in prison on Count Eleven, to run consecutively to all other counts of conviction.

Count Nine charged the appellant and a co-defendant, aiding and abetting each other, with brandishing a firearm in connection with a crime of violence, that is, the carjacking offense alleged in Count Eight, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2. Count Eleven charged the appellant and his co-defendants, aiding and abetting each other, with discharging a firearm in connection with a crime of violence, that is, the attempted carjacking alleged in Count Ten, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

A "crime of violence" is defined in Section 924(c)(3)(B) as a felony 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. In relevant Eleventh Circuit caselaw, subsection 3(A) is referred to as the "elements clause" and subsection 3(B) is referred to as the "residual clause." Following this Courts holding in *Dimaya*, the *Ovalles* en banc court found that the question of "whether a predicate offense qualifies as a 'crime of violence' under either subsection is one that a court must answer 'categorically'--- that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct," overruling *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013) ("*McGuire*").

I. Reasonable jurists could debate whether § 924(c)'s residual clause is unconstitutionally vague.

In *Dimaya*, this Court, relying on its holding in *Johnson*, held that the "residual clause" of the federal criminal code's definition of "crime of violence," Title 18, United States Code, Section 16(b) ("Section 16"), as incorporated into the Immigration and Nationality Act's definition of aggravated felony, was impermissibly vague in violation of due process. *Dimaya* at 1210. Section 16 defines "crime of violence" as (a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and 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. Section 16(b) is referred to as the "residual clause." *Dimaya* at 1211.

The plurality in *Dimaya* stated that Section 16(b) requires a "categorical, ordinary-case approach" and for the reasons set forth in *Johnson*, that approach cannot be a conduct-based approach. *Dimaya* at 1209. *Dimaya* then focused on two factors originally discussed in *Johnson* in arriving at its holding. First, it found that the identification of an "ordinary case" under Section 16(b), in order to measure the crime's risk, would be excessively speculative. *Dimaya* at 1215. Second, Section 16(b)'s definition requiring "substantial risk" possesses uncertainty about the level of risk that makes it "violent." *Id.* The Court found that Section 16(b) required a court "to picture the kind of conduct that the crime involves in the 'ordinary case,' and to judge whether that abstraction presents" some not-well-specified-yet-sufficiently-large degree of risk. *Id.*, *citing Johnson*, 576 U.S., at ___, 135 S.Ct. at 2556-2557. The Court concluded that Section 16(b) produces "more unpredictability and arbitrariness that the Due Process Clause tolerates." *Id.*

The definition of "crime of violence" contained in Section 924(c)(3)'s residual clause is virtually identical to the definition of "crime of violence" set forth in Section 16(b): a felony 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." Section 924(c)(3)(B). The "residual clause" of section 924(c)(3) has the same two features that conspired to make section 16(b)'s definition of "crime of violence" unconstitutionally vague. *Dimaya* at 1223. As such, it is violative of the Due Process Clause and may not be used to impose a sentence on the appellant in this case.

In *Ovalles*, the Eleventh Circuit found that the residual clause of Section 924(c) is not unconstitutionally vague, notwithstanding the holding in *Dimaya*. *Ovalles* at 1253. The appeals court interpreted Section 924(c)(3)'s "residual clause" to incorporate a conduct-based approach to the "crime of violence" determination, reasoning that the plurality's holding in *Dimaya* left the door open for such an interpretation. *Ovalles* at 1239. The court invoked the canon of "constitutional doubt" and found that because Section 924(c)(3)(B) could reasonably be read to employ the conduct-based approach, it therefore must be so read. *Ovalles* at 1244.

In *Ovalles*, the appeals court examined six considerations that have lead the Court to apply the categorical approach to similar residual clauses in other statutes[2]: the government did not ask the court to consider a conduct-based approach; the text of those statutes focused on "convictions," not conduct; those

[2] Section 16(b) and the Armed Career Criminal Act (ACCA), Title 18, United States Code, Section 924(e).

statutes used terms like "offense," "felony," and "by its nature," which the Eleventh Circuit concluded pointed toward a categorical, rather than a conduct-based inquiry; those statutes did not refer to the underlying crime's commission or circumstances; applying the categorical approach would be impractical because of the difficulty of requiring a court to reconstruct the circumstances of underlying prior convictions; and applying the categorical approach would avoid Sixth Amendment issues that could arise from the sentencing court making findings of fact that are properly made by a jury. *Id.*[3]

Respectfully, the appellant's position is that the analysis of whether to employ the categorical or the conduct-based approach should be based on the two factors analyzed in *Dimaya*: first, whether the identification of an "ordinary case" in order to measure the underlying crime's risk would be excessively speculative, and second, whether the definition requiring "substantial risk" possesses uncertainty about the level of risk that makes the offense "violent." *Dimaya* at 1215. Applying those two factors here leads to the conclusion that Section 924(c) incorporates the categorical approach.

This Court's precedent in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) ("*Leocal*"), requires application of a categorical approach to

[3] Only three of these six factors are based on the text of Section 924(c)(3)(B), *see Ovalles II* at 1287 (Jill Pryor, J., dissenting).

Section 924(c)'s "residual clause." *Dimaya* at 1217, *citing Nijhawan v. Holder*, 557 U.S. 29, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (an offense's nature means its "normal and characteristic quality"); *see Dimaya* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment). Applying the categorical approach to Section 924(c) dooms the statute's residual clause.

In holding that Section 924(c)'s "residual clause" can "plausibly" be read as incorporating the "conduct-based" approach, the Eleventh Circuit relies on the canon of "constitutional avoidance," stating that if an interpretation can be plausibly be read in a constitutional manner, it must be. *Ovalles* at 1233. The problem with this approach is that the alternative way of reading Section 924(c)(3)(B) to "permit a conduct-based approach is simply not plausible when we remain faithful to the text of the statute." *Ovalles* at 1278 (Jill Pryor, J., dissenting). If we follow what this Court has said about the text of Section 16 and the Armed Career Criminal Act and apply it to Section 924(c) as a whole and in context, we find that Section 924(c)(3)(B) "presents an even stronger case for applying the categorical approach than the other statutes---so strong that no other reading is plausible." *Id.* at 1278-79.

In adopting a conduct-based approach to the "residual clause" of Section 924(c), the appeals court "contorts the plain text of the statute and reads similar structure and language differently within the same statute." *Ovalles* at 1287 (Jill

Pryor, J., dissenting). However, *Leocal* requires us to look to the nature of the offense of conviction, rather than to the particular facts relating to the crime, i.e., a categorical approach; thus, Section 924(c)(3)(B) cannot plausibly be read another way. *Id.* In order to employ the canon of constitutional avoidance, courts must look to a statute's text alone. If "a purely textual analysis" leads to only one plausible construction, the canon "simply has no application." *Id., citing Jennings v. Rodriguez*, ___ U.S. ___, 138 S.Ct. 830, 842, 200 L.Ed.2d 122 (2018).

Therefore, Section 924(c)'s "residual clause" cannot be "plausibly" read to incorporate the "conduct-based" approach. It must be read using a categorical approach. Accordingly, in light of the holdings in *Dimaya* and *Johnson*, Section 924(c)'s "residual clause" is void for vagueness.

This issue is presented squarely for resolution by this Court in *United States v. Davis,* No. 18-431 (case argued Apr. 17, 2019).

II. Reasonable jurists could debate whether carjacking or attempted carjacking are crimes of violence under § 924(c)'s elements clause.

The Appellant argued on appeal that his convictions for carjacking and attempted carjacking did not qualify as "crimes of violence" under § 924(c)'s "elements clause," while conceding that the Eleventh Circuit has held otherwise. The Eleventh Circuit panel rejected this argument, citing *Ovalles II*, 905 F.3d at 1303-05 and *St. Hubert*, 909 F.3d at 345-46. *See* Opinion Appendix A, p. 5.

On remand in light of the Eleventh Circuit's en banc holding in *Ovalles*, the panel published yet another decision *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) *(Ovalles II)*. The panel held that Ms. Ovalles' underlying crime of violence, attempted carjacking in violation of 18 U.S.C. § 2119, fits not only within § 924(c)'s residual clause, but also its "elements clause." *Id.* at 1302. However, in light of the en banc court's holding, the panel's latest tract is arguably an advisory opinion. It should not have been relied upon in deciding this case. In that event, the controlling case is *Johnson v. United States*, 576 U.S. ___ (2015), because the appellant could not be found to have committed a "crime of violence" without resort to the "residual clause," which is unconstitutionally vague. *See Smith* at 1282 (Jill Pryor, J., dissenting). Several Circuits have attempted to follow the *Ovalles* panel and salvage the residual clause following this Court's holding in *Dimaya*. Such reliance is violative of the appellant's constitutional rights.

What's more, the *Ovalles* panel was wrong. The offenses of carjacking, and of attempted carjacking in which the substantial step need not involve force at all, likely do not fit under § 924(c)'s "elements clause."

The Appellant stands convicted of carjacking and attempted carjacking, and with associated violations of Section 924(c) for using or carrying a firearm in relation to a crime of violence or drug trafficking crime. The "elements clause" of Section 924(c)(3)(A) defines a "crime of violence" as a felony that has an element

the use, attempted use, or threatened use of physical force against the person or property of another. Carjacking is defined in Section 2119 as taking or attempting to take a motor vehicle by force and violence or by intimidation, with the intent to cause death or serious bodily harm, from the person or presence of another. Courts apply the categorical approach to decide whether a predicate conviction satisfies the definition of "crime of violence" contained in section 924(c)'s "elements clause." *St. Hubert* at 345-46. So, in making this determination, a court presumes that the conviction is based on "the least of the acts criminalized" and then decides whether those acts qualify as crimes of violence. Thus, in this case, the inquiry is whether the taking of a vehicle from the person or presence of another "by intimidation" qualifies as a crime of violence under the "elements clause."

The term "intimidation" is not necessarily "coterminous" with threatened use of physical force as it appears in the "elements clause." *See Smith* at 1282 (Jill Pryor, J., dissenting). It is "possible for a defendant to engage in intimidation without ever issuing a verbal threat by, for example, slamming a hand on a counter," and therefore, "possible to commit the offense of carjacking without ever using, attempting to use, or threatening to use physical force as described in the elements clause" of Section 924(c)(3). *Id.* at 1283, *citing United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005).

Intimidation "occurs when an ordinary person … reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (quotation omitted). However, placing a person in fear of "a threat of bodily harm" need not entail the use or threatened "use" of violent "physical force." Importantly, the term "physical force" means "violent force---that is, force that is capable of causing physical pain or injury to another person." *See Johnson v. United States,* 559 U.S. 133, 140 (2010) *(Curtis Johnson)*.

First, the intimidation element does not require proof of a defendant's mental state and thus does not require the "use" or threatened "use" of physical force. *See Palomino Garcia*, 606 F.3d 1317, 1334–36 (11th Cir. 2010) (holding that a crime with a *mens rea* of recklessness does not satisfy the "use of physical force" under U.S.S.G. § 2L1.2); *see also United States v. Dixon*, 805 F.3d 1193, 1197–98 (9th Cir. 2015) (holding that a California conviction for robbery by "force" did not qualify as a "violent felony" under the ACCA because a conviction may be imposed where force is used accidently). Second, an individual may be intimidated without having been threatened with "physical force." *See Curtis Johnson*, 559 U.S. at 140. For example, threatening to overcome a victim's resistance if they do not hand over their car keys is not using physical force. Thus, carjacking by intimidation also does not qualify as a "crime of violence" under the use-of-force ("elements") clause.

Also, proving carjacking requires proof that the person acted with the intent to cause death or serious bodily harm. *See Smith* at 1282 (Jill Pryor, J., dissenting). Carjacking covers more conduct than does the "elements clause" of Section 924(c)(3)(A); the intent element of the carjacking statute requiring that the defendant act with the "intent to cause death or serious bodily harm," and the "by force and violence or by intimidation" element of the carjacking statute, are separate inquiries. *Id.* "Thus, it is possible to prove that a defendant had the intent to commit death or serious bodily harm without proving that he used, attempted to use, or threatened to use physical force against the victim." *Id.* And if the scope of the offense of carjacking is not coextensive with the definition of "crime of violence" in the elements clause of Section 924(c)(3)(A), a court would have to rely on the residual clause to conclude that carjacking categorically qualifies as a crime of violence. *Id.* at 1284. However, the residual clause in unconstitutionally vague, as discussed above, and thus is void; it may not be relied upon in sentencing the Appellant in this case.

Neither is attempted carjacking categorically a "crime of violence." The appellant recognizes that the Eleventh Circuit has held otherwise. *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018) ("*St. Hubert*"); *Ovalles II* at 1305. It is "possible to commit the offense of carjacking without ever using, attempting to use, or threatening to use physical force as described in the elements clause" of

Section 924(c)(3) and would also, then, be possible to commit the offense of attempted carjacking without using, attempting to use, or threatening to use physical force. *Smith* at 1283 (Jill Pryor, J., dissenting). For instance, the government could prove the intent element of carjacking by "looking outside the defendant's charged conduct and at his prior bad acts." *Id.* at 1284. Following this reasoning, *Ovalles II's* finding that because carjacking is a crime of violence, attempted carjacking must also be, is in error, to the extent that the *Ovalles* panel opinion is not considered to be advisory.

Additionally, the reasoning in *St. Hubert* is flawed. *St. Hubert* states that, using the categorical approach, even if the "substantial step" taken by a defendant in an "attempt" case was not violent, he nevertheless attempted to use actual or threatened force, because he attempted to commit a crime that would be violent if completed. *St. Hubert* at 351-52. However, similar to the argument above, it is "possible to prove that a defendant had the intent to commit death or serious bodily harm without proving that he used, attempted to use, or threatened to use physical force against the victim." *Smith* at 1282 (Jill Pryor, J., dissenting), *citing Holloway v. United States*, 526 U.S. 1, 11, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999). Presuming that an attempt offense is based on the least of the acts criminalized, and using the categorical approach, it is easy to envision a situation where the "substantial step" taken is not violent. In such a case, the defendant's actions would not categorically

qualify as a crime of violence under Section 924(c)(3)(A). That is, if the scope of the offense of carjacking is not coextensive with that of the elements clause, our position is that carjacking does not categorically qualify as a crime of violence. *Id.* at 1284 (Jill Pryor, J., dissenting). It follows then, that the offense of attempted carjacking would not categorically qualify as a crime of violence, either.

Therefore, carjacking and attempted carjacking do not qualify as "crimes of violence" under the elements clause of Section 924(c)(3). Neither of these offenses may form the basis for the appellant's conviction and sentence on either Count Nine or Count Eleven in this case.

CONCLUSION

For the foregoing reasons, the petition should be granted. The Court should hold the petition for a writ of certiorari pending the decision in *Davis* and then dispose of Mr. Paul's case in light of that decision.

Respectfully submitted,

/s/ Cynthia A. Hawkins
Cynthia A. Hawkins
Counsel of Record for Petitioner