No. 18-989

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

V.

MARVIN LEWIS

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

BRIEF IN OPPOSITION OF MARVIN LEWIS

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QUESTION PRESENTED FOR REVIEW

The government's petition presents the question whether the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which applies in the context of a federal criminal prosecutions for possessing, using, or carrying a firearm in connection with acts comprising a crime of violence, is unconstitutionally vague.

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OPINION BELOW

The opinion of the court of appeals is reported at 907 F.3d 891 (5th Cir. 2018). The opinion is attached as Appendix A to the petition for certiorari filed by the United States.

PROVISIONS INVOLVED

The provisions involved in this case are 18 U.S.C. § 924 and the Fifth Amendment to the U.S. Constitution. The government's petition sets out in Appendix B both § 924(c) and the Fifth Amendment.

STATEMENT

The government requests that its petition in this case be held pending the Court's decision in *United States v. Davis*, No. 18-431, which is to be argued on April 17, 2019. The question the government presents in this case, as in *Davis*, asks the Court to determine whether 18 U.S.C. § 924(c)(3)(B)—the residual clause of that statute's "crime of violence" definition—is unconstitutionally vague.

Respondent Lewis was charged in a second superseding indictment with a number of offenses relating to plans to rob jewelry stores and the robbery of jewelry stores. Fifth Circuit Electronic Record on Appeal (EROA) 475-92. Count 23 of the second superseding indictment alleged that Lewis had used, carried, or brandished a firearm during and in relation to a crime of violence and had possessed a firearm in connection with a crime of violence. EROA.486. The crime of violence alleged was a conspiracy to obstruct interstate

commerce in violation the Hobbs Act, 18 U.S.C. § 1951, set out in Count 1 of the superseding indictment. EROA.477.[1]

The jury, among its other verdicts, found Lewis guilty of Counts 1 and 23. EROA.827, 849. The district court sentenced him to a total of 77 years' imprisonment. The conviction on Count 23 required a consecutive sentence of imprisonment and also affected the length of two other mandatory, consecutive sentences that Lewis received. *See* 18 U.S.C. § 924(c)(1)(A), (C). Lewis appealed. He challenged his conviction and sentence on Count 23, contending that a Hobbs Act conspiracy is not, by its elements, a crime of violence under § 924(c)(3)(A), and that such a conspiracy could not be a crime of violence within the definition in § 924(c)(3)(B) because that definition was unconstitutionally vague under this Court's teachings in *Johnson v. United States,* 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018).

The Fifth Circuit agreed. It held that a Hobbs Act conspiracy is not a crime of violence under § 924(c)(3)(A). *United States v. Lewis,* 907 F.3d 891, 894-95 (5th Cir. 2018). It also held that, under *Johnson* and *Dimaya,* and its own ruling in *Davis*, a Hobbs Act conspiracy could not be a crime of violence under the residual definition contained in § 924(c)(3)(B) because that provision was unconstitutionally vague. 907 F.3d at 893-95. The court therefore found plain error had occurred, and it reversed Lewis's conviction on

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231. The United States timely filed a petition for a writ of certiorari from the judgment of the court of appeals.

Count 23 and vacated Lewis's entire sentence, remanding to the district court for resentencing. *Id.* at 895.

REASONS FOR DENYING THE WRIT

BECAUSE THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE RESIDUAL CLAUSE OF § 924(C)(3)(B) IS UNCONSTITUTIONALLY VAGUE UNDER THIS COURT'S PRECEDENT AND THAT LEWIS'S CONVICTION AND SENTENCE UNDER THAT PROVISION COULD NOT STAND, THE PETITION SHOULD BE DENIED.

The petition for certiorari should be denied. For the reasons given below, as well as the reasons explained fully in the brief of Respondent Davis in Number 18-431, the residual definition of "crime of violence" set out in 18 U.S.C. § 924(c)(3)B) is, as the Fifth Circuit held in its opinion in this case, void for vagueness under the teachings set out in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The "circumstances-specific" approach the government advances in an effort to avoid the *Johnson/Dimaya* vagueness problem that it concedes exists, *see* Government Davis Br. 45, cannot alter the outcome of this case. This is so because, as explained below and in the amicus brief filed by the National Association of Federal Defenders in *Davis*, the circumstances-specific approach was never put before the jury that tried Lewis, and his conviction and sentence cannot be affirmed on a theory that was not presented to the jury. Because the Fifth Circuit was correct that § 924(c)(3)(B) is unconstitutionally vague and because, even if the Court were to adopt a circumstances-specific reading of § 924(c)(3)(B) Lewis's conviction would have to remain vacated, there is no reason to hold this petition pending *Davis*. Alternatively, because Lewis's conviction cannot be upheld even if the

Court adopts the government's circumstances-specific reading of § 924(c)(3)(B), the petition, if held pending *Davis*, should be denied once *Davis* is decided.

A. Section 924(c)(3)(B) Is Unconstitutionally Vague.

A criminal statute must provide persons and the courts with sufficient guidance as to what conduct it prohibits. If the statute fails to do so, it offends essential requirements of due process that embrace "'ordinary notions of fair play and the settled rules of law.'" *Dimaya*, 138 S. Ct. at 1212 (quoting *Johnson v. United States*, 135 S. Ct. 2251, 2256-57 and *Connally v. General Constr. Co.*, 269 U.S. 385, 291 (1926)). The due process prohibition against vague laws protects persons from arbitrary enforcement of the laws, and "[i]n that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212.

Dimaya held unconstitutionally vague the definition of "crime of violence" in 18 U.S.C. § 16(b). It did so based on "a straightforward application," 138 S. Ct. at 1213, of the reasoning set out in *Johnson*. *Johnson* had invalidated as impermissibly vague the definition of "violent felony" set out in the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). The Court concluded that the language of § 16(b), like the language of the ACCA provision, "require[d] 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." 138 S. Ct. at 1216 (quoting *Johnson*, 135 S. Ct. at 2556-57). "The result is that § 16(b) produces, just as

ACCA's residual clause did, 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Dimaya,* 138 S. Ct. at 1216 (quoting *Johnson,* 135 S. Ct. at 2558).

The language of the ACCA provision and the language of § 16(b) both required an inquiry that "turned on the 'nature of the offense' generally speaking" and thus "require[d] a court to ask whether 'the ordinary case' of an offense poses the requisite risk." 138 S. Ct at 1211 (quoting *Leocal v. Ashcroft,* 543 U.S. 1, 7 (2004) and *James v. United States,* 550 U.S. 192, 208 (2007)). Like the ACCA provision, § 16(b) required a court to determine the risk posed by an offense by applying a categorical approach, and to "picture the kind of conduct that the crime involves 'in the ordinary case'" rather than looking at the "real-world" facts in the individual case at hand to determine the risk of injury. *Dimaya,* 138 S. Ct. at 1216 (citing *Johnson*, 135 S. Ct. at 2557). Like the ACCA's residual clause, § 16(b) required the court to identify a crime's "ordinary case" in order to measure the crime's risk, but "[n]othing in § 16(b) help[ed] courts to perform that task." *Dimaya*, 138 S. Ct. at 1215. The language of the § 924(c) residual clause is, apart from a single comma, identical to the language the Court found unconstitutionally vague in § 16(b). Thus § 924(c) can only reasonably be read, like § 16(b), to require an ordinary-case categorical approach, and, because it requires that approach, § 924(c)(3)(B) must now be, as § 16(b) has been, declared unconstitutionally vague.

Section 924(c)(3) provides that:

> For purposes of this subsection, a "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 per son 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.

Every aspect of this language requires a categorical approach, not a fact-based, case-circumstances-specific inquiry.

The Court has made plain that unadorned statutory references to a "'felony,' or an 'offense,'" are 'read naturally' to denote the 'crime as *generally* committed.'" *Dimaya*, 138 S. Ct. at 1217 (plurality opinion) (quoting *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009) (emphasis in original). The phrase "offense that is a felony" in § 16(b), the Court determined, required a court "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a particular] crime." *Leocal*, 543 U.S. at 7. This reading is consistent with natural ordinary usage. That ordinary usage, *Dimaya* teaches us, meant that, as used in § 16(b), the language was impermissibly vague. The same is true of the identical language as used in § 924(c).

The government's view that the identical language means something different in § 924(c)(3) than it did in § 16(b) runs contrary to ordinary English usage. The government's view that "offense that is a felony" in the introductory clause to § 924(c)(3) means different things depending on whether one then goes to subsection (c)(3)(A) or (c)(3)(B) defies all

rules of usage. The government's view is that, in § 924(c)(3), the single statutory phrase, which had only one meaning in § 16(b) should have two separate meanings, one for § 924(c)(3)(A) and one for § 924(c)(3)(B). This is wrong for at least two reasons. First, § 924(c)(3) tells us what the term means for the entire subsection: it plainly states the definition is "for purposes of this subsection." It cannot therefore be that the words have different meanings in the subdivisions of the subsection. Second, the government is writing, not reading a statute. According to the government, in § 924(c)(3)'s opening phrase the phrase "offense that is a felony" means categorical offense when the reader proceeds to the elements-clause definition of subsection (c)(3)(A), but the same words in the same introductory phrase has a different meaning when the reader proceeds to the residual-clause definition. The government forces itself into this reader's-choice-rules scenario because a fact-specific reading of "offense that is a felony" cannot apply to the elements clause; if it did the courts would be looking at facts under (c)(3)(A), not the elements that Congress has instructed them to review. So, the government argues, the opening phrase must be protean. This is not how statutes, or statutory interpretation, works. Because the circumstances-specific reading cannot apply to the elements clause, it cannot apply to the residual clause either. "To give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). The government's attempt to invent a § 924(c)(3) that benefits it, conflicts with the ordinary rules of English, of statutory interpretation, this Court's precedent, and the words Congress chose. It must be rejected.

The government's claim that § 924(c)(3)(B) must be circumstances-specific also requires that the phrase "by its nature" be read unnaturally. The phrase "by its nature" nature refers back to the word "offense" in the opening phrase. Because "by its nature" refers back to "offense that is a felony," the "nature" a court must consider is that of the "offense that is a felony." See *Leocal*, 543 U.S. at 7. That requires evaluation of the abstract, categorical offense. An individual defendant's particular conduct on one occasion has no normal and characteristic nature. It has only a manifestation of particular, specific facts. Thus a circumstances-specific reading gives no meaning to the phrase "by its nature."

Reading § 924(c)(3) as setting out a categorical approach, not only accords with the language and precedent, it preserves Congress's decision in 1984 to narrow § 924(c)'s scope from all federal felonies to only those that are "crimes of violence." Under the government's circumstances-specific reading, § 924(c)(3) could again reach any federal felony. Every federal felony could thus become a "crime of violence," regardless of its "nature," so long as the particular jury thought the particular facts of the particular case fit within the definition. *See* Respondent Davis Br. at 25-26, 34.

That this is so points up that the government's "circumstances-specific" approach would not give fair notice of what conduct § 924(c) prohibits. A circumstances-specific approach would not clarify the language of the residual clause; that language, defining a crime of violence as an offense that "by its nature" poses a "substantial risk" of force against persons or property, would be clarified only after a jury made a particular decision. *Cf. United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018) (holding government's

theory did not cure § 924(c)(3)'s vagueness problem). Whether one takes an "ordinary case" approach, or attempts to apply it to specific facts, the residual clause remains too vague to "give fair warning of the conduct which it prohibits." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). Under the government's circumstances-specific approach, § 924(c)(3)(B) would continue to lack definition. The government's solution would simply claim that, if a jury found a crime of violence, the statue must have defined on. That cannot be. A statute must tell us in advance what crimes it covers. *Dimaya,* 138 S. Ct. at 1212

The difficulties with the government's circumstances-specific theory go beyond notice issues−though the notice problems are sufficient to reject the theory and invalidate § 924(c)(3)(B) The government's theory does not fix the vagueness problem with § 924(c)(3)(B). It merely allows the jury to define the crime by determining what crime of violence might mean on a case-by-case basis. That approach does not provide a settled meaning to the statute. It encourages the government to bring prosecutions in the hope that it can redefine the law to its advantage in each case. The Court has warned against statutory interpretations that do this, cautioning that "[v]ague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions." *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Vague laws "impermissibly delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis" *Grayned*, 408 U.S. at 108-09. Congress, not law enforcement officers or prosecutors

must define federal crimes. Congress failed to do so adequately when it passed § 924(c)(3)(B). The law must be stricken as unconstitutionally vague.

B. Even if the Court Were to Accept the Government's Circumstances-Specific Approach, Lewis's Conviction Could Not Stand.

Respondent Lewis's conviction could not stand even if the Court were to adopt the government's circumstances-specific approach. To uphold his conviction, or to order him to be retried, under the "circumstances-specific" approach" would violate the Indictment and Due Process Clauses of the Fifth Amendment and the jury trial clause of the Sixth Amendment. *See also* Amicus Brief of National Association of Federal Defenders in *Davis* 2-5 (explaining issues)

Lewis was convicted in a prosecution predicated on the categorical approach to § 924(c)(3)(B). This meant that the indictment charging him did not allege that Lewis's conduct, "by its nature, involve[d] a substantial risk that physical force against the person or property may be used in the course of committing the offense." See 18 U.S.C. § 924(c)(B)(3). It meant that he did not have a right to have his jury determine whether § 924(c)(3)(B)'s residual clause was satisfied. It meant that his jury was not instructed on that definition or instructed that it must determine whether Lewis's conduct satisfied the definition. Instead, Lewis's indictment stated that a Hobbs Act conspiracy was a crime of violence. EROA.486. The district court told the jury that the first step in its § 924(c) deliberation on Count 23 was determining if the underlying crime, here a Hobbs Act offense, had been committed. If so, the court told the jury, "I instruct you that Interference with Commerce by Threats or Violence is a crime of violence." EROA.819.

To affirm Lewis's conviction under a circumstances-specific theory or to vacate Lewis's conviction and allow him to be retried under a circumstances-specific theory, would deprive him of his right to be tried upon the indictment brought against him. A retrial would "destroy[his] substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361 U.S. 212, 217 (1960). "Deprivation of such a basic right is far too serious to be . . . dismissed as harmless error." *Id.*; *see also Russell v. United States*, 369 U.S. 749 (reversing convictions outright where indictment "failed to sufficiently apprise the defendant of what he must be prepared to meet," for otherwise a defendant "could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him"). The charge made against Lewis under the categorical approach was not proved; the government cannot be afforded another chance to convict him on the same conduct.

To affirm the conviction or allow retrial upon a circumstances-specific theory would also violate due process. The Court has repeatedly held that to uphold a conviction based on a construction of a statute the defendant was not convicted under itself violates the Due Process Clause. "To conform to due process of law, [criminal defendants are] entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U.S. 196, 202 (1948). In *Cole*, the state supreme court avoided defendants' constitutional challenge to the statute under which they were convicted by affirming "as though" they had been convicted of an offense "for which they were neither tried nor convicted." *Id.* at 200-01.This Court

reversed. It explained that "[i]t is as much a violation of due process" for a reviewing court "to send an accused person to prison [for] a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id*. at 201.

Other cases also teach that due process notice guarantees mean that an appellate court may not affirm a conviction—and thus avoid vacating a conviction—by altering the elements of the offense for which the defendant was convicted. *See Eaton v. Tulsa*, 415 U.S. 697, 698-99 (1974) (per curiam) (state court of appeals "denied petitioner constitutional due process in sustaining" his conviction by treating it "as a conviction upon a charge not made" or found by the trier of fact); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (state court violated due process by affirming convictions for disorderly conduct, for which there was no evidentiary support, on the ground defendants were convicted for refusing to obey a police officer, a charge that "was never made"); *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966) ("[W]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act.").

Affirming Lewis's conviction or allowing him to be retried on a § 924(c) charge on a circumstances-specific theory would also violate the Sixth Amendment. It is well settled that a jury must find all of the elements necessary for conviction and must find all facts necessary to raise a sentence range, as a conviction for § 924(c) does. *In Re Winship*, 397

U.S. 358 (1970); *Alleyne v. United States*, 570 U.S. 99 (2013). The jury never considered the circumstances-specific theory and thus the conviction cannot be affirmed without violating the Sixth Amendment, and the government should not be given another chance to prove what it failed to at trial.

CONCLUSION

FOR THESE REASONS, Lewis asks that this Honorable Court deny the government's petition for a writ certiorari and let stand the judgment of the court of appeals.

Respectfully submitted.

_/s Philip J. Lynch_____
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DATED: April 10, 2019.