No. 19-5460

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ORTEGA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

In opposing Mr. Ortega's request to grant, vacate, and remand this case, the Solicitor General commits precisely the same error the Ninth Circuit did below. There, the Ninth Circuit held it was "unnecessary" to apply the categorical approach to Mr. Ortega's firearms conviction under 18 U.S.C. § 924(c). *See* Pet. App. 2-3a. Six weeks later, this Court reached the opposite conclusion, holding in *United States v. Davis*, 139 S. Ct. 2319, 2328 (2019), that § 924(c) "commands the categorical approach."

Yet the Solicitor General persists in defending the Ninth Circuit's decision *not* to apply the categorical approach to Mr. Ortega's § 924(c) conviction. *See* Memorandum of the United States in Opposition ("Mem.") at 6-7. For instance, the first step of the categorical approach is to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic"

crime.'" *Descamps v. United States*, 570 U.S. 254, 257 (2013). But instead of doing this, as *Davis* requires, the Solicitor General leap-frogs over this step to examine the facts in Mr. Ortega's case and prematurely conclude that his § 924(c) offense rested on a drug-trafficking crime.

This is precisely the type of case-specific approach this Court has said judges may *not* undertake. Here, the categorical approach required a court to analyze whether RICO conspiracy under 18 U.S.C. § 1962(d) is divisible into multiple offenses before it may consider documents in the record—an inquiry that neither the district court nor the Ninth Circuit ever did. Because *Davis* confirmed that the categorical approach applies to § 924(c), and because no court has ever applied the proper steps in the categorical approach to Mr. Ortega's conviction, the Court should grant the petition for certiorari, vacate the decision of the Ninth Circuit, and remand this case for further proceedings.

ARGUMENT

Davis was unequivocal: to determine whether a predicate offense can sustain a § 924(c) conviction, courts employ the longstanding categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See Davis*, 139 S. Ct. at 2328. In two recent cases, this Court described exactly how this approach works. *See Descamps*, 570 U.S. 254; *Mathis v. United States*, 136 S. Ct. 2243 (2016).

The first step of the categorical approach is to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic" crime.'" *Descamps*, 570 U.S. at 257. If the statute under which the

defendant was convicted "criminalizes a broader swath of conduct than the relevant generic offense," the statute is overbroad. *Id.* at 258. When this occurs, courts must determine whether the statute of conviction contains several separate crimes, each with its own set of "alternative elements," *id.* at 258, or whether the statute "merely specifies diverse means of satisfying a single element of a single crime," *Mathis*, 136 S. Ct. at 2249.

Critically, courts may only consult documents pertaining to the defendant's own case in the former situation—a "narrow range of cases" where the statute of conviction contains multiple crimes with multiple sets of "alternative elements." *Descamps*, 570 U.S. at 261. For when the defendant's statute of conviction contains "a single, indivisible set of elements," this Court firmly holds that judges may *not* "look[] to those materials to discover what the defendant actually did." *Id.* at 258, 268. This is true even if those documents might reveal that "the defendant actually committed the offense in its generic form." *Descamps*, 570 U.S. at 262. *See also id.* at 265 ("Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant.").

But here, that is precisely what the Solicitor General advocates. Eschewing any comparison of the elements of the statute of conviction with the elements of the generic offense, the Solicitor General skips directly to examining the superseding indictment and the transcript of Mr. Ortega's plea colloquy. Mem at 6. Those documents, according to the Solicitor General, show that the § 924(c) count "specifically limited the predicate racketeering conspiracy to an agreement to

distribute drugs," and that Mr. Ortega "expressly admitted during his plea colloquy that he possessed a gun during and in relation to drug offenses." Mem at 7. Thus, claims the Solicitor General, Mr. Ortega's § 924(c) conviction is "premised on his possession of a gun during and in relation to drug trafficking crimes, not crimes of violence." Mem at 6.

This is not how the categorical approach works. As *Descamps* and *Mathis* repeatedly confirm, the first thing a court must do in applying the categorical approach is "line[] up [the predicate] crime's elements alongside those of the generic offense and see[] if they match." *Mathis*, 136 S. Ct. at 2248. So here, *Davis*'s mandatory use of the categorical approach requires that the Ninth Circuit "line up" the elements of the predicate crime (RICO conspiracy) with the elements of the generic offense (a crime of violence under 18 U.S.C. § 16(a)) to see if they match. Doing so reveals that they do *not* match, since a person may be convicted of RICO conspiracy for a plethora of offenses that do not involve the use, attempted use, or threatened use of force under § 16(a). *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include gambling, dealing in obscene matter, bribery, counterfeiting, fraud, and other nonviolent offenses).

Because RICO conspiracy does not categorically match the generic definition, a judge must then consider whether the RICO conspiracy statute contains several separate crimes, each with its own set of "alternative elements," *Descamps*, 570 U.S. at 258, or whether the statute "merely specifies diverse means of satisfying a single element of a single crime," *Mathis*, 136 S. Ct. at 2249. While a *substantive*

RICO offense might contain multiple offenses, the same cannot be said of RICO *conspiracy*, since it requires a jury to find only a "pattern of racketeering activity." 18 U.S.C. § 1962(a) & (d). The statute defines this "pattern" as "at least two acts of racketeering activity." 18 U.S.C. § 1961(1) & (5). But because "a jury need not agree" *which* two racketeering activities constituted this "pattern," the RICO conspiracy statute "merely specifies diverse means of satisfying a single element of a single crime" and is not divisible. *Mathis*, 136 S. Ct. at 2249, 2250. But ultimately the Court need not decide this question—all Mr. Ortega asks is that the Court remand to allow a judge to conduct this analysis in the first instance.

Finally, the Solicitor General urges this Court to sidestep the categorical approach because it "would have no effect on the outcome." Mem at 7. But the only way remand could have "no effect on the outcome" is if the RICO conspiracy statute is divisible—and the Solicitor General never claims it is. Because it does not, saying that the categorical approach would have "no effect on the outcome" of Mr. Ortega's case is like saying that it would have had "no effect on the outcome" in *Descamps* because the defendant there *actually* entered the building unlawfully, or "no effect on the outcome" in *Mathis* because the defendant there *actually* entered a building rather than a vehicle. Such an approach "turns an elements-based inquiry into an evidence-based one" and has "no roots in our precedent." *Descamps*, 570 U.S. at 266-67. But because this now-debunked approach is all the Solicitor General argues for here, the Court should grant this petition and remand for a lower court to apply the categorical approach in the first instance.

CONCLUSION

Because this Court recently held in *Davis* that the categorical approach applies to § 924(c), and because no judge has yet applied the categorical approach to Mr. Ortega's § 924(c) conviction, the Court should grant his petition for certiorari, vacate the decision of the Ninth Circuit, and remand this case for further proceedings.

Respectfully submitted,

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