NO. _____

In The
Supreme Court of the United States

MICKEL L. MARZOUK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated: February 24, 2020

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QUESTIONS PRESENTED

Petitioner Mickel L. Marzouk presents two questions for this Court's review:

1. Whether Petitioner's sentence on the second § 924(c) conviction and twenty-five year sentence enhancement was incorrectly affirmed in the Fourth Circuit in light of the Fair Sentencing Acts' clarification that the twenty-five year enhancement only applies to those who have previously been convicted and served a sentence for such an offense?

2. Whether Hobbs Act robbery under 18 U.S.C. § 1951(a) can serve as a predicate crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)?

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and there are no corporate interests to disclose.

DIRECTLY RELATED PROCEEDINGS

The following proceedings are directly related to this case:

United States v. Mickel L. Marzouk, 3:15cr00052-MHL-1, United States District Court for the Eastern District of Virginia.

United States v. Mickel L. Marzouk, No. 16-4058, United States Court of Appeals for the Fourth Circuit, petition for panel rehearing denied and motion to hold case in abeyance denied November 26, 2019. (Appdx. 11a).

United States v. El Shamy, No. 16-4054 United States Court of Appeals for the Fourth Circuit, order holding case in abeyance. (Appdx. 12a).

United States v. Zavian Jordan, No. 17-4751, United States Court of Appeals for the Fourth Circuit. (Appdx. 28a).

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IN THE SUPREME COURT OF THE UNITED STATES

MICKEL L. MARZOUK
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which is unpublished, appears at pages 1a-3a of the appendix to the petition (hereinafter "Appx."). The Order denying the Petition for Rehearing and Motion for Abeyance appears at page 11a of the appendix to the petition.

JURISDICTION

The court of appeals issued its opinion and judgment on September 11, 2019. A petition for rehearing and motion for abeyance was then filed on September 25,

2019 and September 30, 2019, respectively. The court of appeals entered its order denying the request for rehearing and motion for abeyance on November 26, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IV, Section 403(a) of the First Step Act of 2018, Pub. L. No. 115-391, provides:

> Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

Hobbs Act, Title 18, United States Code § 1951:

> (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) (1) As used in this section—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.

Title 18, United States Code § 924(c)(1)(A) provides:

> Any person who, during and in relation to any crime of violence . . . 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 . . (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[.]

Title 18, United States Code § 924(c)(1)(C) provides:

> In the case of violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—(i) be sentenced to a term of imprisonment of not less than 25 years[.]

Title 18, United States Code § 924(c)(3) provides:

> 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.

STATEMENT OF THE CASE

Overview

This petition for a writ of certiorari seeks review of the denial of Petitioner's motion to withdraw his guilty plea, motion to hold case in abeyance, and petition for rehearing. Petitioner plead guilty to two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). Prior to sentencing, Petitioner moved to withdraw his guilty plea. The trial court denied his motion and he appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the district court's denial. Petitioner filed a Petition for Rehearing and Motion for Abeyance, which was denied.

In this Petition, Petitioner seeks a writ of certiorari so that this Court can correct the Fourth Circuit Court of Appeals' erroneous decision that conflicts with plain language of the First Step Act and the Fourth Circuit Court of Appeals'

erroneous decision that a Hobbs Act robbery is a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3).

Background

This case arises from Petitioner's involvement in a conspiracy to rob two cigarette distributors located in the Eastern District of Virginia. On November 25, 2014, three of Petitioner's co-conspirators robbed an employee of Cigarette Outlet of $50,000 worth of cigarettes while he loaded his delivery van. One of Petitioner's co-conspirators brandished a firearm during the robbery. On February 9, 2015, Petitioner participated in a similar robbery of another cigarette distributor, Tobacco Zone 5. Petitioner arranged a bulk sale of cigarettes to Q.C., a Tobacco Zone 5 employee. During the exchange, two co-conspirators robbed Q.C. of $35,000. One of Petitioner's co-conspirators again brandished a firearm.

Petitioner was charged with two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). He pled guilty to both charges on April 10, 2015. At the time of Petitioner's plea, the underlying crime of violence was Hobbs Act robbery.

Relevant Proceedings

Prior to sentencing, Petitioner moved to withdraw his guilty plea. In this motion, Petitioner contended that his convictions on the § 924(c)'s could not stand in light of the Supreme Court's then-recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the high court ruled that the so-called "residual clause" of the Armed Career Criminal Act's definition of "violent felony" was unconstitutionally

vague. Petitioner also argued that Hobbs Act robbery does not qualify as a crime of violence under the "force clause," (or elements clause) and accordingly moved to withdraw his guilty plea pursuant to his claim of legal innocence. The trial court denied Petitioner's motion to withdraw his guilty plea and sentenced Petitioner to the mandatory minimum of 84 months (7 years) for Count 1 and 300 months (25 years) for Count 2, to run consecutively. This 300-month sentence for Count 2 was imposed pursuant to 18 U.S.C. § 924(c)(1)(C), which, at the time of sentencing, courts had interpreted as requiring a twenty-five-year sentence for a second § 924(c) conviction even when the second conviction came from the same indictment as the first conviction—as was the case for Petitioner.

Petitioner subsequently filed his notice of appeal and challenged the trial court's final judgment and order denying his motion to withdraw his guilty plea. After the Fourth Circuit had been fully briefed on the Hobbs Act issue in Petitioner's case, but before it issued its decision, Congress passed the First Step Act, which clarified the application of the sentencing enhancements provided for in 18 U.S.C. § 924(c)(1)(C). Specifically, the clarification stated that the enhancement does not apply to defendants, such as Petitioner, whose second § 924(c) conviction stems from the same indictment.

In an unpublished decision, the Fourth Circuit found no error by the trial court, held that Hobbs Act robbery qualifies as a crime of violence under the "force clause" of § 924(c)(3)(A) pursuant to its previous decision in *United States v. Mathis*, 932 F.3d

242, 263 (4th Cir. 2019), and did not address the new sentencing enhancement issue created by the recently passed First Step Act.

After the Fourth Circuit's unpublished opinion, Petitioner filed a Petition for Panel Rehearing and Motion for Abeyance in order for the court to consider material factual and legal matters that were overlooked in the decision, as well as the court's failure to consider the First Step Act's change to the law. The Fourth Circuit denied the petition and the motion without explanation.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT INCORRECTLY AFFIRMED PETITIONER'S SECOND 924(C) CONVICTION AND TWENTY-FIVE-YEAR ENHANCEMENT PENALTY DUE TO THE FIRST STEP ACT

The Fourth Circuit erred in affirming Petitioner's second 924(c) conviction and twenty-five-year sentence enhancement because Title IV, Section 403 of the recently passed First Step Act of 2018, Pub. L. No. 115-391 (hereinafter "FSA") forbids that finding.

18 U.S.C. § 924(c) provides for various sentencing enhancements, in different circumstances, to individuals who use or possess a firearm during a drug trafficking crime or a crime of violence. However, the FSA states a "[c]larification" to one of the specific circumstances of 18 U.S.C. § 924(c)(1)(C). That clarification provides as follows:

> **(C)** In the case of a violation of this subsection *that occurs after a prior conviction under this subsection has become final*, the person shall--
> **(i)** be sentenced to a term of imprisonment of not less than 25 years; and
> **(ii)** if the firearm involved is a machinegun or a destructive

> device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(emphasis added).

The FSA made this clarification via amendment because courts had previously—and inaccurately—been interpreting § 924(c) to require a twenty-five-year sentence for a second § 924(c) conviction even when the second conviction came from the *same indictment* as the first conviction. *See Deal v. United States*, 508 U.S. 129, 113 S. Ct. 1993 (1993); *United States v. Raynor*, 939 F.2d 191, 193 (4th Cir. 1991). As a result of the clarification, it is now obvious that a second § 924(c) conviction—and thus a twenty-five-year enhanced sentence—only applies to those who possess a firearm during a crime of violence or a drug crime and, crucially, have previously been convicted and served a sentence for such an offense. It is undisputed that this situation does not apply to Petitioner.

Petitioner was convicted and sentenced under § 924(c)(1)(C), yet he had no prior conviction under § 924(c). Therefore, his conviction and sentence is invalid, and the Fourth Circuit's decision to affirm his sentence is incorrect, as long as the FSA's enhancement clarification applies to cases, such as Petitioner's, that were pending on appeal at the time of the FSA's enactment. For the reasons below, it clearly does.

A. THE FIRST STEP ACT'S ENHANCEMENT CLARIFICATION APPLIES TO CASES PENDING ON APPEAL AT THE TIME OF ITS ENACTMENT BECAUSE THE FSA WAS A CLARIFICATION OF LAW

The FSA's enhancement clarification applies to cases pending on appeal at the time of its enactment because Section 403 of the FSA specifically states that 924(c) is amended to *clarify* the law, as opposed to a *change* it.

The distinction between a "clarification" and a "change" is subtle, but crucial, because a clarification, as opposed to a change, merely "restates what the law … is and has *always* been …." *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (emphasis added) (rev'd on other grounds by *Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999)). As such, when there has been no *change* of the law, there is no implication of the general principle that "[r]etroactivity [of a statute] is not favored in the law." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S. Ct. 468 (1988). Thus, because there are no retroactivity concerns when there is a clarification of a law, courts have held that "when a statute or rule does not change the law but merely *clarifies* existing law [or] corrects a misinterpretation by a court … the statute or rule should apply to the case at bar." *Whiting v. Johns Hopkins Hosp.*, 680 F. Supp. 2d 750 (D. Md. 2010) (emphasis added); *see also ABKCO Music*, *Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) ("[C]larifying legislation is not subject to any presumption against retroactivity and is applied to all *cases pending* as of the date of its enactment") (emphasis added); *McKiver v. Murphy Brown*, 2018 WL 6606061, at *1 (E.D.N.C. Dec. 17, 2018). Such a holding makes logical sense, as to hold otherwise would require a court reviewing a case on direct appeal not to apply what it knows the law *currently* states and has *always* stated, but instead apply what courts *incorrectly believed* the law stated in the *past*.

Importantly, it is clear that Congress intentionally used the word "clarification," and knew the significance of the word. For example, compare Title IV, Section 403 of the FSA which states a "Clarification," with Title IV, Section 401

("*Reduce and Restrict* Enhanced Sentencing for Prior Drug Felonies") (emphasis added); FSA Title IV, Section 402 ("*Broadening* of Existing Safety Valve") (emphasis added); FSA Title V, Section 502 (*Improvements* to Existing Programs) (emphasis added); FSA Title VI, Section 605 (*Expanding* Inmate Employment Through Federal Prison Industries) (emphasis added). *See Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1284 (11th Cir. 1999) (courts "may rely upon a declaration by the enacting body that its intent is to clarify [rather than change] the prior enactment."). Thus, many other titles of the FSA made clear what they were *changing* about existing law by amending the language, but Title IV, Section 403 made clear that it was amending the language in order to *clarify* the meaning of the original statute. Indeed, the word "clarification" is only used in Title IV, Section 403 of the FSA.

Thus, because of the significance of the word "clarification," and Congress intentionally used that word only with respect to § 924(c), it is abundantly clear that the FSA states that a mandatory twenty-five-year sentence under § 924(c)(1)(C) is *and has always been* appropriate *only if* the defendant previously had a § 924(c) conviction and had been convicted a second or subsequent time on a second or subsequent indictment for a § 924(c) offense. Petitioner in this case did not have a previous § 924(c) conviction, as both counts were contained in the same indictment. Therefore, to allow Petitioner, and others in his position, to receive the twenty-five-year enhancement currently imposed would be in clear violation of the federal law, not only as it exists now, but as it existed when he was sentenced.

B. EVEN IF THERE IS A CONTRADICTION IN THE FSA, THE RULE OF LENITY REQUIRES ANY AMBIGUITY TO BE CONSTRUED IN PETITIONER'S FAVOR

While there is an additional provision of the FSA that is arguably contradictory to the "clarification" language, the potential contradiction is insufficient to foreclose the FSA's application to cases pending on direct review at the time of enactment due to the rule of lenity.

Section 403(b) of the FSA, which lays out the FSA's "[a]pplicability to pending cases," states as follows:

> This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been *imposed* as of such date of enactment.

(emphasis added).

First, whether there is even a contradiction created by this provision of the FSA is up for debate. At least one circuit has held that a sentence is not yet "imposed" when the case is still pending on direct review[1]—as is the situation here. On the other hand, the holding among the majority of circuits is that a sentence is "imposed" when the district court judge issues the sentence. *See*, *e.g.*, *Young v. United States*, 943 F.3d 460, 463 (D.C. Cir. 2019); *United States v. Aviles*, 938 F.3d 503, 510 (3d Cir. 2019); *United States v. Pierson*, 925 F.3d 913, 927–28 (7th Cir. 2019). Therefore, because the circuit courts disagree on when a sentence is actually "imposed," a preliminary issue

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[1] *See United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997) ("The initial sentence has not been finally 'imposed' within the meaning of the [federal] statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error.") *superseded by regulation on other grounds*, U.S.S.G. § 1B1.10(b)(2)(A).

exists as to whether there is even a contradiction in the FSA. If this Court finds that there is no contradiction, and adopts the Sixth Circuit's holding in *Clark*, then the FSA clearly applies to Petitioner and those whose cases are still pending on direct appeal.

Second, even if this Court declines to adopt the holding in *Clark*, and finds that the "applicability" provision forecloses the application of the clarification amendments to offenses that were sentenced by a district court judge before the FSA's enactment, that holding would render two provisions of the FSA contradictory: the "applicability" provision and the "clarification" statement. After all, it would be inconsistent for the FSA to state that § 924(c) has *always* had, and will continue to have, only *one* meaning, but then also state that § 924(c) has a different meaning that applies to defendants sentenced before the FSA was enacted.

Due to this direct contradiction in Section 403 of the FSA that exists with the narrow interpretation of the word "imposed," an ambiguity is created. *See*, *Muniz v. Hoffman*, 422 U.S. 454, 468 (1975) (finding that an ambiguity exists when resulting there is an apparent conflict in statutory language). However, the rule of lenity, which is invoked when there is a "grievous ambiguity or uncertainty"[2] in a statute, provides "that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2332–2333 (2019). Thus, even if the "applicability" language of the FSA forecloses the act's application to cases pending on direct review at the time of enactment, such language is contradictory to

[2] *See Staples v. United States*, 511 U.S. 600, 619 n.17, 114 S. Ct. 1793 (1994).

another provision in the statute, and this contradiction must be resolved in Petitioner's favor. As a result, the FSA's enhancement clarification must apply to cases, such as Petitioner's, that were pending on appeal at the time of the FSA's enactment.

For the reasons stated above, the FSA's enhancement clarification must apply to Petitioner's case, making it a violation of the law for him to receive the mandatory twenty-five-year enhancement that the Fourth Circuit affirmed.

II. THE FOURTH CIRCUIT INCORRECTLY AFFIRMED PETITIONER'S SECOND 924(C) CONVICTION AND TWENTY-FIVE-YEAR ENHANCEMENT PENALTY BECAUSE IT IS HOLDING CASES SIMILAR TO PETITIONER'S IN ABEYANCE

Regardless of the substantive arguments made above regarding the FSA, the Fourth Circuit erred in affirming Petitioner's second 924(c) conviction and twenty-five-year sentence enhancement because it is holding cases similar to Petitioner's in abeyance pending a decision in *United States v. Jordan*, Record No. 17-4751,[3] but inexplicably denied Petitioner's request to hold his case in abeyance for the same reasons.

In *Jordan*, the Fourth Circuit is faced with an identical issue as the one presented above: whether the FSA applies to cases pending on appeal at the time of its enactment. *See Jordan*, Record No. 17-4751. In fact, the Fourth Circuit specifically requested supplemental briefing on this very specific issue. (Appx. at 28a). The Fourth Circuit heard oral argument on this issue on October 29, 2019, but has yet to

[3] Case No. 3:16-cr-00145 (W.D.N.C. Oct. 23, 2017).

issue a decision in *Jordan* on the FSA's application to cases on direct appeal. *See Jordan*, Fourth Circuit Record No. 17-4751.

The Fourth Circuit is holding cases raising similar issues in abeyance pending a decision in *Jordan*. *See United States v. Ali*, Record No. 15-4433, Doc. 116.[4] In fact, on November 19, 2019, the Fourth Circuit even held Petitioner's *co-defendant's* case in abeyance "pending a decision … in *United States v. Jordan* …." *United States v. El Shamy*. (Appx. at 12a) (Record No. 16-4054, Doc. 40).[5] The appellant in *El Shamy* raises the exact same issues on appeal as Petitioner and both cases were being held in abeyance pending the outcome of cases raising the claim of whether Hobbs Act robbery constitutes a crime of violence pursuant to 18 U.S.C. § 924(c)(3)(A).

Despite the above facts, for reasons that are unclear, the Fourth Circuit took Petitioner's case out of abeyance, but did not take his co-defendant's appeal out of abeyance, affirmed Petitioner's conviction and sentence, and denied his Petition for Rehearing (Appx. at 4a, 11a), which requested his case be again held in abeyance pending a decision in *Jordan*. (Appx. at 13a).[6] Because the Fourth Circuit has yet to issue a decision in *Jordan*, and has found it necessary to hold cases similarly situated to Petitioner's in abeyance until *Jordan* is decided, the Fourth Circuit erred in denying Petitioner's Petition for Rehearing and/or Motion to Hold Case in Abeyance and affirming his sentence.

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[4] Case No. 1:14-cr-00362 (M.D.N.C. July 10, 2015).
[5] Case No. 3:15-cr-00055 (E.D. Va. Feb. 02, 2016).
[6] Petitioner's FSA argument was not made in his original appeal, and first appeared in his Petition for Rehearing, because the FSA was not passed until after his appeal was submitted and fully briefed.

III. THE FOURTH CIRCUIT INCORRECTLY AFFIRMED PETITIONER'S CONVICTIONS UNDER 18 U.S.C. § 924(C) HOLDING HOBBS ACT ROBBERY IS A CRIME OF VIOLENCE UNDER THE ELEMENTS CLAUSE OF § 924(C)

The Fourth Circuit's decision in *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019) is erroneous in its holding that Hobbs Act robbery qualifies as a crime of violence under the force clause of § 924(c)(3)(A). Because the Fourth Circuit rejected Petitioner's appeal based on it *Mathis* decision, which fails to analyze the elements of Hobbs Act robbery under the categorical approach, this Court should grant certiorari to correct this error.

In order for Petitioner's convictions for 924(c) to be valid, it must be found that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3). Petitioner contends that Hobbs Act robbery is not a crime of violence under the elements clause of § 924(c)(3) because it does not involve the requisite degree of physical force required for a conviction under that section.

It is undisputed that the residual clause of § 924(c)(3) is unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). Thus, the elements clause is the only remaining basis on which to find a valid predicate crime of violence. A determination of whether Hobbs Act robbery qualifies as a predicate crime of violence under the elements clause requires the court employ the categorical approach. A prior offense categorically qualifies as a predicate offense only if the statute defining the prior offense has the same elements or defines the crime more narrowly than the predicate offense definition. *See Descamps v. United States*, 570

U.S. 254, 260-61 (2013) (quotations omitted). If the prior offense "sweeps more broadly" than the predicate offense definition, the prior offense cannot qualify as a predicate offense. *Id.* "The key" to the categorical approach "is elements, not facts." *Id*. Thus, courts looks only to the elements in the statute and not to the particular facts underlying a conviction. *Id.*

A comparison of the elements of a Hobbs Act robbery with the elements of "crime of violence" under the elements clause of § 924(c)(3) shows that the elements of Hobbs Act robbery are broader and, thus, cannot qualify it as a crime of violence under § 924(c)(3).

The Hobbs Act defines various offenses, including robbery and extortion and provides that:

> 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.

18 U.S.C. § 1951. The Hobbs Act then defines "robbery":

> 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.

18 U.S.C. § 1951(b)(1).

Under the language of the Hobbs Act, a robbery can be committed by causing fear of future injury to property that does not involve the "physical force" required for

it to qualify as a crime of violence under the elements clause of § 924(c)(3) in light of *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*). This Court held in *Johnson I* that a prior offense qualifies as a predicate offense under the elements clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), if the "physical force" used is "violent force—that is, force capable of causing physical pain or injury to another person." *Johnson I*, at 140.

In contrast to the ACCA, the elements clause of § 924(c)(3) defines "physical force" more broadly and includes force applied against the person "or the property" of another. Petitioner contends that Hobbs Act robbery is categorically not a crime of violence under the elements clause of § 924(c)(3) because a Hobbs Act robbery can be committed by causing fear of future injury to property and this does not meet the *Johnson I* standard that the prior offense involve actual or threatened physical force that is violent.

A Hobbs Act robbery can be committed by fear of injury, immediate or future, to person or property. In *United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017), the court held Hobbs Act robbery criminalizes conduct involving threats to property. Further, Hobbs Act robbery can be committed by causing fear of future injury to property, which does not involve the use or threats of violent physical force required by *Johnson I*.

The statutory language of § 1951(b)(1) clearly allows for a Hobbs Act robbery to be committed by causing fear of future injury to property and this does not require the use or threatened use of any physical force, indeed does not require the violent

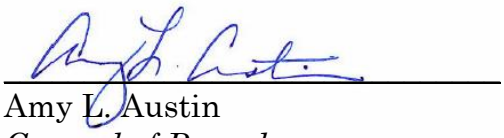
physical force, required by *Johnson I*. The Fourth Circuit's opinion in *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019), upon which it relied in affirming Petitioner's appeal, failed to analyze the Hobbs Act robbery statute in relation to *Johnson I* and address the fact that Hobbs Act robbery can be committed by causing fear of future injury to property – a set of facts that does not require the use or threatened use of any physical force or violent force. Thus, the Fourth Circuit has failed to address the fact that § 1951(b)(1) sweeps more broadly than the definition of a "crime of violence" under the elements clause of § 924(c)(3) and, under the categorical approach, requires a finding that Hobbs Act robbery does not qualify as a crime of violence under the elements clause of § 924(c)(3).

Based on the erroneous decision in *Mathis*, the Fourth Circuit Court of Appeals erroneously affirmed the convictions and sentence of Petitioner. Petitioner's § 924(c) convictions can stand only if Hobbs Act robbery is a valid predicate crime of violence under the elements clause of § 924(c). Based on the foregoing, Petitioner asserts that his convictions cannot be upheld because Hobbs Act robbery elements are broader than the elements of "crime of violence" under the elements clause of § 924(c).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, this Court should summarily vacate the judgment below and grant Petitioner's request to hold his case in abeyance pending the Fourth Circuit's decision in *Jordan*.

Respectfully submitted,



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February 24, 2020