No. _____

In the

Supreme Court of the United States

PAUL DEMETRIUS LAMAR GRAY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Before *United States v. Johnson*, 576 U.S. 591 (2015), the federal courts routinely relied on the residual clause to hold that convictions sustained under a *Pinkerton* theory were crimes of violence if the crime targeted by the conspiracy was a crime of violence. Those cases rested on the theory that a crime committed under a *Pinkerton* conspiracy theory necessarily entailed the same "substantial risk" of physical force as the target offense.

Once the residual clause was struck, however, does a conviction sustained under either a *Pinkerton* conspiracy theory satisfy the elements clause—that is, is it an offense that require, as an element, the "use, attempted use, or threatened use of force."

Statement of Related Proceedings

- *United States v. Paul Demetrius Lamar Gray,* 2:95-cr-00160-CBM-1 (C.D. Cal. Feb. 2, 1996)
- *United States v. Paul Gray,* 95-50200 (9th Cir. Apr. 24, 1997)
- *United States v. Paul Demetrius Lamar Gray,* 96-50081 (9th Cir. Jul. 10, 1997)
- *Paul Demetrius Lamar Gray v. United States,* 2:98-cv-02791-HLH (C.D. Cal. Nov. 6, 1998)
- *Paul Demetrius Lamar Gray v. United States,* 98-56978 (9th Cir. Nov. 6, 1998)
- *Paul Demetrius Lamar Gray v. United States,* 2:98-cv-04219-CBM (C.D. Cal. Dec. 7, 1998)
- *Paul Demetrius Lamar Gray v. United States,* 99-56626 (9th Cir. Feb.15, 2000)
- *Paul Demetrius Lamar Gray v. United States,* 03-50453 (9th Cir. Jun. 21, 2005)
- *Paul Demetrius Lamar Gray v. United States,* 13-70504 (9th Cir. Feb. 25, 2013)
- *Paul Demetrius Lamar Gray v. United States,* 2:13-cv-02077-CBM (C.D. Cal. Jan. 10, 2014)
- *Paul Demetrius Lamar Gray v. United States,* 14-55279 (9th Cir. Sep. 29, 2014)
- *Paul Demetrius Lamar Gray v. United States,* 16-72691 (9th Cir. May 11, 2017)
- *Paul Demetrius Lamar Gray v. United States,* 2:16-cv-09680-CBM (C.D. Cal. Nov. 6, 2018)
- *Paul Demetrius Lamar Gray. v. United States*, 18-56507 (9th Cir. Nov. 24, 2020)

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Petition for Writ of Certiorari

Paul Demetrius Lamar Gray petitions for a writ of certiorari to review the memorandum decision entered by the United States Court of Appeals for the Ninth Circuit affirming the denial of Mr. Gray's motion under 28 U.S.C. § 2255.

Opinions Below

The Ninth Circuit's memorandum disposition affirming the denial of Mr. Gray's 28 U.S.C. § 2255 motion was not published. (App. 1a-4a.) The district court issued a written order denying Mr. Gray's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and granting his request for a certificate of appealability. (App. 5a-19a.)

Jurisdiction

The Ninth Circuit issued its memorandum disposition affirming the denial of Mr. Gray's 28 U.S.C. § 2255 motion on November 24, 2020. (App. 1a-4a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

18 U.S.C. § 924(c)(3) states:

> 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.

Introduction

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 576 U.S. 591 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S.

at 598. Among that number was Paul Gray. He argued that, after *Johnson*, his postal robbery conviction was not a valid predicate crime of violence for purposes of § 924(c). On appeal, he argued that his offense—in which all agreed he was not the principal—was not a crime of violence because commission of armed postal robbery via *Pinkerton* did not satisfy the elements clause in § 924(c)(3)(B). The Ninth Circuit said that a defendant who commits the offense under a *Pinkerton* theory is treated as if he had personally committed the offense, and so he stands before the categorical approach just as if he had personally committed armed postal robbery.

This Court should grant certiorari to reconsider this conclusion. That defendants convicted under different theories are treated the same—that they face the same sentencing exposure, or that they are convicted of the same offense—does not mean they are the same. Instead, under the categorical approach, each defendant is judged by the elements that the jury necessarily found in returning *his* conviction. And in the context of a conviction under a *Pinkerton* theory, the jury need not find that the defendant intended that his co-conspirators commit a certain act, only that it was reasonably foreseeable that they would do so.

The writ should be granted.

Statement of the Case

1. Mr. Gray was convicted, following a jury trial, of two counts of use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(3) (Counts Three and Five). The predicate crime of violence alleged with respect to each offense was robbery of a postal carrier, 18 U.S.C. § 2114. A trial, the jury was instructed that to return a verdict on any of three theories: that Mr. Gray was the principal (though it was undisputed that Mr. Gray did not personally commit any offense), that he was liable as a co-conspirator under *Pinkerton v. United States*, 328 U.S. 640 (1946), or that he aided and abetted his associate in committing postal robbery. (ER 91, 101, 102.) The jury returned a general verdict; the verdict form did not call on the jurors to identify the theory of prosecution upon which their verdict rested. (ER 109.)

On appeal, the Ninth Circuit affirmed his conviction. Of relevance here, it concluded that Mr. Gray's § 924(c) convictions were properly sustained under a *Pinkerton* or aiding-and-abetting theory, confirming that Mr. Gray did not personally commit the offense. *United States v. Gray*, 120 F.3d 269, at *1 (9th Cir. 1997).

Mr. Gray is currently serving the sentenced imposed in this case: 110 months on the postal robbery and possession of stolen mail counts, plus a

mandatory consecutive 40 years on Counts Three and Five, the Section 924(c) convictions.

2. On May 11, 2016, Mr. Gray filed a timely motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his Section 924(c) convictions should be vacated under *Johnson* because his armed postal robbery convictions no longer served as valid predicate offenses for purposes of § 924(c). The district court disagreed, concluding that the jury could not have convicted Mr. Gray without finding that either he or his co-conspirators committed armed robbery, and that that offense was still a crime of violence. (App. 13a.)

On appeal, the Court rejected Mr. Gray's *Pinkerton* argument in a terse memorandum disposition, noting that, "A defendant found guilty based on aiding and abetting or Pinkerton liability is treated as if that defendant had committed the offense as a principal." (App. 3a.)

Mr. Gray now files this writ seeking review of that decision.

Reason or Granting the Writ

The Court should grant the writ of certiorari to address the Ninth Circuit's conclusion that a defendant convicted under a *Pinkerton* theory has committed a crime of violence so long as the target offense is a crime of violence. This conclusion goes against this Court's caselaw on the categorical

approach, which judges each conviction on the elements the jury would have necessarily found in returning a guilty verdict. Here, the jury needed only to find that it was reasonably foreseeable that co-conspirators would used armed force against the perpetrator; he did not need to *intend* that such force be used. As such, the Ninth Circuit's conclusion is wrong and should be revisited.

A. *A defendant who commits postal robbery via Pinkerton conspiracy theory has not intentionally used, attempted, or threatened use of force.*

The jury was instructed in this case that it could return a guilty verdict if the government proved the elements of liability under *Pinkerton*. (ER 91, 101.) To decide whether that offense satisfies the elements clause, this Court applies the categorical approach to the elements of the offense. *United States v. Davis*, 139 S. Ct. 2319, 2330 (2019). The categorical approach requires the Court to decide whether the jury *necessarily* convicted the defendant of an offense whose elements satisfy the definition of a crime of violence. *Descamps*, 570 U.S. 254, 261 (2013).

The elements of postal robbery via *Pinkerton* theory are these: (a) a person named in the indictment knowingly committed the crime of postal robbery; (b) the person who committed the crime was a member of the conspiracy at the time they committed the offense; (c) the person committed the offense in furtherance of the conspiracy; (d) the defendant was a member

of the conspiracy at the time; and (e) the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement. *See* Ninth Cir. Model Instruction 8.25. None of these elements require that Mr. Gray use, attempt to use, or threaten the use of force. Indeed, Mr. Gray did not need to *do* anything, except enter an unlawful agreement. And that unlawful agreement did not need to be an agreement to commit armed postal robbery—the government could sustain the conviction if, for example, the unlawful agreement were an agreement to steal mail, and it was reasonably foreseeable that the co-conspirator would escalate that plan to steal mail to a plan to use a force or a firearm to steal mail. *E.g.*, *United States v. Carter*, 560 F.3d 1107, 1113 (9th Cir. 2009) (sustaining conviction for armed bank robbery where, although defendant claimed he was not present during meeting at which robbery was planned and disclaimed actual knowledge of the plan, it was "reasonable to infer from the nature of the plan—the overtaking of a bank by force and intimidation—that guns would be used.") (cleaned up).

But reasonable foreseeability that force will be used it not the same as an *intent* to use such force. The elements clause is satisfied only where the elements of the offense require the intentional use of force, not accidental or negligent conduct. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). And reasonable

foreseeability is a negligence standard. *See United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998) (Pinkerton applies an objectively reasonably foreseeable test); *United States v. Cottrell*, 333 F. App'x 213, 215-16 (9th Cir. 2009); *United States v. Hansen*, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003) (raising concerns about Pinkerton liability as applied to a particular case; "'Foreseeability' is the language of negligence law."). Because a conviction for postal robbery committed via *Pinkerton* does not require that the *defendant* use, attempt to use, or threaten use of force, it does not satisfy the elements clause.

The Ninth Circuit reached a contrary conclusion on the basis that a defendant convicted under *Pinkerton* is treated as if he had committed the offense. (App. 3a.) It is, of course, true that an individual convicted under *Pinkerton* is deemed criminally liable as if he had committed the act himself. *United States v. Bingham*, 653 F.3d 983, 997 (9th Cir. 2011). He's deemed to have been convicted of the target offense, and is subject to the same punishment as a principal. Yet, as the Supreme Court recently reiterated in *Honeycutt v. United States*, those bedrock principles of conspiracy law do not efface the real differences between the defendant convicted as a principal and the one convicted under a *Pinkerton* theory. 137 S. Ct. 1626, 1632 (2017) (holding that "background principles of conspiracy liability" treating a *Pinkerton* conspirator as legally responsible for the actions of others, does not

permit entry of a forfeiture order for the full proceeds attributable to the conspiracy).

Here, the question is governed by the categorical approach, which is laser focused on the *elements* of the offense. *Descamps*, 570 U.S. at 269-70. And the elements by which the government secured Mr. Gray's conviction differ from those that would be necessary to secure a conviction against a principal in the offense. Under the categorical approach, the fact that the two theories of criminal liability have different elements necessarily requires that they be viewed separately under the categorical approach. Because the elements of postal robbery under *Pinkerton* do not require that the defendant use, attempt to use, or threaten the use of force, or that the defendant *intend* the use of force, Mr. Gray's crime does not satisfy the elements clause.

Nor is it any answer that a *Pinkerton* conspiracy to commit armed postal robbery requires that someone commit the offense of postal robbery—and as the Court found, that someone use force. As the Ninth Circuit recognized in *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993), a crime does not satisfy the elements clause merely because it has, as an element, that *someone* must commit a violent crime. In *Innie*, the defendant was charged with being an accessory after the fact to a murder-for-hire. A conviction for accessory after the fact requires the government prove that *someone* commit the underlying offense of murder for hire—it thus had, as an element, that

someone use force. *Id.* at 850-51. Nevertheless, the Court held that the *defendant*'s offense did not require the use, attempted use, or threatened use of force—only that the defendant comfort or assist the offender. *Id.* at 851. As such, it could not be a crime of violence under the elements clause. *Id.*

Like *Innie*, the mere fact that the government would have to prove that *someone* committed the offense of armed postal robbery to secure a conviction under a *Pinkerton* theory does not mean that the jury in Mr. Gray's case was required to find that Mr. Gray committed an offense that required, as an element, the use, attempted use, or threatened use of force. For these reasons, a conviction for postal robbery based on a *Pinkerton* theory of liability does not satisfy the elements clause.[1]

B. *This question warrants this Court's intervention.*

While there is no current circuit split on this question, this Court's intervention is nonetheless warranted. The Court's reasoning below runs directly contrary to this Court's caselaw requiring the categorical approach to take account only of the elements of the offense. *Pinkerton* liability is

[1] Mr. Gray made an argument below that aiding-and-abetting liability also fell outside the ambit of the elements clause. While he maintains the correctness of that view, he does not re-raise it in this petition; the government did not argue that it could establish that the jury's verdict was based on aiding-and-abetting, to the exclusion of *Pinkerton* conspiracy. Thus, if an offense based on *Pinkerton* liability is not a crime of violence after the residual clause was eliminated, the constitutional error cannot be said to be harmless.

ubiquitous, particularly in the context of § 924(c). Mr. Gray is serving a forty-year mandatory consecutive sentence for this conviction, and even with all potential good time credit, he is consigned to live behind bars until he is 81 years old. This is neither fair not just.

Conclusion

For the foregoing reasons, Mr. Gray respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: April 23, 2021

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