No. 21-

IN THE

Supreme Court of the United States

HASSAN SHARIF ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

EMILY D. GLADDEN
TIN FULTON WALKER & OWEN, PLLC
204 N. Person Street
Raleigh, NC 27601

PARESH S. PATEL
Assistant Federal Public Defender
Federal Public Defender
District of Maryland
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770

MARK C. FLEMING
Counsel of Record
TASHA J. BAHAL
SOFIE C. BROOKS
HANNAH E. GELBORT
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

QUESTION PRESENTED

The jury in this case was instructed that it could convict Petitioner under 18 U.S.C. § 924(c) based on one of several accused crimes. The court of appeals held, however, that at least one of the crimes the jury was allowed to consider was not, in fact, a valid predicate "crime of violence" under § 924(c). The jury verdict and the record do not reveal whether the jury relied on the erroneous predicate offense in convicting Petitioner under § 924(c). Notwithstanding that ambiguity, however, the court of appeals affirmed Petitioner's § 924(c) conviction because the jury merely *could have* relied on a valid crime of violence, and refused to apply the modified categorical approach to determine whether the verdict *necessarily* relied on a crime of violence.

The question presented is:

Whether a court must apply the modified categorical approach to determine whether a verdict of conviction under 18 U.S.C. § 924(c) necessarily rests on a valid predicate offense, as this Court directed in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), and *Shepard* v. *United States*, 544 U.S. 13 (2005), or whether it may affirm such a § 924(c) conviction if it is merely *possible* that the jury relied on a valid predicate offense.

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Petitioner Hassan Sharif Ali respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

INTRODUCTION

A conviction under 18 U.S.C. § 924(c)(1)(A) is valid only if the defendant used or carried a firearm while committing a crime that "necessarily" meets the federal definition of a crime of violence because it has "as an element" the use of violent force. *Taylor* v. *United States*, 495 U.S. 575, 602 (1990) (under the categorical approach, a "jury necessarily ha[s] to find" all required elements of the predicate offense); *United States* v. *Davis*, 139 S. Ct. 2319, 2327-2328 (2019). But here, it is

impossible to tell whether the jury in fact based its verdict under § 924(c) on a crime that necessarily has violence as an element. That is because the jury was erroneously instructed that conspiracy to commit Hobbs Act robbery qualified as a crime of violence, an instruction the Fourth Circuit correctly recognized was plain error. App. 19a-20a (citing *United States* v. *Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc)).

In order to determine whether a conviction is a valid predicate under § 924(c), this Court's precedents require the application of the categorical or modified categorical approach to determine whether the jury necessarily predicated the § 924(c) conviction on a crime of violence. *See generally Davis*, 139 S. Ct. 2319; *see also Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016). Under the modified categorical approach, courts can consult only "a limited class of documents … to determine what crime, with what elements" necessarily constituted the predicate offense. *Mathis*, 136 S. Ct. at 2249. If the record of conviction, as reflected in the so-called "*Shepard* documents," does not conclusively demonstrate that the predicate included an element that involved the use of force, the predicate is invalid and the § 924(c) conviction cannot stand. *Id.* at 2257; *see Shepard* v. *United States*, 544 U.S. 13, 24-26 (2005).

In this case, proper application of the modified categorical approach compels the conclusion that the jury did not necessarily rely on a valid predicate. The *Shepard* documents do not reveal whether the jury found Mr. Ali guilty of conspiracy to commit Hobbs Act robbery (which is not a crime of violence) or aiding and abetting Hobbs Act robbery (which is). Accordingly, the Court cannot determine that the jury necessarily found that he committed a crime of violence, and the § 924(c) convictions should be vacated.

The Fourth Circuit's contrary ruling conflicts with *Davis* and related categorical approach cases. Instead of applying the modified categorical approach to determine if Mr. Ali's § 924(c) conviction necessarily rested on a crime of violence, the panel inquired simply whether the jury *could have convicted* him of a crime of violence (aiding and abetting Hobbs Act robbery) based on the facts presented at trial. The Court in *Davis* expressly rejected this type of fact-bound analysis for § 924(c) cases. 139 S. Ct. at 2328-2329. The Fourth Circuit's approach also conflicts with decisions in the Second and Fifth Circuits, which have rightly treated an ambiguous § 924(c) predicate as a reversible error that cannot be remedied by the court stepping into the shoes of the jury to find a valid predicate offense itself.

Where the jury was wrongly instructed that it could treat a non-predicate offense as a potential predicate offense, and the jury's verdict is ambiguous as to which offense it relied on, the § 924(c) convictions should be vacated. The plain error review standard does not suggest otherwise. Because the ambiguous record here cannot establish that Mr. Ali's § 924(c) convictions were necessarily predicated on an actual crime of violence (aiding and abetting Hobbs Act robbery), the instructional error is plain and not harmless. Indeed, the error undoubtedly affects Mr. Ali's substantial rights, because the § 924(c) convictions increased his sentence by 80 years. *See United States* v. *Fuertes*, 805 F.3d 485, 501 (4th Cir. 2015).

The Fourth Circuit's decision conflicts with this Court's precedents and the decisions of other circuits, *see* S. Ct. R. 10. This Court should grant certiorari, clarify that the modified categorical approach applies in this situation, and vacate Mr. Ali's § 924(c) convictions.

OPINIONS BELOW

The opinion of the Fourth Circuit affirming the jury verdict (App. 1a-27a) is published at *United States* v. *Ali*, 991 F.3d 561 (4th Cir. 2021). The Fourth Circuit's order denying rehearing en banc (App. 43a) is unreported. The judgment of conviction (App. 29a-42a) is unreported.

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on March 19, 2021 and denied a timely petition for rehearing en banc on April 30, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. §§ 924(c) and 1951(a) are reproduced at App. 45a-49a.

STATEMENT

A. The Government, District Court, And Jury All Fail To Specify The Predicate Offense On Which Mr. Ali's § 924(c) Convictions Are Based

Mr. Ali was named in a nine-count indictment alleging: (1) that he "conspire[d] to and did unlawfully obstruct, delay, and affect commerce … by robbery" under the Hobbs Act, 18 U.S.C. § 1951(a); (2) four counts of using or carrying a firearm during a crime of violence under 18 U.S.C. § 924(c); and (3) one count of possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). CAJA 40-48. For the substantive Hobbs Act offenses, the government asserted both a theory of aiding and abetting and a theory of conspiracy. App. 7a; 18 U.S.C. § 2. The § 924(c) charges against Mr. Ali

required that the government prove that he possessed a firearm in furtherance of a predicate crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). These charges carry a separate mandatory term of imprisonment to run consecutively to any term imposed for the underlying predicate offenses. *Id.* § 924(c)(1)(A).

At trial, the district court treated aiding and abetting Hobbs Act robbery and conspiracy to commit Hobbs Act robbery as interchangeable, both for the substantive Hobbs Act charges and for the § 924(c) predicates. App. 7a. When instructing the jury on the Hobbs Act robbery counts, the district court stated that the jury should return a guilty verdict if it found that Mr. Ali "*either* directed or aided and abetted another person in committing" the robberies, "*or* if you find … that Mr. Ali knowingly conspired with others to commit" them. CAJA 756 (emphasis added); *see also* CAJA 752, 756, 759, 762, 764. The district court also instructed that the jury could use either offense—conspiracy or aiding and abetting—as the predicate crime of violence for a conviction under § 924(c). For example, on Count Two, the court instructed that the government had to prove that Mr. Ali "knowingly conspired to commit *or* aided and abetted in the commission of the robbery." CAJA 756-757 (emphasis added). The remaining § 924(c) counts had a similar instruction. CAJA 752-765.

The jury returned a guilty verdict on all counts, but the verdict sheet required the jury to mark only "guilty" or "not guilty" for each count. App. 7a. The jury was not required to specify whether it was convicting Mr. Ali of aiding and abetting Hobbs Act robbery or conspiracy to commit Hobbs Act robbery. The

verdict also did not specify which offense was the predicate for the § 924(c) convictions. *Id.* Because the proceedings failed to distinguish between aiding and abetting and conspiracy, there is no way to know which crime the jury found Mr. Ali to have committed.

The district court sentenced Mr. Ali to 80 years for the § 924(c) charges, nearly 20 years for the Hobbs Act robbery charges, and 10 years for the firearm possession charge, for a total of 1195 months (over 99 years). CAJA 980-81, 990.[1]

B. The Fourth Circuit Refuses To Apply The Modified Categorical Approach

By the time the Fourth Circuit considered Mr. Ali's appeal, it had decided, sitting en banc, that conspiracy to commit Hobbs Act robbery is not a crime of violence. *See United States* v. *Simms*, 914 F.3d 229, 233 (4th Cir. 2019). Based on the record, the Fourth Circuit panel acknowledged that it was impossible to know whether Mr. Ali's § 924(c) convictions were based on valid predicate offenses (aiding and abetting Hobbs Act robbery) or offenses that could not support § 924(c) convictions (conspiracy to commit Hobbs Act robbery). App. 24a. The panel also agreed that "[t]here [was] no room for doubt that there was an instructional error here," and "[i]t is equally clear that the error was plain." App. 19a-20a.

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[1] When Mr. Ali was sentenced, the mandatory sentence was five years for the first § 924(c) conviction and 25 consecutive years for each subsequent § 924(c) conviction. Since his sentencing, the law changed and now mandates five years for each § 924(c) conviction in Mr. Ali's situation. *See* 18 U.S.C. § 924(c)(1)(C) (allowing for a term of imprisonment of 25 years only for prior convictions that are final at the time of the violation).

Nonetheless, the panel affirmed Mr. Ali's § 924(c) convictions. The panel rejected the categorical approach in its application of the plain error standard, because it believed that "[t]he purpose of the categorical (and modified categorical) approach is not to determine what the predicate was." App. 23a. Instead, the panel ruled under the third prong of the plain error test that the error was harmless using what it referred to as "a record-intensive factual inquiry." *Id.* In the panel's estimation, a jury *could* have found Mr. Ali guilty of aiding and abetting Hobbs Act robbery, and mere ambiguity about whether the conviction was based on an invalid predicate was "insufficient under plain error review." App. 24a.

Mr. Ali's timely petition for rehearing was denied. App. 43a.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT DECIDED AN IMPORTANT QUESTION IN CONFLICT WITH THIS COURT'S PRECEDENTS, WHICH REQUIRE APPLICATION OF THE CATEGORICAL AND MODIFIED CATEGORICAL APPROACHES

Under this Court's precedents, to determine whether a defendant's conviction qualifies as a predicate "crime of violence" for purposes of § 924(c), courts may not look to the "case-specific" facts underlying the defendant's commission of the crime, but must instead employ the categorical or, where necessary, the modified categorical approach. *United States* v. *Davis*, 139 S. Ct. 2319, 2336 (2019). Under the categorical approach, courts can only evaluate "whether the elements of the statute of conviction meet the federal standard"; the facts of the given case are irrelevant. *Borden* v. *United States*, 141 S. Ct. 1817, 1822 (2021). In a "nar-

row range of cases" where the offense of conviction is "divisible," meaning that it sets forth multiple crimes with different elements, courts may look at a short list of judicial documents (authorized by *Shepard* v. *United States*, 544 U.S. 13, 26 (2005))—including the indictment, jury instructions, plea agreement, and plea colloquy—to determine whether the defendant was "necessarily" convicted of using a firearm in furtherance of a crime that categorically qualifies as a "crime of violence" as defined in § 924(c)(3). *See Descamps* v. *United States*, 570 U.S. 254, 261, 262 (2013).

For a court to engage in any broader inquiry, without "ask[ing] the jury to make an additional finding about whether" the conduct for which the defendant was convicted involved the use of violence, would pose "'serious Sixth Amendment concerns.'" *Davis*, 139 S. Ct. at 2327 (quoting *Descamps*, 570 U.S. at 269-270). That is why this Court has rejected any approach in which a reviewing court, "[i]nstead of reviewing documents like an indictment or plea colloquy only to determine 'which statutory phrase was the basis for the conviction,' … looks to … discover what the defendant actually did." *Descamps*, 570 U.S. at 268. It is "not enough" simply that trial records demonstrate that the defendant "committed" a valid predicate, "and so hypothetically *could have been* convicted under a law criminalizing that conduct." *Id.*

Yet the Fourth Circuit here followed the very process this Court disapproved in *Davis* and *Descamps*. Mr. Ali was charged with conspiracy to commit robbery and aiding and abetting robbery under the Hobbs Act, 18 U.S.C. § 1951(a). CAJA 752-764 (Counts 1, 3, 5, and 7); App. 7a. Each substantive count charged both theories, and the jury was instructed it could convict if it found that he committed *either* aiding and abetting *or*

conspiracy. App. 18a (jury was instructed that Mr. Ali "could be found guilty under either one of two theories" and that the government did not need to prove both: "[o]ne [wa]s sufficient").

Mr. Ali was also charged with four counts of violating 18 U.S.C. § 924(c). CAJA 756-758, 760-761, 763, 765 (Counts 2, 4, 6, and 8). The alleged predicate "crimes of violence" for all four § 924(c) counts were the four alleged Hobbs Act violations, each of which was charged under both (1) aiding and abetting and (2) conspiracy theories. App. 7a, 18a. Although the jury found Mr. Ali guilty of the Hobbs Act violations, the verdict form does not state whether those convictions rested on conspiracy or aiding and abetting. App. 24a.

The parties and the Fourth Circuit agreed that the Hobbs Act is a divisible statute. *See* 18 U.S.C. § 1951(a); App. 19a-21a (applying the categorical approach individually to both "offenses supporting each theory of guilt" under the Hobbs Act); Resp. CA Br. 38 ("Hobbs Act conspiracy and robbery are '*crimes* of violence'" (emphasis added)). The Fourth Circuit held that aiding and abetting robbery is categorically a crime of violence, but conspiracy to commit robbery is not. App. 19a, 21a-22a. Therefore, if the jury convicted Mr. Ali for using, carrying, or possessing a firearm in furtherance of conspiracy to commit robbery, the § 924(c) convictions would have no valid predicates.

Under this Court's precedents, the Fourth Circuit was required to apply the modified categorical approach to determine whether the jury necessarily found that Mr. Ali used a firearm in furtherance of a crime of violence (aiding and abetting robbery) and not an alternative crime that does not require violence (conspiracy). *See Mathis*, 136 S. Ct. at 2248-2249. Because the

charges, jury instructions, and verdict are all ambiguous as to the predicate offense, the *Shepard* documents do not conclusively demonstrate that the predicate offense for the § 924(c) convictions was a crime of violence. Rather, it is equally possible that the jury based those convictions on conspiracy, which is not a crime of violence. Thus, because the jury did not necessarily find that Mr. Ali committed a crime of violence, the § 924(c) convictions—and the 80 years' imprisonment they yielded—cannot stand.

The Fourth Circuit's refusal to apply the modified categorical approach under these circumstances was erroneous and contrary to this Court's precedent. The Fourth Circuit held that the modified categorical approach only identifies "whether a particular predicate meets the requirements of a 'crime of violence,'" which is "a purely legal question" and is inapplicable "to determine what the predicate was," which it treated as "a factual question." App. 23a. In other words, it held that the modified categorical approach does not determine which of multiple predicate offenses actually formed the basis of the § 924(c) conviction because such an inquiry is factual. That characterization of the modified categorical approach is patently incorrect.

Indeed, the sole purpose of the modified categorical approach is to determine—based on the limited body of *Shepard* documents—which of multiple offenses within a divisible statute necessarily constituted the basis for the conviction. *See Mathis*, 136 S. Ct. at 2249 (describing modified categorical approach as an aid for determining "what crime, with what elements, a defendant was convicted of"). "[T]his Court has long acknowledged that to ask what crime the defendant was convicted of committing is to ask a question of fact" and that the principal inquiries of the modified categorical

approach ("the who, what, when, and where of a conviction—and the very existence of a conviction in the first place") "pose questions of fact." *Pereida* v. *Wilkinson*, 141 S. Ct. 574, 764-765 (2021). Whenever a court employs the modified categorical approach, it does so to answer the same type of factual question at issue in Mr. Ali's case: whether the jury in fact convicted the defendant of a particular valid predicate offense, or whether the conviction may have been based on a different offense that is not a valid predicate. *See United States* v. *Castleman*, 572 U.S. 157, 169 (2014) ("apply[ing] the modified categorical approach" by "consulting the indictment" to determine to which offense the defendant in fact "pleaded guilty"); *Pereida*, 141 S. Ct. at 764-765 (the modified categorical approach "requir[es] courts to 'review … record materials' to determine which of the offenses in a divisible statute the defendant was convicted of committing"). The Fourth Circuit legally erred by failing to recognize the nature of this inquiry and therefore looking beyond the *Shepard* documents to trial evidence.

Had the Fourth Circuit employed the modified categorical approach and properly limited itself to the *Shepard* documents to determine whether the jury necessarily convicted Mr. Ali of possessing a firearm in furtherance of a valid predicate offense, it could not have determined whether the § 924(c) convictions were predicated on aiding and abetting (a valid predicate) or conspiracy (an invalid one). Indeed, neither the government nor the Fourth Circuit denied that it is impossible to know which route the jury took. The Fourth Circuit therefore should have declared the § 924(c) convictions invalid. *Johnson* v. *United States*, 559 U.S. 133, 137 (2010) (when "nothing in the record of … conviction" permitted the lower court "to conclude that it

rested upon anything more than the least of" the sub-offenses defined in a divisible statute, defendant could be convicted under the Armed Career Criminal Act only if the least violent sub-offense met the definition of a violent felony).

Instead, the Fourth Circuit embarked on the type of judicial fact-finding that this Court's precedents prohibit. *See Descamps*, 570 U.S. at 269. It admitted engaging in "a record-intensive factual inquiry" and looked to "evidence the government presented at trial," including "historic cell site location data" and witness testimony to conclude that even if the jury did *in fact* convict Mr. Ali of a non-predicate crime (conspiracy to commit Hobbs Act robbery), it *could have* also convicted him of a valid predicate crime (aiding and abetting Hobbs Act robbery). App. 23a, 25a-26a. That was legal error contrary to the holdings of *Descamps*, *Davis*, *Mathis*, and *Shepard*.

The Fourth Circuit erroneously believed that its approach was "mandated" by this Court's decision in *Hedgpeth* v. *Pulido*. App. 25a (citing 555 U.S. 57, 61 (2008) (per curiam)). In *Hedgpeth*, the jury was "instructed on multiple theories of guilt" on the same felony murder charge: the jury was told that the defendant could be convicted either "if he formed the intent to aid and abet the underlying felony before the murder" or "if he formed that intent only after the murder." 555 U.S. at 59. This Court held that even though "the latter theory was invalid under California law," harmless error analysis applied. *Id.* at 61. But the California criminal law at issue in *Hedgpeth* was not the type of specialized federal statute at issue here, which specifically requires application of the categorical and modified categorical approaches to determine whether a particular crime is a valid predicate offense. This

Court's discrete jurisprudence mandating that courts take these approaches when dealing with specialized statutes such as 18 U.S.C. § 924(c) and the Armed Career Criminal Act make clear that the fact-intensive inquiries that govern in non-categorical-approach cases such as *Hedgpeth* do not apply here.

This Court should grant certiorari to correct the Fourth Circuit's error and clarify that the categorical and modified categorical approaches apply to determinations whether a conviction qualifies as a valid predicate under § 924(c). The Fourth Circuit's approach improperly engages in unconstitutional judicial fact-finding in violation of the Sixth Amendment and this Court's precedent. This Court has consistently interpreted the Sixth Amendment to require that "other than the fact of a prior conviction" for an offense that legally—categorically—constitutes a crime of violence, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). "That means a judge cannot … explore the manner in which the defendant committed th[e] offense" and remain within constitutional bounds. *Mathis*, 136 S. Ct. at 2252. Judges are "barred from making a disputed determination" regarding "'what the jury in a prior trial must have accepted as the theory of the crime.'" *Id.* (quoting *Shepard*, 544 U.S. at 25). Because that is precisely what the Fourth Circuit did here, the Court should grant certiorari and clarify the appropriate application of the modified categorical approach to avoid Sixth Amendment violations.

The issue is unquestionably important, not merely in this case, where 80 years' imprisonment turn on it. It is also broadly applicable. The government frequent-

ly brings § 924(c) charges based on multiple possible predicates and courts sometimes fail to require juries to specify upon which potential predicate a § 924(c) conviction ultimately rests. This Court has also recognized the interconnected nature of § 924(c), the Armed Career Criminal Act, and related immigration statutes that necessitate the application of the categorical and modified categorical approaches. *See Pereida*, 141 S. Ct. at 762 ("The Court first discussed the categorical approach in the criminal context, but it has since migrated to our INA cases."). Development of the Court's jurisprudence on this question would prove useful in those contexts as well.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The Fourth Circuit's decision conflicts with the approaches taken by its sister circuits in their treatment of ambiguous verdicts in cases that require the categorical approach. The Second and Fifth Circuits have correctly held that, when it is impossible to tell whether a § 924(c) conviction is based on a valid or invalid predicate offense, the conviction must be vacated.

The Second Circuit vacated a conviction under § 924(c) because it could not conclude that the conviction "necessarily rested upon either a qualifying drug-trafficking offense or categorical crime of violence." *United States* v. *Heyward*, 3 F.4th 75, 81 (2d Cir. 2021). There, the court held that "because … Heyward's § 924(c) conviction may very well have been premised on an unconstitutionally vague provision of that statute, we conclude that it would constitute plain error affecting Heyward's substantial rights to permit that conviction to stand." *Id.* at 85. The court rejected a harmless error analysis like the Fourth Circuit's be-

cause "[t]he fairness of any criminal judicial proceeding insists upon the foundational rule that all elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt." *Id.* (alteration and quotation marks omitted). Therefore, upon recognizing that there was no way to know whether the jury based the § 924(c) conviction on a valid predicate offense or not, the Second Circuit determined that "only a vacatur of Heyward's § 924(c) conviction will vindicate that principle." *Id.*[2]

The Fifth Circuit has also held on multiple occasions that, where the jury was instructed on two predicate offenses, one of which is a valid crime of violence and the other of which is not, a resulting firearms conviction under § 924 must be vacated. *United States* v. *Jones*, 935 F.3d 266, 273-274 (5th Cir. 2019); *United States* v. *McClaren*, --- F.4th ---, 2021 WL 4099548, at *16 (5th Cir. Sept. 9, 2021). In *Jones*, the court ruled that the instructional error affected the defendant's substantial rights because the valid and invalid predicates were "not coextensive," meaning that the invalid predicate "encompassed conduct beyond" the valid predicate and the jury could have based its conviction on this broader conduct. 935 F.3d at 273. Because the verdict did not make clear that the jury necessarily based its § 924 conviction on the valid predicate, the Fifth Circuit vacated the conviction. *Id.* at 274. Similarly, in *McClaren*, the court determined that the con-

[2] The Second Circuit has not been entirely consistent in this approach. *See United States* v. *Eldridge*, 2 F.4th 27, 39 (2d Cir. 2021) (affirming § 924(c) conviction where "there was strong evidence that [the defendant] did, in fact, attempt to commit" the valid predicate offense, and that the jury therefore "would have convicted Eldridge … even if the only theory had been" the categorical crime of violence).

viction could not stand because the court "[could not] determine whether the jury relied on" the valid or the invalid predicate crime and therefore "the basis for conviction may have been improper."[3] 2021 WL 4099548, at *16.

In contrast, the Seventh and Eleventh Circuits take the same view as the Fourth Circuit, refusing to apply the categorical or modified categorical approach at all, contrary to this Court's jurisprudence.

In *United States* v. *Cardena*, 842 F.3d 959 (7th Cir. 2016), the Seventh Circuit held that—even though the jury was improperly instructed, such that there was a possibility the defendant was convicted under § 924(c) based on a crime that did not qualify as a crime of violence—the error was harmless because the jury still

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[3] District courts in multiple jurisdictions have also reversed convictions under § 924(c) because the record did not make clear whether the jury relied on a valid predicate offense. *See United States* v. *Lettiere*, No. CR 09-049-M-DWM, 2018 WL 3429927, at *4 (D. Mont. July 16, 2018) (vacating conviction where *Shepard* documents failed to reveal whether the jury based its § 924(c) conviction on Hobbs Act robbery, which is a valid predicate, or Hobbs Act extortion, which is not a valid predicate); *United States* v. *McCall*, No. 3:10CR170-HEH, 2019 WL 4675762, at *6-7 (E.D. Va. Sept. 25, 2019) (vacating conviction post-*Davis* where one of the *Shepard* documents indicated that jury could convict under § 924(c) based on conspiracy).

One district court in the Fourth Circuit has treated an ambiguous predicate offense as a reversible error even since the Fourth Circuit decision in this case, explaining that "[a]s sister courts have found, the court's failure to provide special jury instructions [designating the predicate offense] resulted in a harmful error, and, thus, Petitioner's convictions must be vacated." *Said* v. *United States*, No. 2:10-CR-57-1, 2021 WL 3037412, at *12 (E.D. Va. July 19, 2021), *appeal filed*, No. 21-7089 (4th Cir. July 21, 2021).

would have convicted the defendant had it been properly instructed. *Id.* at 998-999.

The Eleventh Circuit also recently held that, because it had before it "a complete factual record" that the court believed "established definitively" the defendant had committed a crime of violence, the defendant's § 924(c) conviction could stand, despite the district court instructing the jury that the potential predicate offenses included one that was not a valid predicate. *See United States* v. *Cannon*, 987 F.3d 924, 949-950 (11th Cir. 2021), *petition for cert. filed sub nom. Holton* v. *United States*, No. 21-5235 (July 28, 2021) .

The approach taken by the Fourth, Seventh, and Eleventh circuits contravenes this Court's precedent in *Davis* and *Mathis* and warrants this Court's intervention. Indeed, the circuit split described above creates fundamental unfairness for criminal defendants, because similarly situated individuals who are convicted of the same federal crime and subject to the same error (failure to distinguish between theories that may and may not support a § 924(c) conviction) may be sentenced to significantly different prison terms based solely on where in the country their prosecution occurs. This case is a prime example: had Mr. Ali been prosecuted in Texas or New York, his sentence would have been 80 years lower. *See Moncrieffe* v. *Holder*, 569 U.S. 184, 218 (2013) (Alito, J., dissenting) ("We adopted the categorical approach to avoid disparities in our treatment of defendants convicted in different States for committing the same criminal conduct.").

This Court's intervention is needed to ensure compliance with this Court's precedents and a uniform national approach to the application of § 924(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EMILY D. GLADDEN
TIN FULTON WALKER & OWEN, PLLC
204 N. Person Street
Raleigh, NC 27601

PARESH S. PATEL
Assistant Federal Public Defender
Federal Public Defender, District of Maryland
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770

MARK C. FLEMING
Counsel of Record
TASHA J. BAHAL
SOFIE C. BROOKS
HANNAH E. GELBORT
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

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