No. _____

IN THE

Supreme Court of the United States

MARCUS CRAWLEY,

Petitioner,

vs.

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

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QUESTION PRESENTED

In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court held that 18 U.S.C. § 924(c)'s crime of violence residual clause was unconstitutionally vague.

The question presented is: If a defendant pleaded guilty to a § 924(c) charge and a predicate crime of violence that is no longer valid after *Davis*, may a reviewing court search plea documents for evidence of another predicate to sustain the § 924(c) conviction when that predicate was not proven beyond a reasonable doubt or admitted to by the defendant?

RELATED PROCEEDINGS

United States v. Crawley, No. 3:07-CR-00488 (E.D. Va. Sept. 11, 2019)

United States v. Crawley, No. 19-7369 (4th Cir. June 23, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Marcus Crawley respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 2 F.4th 257. App. 2a. The relevant order of the United States District Court for the Eastern District of Virginia is unpublished. *See United States v. Crawley*, No. 3:07-CR-00488, 2019 WL 4307868 (E.D. Va. Sept. 11, 2019); App. 36a.

JURISDICTION

The Fourth Circuit denied Mr. Crawley's petition for rehearing en banc on August 20, 2021. This petition is timely under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 924(c), in relevant part, provides:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, 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 or drug trafficking crime—
>
> (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; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

INTRODUCTION

A divided Fourth Circuit, following decisions from the Third and Eleventh Circuits, refused to vacate Marcus Crawley's § 924(c) conviction after the predicate crime of violence he pleaded guilty to committing was invalidated by this Court's ruling in *United States v. Davis*, 139 S. Ct. 2319 (2019). The lower court circumvented *Davis* by holding it could search the plea agreement's statement of facts for proof of a drug trafficking predicate because the government charged Mr. Crawley with using, carrying, or brandishing a gun during a crime of violence *and* a drug trafficking crime, despite the statute only requiring proof of one or the other. The Fourth Circuit then found, based on the statement of facts, that Mr. Crawley was guilty of a predicate drug trafficking offense even though he pleaded not guilty to that charge and the government had dismissed it as part of the plea agreement.

The Fourth Circuit's ruling "conflicts with relevant decisions from this Court." Sup. Ct. R. 10(c). By searching Mr. Crawley's plea agreement's statement of facts for proof of a drug trafficking crime, the court engaged in the type of judicial factfinding that the Sixth Amendment forbids. *See Alleyne v. United States*, 570 U.S. 99, 114–15 (2013). In so doing, the Fourth Circuit failed to heed this Court's lesson that "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Descamps v. United States*, 570 U.S. 254, 270 (2013). Given that Mr. Crawley only had to plead guilty to a § 924(c) charge based on one predicate, which was established by the Hobbs Act conspiracy charge he pleaded guilty to committing, he had no reason to contest the

drug-related facts in the government's proffer. Additionally, because a drug trafficking offense was not *necessarily* an element of the § 924(c) charge, Mr. Crawley also did not have to admit to those drug-related facts.

The question presented has far-reaching implications. Since § 924(c) has been on the books, the government has prosecuted "tens of thousands of [people]" under the statute. *Davis*, 139 S. Ct. at 2333. The Third, Fourth, and Eleventh Circuits have now allowed the government to retroactively choose which predicate offense applies when, exploiting the government's power to charge conjunctively and to broadly frame plea agreements. As a result, defendants have "no sure way to know what consequences will attach to their conduct." *Id.* at 2323. And the lower courts are engaging in this exercise to avoid the consequences of *Davis* despite the practice contravening this Court's Sixth Amendment precedents. This Court should review this important question of federal law given its constitutional implications.

STATEMENT OF THE CASE

I. Mr. Crawley Pleaded Guilty to a § 924(c) Charge and Conspiracy to Commit Hobbs Act Robbery—then a Predicate Crime of Violence.

In 2007, a federal grand jury returned a four-count indictment charging Marcus Crawley with: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951; attempt to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846; using, carrying, or brandishing firearms during and in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). App. 4a.

Mr. Crawley first pleaded not guilty to all counts, but ultimately accepted a plea agreement offered by the government. Under the agreement, Mr. Crawley pleaded guilty to the Hobbs Act conspiracy and § 924(c) charges, and the government dismissed the drug trafficking and felon in possession of a firearm charges. App. 5a. The district court sentenced Mr. Crawley to 150 months in prison for the Hobbs Act conspiracy charge, to be served consecutively with an 84-month term for the § 924(c) conviction. App. 6a.

II. Mr. Crawley Moved to Vacate His § 924(c) Conviction Following this Court's Decisions in *Johnson* and *Davis* given that Hobbs Act Conspiracy No Longer Qualifies as a Predicate Crime of Violence.

In May 2016, the United States Court of Appeals for the Fourth Circuit granted Mr. Crawley permission to file a successive application for relief under 28 U.S.C. § 2255 based on this Court's decision in *Johnson v. United States*, 574 U.S. 591 (2015), which held that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. App. 6a. In requesting relief, Mr. Crawley argued that §

924(c)'s residual clause, which is almost identical to the ACCA residual clause, was also unconstitutionally vague. App. 6a. He asserted that his § 924(c) charge was based on the Hobbs Act conspiracy charge to which he had also pleaded guilty, and thus because Hobbs Act conspiracy only qualified as a predicate under the crime of violence residual clause, his § 924(c) conviction must be vacated. App. 37a–38a.

Mr. Crawley's petition remained pending in the district court for nearly three years, during which time both the Fourth Circuit and this Court issued opinions vindicating some of Mr. Crawley's contentions.

First, the Fourth Circuit held that "(1) conspiracy to commit Hobbs Act robbery isn't a crime of violence under § 924(c)'s force clause and (2) the crime of violence definition in § 924(c)'s residual clause is unconstitutionally vague." App. 6a (citing *United States v. Simms*, 914 F.3d 229, 233, 236 (4th Cir.) (en banc), *cert. denied*, 140 S. Ct. 304 (2019)). Then, a few months later, this Court agreed with the Fourth Circuit and declared that § 924(c)'s residual clause was unconstitutionally vague under the reasoning of *Johnson*. *See Davis*, 139 S. Ct. at 2326–27.

III. The Courts Below Refused to Vacate Mr. Crawley's Conviction.

A. The district court sustained Mr. Crawley's § 924(c) conviction by finding he was guilty of a dismissed drug trafficking charge.

The district court dismissed Mr. Crawley's petition in September 2019, asserting his "*Johnson* claim plainly lack[ed] merit." App. 37a. The district court agreed that conspiracy to commit Hobbs Act robbery could no longer serve as a predicate crime of violence. App. 39a–40a. Still, the district court refused to vacate Mr. Crawley's § 924(c) conviction, holding it "was predicated on <u>both</u> conspiracy to commit

Hobbs Act robbery, and on use, carry, and brandish firearms during a drug trafficking crime." App. 40a (emphasis in original). The district court reasoned that the indictment "clearly indicated" that the § 924(c) conviction was predicated on *both* a crime of violence and a drug trafficking charge given that the indictment was worded conjunctively. App. 40a. It then found that the factual basis for the § 924(c) charge "clearly included" both the dismissed drug trafficking charge and the conspiracy to commit Hobbs Act robbery charge. App. 40a.

B. A divided Fourth Circuit affirmed.

A divided Fourth Circuit affirmed the district court. The majority held that Mr. Crawley's § 924(c)'s "conviction [was] sound because the [drug trafficking] predicate offense alleged in the § 924(c) indictment remains valid." App. 3a. According to the majority, because the government worded the § 924(c) charge in the indictment conjunctively—charging Mr. Crawley with using, carrying, or brandishing a firearm during a crime of violence *and* a drug trafficking offense—"the statement of facts in [his] plea agreement [was] akin to a special verdict identifying the factual bases for conviction." App. 17a–18a (quoting *United States v. Vann*, 660 F.3d 771, 774 (4th Cir. 2011) (en banc) (per curiam)). And after examining the statement of facts, the majority believed that Mr. Crawley pleaded guilty to a single § 924(c) offense predicated on "both a crime of violence *and* a drug trafficking crime." App. 10a (emphasis in original). In support, the majority pointed to a single line that it thought proved Mr. Crawley pleaded guilty to a predicate drug trafficking offense. The one line stated Mr. Crawley and his coconspirators intended to rob the victim, "who they believed was a

drug dealer . . . [of] half a kilogram or more of cocaine." App. 9a. The majority reasoned that this fact alone was "enough to sustain [Mr. Crawley's] conviction pursuant to a guilty plea for a § 924(c) charge expressly predicated upon a drug trafficking crime." App. 14a.

Judge Thacker dissented. She stressed that "nowhere in the plea proceedings did [Mr. Crawley] admit to – and nowhere did the Government proffer – that [Mr. Crawley] intended to distribute drugs, an element of the drug trafficking crime. App. 30a (Thacker, J., dissenting). As Judge Thacker wrote in her opinion, Mr. Crawley did *not* admit to a § 924(c) charge predicated on drug trafficking. App. 20a. Judge Thacker explained that just because an "indictment charges a crime in the conjunctive, this certainly does not mean that the defendant necessarily pleaded guilty to both components." App. 20a (cleaned up). Judge Thacker then pointed out that "all indicators are that [Mr. Crawley] believed he was pleading guilty to the Hobbs Act robbery predicate: [Mr. Crawley] pled guilty to the substantive Hobbs Act robbery count; the conduct to which he stipulated in the statement of facts satisfied the elements of Hobbs Act robbery; he pled not guilty to the substantive drug trafficking charge; there is no mention of intent to distribute drugs in the statement of facts; and the Government dismissed the substantive drug trafficking charge." App. 28a. Moreover, said Judge Thacker, drugs were never the focus of the plea proceedings: "at the plea hearing the magistrate judge focused on the violent nature of the robbery/home invasion, which again supports the notion that [Mr. Crawley] was pleading guilty to

the Hobbs Act predicate." App. 33a. "The magistrate judge never mentioned the quantity of drugs [Mr. Crawley] hoped to find, nor the intent to distribute such drugs." App. 34a.

Judge Thacker further criticized the majority for finding that "that the amount of drugs [Mr. Crawley] was hoping to find at the robbery" was sufficient to make out a drug trafficking charge. App. 34a. As Judge Thacker reminded, a court of appeals "cannot make factual findings in the first instance." App. 34a (cleaned up). "Neither the magistrate judge, nor the district court, made a finding that the weight of the drugs [Mr. Crawley] and his coconspirators hoped to find satisfied the intent to distribute element of the drug trafficking predicate." App. 34a–35a. Indeed, there was "zero mention" of a "'direct and substantial act' in furtherance of possessing cocaine *with the intent to distribute it*," which is a necessary element of the drug trafficking charge. App. 32a (emphasis in original). For that reason, Judge Thacker asserted there was not even a factual basis in the plea documents for concluding that Mr. Crawley pleaded guilty to a § 924(c) charge predicated on drug trafficking. App. 35a.

REASONS FOR GRANTING THE PETITION

I. In the Wake of *Davis*, Lower Courts are Engaging in Impermissible Factfinding to Sustain § 924(c) Charges, Violating this Court's Sixth Amendment Precedents.

Although this Court has held that the government may charge a disjunctive statute in the conjunctive, it has made clear that the government need only prove one of the "various means" of committing the offense to establish guilt. *Griffin v. United States*, 502 U.S. 46, 51 (1991).[1] It necessarily follows that when a defendant pleads guilty to a charge where a disjunctively worded statute is phrased conjunctively, he does not necessarily plead guilty to all of the conjunctive elements. A defendant does not have to admit to all of the conjunctively phrased conduct to be guilty of the charge, and a district court would not have to satisfy itself that the defendant committed all of the conjunctively charged conduct before accepting the plea. *See* Fed. R. Crim. P. 11(b)(3). Simply, whenever a defendant pleads guilty to a conjunctively worded charge, he can admit to either of the conjunctive elements so long as it satisfies proof of the offense. *See, e.g.*, *Malta-Espinoza Gonzales*, 478 F.3d 1080, 1082–83 (9th Cir. 2007) (when a disjunctive statute is pleaded conjunctively, "[a]ll that we can gather

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[1] Some circuits, including the Fourth Circuit, have suggested that the government should *always* charge disjunctively worded statutes conjunctively. *See, e.g.*, *United States v. Coughlin,* 610 F.3d 89, 107 n.10 (D.C. Cir. 2010) (cleaned up) ("The correct method of pleading alternative means of committing a single crime is to allege the means in the **c**onjunctive."); *United States v. Mejia,* 545 F.3d 179, 207 (2d Cir. 2008) ("Where there are several ways to violate a criminal statute . . . federal pleading requires . . . that an indictment charge [be] in the conjunctive to inform the accused fully of the charges.") (quotation marks omitted); *United States v. Montgomery,* 262 F.3d 233, 242 (4th Cir. 2001) (cleaned up) ("Where a statute is worded in the disjunctive, federal pleading requires the Government to charge in the conjunctive.").

from the charge and the bare record of a plea of guilty . . . is that [the defendant] was guilty of either [or] both" of the conjunctively charged acts); *United States v. Vann*, 660 F.3d 771, 774 (4th Cir. 2011) (en banc) (per curiam) ("That [the defendant's] predicate charging documents properly use the conjunctive term 'and,' rather than the disjunctive 'or,' does not mean that [the defendant] 'necessarily' pleaded guilty to [both] subsection[s].").

Here, the government charged Mr. Crawley with using, carrying, or brandishing a firearm during a crime of violence *and* a drug trafficking crime under 18 U.S.C. § 924(c), when § 924(c) penalizes using, carrying, or brandishing a firearm during a crime of violence *or* a drug trafficking crime. As is common practice, the government also charged Mr. Crawley with offenses that could serve as bases for the § 924(c) charge. *See Davis*, 139 S. Ct. at 2338 (Kavanaugh, J., dissenting) ("Ordinarily, when charged under § 924(c), a defendant will be charged with both an underlying federal crime and then also a § 924(c) offense."). It charged a crime of violence—conspiracy to commit Hobbs Act robbery. And it charged a drug trafficking offense—attempt to possess with intent to distribute cocaine-base. Mr. Crawley pleaded guilty to the § 924(c) and Hobbs Act conspiracy charges. He pleaded *not* guilty to the drug trafficking offense and the charge was dismissed under the plea agreement.

Years after Mr. Crawley entered his plea, this Court held that § 924(c)'s crime of violence residual clause was unconstitutionally vague. *See Davis*, 139 S. Ct. at 2336. So Mr. Crawley moved to set aside his § 924(c) conviction, asserting that his conspiracy to commit Hobbs Act robbery conviction could no longer serve as a valid

predicate for his § 924(c) conviction. And the courts below agreed that conspiracy to commit Hobbs Act robbery can no longer serve as a predicate to a § 924(c) charge after *Davis*. Yet they refused to vacate Mr. Crawley's § 924(c) conviction, concluding he had pleaded guilty to a single § 924(c) charge predicated on both a crime of violence *and* a drug trafficking offense because the indictment was worded conjunctively. The Fourth Circuit assured itself this was so by searching the plea agreement's statement of facts and finding that they set forth a requisite drug trafficking offense.

The result is perverse. The lower courts found that Mr. Crawley was guilty of a drug trafficking offense even though he pleaded not guilty to that offense to maintain a conviction that should have been vacated after *Davis* declared § 924(c)'s residual clause unconstitutionally vague. It makes little sense to conclude that Mr. Crawley pleaded guilty to a § 924(c) charge predicated on a drug trafficking crime when he pleaded *not guilty* to that very offense. And yet the government has now received the benefit of a penalty from a charge it willingly dismissed under the plea agreement.

The Fourth Circuit is not the only court engaging in such impermissible fact-finding to save what would otherwise be constitutionally infirm § 924(c) convictions after *Davis*. The Eleventh and Third Circuits, which the Fourth Circuit followed, *see* App. 10a, have done the same thing.

Eleventh Circuit. In *In re Navarro*, much like this case, the government charged the defendant with using, carrying, or brandishing a firearm during a crime of violence *and* a drug trafficking crime. 931 F.3d 1298, 1299 (11th Cir. 2019). The government accordingly charged Navarro with a predicate drug trafficking crime:

conspiracy to distribute and possess with intent to distribute cocaine, and a predicate crime of violence: conspiracy to commit Hobbs Act robbery. *Id.* As part of a plea agreement, Navarro pleaded guilty to the Hobbs Act charge and the § 924(c) charge, and the government dismissed the drug trafficking offense. *Id.* at 1299–1300. After this Court decided *Davis,* Navarro moved to set aside his § 924(c) conviction given Hobbs Act conspiracy can no longer serve as a valid predicate. *Id.* The Eleventh Circuit denied relief, holding that even if "conspiracy to commit Hobbs Act robbery no longer qualifies as a crime of violence in light of *Davis*," the plea agreement's "factual proffer established Navarro committed the drug trafficking crime[ ] in Count[ ] Two" even though that charge was dismissed. *Id.* at 1302.

Third Circuit. In *United States v. Collazo*, the government charged the defendant with violating § 924(c) and two predicate crimes of violence: conspiracy to commit Hobbs Act robbery and Hobbs Act robbery. 856 F. App'x 380, 380–81 (3rd Cir. 2021) (unpublished). Collazo pleaded guilty to the § 924(c) charge and the conspiracy charge, and the robbery charge was dismissed. *Id.* After *Davis*, Collazo argued Hobbs Act conspiracy no longer qualifies as a crime of violence, and thus his § 924(c) conviction should be vacated. *Id.* at 381–82. The Third Circuit disagreed, concluding that "the indictment, plea agreement, and plea colloquy all ma[de] clear that Collazo committed Hobbs Act robbery" even though that charge was dismissed. *Id.* at 384.

These cases defy this Court's Sixth Amendment precedents in two distinct ways, making the question presented worthy of review. *See* Sup. Ct. R. 10(c).

A. Lower courts are engaging in impermissible factfinding in violation of *Alleyne*.

First, the lower courts are flouting this Court's precedents by engaging in judicial factfinding the Sixth Amendment forbids. This Court has held that it is improper for courts to conduct factfinding that increases punishment, as that arrogates power to the judge that is constitutionally reserved to the jury. *Alleyne*, 570 U.S. at 114–16. As the Court held in *Alleyne*, a case involving a § 924(c) conviction: "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 114–15. In *Alleyne*, the jury convicted the defendant of a § 924(c) charge, expressly finding that he used or carried a firearm as part of a crime of violence; the jury did not expressly find that he had brandished a firearm. *Id.* at 104. Section 924(c) provides for a mandatory minimum sentence of five years for using or carrying a firearm, but the district court found that "the evidence supported a finding of brandishing" too, which carries a mandatory minimum sentence of seven years. *Id.* It was this judicial finding of fact that the *Alleyne* Court found improper, because "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment." *Id.* at 115.

As Judge Thacker explained, the Fourth Circuit, following other circuits' similar mistakes, engaged in impermissible factfinding to sustain Mr. Crawley's § 924(c) conviction that would have otherwise been vacated. Just as the judicial determination that Alleyne had brandished a firearm increased his minimum sentence, the Fourth Circuit's factual determination that Mr. Crawley was guilty of a drug offense that

could serve as a predicate for his § 924(c) conviction increased his sentence. Mr. Crawley's sentence for his § 924(c) conviction would have been vacated had the Fourth Circuit's not found the drug charge was sufficiently proven based on the plea proffer. As a result, the Fourth Circuit's finding that Mr. Crawley was guilty of the drug trafficking offense to which he had pleaded *not* guilty and had been dismissed, functionally increased Mr. Crawley's punishment by the seven-year mandatory term for a § 924(c) conviction.

As this Court explained in *Alleyne*, the "touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Id.* at 107. There is no question that the predicate for a § 924(c) charge is an "element" or "ingredient" of the offense, so it must be found by a jury *unless* a defendant admits to that offense thereby waiving the right to a jury's finding. Mr. Crawley pleaded guilty to a predicate crime of violence, thereby waiving his right to a jury as to *that* element. He did not waive his right to a jury finding that he carried a gun in furtherance of a *drug trafficking* crime, however. In fact, the opposite is true. He pleaded not guilty to the predicate drug trafficking charge and never admitted to having any intent to traffic drugs during any point of the plea proceedings. Thus, it was during post-conviction proceedings where the district court and Fourth Circuit found for the first time that Mr. Crawley was guilty of a predicate drug trafficking offense—the exact factfinding *Alleyne* forbids. In some ways, the factfinding engaged in by the lower courts here is worse than

that in *Alleyne*, because the courts conducted such factfinding to avoid the logical outcome of *Davis*.

B. Lower courts are conducting factfinding based on superfluous facts in plea agreements in violation of *Mathis* and *Descamps*.

Second, making matters worse, lower courts are finding facts based on superfluous statements in plea agreements, despite this Court holding that it offends the Sixth Amendment when a court relies on a plea agreement's non-elemental facts to impose a greater punishment. *See Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016).

In *Descamps*, this Court explained that "when a defendant pleads guilty to a crime, he waives his right to a jury determination of *only* that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Descamps*, 570 U.S. at 270 (emphasis added). Otherwise, explained the Court, judges could impose sentences based on facts not proven beyond a reasonable doubt. *Id.* at 269–70. In the view of the *Descamps* Court, relying on plea agreements' factual proffers in this way raises serious "Sixth Amendment concerns" because it entails sentencing courts "making findings of fact that properly belong to juries." *Id.* at 267. "The Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . facts[] unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense." *Id.* at 269–70.

Descamps also explained as a practical matter why it is imprudent for courts to rely on a plea agreement's extra-elemental facts when imposing punishment. Plea

documents, which the government singlehandedly crafts, "will often be uncertain" if not "downright wrong." *Id.* at 270. The statement of facts accompanying a plea agreement is the government's best version of its case. The government often drafts those facts without full investigation or the defendant's input. There is not even a requirement that a plea's statement of facts be complete. Instead, when crafting a plea's narrative, the government has the chance to exorcise all the weaknesses from its case. Thus, contrary to what the Fourth Circuit majority said, a plea's statement of facts is "a far cry from a special jury verdict form" where a jury finds certain elements beyond a reasonable doubt. App. 27a (Thacker, J., dissenting).

This Court emphasized this point a few years ago in *Mathis*, reiterating that plea agreements' "[s]tatements of 'non-elemental fact' . . . are prone to error . . . ." *Mathis*, 136 S. Ct. at 2253. And *Mathis* made this point in an analogous context: deciding how to determine whether a defendant has a qualifying conviction for an ACCA enhancement. There, this Court explained that "at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to.'" *Id.* (quoting *Descamps*, 570 U.S. at 270). For these reasons, "[s]uch inaccuracies should not come back to haunt the defendant many years down the road." *Id. Mathis* therefore prescribed an "elements-only inquiry" for reviewing a plea agreement's facts for two reasons particularly resonant here. First, allowing a judge "to go any further would raise serious Sixth Amendment concerns" given that "only a jury, not a judge, may find facts that increase the maximum penalty." *Id.* at 2252. Second, "an elements-focus avoids unfairness to defendants" who

otherwise might be sentenced based on statements of "non-elemental fact" that are "prone to error precisely because their proof is unnecessary." *Id.* 2253 (cleaned up).

The need for an elements-only inquiry is just as strong here, when a defendant pleads guilty to a § 924(c) charge and a necessary underlying predicate. In this situation, there would be no "incentive for [the defendant] to contest" any facts related to any other predicate given that they "do not matter under the law." *Id.* Taking the lessons from *Descamps* and *Mathis* and applying them here, Mr. Crawley could have pleaded guilty to violating § 924(c) based on a predicate crime of violence or a drug trafficking crime. If Mr. Crawley was pleading guilty to a § 924(c) violation based on a crime of violence, a drug trafficking crime was not an element of his offense. As a result, he would not have had an "incentive" to contest the facts in the proffer referencing drugs (which, are meager), and thus did not necessarily admit to them under the logic of *Mathis* and *Descamps*.

Yet flouting *Mathis* and *Descamps*, courts are asserting that they are free to search the plea documents for proof of a valid predicate after the crime of violence predicate the defendant pleaded guilty to committing was invalidated by *Davis*. Before the Fourth Circuit's decision, none of the lower courts had reckoned with whether this approach aligns with this Court's Sixth Amendment precedents. But these arguments were raised in the Fourth Circuit and the court blew past them,[2] making this case the perfect vehicle for resolving the important question presented.

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[2] The Fourth Circuit asserted in a footnote that the facts relating to alleged drug trafficking were elemental because they pertained to one of the potential predicates. It therefore concluded that its analysis did not violate *Descamps* and *Mathis*. App.

C. The question presented is important.

In the end, the Fourth Circuit, following the Third and Eleventh Circuits, ignored this Court's precedents to avoid granting what it called "a windfall based on later developments in the law." App. 19a. However, this Court already considered and rejected a similar concern in *Davis*. As this Court said there, when "Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *Davis*, 139 S. Ct. at 2323. Just as it is not the role of the courts to rewrite criminal laws to make up for their constitutional shortcomings, it is not the role of the courts to effectively rewrite plea agreements to maintain otherwise unconstitutional convictions.[3]

16a, 17a n.4. But this ignores the fact that the elements of § 924(c) require proof of only a crime of violence *or* a drug trafficking crime. Thus, the facts relating to drug trafficking were not *necessarily* elemental and were therefore "prone to error" because their proof was unnecessary to Mr. Crawley's conviction. *Mathis*, 136 S. Ct. at 2253. The Fourth Circuit avoided *Alleyne* by citing its own precedent issued decades before *Alleyne* and drawing factual distinctions between *Alleyne* and this case without explaining how they were material. *See* App. 11a, 14a–15a.

[3] The idea that Mr. Crawley and similarly situated defendants would be getting a "windfall" is not borne out by the facts. Mr. Crawley served 150 months in prison for the underlying "crime of violence" predicate to which he pleaded guilty. App. 6a; *see* Evan Tsen Lee, Mathis v. U.S. *and the Future of the Categorical Approach*, 101 Minn. L. Rev. Headnotes 263, 274 (2016) ("*The government's* windfall under current law is being allowed to impose multiple punishments for the same crime."). Mr. Crawley's case is not an anomaly. According to the government, in FY 2020, in 86.8% of cases involving a § 924(c) conviction, the defendant was simultaneously convicted of the predicate. *See* U.S. Sent'g Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearm Offenses*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf (last visited Nov. 2, 2021). It is worth noting the staggering racial disparities in prosecutions under § 924(c). In FY 2020, 51% of those convicted under § 924(c) were Black, and 23.4% were Hispanic. *Id.*;

If lower courts can continue to engage in the type of factfinding that is now regularly occurring, only confusion will follow. For collateral purposes, the predicates underlying a § 924(c) charge are not interchangeable. For example, Section 4B1.2 of the Sentencing Guidelines states that a "violation of 18 U.S.C. § 924(c) . . . is a 'crime of violence' or a 'controlled substance offense' if the offense of conviction established that the underlying offense was a 'crime of violence' or a 'controlled substance offense.'" U.S. Sent'g Guidelines Manual § 4B1.2 (U.S. Sent'g Comm'n 2007). Now that courts are holding that they can pick which predicate applies as long as the indictment is worded conjunctively, how are courts to define a § 924(c) conviction at sentencing? Is it a crime of violence, a controlled substance offense, or both? How is a defendant to know the consequences of his plea if a court can come back years later and decide which predicate applies? And how is defense counsel to effectively advise clients of the consequences of their pleas? [4] There can be little doubt that Mr. Crawley and his counsel would have thought that he was pleading guilty to a § 924(c) charge predicated on a crime of violence given that he was also pleading guilty to a crime of

[4] This is problem is not academic. When Mr. Crawley was sentenced in 2008, if he committed a subsequent drug offense in violation of 21 U.S.C. § 841(b), he would have faced a mandatory minimum if his § 924(c) charge was predicated on drug trafficking. But if his § 924(c) conviction had been predicated on a crime of violence, he would *not* have faced the same mandatory minimum under 21 U.S.C. § 841(b) as it was in effect at the time. *See* First Step Act of 2018, Pub. L. No. 115-391, December 21, 2018, 132 Stat 5194 (amending 21 U.S.C. § 841(b) such that violent felonies could also trigger the mandatory minimum). This could have made a difference to Mr. Crawley's calculus when pleading guilty. He may have been willing to stand on his trial rights and face a § 924(c) charge predicated on drug trafficking given that, even in the government-friendly version of the facts presented in the plea proffer, the proof of drug trafficking was weak.

violence. It is hardly likely that anyone in that courtroom would have understood Mr. Crawley to also be pleading guilty to a § 924(c) charge predicated on a drug trafficking offense—*in a single count*—given that Mr. Crawley pleaded not guilty to that charge and the government dismissed the charge under the plea agreement.

In short, to avoid the consequences of *Davis*, lower courts are bending over backwards to sustain constitutionally suspect § 924(c) convictions. *Cf. Davis*, 139 S. Ct. at 2337 (Kavanaugh, J., dissenting) (hypothesizing that "thousands of inmates who committed violent gun crimes will be released" early because of the Court's decision).[5] But it is not for the lower courts to craft ingenious ways to avoid the "social policy consequences" that may flow from this Court's decisions. *Id.* at 2335 (majority op.). This is especially so when the solution they devise flouts two strands of this Court's Sixth Amendment precedents. If the reasoning of the lower courts stands, so long as prosecutors can charge disjunctively worded statutes conjunctively, defendants will have "no sure way to know what consequences will attach to their [plea agreements]." *Id.* at 2323.

[5] But as the *Davis* majority noted, "defendants whose § 924(c) convictions are overturned by virtue of today's ruling will not even necessarily receive lighter sentences . . . . [W]hen a defendant's § 924(c) conviction is invalidated, courts of appeals routinely vacate the defendant's entire sentence on all counts so that the district court may increase the sentences for any remaining counts if such an increase is warranted." *Davis*, 139 S. Ct. at 2336 (quotation marks omitted). *Id.*

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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