No. _____

IN THE

Supreme Court of the United States

CRISTIAN SERRANO-DELGADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A jury convicted Cristian Serrano-Delgado of 18 U.S.C. §§ 924(c) and (j) based on instructions providing various possible crime-of-violence predicates.

These included, within the same § 924(c) counts, conspiracy to commit Hobbs Act Robbery, Hobbs Act robbery based on *Pinkerton* conspiracy, and aiding and abetting of Hobbs Act robbery.

Under *Davis*, conspiracy is not a crime of violence, and *Pinkerton*-liability-based Hobbs Act robbery has not been assessed by this Court. The question presented is:

> Can a valid Section 924(c) conviction be based on jury findings that may have been based on Hobbs Act conspiracy, *Pinkerton* Hobbs Act conspiracy, and aiding and abetting when those offenses require no proof of the requisite violent force?

PARTIES

Cristian Serrano-Delgado, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellant below.

RELATED PROCEEDINGS

The following proceedings are directly related to this case.

- *United States v. Serrano-Delgado*, No. 19-1652 (1st Cir. March 22, 2022) (reported at 29 F.4th 16)
- *United States v. Serrano-Delgado*, No. 3:17-cr-00533-3-FAB (D.P.R. June 12, 2019)

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OPINIONS BELOW

Cristian Serrano-Delgado respectfully petitions for a writ of certiorari to review the judgment of the First Circuit, which is reported at 29 F.4th 16. Pet. App. 1a-16a. The District Court's judgment is unreported. App. at 17a-24a.

JURISDICTIONAL STATEMENT

The First Circuit entered judgment on March 22, 2022. The deadline for this petition is July 20, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The First Circuit's decision in *United States v. Serrano-Delgado*, 29 F.4th 16 , charts a divergent path from that dictated by this Court's categorical analysis in *United States v. Davis*, 139 S. Ct. 2319 (2019), and *United States v. Taylor*, 142 S. Ct. 2015 (2022). Those cases saw two versions of Hobbs Act robbery — attempt and conspiracy — stricken as qualifying crime-of-violence predicates under 18 U.S.C. § 924(c). *Taylor*, 142 S. Ct. at 2019; *Davis*, 139 S. Ct. at 2336.

Serrano-Delgado offers nothing less than a complete workaround to *Davis*. If left on the books, it lets Section 924(c) convictions stand even when the jury is given a grouping of possible putative crime-of-violence predicates, which includes multiple forms of inchoate crimes that demand no proof of violent force. Certiorari should be granted to evaluate how reviewing courts should address whether the various Hobbs Act robbery variations used here are categorically crimes of violence under Section 924(c)(3)(A). And certiorari should assess whether a general verdict of Section 924(c), when jurors were handed multiple putative predicates and one or more of the predicates are invalid.

STATEMENT

The essential relevant legal background of Section 924(c) categorical analysis is set forth in *United States v. Davis*, 139 S. Ct. 2319 (2019), and *United States v. Taylor*, 142 S. Ct. 2015 (2022). Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug

trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute defines "crime of violence," in subparagraphs, (A) and (B). Both were valid when Mr. Serrano-Delgado went to trial, and that is part of the problem faced now.

Section 924(c)(3)(A) — the "elements" clause — specifies that the term "crime of violence" includes any "offense that is a felony" and "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).

Section 924(c)(3)(B) — the now-defunct "residual" clause — specifies that a "crime of violence" includes any "offense that is a felony and . . . 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." 18 U.S.C. § 924(c)(3)(B).

District of Puerto Rico Trial

The trial charges all relate to a 2017 robbery where Mr. Serrano drove two co-defendants to rob a bar called the Herol Café in Ponce, Puerto Rico. Pet. App. 6a-7a.

Mr. Serrano-Delgado, who was the getaway driver, did not go into the bar and never held a gun. But codefendants Jonathan Valentín-Santiago and Rubén Miró-Cruz, with their faces covered, did. And in the course of robbing bar patrons for their cash and jewelry, Valentín got into a shootout and killed a customer at the bar. Pet. App. 6a. After Valentín and Miró ran to Mr. Serrano's car, he left quickly, and all three

men were later arrested. Pet. App. 6a-7a. All three men were charged with four counts.

Count 1	Conspiracy to Commit a Hobbs Act Robbery (18 U.S.C. § 1951(a))
Count 2	Substantive Hobbs Act Robbery (18 U.S.C. § 1951(a))
Count 3	Firearm Discharge "During and in Relation to Crimes of Violence" (18 U.S.C. § 924(c)(1)(A)(iii))
Count 4	Causing a Death that Resulted from Valentín's Gun Discharge (18 U.S.C. § 924(j))

The First Circuit understood Counts 3 and 4 to relate to Valentín's gun. Pet. App. 7a. Valentín and Miró each pleaded guilty to reduced charges, but Mr. Serrano went to trial after moving to dismiss Counts 3 and 4, the Section 924(c) and (j) counts. Pet. App. 7a.

Moving to dismiss the Section 924(c) charges, Mr. Serrano set the stage for the issues raised here. For dismissal, he contended that the Section 924(c) counts charged non-offenses because they were predicated on crimes that do not satisfy Section 924(c)(3)'s crime of violence definition.

In his pre-*Davis* trial, First Circuit law allowed Hobbs Act conspiracy to serve as a Section 924(c) predicate on "a case-specific, real-world approach" under the residual clause. *United States v. Douglas*, 907 F.3d 1, 15 (1st Cir. 2018). As if predicting Justice Gorsuch's opinion in *Davis*, Mr. Serrano

maintained that Section 924(c)'s residual clause was unconstitutionally vague.

He also argued that neither Hobbs Act conspiracy, nor Hobbs Act robbery qualified as "crimes of violence" under Section 924(c)'s force clause. This motion was denied.

The jury convicted Mr. Serrano on all charges, including the Section 924(c) counts. The Section 924(c) counts were based on co-defendant Valentín's use of a gun while Mr. Serrano was yards away in his car. The court instructed the jury that either Hobbs Act conspiracy or completed Hobbs Act robbery sufficed as valid predicates.

For the conspiracy to be a predicate, the district court instructed the jury as follows: "[I]f the conspiracy to commit a robbery charged in Count ONE involved a substantial risk that physical force against the person or property of another would be used in the course of the conspiracy, it is up to you to decide whether the conspiracy charged in Count ONE is a crime of violence." Appellant's Appendix, No. 19-1652, *268 (1st Cir.).

For the substantive count, the jury was told categorically "that the robbery charged in Count TWO is a crime of violence." *Id.*

Over objection, the district court allowed the government to proceed on multiple theories to prove the substantive Hobbs Act offense, including based on conspiracy as innovated by *Pinkerton v. United States*, 328 U.S. 640 (1946).

The *Pinkerton* charge carried no use-of-force element as applied to Mr. Serrano. For that charge, the substantive Hobbs Act robbery and Section 924(c) counts need not be committed by Mr. Serrano. *Id.* at *269. Instead, the first and second elements required only that *someone* commit the crimes in Counts Two, Three and Four, and that person was involved in a conspiracy with Mr. Serrano. The jury had to further find that the other person's crimes furthered the conspiracy while Mr. Serrano was a member of the conspiracy. Finally, the jury had to find that Mr. Serrano "could reasonably have foreseen" that a gun would be used. *Id.*

Aside from *Pinkerton* liability, jury instructions allowed guilty verdicts on Counts Two, Three, and Four, if the jury found Mr. Serrano guilty of the substantive crimes or guilty of aiding and abetting their commission. *Id.* It is unknown which of the various crimes the jury used as a predicate for the Section 924(c) counts, because — again, over objection — the jury needed only return a general verdict for the counts. Pet. App. 12a-13a.

First Circuit Court of Appeals Opinion

As mentioned, after Mr. Serrano's trial, this Court clarified that a putative crime of violence qualifies under Section 924(c) only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Davis*, 139 S. Ct. at 2329 (2019). The First Circuit's opinion here acknowledges that Hobbs Act conspiracy is not a qualifying predicate. *See* Pet. App. 12a-13a (citing *United States v. Lara*, 970 F.3d 68, 74 (1st Cir. 2020)).

The First Circuit further acknowledged Mr. Serrano's argument that between the express offering of conspiracy as a crime-of-violence predicate and instruction through *Pinkerton* liability, it is "[e]minently possible that [his] substantive convictions rested on the jury's conspiracy finding." Pet. App. 13a.

Mr. Serrano argued that a general verdict makes it impossible to conclude that the jurors found a crime of violence was committed when jurors had the option of finding a non-qualifying predicate. Pet. App. 13a; *In re Gómez*, 830 F.3d 1225, 1227 (11th Cir. 2016).

The First Circuit, however, rejected these arguments based on its conclusion that the general verdicts necessitated a finding that Mr. Serrano committed the substantive robbery. Pet. App. 13a. The First Circuit did not separately contend with the issue of whether *Pinkerton* Hobbs Act robbery was a crime of violence, reasoning that Hobbs Act robbery was a crime of violence as a matter of law. Pet. App. 13a.

The First Circuit thus did not contend with the question of whether *Pinkerton*-liability-based Hobbs Act robbery is a crime of violence despite its notable lack of a violent force element.[1] Instead, the court's decision is a novel fact-based determination that approves of the convictions despite at

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[1] Similarly, the decision did not address whether aiding and abetting someone else to commit Hobbs Act robbery, *see* 18 U.S.C. § 2, is a crime of violence.

least one invalid predicate. The First Circuit's justification is that the jurors had to have found the Section 924(c) offenses occurred during and in relation the robbery because the First Circuit opined that the jury's conspiracy finding depended on an initial finding that Mr. Serrano "knowingly joined the robbery as the getaway driver." Pet. App. 13a. This timely petition follows.[2]

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[2] While this petition examines whether *Pinkerton*-liability-based Hobbs Act robbery is crime of violence, Mr. Serrano also challenged below whether a *Pinkerton* instruction should have been given at all and in what form. There is limited case law and scholarship on the common-law notion that *Pinkerton* liability is a path to liability for a substantive crime. But the First Circuit concluded that "what we have here is what one academic has dubbed "[t]he classic example" of someone liable under *Pinkerton*, namely '[t]he lookout who stays behind in the car.'" Pet. App. 11a (citing Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. Crim. L. & Criminology 147, 147-48 (2007). For the First Circuit, it followed that such a "lookout 'is just as guilty as' the bank robber who shoots a security guard, 'as long as it was reasonably foreseeable that the plan might go awry and result in physical violence.'" Pet. App. 11a (citing Ohlin, *supra*, at 148). The comparison between such foreseeability and residual clauses like Section 924(c)(3)(B) does not appear to have been explored in case law.

REASONS FOR GRANTING THE PETITION

Viewed alongside *United States v. Davis*, 139 S. Ct. 2319 (2019), and *United States v. Taylor*, 142 S. Ct. 2015 (2022), the decision below, *United States v. Serrano-Delgado*, 29 F.4th 16 (1st Cir. 2022), leaves an exception in categorical-approach jurisprudence that would swallow this Court's rules.

A prosecution seeking to secure Section 924(c) convictions need not toil to prove a defendant committed an offense satisfying Section 924(c)(3)(A)'s elements clause if *Pinkerton* liability does the trick. *Serrano-Delgado* is quite adverse to the Court's pronouncements in *Davis* and *Taylor* and so many categorical-approach cases decided since the original *Taylor* decision. *See Taylor v. United States*, 495 U.S. 575 (1990). The Section 924(c) crimes "threaten[] long prison sentences for anyone who uses a firearm in connection with certain other federal crimes." *Davis*, 139 S. Ct. at 2323.

The conviction here rested on a series of inferences pointing toward conspiracy, both as was charged in Count One and as tacked on to the substantive count using *Pinkerton* liability. The mere labeling of statutory conspiracy versus common-law conspiracy presents no basis to attach liability for Mr. Serrano's awareness that a codefendant "might commit" the charged substantive crime — not for his use of a firearm. Pet. App. 12a, 16a.

The First Circuit questioned "why *Pinkerton* is not more frequently employed," suspecting "that prosecutors and district courts prudently pay heed to [the court's] warnings regarding its use when the evidence of a separate agreement is

not strong and the case is complex." Pet. App. 11a. The answer is difficult to know, but the problem remains acute. Mr. Serrano's sustained charge led to a similar sentence increase as the *Davis* defendants received. 139 S. Ct. at 2324-2325. Merits briefing and analysis should seek an answer as how the *Pinkerton* formulation could possibly survive scrutiny when the residual clause cannot.[3]

Thus, there are at least two ways this Court could, and should, address the *Serrano-Delgado* danger in merits briefing. First, it could address whether additional Hobbs Act robbery variations used here are categorically crimes that "have as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A).

Alternatively, the Court could assess whether a general verdict — like that given here — survives as proof of a crime of violence for Section 924(c) even when jurors were handed multiple putative predicates and one or more, are invalid.

I. THE *SERRANO-DELGADO* DECISION CONFLICTS WITH *DAVIS* AND *TAYLOR*'S CATEGORICAL APPROACH ANALYSIS AND PROMOTES ARBITRARILY VAGUE AND INCONSISTENT RESULTS

Underlying this Court's reasoning in *Davis* and *Taylor* is a common-sense categorical-approach analysis left out of the

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[3] A related question is currently pending before the Court in *Gillespie v. United States*, petition for cert. pending, No. 21-8089 (filed July 6, 2022).

First Circuit's *Serrano-Delgado* opinion. Section 924(c)(3)'s residual clause had to be stricken because to endorse a "case-specific approach" to crime-of-violence determinations would lead to a "series of seemingly inexplicable results." *Davis*, 139 S. Ct. at 2329-2330. Some very serious offenses would get a strict, elements-based approach; other minor crimes would warrant case-specific factual analysis. *Id.* at 2330. The majority opinion saw "no rhyme or reason to any of this" and heard no "plausible account why Congress would have wanted courts to take such dramatically different approaches to classifying offenses as crimes of violence in . . . various provisions." *Id.*

The *Davis* Court reasoned that Section 924(c)'s case-specific-approach prong, even limited by an interpretation offered by the government, "would result in the vast majority of federal felonies becoming potential predicates for § 924(c) charges, contrary to the limitation Congress deliberately imposed when it restricted the statute's application to crimes of violence." *Id.* at 2332.

Doubtless one of the predicates used to convict Mr. Serrano does not require the use or attempted or threatened use of physical force. That offense — conspiracy to commit Hobbs Act robbery — is not a crime of violence. Neither should *Pinkerton*-liability-based Hobbs Act robbery, which provided an alternative to traditional conspiracy here that was no less tempting to the jury.

To get to the predicate offense of conviction, the modified categorical approach is mandated. This is evident from the

fact that Hobbs Act, 18 U.S.C. § 1951, defines multiple offenses. Pet. App. 26a. As such, the Court may examine certain judicial documents like the indictment, jury instructions, and the verdict form, to determine which offense was the predicate for the § 924(c) conviction.

As evident from the record, neither the jury instructions nor the verdict form establishes whether the jury convicted him of conspiring or of committing Hobbs Act robbery.

In other words, this Court must presume that the jury convicted Mr. Serrano of the lesser offense, *i.e.*, conspiracy to commit a Hobbs Act robbery. Considering that per *Davis*, conspiracy to commit a Hobbs Act robbery is not a crime of violence, Mr. Serrano's § 924(c) convictions must be vacated.

The categorical approach requires courts to "'presume that the conviction rested upon nothing more than the least of the acts criminalized.'" *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)). Once the court identifies "the minimum conduct criminalized" by the offense, the pivotal question becomes whether that minimally culpable conduct satisfies the force clause. *United States v. Edwards*, 857 F.3d 420, 423 (1st Cir. 2017) (quoting *Moncrieffe*, 569 U.S. at 191).

Under this approach, when the *Shepard* documents[4] do not speak plainly to establish the elements of which a defendant was necessarily convicted, the court must assume that

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[4] *See Shepard v. United States*, 544 U.S. 13 (2005).

the defendant was convicted of the least serious of the disjunctive elements of the statute. There is no reason this analysis should not be applied when evaluating which predicate the jury found when facing two separate types of conspiracy, aiding and abetting, and substantive Hobbs Act robbery. When applied, we see that the general verdict does not reveal "any unanimous finding by the jury that [Mr. Serrano] was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of predicate offenses, or guilty of conspiring during some and not others." *In re Gómez*, 830 F.3d 1225 (11th Cir. 2016).[5]

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[5] For a related analysis dealing with alternative elements supporting a single conviction, see *United States v. Vann*, 660 F.3d 771, 774 (4th Cir. 2011) (en banc); *see also United States v. Chapman*, 666 F.3d 220, 228 (4th Cir. 2012) (en banc). In looking at indictment charges with alternative elements expressed in the conjunctive (e.g., a § 924(c) count alleging Hobbs Act robbery and Hobbs Act conspiracy as § 924(c) predicates) that court held the mere fact that a count alleges two sets of elements does not mean that a defendant was necessarily convicted of both sets. "Indictments often allege conjunctive elements that are disjunctive in the corresponding statute, and this does not require either that the government prove all of the statutorily disjunctive elements or that a defendant admit to all of them when pleading guilty." *Vann*, 660 F.3d at 774 (quoting *Omari v. Gonzales*, 419 F.3d 303, 308 n.10 (5th Cir. 2005)). Therefore, "when a defendant pleads guilty to a formal charge in the indictment which alleges conjunctively the disjunctive components of a statute, the rule is that the defendant admits to the least serious of the disjunc-

Returning briefly to *Taylor*, we see this Court's reiteration that a strict categorical analysis truly means a strict elements-based analysis. 142 S. Ct. at 2020-2021. Just like attempted Hobbs Act robbery and Hobbs Act conspiracy do not demand violent force, neither does *Pinkerton*-based Hobbs Act conspiracy. *See* Pet. App. 16a. This Court noted the simple feature of Section 924(c)'s elements clause as a product of legislative design. While *Taylor* focused on the difference between attempted and completed robbery, the limits of the elements clause were on display as relevant here, as the court noted that specific factual scenarios were left out of the equation.

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tive statutory conduct" unless *Shepard* documents conclusively establish otherwise. *Chapman*, 666 F.3d at 227-28. A number of cases have vacated § 924(c) convictions, where, like here, there was no means of establishing whether a conviction was based on an offense that could qualify as a crime of violence as opposed to conspiracy, which does not. *United States v. Rodríguez*, No. 94-cr-313, 2020 WL 1878112, at *17 (S.D.N.Y. Apr. 15, 2020); *United States v. Berry*, No. 3:09-cr-19, 2020 WL 591569, at *3 (W.D. Va. Feb. 6, 2020) (granting petitioner's uncontested 28 U.S.C. § 2255 motion to vacate his Section 924(c) conviction and sentence based on a conviction for Hobbs Act conspiracy); *Moss v. United States*, No. 4:16-cv-82, 2019 WL 5079713, at *2 (E.D.N.C. Oct. 10, 2019) (granting petitioner's uncontested § 2255 motion to vacate his § 924(c) conviction and sentence based on a conviction for conspiracy to commit Hobbs Act robbery); *United States v. Oliver*, No. 3:11-cr-63, 2019 WL 3453204, at *3-4 (E.D. Va. July 30, 2019) (same).

As such, the Court observed that "if the government's view of the elements clause caught on, it would only wind up effectively replicating the work formerly performed by the residual clause, collapsing the distinction between them, and perhaps inviting similar constitutional questions along the way." 14 S. Ct. at 2023. If such an interpretation must be rejected in *Taylor*, a fortiori it must be rejected regarding *Pinkerton*-based conspiracy, whose foreseeability concept perhaps requires even less specificity than the now-unconstitutional residual clause.

II. THIS PETITION IS A STELLAR VEHICLE TO ADDRESS QUESTIONS THAT REMAIN CRITICAL TO ENSURING *DAVIS* AND *TAYLOR* ARE FOLLOWED IN PRACTICE

Though essentially legal question, the issues raised here were presented at trial and preserved. The case of *United States v. Serrano-Delgado*, 29 F.4th 16 (1st Cir. 2022), reflects precisely what the government and the district court did prior to this Court's holdings in *Davis* and *Taylor*. And it reflects what the appellate forum did without guidance to fill in the gaps. Nothing is walled off by a plea agreement, appellate waiver, or other obstacle. Resolution of this case would provide timely clarification following *Davis* and *Taylor* and prevent a great deal of litigation.

The guidance in *Davis* should not be circumvented by a mere refashion of conspiracy as *Pinkerton* conspiracy. And the striking of Section 924(c)'s residual clause should not be

replaced by *Pinkerton*'s referral of foreseeability to the jury when such action is prohibited outright by *Davis*.

CONCLUSION

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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