CASE NO. 22-5982 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN JACKSON,
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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. The Question of Whether Federal First-Degree Murder, 18 U.S.C. § 1111(a), Is an Indivisible Offense, and Thus Not a Crime of Violence Pursuant to the Force Clause of 18 U.S.C. § 924(c)(3)(A), Merits Review.

This case turns on the question of whether federal first-degree murder under 18 U.S.C. § 1111(a), which includes both premeditated and felony murder, is an indivisible or divisible offense. If the government is correct that the statute is divisible, and that felony and premeditated murder are separate offenses that must be specifically charged and proven beyond a reasonable doubt, Mr. Jackson's claim fails. However, if Mr. Jackson is correct that the statute is indivisible, consistent with its historical and common law roots, then it does not meet the definition of a crime of violence, and he is entitled to relief. Thus, the question presented is of exceptional importance and worthy of this Court's review.

The Fourth Circuit below properly recognized that felony murder cannot qualify as a crime of violence. *United States v. Jackson*, 32 F.4th 278, 285 (4th Cir. 2022). Mr. Jackson agrees, and the government has not argued otherwise. Instead, the government tries to reframe the question presented, and mask its importance, by asking whether first-degree premeditated murder is a crime of violence. BIO at I. This is misleading as Petitioner has not raised that question. All parties agree that premeditated murder, standing alone, would qualify as a crime of violence. The real issue here is whether first-degree murder under § 1111(a) is a single indivisible offense, as indicated by its common law origin and *Schad v. Arizona*, 501 U.S. 624

(1991), or whether the statute lists multiple and distinct crimes, as held below, *Jackson*, 32 F.4th at 285.

This issue is not only decisive in this case, but also implicates other compelling concerns – statutory interpretation of the federal murder statute, the role of the common law in interpreting federal statutes, prosecutorial discretion in choosing how to charge and pursue a murder conviction in federal court, and Congress's role in addressing this Court's constitutional decisions applying the vagueness doctrine. These issues are worthy of this Court's review. Petitioner's case squarely presents the question, which was directly addressed by the Court below, and is, therefore, an appropriate vehicle for this Court's review.

A. The Question Presented Is Worthy of Review.

Mr. Jackson's Petition has already detailed why this issue should be heard and how the Fourth Circuit's holding below conflicts with this Court's opinions in *Schad* and *Mathis v. United States*, 579 U.S. 500 (2016). None of the government's arguments in its Brief in Opposition (BIO) alleviate the reasons certiorari should be granted.

1. The government does not deny that at common law, and throughout most of history, first-degree murder was an indivisible offense where the heightened mens rea element could be proven by showing premeditation or that it was committed during a felony. The government cites to no statement, or legislative history, announcing Congress's intent to move beyond the common law and create a new, divisible, form of first-degree murder. Petitioner is unaware of any

documentation evidencing such an intent to deviate from the common law. Instead, the government cites *United States v. Allred*, 942 F.3d 641, 649 (4th Cir. 2019), to argue that § 1111(a)'s use of the disjunctive "or" is "highly probative" that the statute is divisible. BIO at 12-13. But, as Mr. Jackson stated in his Petition at 16-17, this Court in *Mathis* recognized that a disjunctive list may list alternative factual means of committing a single crime just as easily as it may list alternative elements of different crimes. 579 U.S. at 512-13. Indeed, *Mathis* cited *Schad* for the proposition that a statute may disjunctively list alternative means rather than alternative elements. *Id.* at 506.

2. Next, the government argues that § 1111(a) is divisible because "each alternative definition of first-degree murder involves 'significantly' different conduct." BIO at 13. Yet Justice Scalia's hypothetical from his concurrence in *Schad* illustrates that a person can commit premeditated murder and felony murder at the same time. 501 U.S. at 649-50 (Scalia, J., concurring). Indeed, the jury here found Mr. Jackson committed both premeditated and felony murder (as different means of committing the single crime of first-degree murder) based on the *exact same* conduct. There are differences between the two means of committing first-degree murder, and cases where only one and not the other may apply, but premeditated and felony murder can hardly be said to involve significantly different conduct.

The government's related argument that the purportedly different mens rea requirements of premeditated and felony murder distinguish these types of murder as separate crimes, BIO at 13, ignores the common law origins of § 1111(a).

"Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991). Congress wrote the federal murder statute broadly to "cover[] all variants of murder" and "intended its statute to cover a particular field—namely, 'unlawful killing of a human being with malice aforethought'—as an integrated whole." *Lewis v. United States*, 523 U.S. 155, 169 (1998). Felony murder was never a separate offense from premeditated murder under common law. Petition at 9-11. Consistent with the common law, § 1111(a) codifies felony murder as one of several means of establishing the single heightened mens rea element necessary for first-degree murder.

3. The government next argues that the record materials in this case establish that premeditated murder and felony murder are separate crimes under the modified categorical approach. BIO at 13-15. But the modified categorical approach only applies when the law and the text of the statute itself are unclear. *Mathis* firsts look to relevant decisional law and the text of a statute itself "to determine whether its listed items are elements or means." 579 U.S. at 517. This "threshold inquiry—elements or means?—is easy in this case, as it will be in many others," because a "decision definitively answers the question." *Id.* Because a court "can readily determine the nature of [the] alternatively phrased list," *Mathis*, *id.* at 518, in the first-degree murder statute as means rather than elements, the crime is indivisible, and the jury instructions and other record documents play no role. At a minimum, however, the government's argument shows that the question of when

the modified categorical approach should be used to determine if a statute is indivisible, and to what extent a court can or should look to the record materials, are worthy of this Court's review and guidance.

Even if appropriate, under the modified categorial approach, the "record materials" must "speak plainly," and "if they do not, a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty'" to deem a statute divisible. *Mathis*, 579 U.S. at 519. Here, the records only establish that the jury found Mr. Jackson guilty of the single predicate crime of violence, first-degree murder, under several different theories. Indeed, the jury unanimously found Mr. Jackson guilty of two types of felony murder based on two separate felonies, and neither the Fourth Circuit nor the government has ever suggested that this compels that each type of felony murder is a separate, divisible crime. The government in its own words states the jury instructions describe "variant[s] of first-degree murder." BIO at 14. Contrary to the government's assertion, the record materials do not speak plainly with the certainty necessary to find the crime divisible under *Mathis*.

4. The government next argues that "[t]he absence of a developed body of law on this question, let alone a circuit conflict, counsels against review by this Court." BIO at 15. But, as detailed in Mr. Jackson's Petition at 7-18, the Fourth Circuit's opinion conflicts with this Court's opinions in *Mathis* and *Schad*. As set forth in the Petition at 18-21, the question of whether federal first-degree murder is indivisible is of enormous importance, not only to the resolution of this case, but to the prosecution of all federal murder cases. This Court's review would not only

address this conflict with *Schad* and *Mathis*, but also provide guidance to the courts of appeal regarding *Johnson* litigation more broadly and bring the need to legislatively address the criminal statutes affected by *Johnson* and its progeny to Congress's attention.

The government's attempt to argue that the decision below is not in conflict with *Schad* minimizes the import of that decision. Justice Scalia, concurring in *Schad*, observed, "down to the present time *the United States* and most States have a single crime of first-degree murder that can be committed by killing in the course of a robbery as well as premeditated killing." *Schad*, 501 U.S. at 649 (Scalia, J., concurring) (citing § 1111) (emphasis added). He further noted, "Schad and the dissenting Justices would in effect have us abolish the crime of first-degree murder and declare that the Due Process Clause of the Fourteenth Amendment requires the subdivision of that crime into (at least) premeditated murder and felony murder." *Id.* This is exactly what the Fourth Circuit did below. The panel's decision conflicts with *Schad* and directly contradicts Justice Scalia's concurrence.

The government asserts that "[t]he court of appeals precisely followed the procedure that *Mathis* sets forth for determining whether a statute is divisible into multiple offenses." BIO at 17. Mr. Jackson has argued the opposite in his Petition at 15-18. Such disagreement illustrates the need for this Court's guidance in how to evaluate the divisibility of statutes.

B. This Case Is a Proper Vehicle for the Court's Review

1. The government's argument that Mr. Jackson's claim is procedurally defaulted, BIO at 18, was readily rejected below and provides no basis to forego review. The Fourth Circuit dismissed this argument in a footnote. *Jackson*, 32 F.4th at 283 n.3. Where, as here, a new rule of constitutional law has been held to apply retroactively, there is no requirement, and the government has cited no law, that a defendant was obligated to raise the claim before the new rule was recognized. Mr. Jackson's claim, like thousands of others based on the retroactive new rule of constitutional law from *Johnson*, was properly raised in a second or successive motion to vacate his sentence pursuant to 28 U.S.C. § 2255(h)(2).

2. Lastly, the government takes pains to argue that any error in this case would be harmless because a court below could enter a judgment of conviction for the uncharged predicate crimes of violence if Mr. Jackson's single count of using a firearm during a crime of violence were invalidated. BIO at 18-20. Mr. Jackson was not indicted separately with these predicate offenses, and he was not convicted of any offense other than a single conviction of violating 18 U.S.C § 924(c). Because the grand jury did not indict Mr. Jackson under § 1111(a), and the jury consequently did not convict him under that statute, the government's harmless error theory is not only inapplicable, but also constitutionally impermissible.

The government could have sought an indictment from a grand jury for other changes but elected not to do so. The government's speculation as to what a grand jury may have indicted and what a jury of Mr. Jackson's peers may have found does

not meet any legal standards. *Ex parte Bain*, 121 U.S. 1, 10 (1887) ("If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance" of the grand jury right would be "almost destroyed").

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .," and "'guarantees that a criminal defendant will be tried only on charges in a grand jury indictment.'" *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999). Here, Mr. Jackson is not simply alleging that an error occurred at trial, rather, Mr. Jackson argues that the only crime for which he was charged and convicted is invalid. As this Court has noted, "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). Finding harmless error would require finding Mr. Jackson guilty of offenses that he has not been charged with in the indictment. The Court recognizes that this affects a "defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury" and that "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone*, 361 U.S. at 216. "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the

findings to support that verdict might be—would violate the jury-trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1996).

CONCLUSION

For these reasons and the reasons stated in Mr. Jackson's Petition for Writ of Certiorari, the Court should grant certiorari.

Respectfully submitted,

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