CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

PETITION FOR WRIT OF CERTIORARI
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit of Appeals

SANFORD A. SCHULMAN
Attorney for Petitioner
BERNARD EDMOND
Guardian Building
500 Griswold Street, Suite 2340
Detroit, MI 48226
(313) 963-4740

ISSUE PRESENTED

I. Whether the Sixth Circuit Court of Appeals erroneously decided that the petitioner's predicate offense for his Sec. 924© is the conspiracy charge and not the substantive carjacking offenses and in Johnson v. United States, the Supreme Court invalidated the so-called residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Johnson, 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). This Court has held, in the wake of Johnson, that the § 924(c)(3)'s residual clause remained valid. See United States v. Taylor, 814 F.3d 340, 375-76 (6th Cir. 2016), cert. denied, 138 S. Ct. 1975, 201 L. Ed. 2d 247 (May 14, 2018), rehr'g denied, 138 S. Ct. 2646, 201 L. Ed. 2d 1045 (June 11, 2018). The Supreme Court, however, has now resolved the circuit split, holding that § 924(c)(3)'s residual clause, like that in the ACCA, is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). Davis effectively invalidated Taylor, and it is now clear that a conviction for conspiracy to commit Hobbs Act robbery cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B) as was done here. It also does not fall within the scope of the elements clause, § 924(c)(3)(A)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petition was the defendant in the case below, United States of America vs. Bernard Edmond, United States District Court for the Eastern District of Michigan, Case Number 11-cr-20188 and on appeal in Case No. 20-1929

The United States of America was the plaintiff in the case below and is the Respondent herein.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOW COMES the Petitioner, BERNARD EDMOND, by and through his assigned attorney, SANFORD A. SCHULMAN, and respectfully requests this Honorable Court grant this Petition for Writ of Certiorari and to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit Court, entered in the above-entitled proceeding on August 22, 2022 and the Order Denying the Petition for Rehearing and Rehearing *En Banc* entered on September 22, 2022.

The District Court and the Sixth Circuit Court of Appeals erroneously denied the petitioner's motion to vacate, set aside or correct the sentence pursuant to 28 USC Sec. 2255 arguing that the conviction for conspiracy to commit Hobbs Act robbery should not be sustained as a predicate crime of violence for purpose of a conviction under the residual clause of Sec. 924©(3)(B).

OPINIONS BELOW

The petitioner was arraigned and charged in a Third Superseding Indictment. (Appendix A: Third Superseding Indictment, R. 109, pp 1-20). The petitioner was sentenced on October 27, 2016 and a Judgment as to BERNARD EDMOND was entered by the trial court. (Appendix B: Judgment: October 28, 2016)

The petitioner in pro se filed a habeas petition which was denied on December 7, 2019 (Appendix F, R. 360-1, PgID 4981-4986 and Appendix G, Order Denying Motion for Reconsideration and Granting Certificate of Appealability, R. 412, PgID 5363-5364) The petitioner filed a timely appeal and the Sixth Circuit issued and Opinion affirming the district court's denial of relief and later denied the petitioner's request for rehearing en banc.

JURISDICTION

This Court has jurisdiction to grant this Petition for Writ of Certiorari and address the issue of whether a handwriting expert should have been appointed; whether the Sixth Circuit Court of Appeals erroneously decided that the petitioner's predicate offense for his Sec. 924© is the conspiracy charge and not the substantive carjacking offenses and based on this Court's decision in Johnson v. United States, the residual

clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii) was found to be unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Johnson, 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). This Court has held, in the wake of Johnson, that the § 924(c)(3)'s residual clause remained valid. See United States v. Taylor, 814 F.3d 340, 375-76 (6th Cir. 2016), cert. denied, 138 S. Ct. 1975, 201 L. Ed. 2d 247 (May 14, 2018), rehr'g denied, 138 S. Ct. 2646, 201 L. Ed. 2d 1045 (June 11, 2018). This Court, however, has now resolved the circuit split, holding that § 924(c)(3)'s residual clause, like that in the ACCA, is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). Davis effectively invalidated Taylor, and it is now clear that a conviction for conspiracy to commit Hobbs Act robbery cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B) as was done here. It also does not fall within the scope of the elements clause, § 924(c)(3)(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. **USCS Const. Amend. 5**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2, **18 USCS §924©(3)(A).**

For purposes of this subsection the term "crime of violence" means an offense that is a felony and—**(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

2. **18 USCS §924©(3)(B).**

For purposes of this subsection the term “crime of violence” means an offense that is a felony and—(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

INTRODUCTION

On July 9, 2013 a 23 count Third Superseding Indictment was filed charging Bernard Edmond with Count One: Conspiracy, Carjacking and Attempted Carjacking, Use and Carrying a Firearm During and in relations to a Crime of Violence, Causing Interstate Transportation of Stolen Motor Vehicles, Falsification and Removal of Motor Vehicle Identification Numbers, Trafficking in Motor Vehicle with Falsified Altered or Removed Identification Numbers and Operating a Chop Shop) (R. 109, pp 1-20, Appendix A: Third Superseding Indictment)

The Government alleged that beginning in 2009 the Detroit Police Department began investigating allegations of vehicles that were stolen and retagged in the Detroit area. Mr. Edmond was investigated and several searches were conducted. However, it was not until October, 2010 that there was any allegation of carjacking. (R. 109, pp 1-20, Third Superseding Indictment, Pg Id 435-454).

In early 2011 several carjackings were reported from various locations throughout the city of Detroit. The carjackings continued until March, 2011 and a minivan associated with the carjackings was owned by Stratford Newton’s father was located in the possession of Kayla Grady, Mr. Newton’s girlfriend. The Government theorized that Bernard Edmond created a market for the theft of the high-end and sport utility vehicles and purportedly would compensate for domestic and foreign vehicles. The Government suggested that an individual named Omar Johnson would interact with

Stratford Newton, Phillip Harper, Frank Harper, Justin Bowman and Darrell Young. (Appendix A,. 109, pp 1-20, Third Superseding Indictment, Pg Id 435-454).

There was no evidence, however, or testimony or even suggestion that Mr. Edmond was present during any carjackings and that the vehicles were stolen spontaneously by various individuals. (R. 166, Tr. 9/3/2013, p. 164, 168-169; Pg ID 1673, 1677-1678). In fact, on one such occasion Mr. Newton stated he got the idea from a t.v. show. (R. 166, Tr. 9/3/2013, p. 179; Pg ID 1688).

There was no phone records or testimony that Mr. Newton or Mr. Bowman had any contact with Bernard Edmond. (R. 169, Transcript 9/11/13, Pg. 92, 95-96; Pg ID No. 2237, 2240-2241). Nevertheless, Mr. Newton, Mr. Bowman and the lead agent, Alan Southard, testified before the grand jury that there had been telephone communication between Mr. Edmond and the other co-defendants as it relates to stealing and selling the vehicles. Based on this testimony Bernard Edmond was indicted. (R. 169, Transcript 9/11/13, Pg. 92, 95-96; Pg ID No. 2237, 2240-2241). However, at trial the very opposite testimony was presented, and it was clear that the testifying cooperating witnesses not only did not speak with Mr. Edmond, but did not even have his phone number or contact information. (R. 166, Tr. 9/3/2013, p. 157-159, 162, Pg ID 1666-1668, 1671).

The defendant, Bernard Edmond, was specifically charged with an October 14, 2010 carjacking from Club Elysium where three vehicles were taken including a 2010 GMC Yukon, a 2009 Chrysler Aspen and a 2006 Mercury Milan. The vehicles were later recovered. (R. 168, Trial Tr. 9/10/13, p. 27, Pg ID 1932).

Amongst the vehicles stolen, it was alleged that on December 10, 2010 Darrell Young stole a 2009 Mercedes Benz S550 from a woman who handed him her keys and on March 12, 2011, it was alleged that Phillip Harper attempted to steal a 2011 Porsche Panamera 4s from the valet of the Greektown Casino. (R. 168, Trial Tr. 146-168, Pg ID 2051-2073).

The defense argued that the alleged carjackings were spontaneous and no evidence that Mr. Edmond suggested, requested, encouraged or even assisted in the thefts or the carjackings. (R. 166, Pg. 164-168-169, Pg ID 1673, 1677-1678). Moreover, there was no evidence that Mr. Edmond had any nexus or connection to any of the firearms purportedly used. (R. 166, Pg 164, 179, Pg ID 1673, 1688).

On September 17, 2013 the jury returned a verdict of guilty to Conspiracy; four counts of Carjacking, three counts of Use and Carrying a Firearm During and in relations to a Crime of Violence, one count of Causing Interstate Transportation of Stolen Motor Vehicles, two counts of Falsification and Removal of Motor Vehicle Identification Number, two counts of Trafficking in Motor Vehicle with Falsified Altered or Removed Identification Numbers and one count of Operating a Chop Shop. (R. 183, Trial transcripts 9/17/2013, p 13-14, Pg ID 3373-3374)

On October 27, 2014, the appellant was sentenced to 60 months to be served concurrent with Counts 2-7, 12 and 18-22 and 180 months on each count to be served concurrently with one another and to all other counts. Count 4s: 240 months to be served concurrently to all other counts. Counts 18s through 22s: 120 months, each count, to be served concurrently and concurrent to all other counts. Count 3s: 60 months to be served consecutive to Counts 1s, 2s, 4s through 7s, 12s, and 17s through 22s. Count 5 and 7 each 25 years to be served consecutive to all other counts for a total

of 75 years. (R. 235, Sentencing Tr., pp 1-40; Pg Id 4112-4152 and R. 210, Judgment, 3720-3727) (APPENDIX B: Judgment as to BERNARD EDMOND)

The case was remanded for resentencing considering the Supreme Court's decision in Dean v. United States, 137 S. Ct. 1170, 197 L. Ed. 2d 490 (2017). On May 9, 2018 an Amended Judgment was entered imposing the following amended sentence: Counts 1s and 17s: 1 day on each count to be served concurrent with Counts 2s, 3s, 4s, 5s, 6s, 7s, 12s and 18s through 22s. Counts 2s, 6s, 12s and 22s: 1 day on each count to be served concurrently with one another and to all other counts. Count 4s: 1 day to be served concurrently to all other counts. Counts 18s through 22s:1 day, each count, to be served concurrently and concurrent to all other counts. Count 3s: 60 months to be served consecutive to Counts 1s, 2s, 4s through 7s, 12s, and 17s through 22s. Count 5s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s, 4s, 6s, 7s, 12s and 17s through 22s. Count 7s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s, 4s, 5s, 6s, 12s and 17s through 22s. (R. 311, Appendix C Amended Judgment, PgID 4680-4687).

On August 20, 2018, the defendant filed in pro per a Motion Under 28 USC Sec. 2255 to Vacate, Set Aside, Or Correct the Sentence Imposed. In his motion the petitioner asserts that his convictions for 18 USC Sec. 924© and Using and Carrying a Firearm During and in Relation to a Crime of Violence should be vacated because the residual clause contained in 18 U.S.C. Sec. 924© is unconstitutional vague. (Appendix D; R. 317, Motion to Vacate Sentence under 28 U.S.C. 2255, PgID 4733-4762 and R. 318 Notice of Filing Motion PgID 4763)

On December 7, 2019, appointed counsel filed a Supplemental Brief in Support of the defendant's motion. (Appendix E: R. 360, Supplemental Brief, PgID 4961-4980)

On September 14, 2020 the court held oral argument. (R. 419, Transcripts, PgID 5523-5538) and later that day the defense submitted a supplemental brief with additional authority. (Appendix F, R. 400, Supplemental Brief, PgID 5276-5280).

On September 15, 2020, the trial Court issued an ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 USC § 2255 (R. 401, Order Denying Defendant's 2255 Motion, PgID 5281-5290). The trial Court accurately stated the issue before the court: "[d]efendant argues that his convictions for conspiracy to commit carjackings similarly do not support his 924(c) convictions because they do not fall within the scope of the statute's elements clause and the residual clause has been declared unconstitutionally vague." (Appendix H: District Court's ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 USC § 2255, R. 401)

The trial court erroneously concluded as follows:

"However, defendant's argument falls apart because his 924(c) convictions are not based on charges of conspiracy to commit carjacking. Rather, his three § 924(c) counts were each based on a predicate substantive carjacking count. The third superseding indictment specifies that each § 924(c) is based on one substantive carjacking count. (ECF No. 109: Third Superseding Indictment, 442-44, 447). The government's closing argument is consistent with the indictment. (ECF No. 181: Trial Tr., 3159) ("And so we have the carjackings and the gun charges. They are paired together in order. There are seven of them. So we have Count 2. That will be a carjacking. The gun for that is right behind it, Count 3. Then we go like that all the way

through to Count 15."). The verdict form has identical pairings. (ECF No. 137: Verdict Form, 733-34)." (R. 401).

A week later, on September 22, 2020, the defendant filed a timely Notice of Appeal. (R. 404, Notice of Appeal, PgID 5314). On October 2, 2020 the defense requested reconsideration and sought a certificate of appealability. (R. 407, Motion for Certificate of Appealability and Motion for Reconsideration, PgID 5319-5326)

However, on October 21, 2020 the trial court denied the motion for reconsideration but granted the defense motion for a certificate of appealability not that the court "finds that reasonable jurists could debate whether the carjacking charges defendant was convicted of under a coconspirator theory of liability (Pinkerton conspiracy) qualify as substantive crimes of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) (R. 412, Order Denying Defendant's Motion for Reconsideration and Granting Motion for Certificate of Appealability, PgID 5365).

The Sixty Circuit affirmed the lower court's judgment in an unpublished opinion. (Appendix I: Opinion of Sixth Circuit Court of Appeals, R. 43-2)

STATEMENT OF THE CASE

The trial court noted that the issues presented is whether the residual clause of 18 U.S.C. sec 924(c) is unconstitutionally vague considering the reasoning of the Supreme Court in Sessions v. Dimaya, 138 S.Ct. 1204 (2018) and Johnson v. United States, 135 S.Ct. 2551 (2015). As the Sixth Circuit Court of Appeals has noted and this Court is aware the Supreme Court has since held that the residual clause of section 924(c)(3)(B) is unconstitutionally vague. United States v. Davis, 139 S.Ct. 2319 (2019); United States v. Ledbetter, 929 F.3d 338, 361 (6th Cir. 2019) (setting aside 924(c) conviction that relied on residual clause).

Section 924(c) provides enhanced penalties for anyone who "uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," "during and in relation to a crime of violence." 18 U.S.C. § 924(c)(1)(A). As relevant here, an individual convicted of a crime of violence during which a firearm is discharged is subject to a mandatory minimum sentence "in addition to the punishment provided" for the underlying crime of violence. 18 U.S.C. § 924(c)(1)(A)(iii).

Section 924(c)(3) defines "crime of violence" as "an offense that is a felony" and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.18 U.S.C. § 924(c)(3). Courts commonly refer to § 924(c)(3)(A) as the "force clause" or "elements clause" and to § 924(c)(3)(B) as the "residual clause."

Bernard Edmond was charged with and convicted under Section 924©(3)(B) which is the residual clause of the firearm statute. The facts as described by the Sixth Circuit Court of Appeals in the initial appeal as follows: “The jury convicted Edmond of one count of conspiring to commit carjackings, three carjackings through a co-conspirator theory of liability, and one attempted carjacking, also through a co-conspirator theory. To prove the conspiracy charge, the government had to show: “(1) that the conspiracy was willfully formed and was existing at or about the time alleged; (2) that the defendant voluntarily became a member of the conspiracy; (3) that one of the conspirators knowingly committed an overt act; and (4) that the overt act was knowingly done in furtherance of the conspiracy.” United States v. McGahee, 257 F.3d 520, 530 (6th Cir. 2001).

The Sixth Circuit, in the original appeal found that the evidence met these requirements. As to the first two elements, the defendants intentionally formed a conspiracy, and Edmond willfully participated in it through an assortment of acts. He bought and sold cars carjacked by the Harpers and their cohorts. He falsified titles and vehicle identification numbers and paid others to do so. He knew that the cars had been carjacked. And he paid more for stolen vehicles that included the keys, a premium that encouraged carjackings, as opposed to less dangerous forms of vehicle theft. Obtaining the keys often means taking them physically from a person, as most individuals do not lightly part with the keys to expensive pieces of property.

As to the third and fourth elements, Edmond's co-conspirators knowingly committed overt acts (carjackings and an attempted carjacking), and they did so to further the ends of the conspiracy. The same evidence that supports the brothers' carjacking convictions supports these elements. Faced with considerable evidence of Edmond's pivotal role in the conspiracy, the jury had good reason to find that the carjackings were "reasonably foresee[able]" results of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 648 (1946).

Most relevant to the case at bar is the Sixth Circuit Court of Appeals summary of the gun charge. The Sixth Circuit noted that "the district court instructed the jury that it could convict Edmond of the § 924(c) violations under a co-conspirator theory of liability. The question for the jury was this: "Was the use of a firearm in connection with the carjackings reasonably foreseeable? See United States v. Myers, 102 F.3d 227, 237 (6th Cir. 1996). It is clear that the firearm convictions were obtained pursuant to § 924(c)(3)(B) commonly referred to as the "residual clause" which has been deemed

unconstitutional and the defendant's convictions for the firearm convictions fall directly on point and are similarly invalid.

REASONS IN SUPPORT OF GRANTING WRIT OF CERTIORARI

In Johnson v. United States, the Supreme Court invalidated the so-called residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Johnson, 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). This Court has held, in the wake of Johnson, that the § 924(c)(3)'s residual clause remained valid. See United States v. Taylor, 814 F.3d 340, 375-76 (6th Cir. 2016), cert. denied, 138 S. Ct. 1975, 201 L. Ed. 2d 247 (May 14, 2018), rehr'g denied, 138 S. Ct. 2646, 201 L. Ed. 2d 1045 (June 11, 2018).

Justice Thomas in his dissent in Johnson comments on the problems that have arisen in the application of the US Supreme precedent. He writes:

"To the contrary, the last three years have instead shown how our §924(c) precedents have "left prosecutors and courts in a bind." Borden, 593 U. S., at ___, 141 S. Ct. 1817, 210 L. Ed. 2d 63, at 83 (Thomas, J., concurring in judgment). Section 924(c)'s residual clause—which squarely applies to the mine run of violent crimes—is no longer available. The categorical approach, meanwhile, forecloses §924(c)'s elements clause unless, in every hypothetical prosecution, the crime of conviction requires the Government to prove that physical force against another was used, attempted, or threatened. In case after case, our precedents have compelled courts to hold that heinous crimes are not "crimes of violence" just because someone, somewhere, might commit that crime without using force.

A few examples from the Courts of Appeals demonstrate how our precedents have emasculated §924(c). First, in United States v. Walker, 934 F. 3d 375 (2019), the Fourth Circuit considered whether a conviction for federal kidnaping could predicate a §924(c) conviction. See id., at 376 (citing §1201(a)). Walker and an accomplice had kicked in the door of a family's home, held the victims at gunpoint, beat some of them, demanded money, and threatened to kill the family's 4-year-old daughter, all before locking the family in a closet and ransacking the house. Factual Basis for Guilty Plea in United States v. Walker, No. 14-cr-00271, ECF Doc. 13 (MDNC, Nov. 3, 2014). No one could dispute that Walker's conduct presented a "substantial risk that physical force" would be used "in the course of committing the offense." §924(c)(3)(B). Yet, because of Davis, the Fourth Circuit could not invoke the residual clause. See Walker, 934 F. 3d, at 378. That left only §924(c)(3)'s elements clause, interpreted according to the inflexible categorical approach. Compelled to imagine whether federal kidnaping could hypothetically be committed without the use of physical force, the Fourth Circuit ultimately vacated Walker's §924(c) conviction because a criminal could commit the offense by "inveigl[ing]" a victim and then holding him in captivity with a "mental restraint." Id., at 378-379 (emphasis deleted).4

Second, in United States v. Tsarnaev, 968 F. 3d 24 (CA1 2020), reversed on other grounds, 595 U. S. ___, 142 S. Ct. 1024, 212 L. Ed. 2d 140 (2022), the First Circuit considered whether a terrorist's conviction for federal arson—which he committed in the course of carrying out the Boston Marathon bombings—counted as a crime of violence under §924(c). Tsarnaev and his brother intentionally detonated bombs that killed three people, including an 8-year-old, and injured hundreds more. See id., at ___-___, 142 S. Ct. 1024, 212 L. Ed. 2d 140, at 162. Yet, the categorical-

approach precedents led the First Circuit to the admittedly "counterintuitive" conclusion that federal arson resulting in death arising from a terrorist bombing was not a crime of violence. Tsarnaev, 968 F. 3d, at 102. The residual clause had been nullified, id., at 99, and the First Circuit held that federal arson did not satisfy the elements clause because it theoretically could have been committed recklessly, id., at 102,5 which, we have held in the ACCA context, renders a crime outside the elements clause, see Borden, 593 U. S., at ___-___, 141 S. Ct. 1817, 210 L. Ed. 2d 63 (plurality opinion).

Finally, in United States v. Ledbetter, 929 F. 3d 338 (CA6 2019), the Sixth Circuit vacated two convictions under 18 U. S. C. §924(j), which criminalizes "caus[ing] the death of a person through the use of a firearm" "in the course of a violation of " §924(c). 929 F. 3d, at 360-361. The two defendants were associated with a gang called the "Short North Posse." Id., at 359. One belonged to a subunit of the gang, appropriately named the "'Homicide Squad,'" which "specializ[ed] in murders and robberies." Id., at 345. In August 2007, they joined a team of gang members who broke into a home and shot a victim to death. Id., at 359. Section 924(c)'s residual clause would have covered the defendants' conduct, given that there is obviously a "substantial risk that physical force" would be "used in the course of " a gangland home-invasion murder. §924(c)(3)(B). But Davis had nullified that clause, and the Government conceded that conspiracy to commit Hobbs Act robbery—the predicate crime for the defendants' §924(j) convictions—was not a crime of violence under this Court's elements-clause precedents. 929 F. 3d, at 360-361. These are not the only homicide-related §924 convictions that Davis has undermined.6

These examples show how our precedents have led the Federal Judiciary to “a pretend place.” United States v. Davis, 875 F. 3d 592, 595 (CA11 2017). With the residual clause nullified, courts cannot look to it to capture violent crimes. And, because of the categorical approach, the elements clause often does not apply because “other defendants at other times may have been convicted, or future defendants could be convicted, of violating the same statute without violence.” Ibid. Like Alice, we have strayed far “down the rabbit hole,” and “[c]uriouser and curiouser it has all become.” Ibid.” United States v. Taylor, 142 S. Ct. 2015, 2030-31 (2022)

One thing is clear, § 924(c)(3)'s residual clause, like that in the ACCA, is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019) and a conviction for conspiracy to commit Hobbs Act robbery cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B) as was done here. It also does not fall within the scope of the elements clause, § 924(c)(3)(A).

A conviction for conspiracy to commit Hobbs Act robbery cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B). It also does not fall within the scope of the elements clause, § 924(c)(3)(A). The defendant was charged with conspiracy to commit carjacking and the Government failed to charge Pinkerton in the indictment and their trial conspiracy was conspiracy the only connect the defendant had to the carjacking alleged. That conspiracy to commit the carjackings as charged in the Indictment "is no longer a valid predicate for a § 924(c) conviction after Davis because its use as a §924(c) predicate relied on the now invalidated risk-of-force or residual clause.

Applying the categorical approach in the case at bar, Pinkerton is not an element of the offense of conspiracy to commit carjacking, the defendant was not charged with carjacking but instead was charged with conspiracy to commit carjacking and pursuant to 371 and carjacking only listed as an overt act. The carjacking is only listed under the conspiracy. The categorical application therefore would require the court to examine the elements which does not include a reasonably foreseeable element. The element of "reasonably foreseeable" is not an element of the offense and was applied pursuant to 924©(3)(B)'s residual clause that has been deemed invalid.

The trial court and the appellate courts analysis is erroneous because the indictment does not charge appellant under a Pinkerton theory. Indeed, the Government's argument is that the charged 924(c) counts are for the actual carjacking and not the conspiracy. The indictment charges the offense under a conspiracy charge, and they had to do that because it was clear that Edmonds was not part of any carjackings. He was never present and did nothing to promote them. They were done without his knowledge. As such, the trial court should have examined the specific facts associated with this defendant. Pinkerton does not have as an element the use of force

ARGUMENT:

I. The trial and Sixth Circuit Court of Appeals erroneously decided that the petitioner's predicate offense for his Sec. 924© is the conspiracy charge and not the substantive carjacking offenses and in Johnson v. United States, the Supreme Court invalidated the so-called residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Johnson, 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). This Court has held, in the wake of Johnson, that the § 924(c)(3)'s residual clause remained valid. See United States v. Taylor, 814 F.3d 340 (6th Cir. 2016), cert. denied, 138 S. Ct. 1975, 201 L. Ed. 2d 247 (May 14, 2018), rehr'g denied, 138 S. Ct. 2646, 201 L. Ed. 2d 1045 (June 11, 2018). This Court has now resolved the circuit split, holding that § 924(c)(3)'s residual clause, like that in the ACCA, is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). Davis effectively invalidated Taylor, and it is now clear that a conviction for conspiracy to commit Hobbs Act robbery cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B) as was done here. It also does not fall within the scope of the elements clause, § 924(c)(3)(A)?).

In Johnson v. United States, supra, this Court invalidated the so-called residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Johnson, 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). Since then, courts and litigants have continued to grapple with the full import of Johnson both with respect to how it affects the interpretation of the still-valid parts of the ACCA and how it pertains to other similarly worded statutes.

While other circuit courts disagreed, the Sixth Circuit had held, in the wake of Johnson, that the § 924(c)(3)'s residual clause remained valid. See United States v. Taylor, 814 F.3d 340, 375-76 (6th Cir. 2016), cert. denied, 138 S. Ct. 1975, 201 L. Ed. 2d 247 (May 14, 2018), rehr'g denied, 138 S. Ct. 2646, 201 L. Ed. 2d 1045 (June 11, 2018). The Supreme Court, however, has now resolved the circuit split, holding that § 924(c)(3)'s residual clause, like that in the ACCA, is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). Davis effectively invalidated Taylor, and it is now clear that a conviction for conspiracy to commit such offenses such as Hobbs Act robbery or carjacking cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B). It also does not fall within the scope of the elements clause, § 924(c)(3)(A).

In Taylor, 814 F.3d at 379, the appellate court erroneously held that the residual clause of § 924(c)(3), despite its similarities to the residual clause in the ACCA, was not unconstitutionally vague. That holding was abrogated by Davis, in which this Court held that the residual clause of § 924(c)(3) is unconstitutionally vague. Davis, 139 S. Ct. at 2324. In that case, the Fifth Circuit had held that the defendants' convictions for Hobbs Act robbery qualified as predicate crimes of violence under the elements clause of §

924(c) but that their conviction for Hobbs Act conspiracy qualified only under the residual clause of § 924(c), which it found to be unconstitutionally vague. 903 F.3d 483, 486 (5th Cir. 2018) (per curium), cited in Davis, 139 S. Ct. at 2325. The court therefore vacated the § 924(c)(1)(A) conviction that was predicated upon Hobbs Act conspiracy. The defendant in the case at bar, Bernard Edmonds, presents the identical argument.

Indeed, this Court affirmed Davis, 139 S. Ct. at 2336 ("We agree . . . that § 924(c)(3)(B) is unconstitutionally vague."). The government in Davis did not attempt to argue that Hobbs Act conspiracy qualified under the elements clause as a predicate crime of violence, and this Court did not expressly reach that question. However, it did hold that courts must apply the "categorical" approach, rather than a case-specific approach, in determining whether an offense is a crime of violence under § 924(c). Davis, 139 S. Ct. at 2326-32.

Since Davis, various circuits have addressed this issue post-Davis including the Second Circuit Court of Appeals case of United States v. Barrett, 937 F.3d 126 (2d Cir. 2019) in the case of Defendants' convictions on the brandishing charge in Count 2 of the Indictment were predicated on their convictions of the Hobbs Act conspiracy alleged in Count 1. It is now established that Hobbs Act conspiracy is not a crime of violence within the meaning of § 924(c). See United States v. Barrett, 937 F.3d 126 (2d Cir. 2019) ("Barrett II").

In United States v. Barrett, 903 F.3d 166 (2d Cir. 2018) ("Barrett I"), vacated and remanded for further consideration, 139 S. Ct. 2774, 204 L. Ed. 2d 1154 (2019), the circuit court affirmed the defendant's convictions on several § 924(c) counts that were predicated on Hobbs Act robbery (see Part II.B.3 below), and had affirmed one § 924(c) conviction that was predicated on Hobbs Act conspiracy. The appellate court affirmed

the latter § 924(c) conviction based in part on § 924(c)(3)(B) because Hobbs Act conspiracy (an offense that is complete without performance of any overt act see, e.g., United States v. Maldonado-Rivera, 922 F.2d 934, 983 (2d Cir. 1990), cert. denied, 501 U.S. 1211, 111 S. Ct. 2811, 115 L. Ed. 2d 98 (1991); United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987), cert. denied, 486 U.S. 1022, 108 S. Ct. 1995, 108 S. Ct. 1996 (1988)), poses a risk of the use of force, see Barrett I, 903 F.3d at 175-77.

While the present appeals were pending, this Court decided United States v. Davis, U.S. , 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), ruling that§ 924(c)(3)(B), in defining crime of violence in terms of a "risk" that physical force would be used, was unconstitutionally vague, see 139 S. Ct. at 2323-24. As "a vague law is no law at all," id. at 2323.

This Court then went on to address § 924(c)(3)(A). It had previously affirmed Barrett's Count Two conviction based, in part, on its conclusion that "Hobbs Act robbery conspiracy could be categorically identified as a crime of violence by reference only to its elements." 2019 U.S. App. LEXIS 26461, [WL] at 2. Post-Davis, however, the court recognized that its "elements-based conclusion . . . depended on both § 924(c)(3)(A) and § 924(c)(3)(B). The Court reasoned that where the elements of a conspiracy's object crime (here, Hobbs Act robbery) establish it as a categorical crime of violence under § 924(c)(3)(A), the agreement element of a conspiracy categorically establishes the 'substantial risk' of violence under § 924(c)(3)(B)." Id.

Although this Court did not adopt this "hybrid approach," since the issue was not presented to it, the Second Circuit read Davis as foreclosing that approach, insofar as it depended in part on § 924(c)(3)(B), which this Court had left "no longer valid in any form." 2019 U.S. App. LEXIS 26461, [WL] at 3. The appellate court therefore concluded

that the Hobbs Act conspiracy conviction did not fall within § 924(c)(3)(A) either. Accord United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019) (holding, pre-Davis, that conspiracy to commit Hobbs Act robbery "does not categorically qualify as a crime of violence under the elements-based categorical approach, as the United States now concedes," and that the residual clause of § 924(c)(3)(B) is unconstitutionally vague, and, therefore, vacating a conviction under § 924(c)(1) predicated on conspiracy to commit Hobbs Act robbery).

This court should also be guided by the United States v. Rodriguez, 2020 U.S. Dist. LEXIS 66715 (S.D.N.Y. Apr. 15, 2020) and United States v. Begay, 934 F.3d 1033 (9th Cir. 2019)

The Sixth Circuit has not directly addressed the issue, but several district courts have. In the case of McQuiddy v. United States, No. 3:16-cv-02820, 2019 U.S. Dist. LEXIS 172815 (M.D. Tenn. Oct. 3, 2019), the district court indicated that it was persuaded that (1) Davis requires a categorical approach to §924(c)(3)(A) as well as to § 924(c)(3)(B) and (2) Hobbs Act conspiracy is not categorically a crime of violence under the elements clause of § 924(c)(3)(A). Under Davis, § 924(c)(3)(B) is unconstitutionally vague. The district court in McQuiddy concluded that McQuiddy's conviction under 18 U.S.C. § 924(c)(1) must be vacated.

The Sixth Circuit issued an opinion in United States v. Ledbetter, 929 F.3d 338 (6th Cir. 2019) just one month after Davis. In Ledbetter, our Sixth circuit considered a case involving similar issues. The relevant facts were summarized as follows: “For their participation in the Cunningham home invasion and Moon murder, Harris and Robinson were also convicted of murder by firearm during a crime of violence, 18 U.S.C. § 924(c), (j)(1). Here, the purported "crime of violence" was conspiracy to commit Hobbs Act

robbery, which makes it a crime to conspire to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a).

Section 924(c)(3) defines "crime of violence" in two ways, but the parties agree that conspiracy to commit Hobbs Act robbery qualifies only if it meets § 924(c)(3)(B)'s residual definition. By that definition, a "crime of violence" is a felony offense "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." § 924(c)(3)(B).

In the case at bar the conspiracy charge to which Bernard Edmond was convicted cannot qualify under the elemental clause in section 924(c)(3)(A), because it does not require proof of any element directly implicating the use of force. In United States v. Simms, 914 F.3d 229 (4th Cir. 2019), the Fourth Circuit sitting en banc held that "conspiracy to commit Hobbs Act robbery [] does not categorically qualify as a crime of violence under the elements-based categorical approach[,] because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act[, and] such an agreement does not invariably require the actual, attempted, or threatened use of physical force," id. at 233-34.

Similarly, in United States v. Davis, 903 F.3d 483 (5th Cir. 2018), the Fifth Circuit held that "conspiracy to commit an offense is merely an agreement to commit an offense. Therefore . . . the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force," id. at 485. The Fifth Circuit went on to conclude that section 924(c)(3)(B) was unconstitutionally vague, and

its holding on that point was affirmed by the Supreme Court in Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757, although the judgment was vacated on other grounds.

Edmond is in the identical situation and argues that his convictions under § 924(c) must be set aside because § 924(c)(3)(B)'s residual clause is unconstitutionally vague. The Supreme Court has now held that § 924(c)(3)(B)'s residual definition is unconstitutionally vague. See United States v. Davis, No. 18-431, 139 S. Ct. 2319, 204 L. Ed. 2d 757, 2019 U.S. LEXIS 4210, 2019 WL 2570623 at *13 (June 24, 2019). Because the Government relies only on that now-invalidated clause to support Edmond's convictions under § 924(c), those convictions must be set aside. United States v. Ledbetter, 929 F.3d 338, 360-61 (6th Cir. 2019)

The issues presented have been the subject of recent law review articles most relevant and cited by several district courts being: *Plagued By Vagueness: The Effect of Johnson v. United States and the Constitutionality of 18 U.S.C. § 924(c)(3)(B)*, 54 No. 4 Crim. Law Bulletin ART 3 (Summer 2018).

Indeed, the Middle District of Tennessee was presented with the identical issue in the 2255 petition filed by Demario Winston. Judge David M. Lawson issued an Opinion and Order granting Motion to Vacate. Demario Winston vs. United States of America, Case No. 16-00865, Criminal Case Number 11-00012).

A. A conviction for conspiracy to commit Hobbs Act robbery cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B). It also does not fall within the scope of the elements clause, § 924(c)(3)(A). The defendant was charged with conspiracy to commit carjacking and the Government failed to charge Pinkerton in the indictment and their trial conspiracy was conspiracy the only connect the defendant had to the carjacking alleged. That conspiracy to commit the carjackings as charged in the Indictment "is no longer a valid predicate for a § 924(c) conviction after Davis because its use as a §924(c) predicate relied on the now invalidated risk-of-force or residual clause.

In the case at bar, Bernard Edmond was convicted under 18 U.S.C. § 924(c), which prohibits possession of a firearm during commission of or in relation to a crime of violence. That statute, as applied to Mr. Edmonds case carries a mandatory minimum sentence of five years. 18 U.S.C. § 924(c)(1)(A). Section 924(c) defines "crime of violence" as a felony that: "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Id. The first clause is commonly referred to as the elements clause while the second is known as the residual clause. United States v. Jackson. 918 F.3d 467, 485 (6th Cir. 2019).

In light of Dimaya and Davis, the defendant, Bernard Edmonds petition warrants sentencing relief because his offense for which he was convicted meets the definition of a crime of violence under the elements clause of § 924(c)(3)(B), which has been invalidated. In Davis, this Court scrutinized the language of section 924(c)(3)(B), applying the principles announced by it in Johnson and Dimaya. Based on those principles, this Court held that the identically worded penalty provision in section 924(c)(3)(B) also is unconstitutionally vague. Id. at 2336. Thus, deprived of any constitutionally sound footing under the now defunct residual clause.

This Court should be guided by Federal District Court Judge David M. Lawson's Opinion and Order Granting Motion to Vacate Sentence in the case of Demario Winston vs. United States of America, habeas petition filed in Middle District of Tennessee, Nashville Division, civil case No. 16-00865 and Criminal Case Number 11-00012. In Winston, Judge Lawson was confronted with the identical issue at bar. The application of the Supreme Court decisions in Johnson vs. United States and more recently

Session v. Dimaya and United States vs. Davis. Like Davis and Winston, Mr. Edmonds argues that his conviction under 18 USC Sec. 924© has been rendered unconstitutional because the conspiracy offense charged could qualify as a crime of violence only under the residual clause, which the US Supreme Court has found unconstitutional. As such, the 924(c) convictions must be vacated and, like Winston, remanded for resentencing.

Judge Lawson noted in Winston that under section 1951(a) of Title 28, persons may be convicted of conspiracy to commit Hobbs Act Robbery where they "conspire to 'in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery.'" United States v. Ledbetter, 929 F.3d 338, 360-61 (6th Cir. 2019) (quoting 18 U.S.C. § 1951(a)). The Ledbetter court observed that "conspiracy to commit Hobbs Act robbery qualifies only if it meets § 924(c)(3)(B)'s residual definition," and, following the invalidation of that clause in Davis, held that the 924(c) convictions predicated on the conspiracy offense must be vacated. Id. at 361.

Other courts of appeals that squarely have addressed the issue similarly have concluded that conspiracy to commit Hobbs Act Robbery cannot qualify under the elemental clause in section 924(c)(3)(A), because it does not require proof of any element directly implicating the use of force. In United States v. Simms, 914 F.3d 229 (4th Cir. 2019), the Fourth Circuit sitting en banc held that "conspiracy to commit Hobbs Act robbery [] does not categorically qualify as a crime of violence under the elements-based categorical approach[,] because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act[, and] such an agreement does not

invariably require the actual, attempted, or threatened use of physical force," id. at 233-34.

Similarly, in United States v. Davis, 903 F.3d 483 (5th Cir. 2018), the Fifth Circuit held that "conspiracy to commit an offense is merely an agreement to commit an offense. Therefore . . . the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force," id. at 485. The Fifth Circuit went on to conclude that section 924(c)(3)(B) was unconstitutionally vague, and its holding on that point was affirmed by the Supreme Court in Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757, although the judgment was vacated on other grounds.

The Government recognizes that the residual clause of 18 U.S.C. sec 924(c) is unconstitutionally vague considering the reasoning of the Supreme Court in Sessions v. Dimaya, 138 S.Ct. 1204 (2018) and Johnson v. United States, 135 S.Ct. 2551 (2015). In light of the Supreme Court cases, the Sixth Circuit Court of Appeals since held that the residual clause of section 924(c)(3)(B) is unconstitutionally vague as noted in United States v. Davis, 139 S.Ct. 2319 (2019); United States v. Ledbetter, 929 F.3d 338, 361 (6th Cir. 2019) (setting aside 924(c) conviction that relied on residual clause).

Indeed, on June 24, 2019, this Court Davis extended its holdings in Johnson and Dimaya to § 924(c) and held that § 924(c)(3)(B)'s residual clause, like the residual clauses in the Armed Career Criminal Act and 18 U.S.C. § 16(b), is unconstitutionally vague. Id. at 2324-25, 2336. The Court resolved a circuit split on the issue, rejecting the position that § 924(c)(3)(B)'s residual clause could remain constitutional if read to encompass a case-specific, conduct-based approach, rather than a categorical approach. Id at 2325 & n.2, 2332-33. The Court in Davis emphasized that there was no "material difference" between the language or scope of § 924(c)(3)(B) and the residual

clauses struck down in Johnson and Dimaya, and, therefore, concluded that § 924(c)(3)(B) was unconstitutional for the same reasons. Id. at 2326, 2336.

As was noted by the Sixth Circuit Court of Appeals, “the jury convicted Bernard Edmond of one count of conspiring to commit carjackings, three carjackings through a co-conspirator theory of liability, and one attempted carjacking, also through a co-conspirator theory.” United States v. Edmond, 815 F.3d 1032 (6th Cir. 2016)

To establish a Davis claim, the movant must show that it is more likely than not that he was adjudicated guilty of using or carrying a firearm during, or possessing a firearm in furtherance of, a "crime of violence" under 18 U.S.C. § 924(c)(3)(B)'s "residual clause." If it is just as likely that the movant was adjudicated guilty of using or carrying a firearm during, or possessing a firearm in furtherance of, a "crime of violence" under Section 924(c)(3)(A)'s "elements clause," the motion fails. See Cooper, 2019 U.S. Dist. LEXIS 141917, 2019 WL 3948098, at 1 (finding that a criminal defendant "may obtain relief from a 924(c) conviction [under Davis] if—but only if—the residual clause was essential to the conviction. A defendant whose conviction was or, had there been no residual clause, would have been imposed based on the element clause is not entitled to relief.") (citing Beeman, 871 F.3d 1215).

In Davis, the Supreme Court stated that in determining whether a particular offense qualifies as a "crime of violence" under Section 924(c)(3)(A)'s elements clause, courts must apply the "categorical approach." 139 S. Ct. at 2326. "In applying the categorical approach, we look only to the elements of the predicate offense statute and do not look at the particular facts of the defendant's offense conduct." United States v. St. Hubert, 909 F.3d 335, 348 (11th Cir. 2018) (citing United States v. Keelan, 786 F.3d 865, 870-71 (11th Cir. 2015)), abrogated on other grounds by Davis, 139 S. Ct. 2319,

204 L. Ed. 2d 757. "In doing so, 'we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts' qualify as crimes of violence." Id. (quoting Moncrieffe, 569 U.S. at 190-91).

If the crime, in general, "plausibly covers any non-violent conduct," then it is not a crime of violence under Section 924(c)(3)(A)'s elements clause. United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013); see also United States v. Gillis, 938 F.3d 1181, 1198-99 (11th Cir. 2019) (concluding that "McGuire's categorical approach ruling—that the text of § 924(c)(3)(A)'s elements clause requires use of the categorical approach in analyzing whether a felony offense qualifies as a crime of violence—was "necessary to [the] result," and therefore part of the holding, in that case").

In short, the Government's case and theory at trial and on appeal was that Bernard Edmond was part of a conspiracy. This was the underlying theory. The firearm(s) and even the carjacking offenses were fundamentally connected with the conspiracy. There was no other way to connect Mr. Edmond with the offenses charged and the co-defendants. Mr. Harper's case is clearly distinguishable. The residual clause of the 924 offense was entirely predicated on the conspiracy. There is no way the jury could have convicted the defendant and the instructions allowed such a verdict based entirely on the conspiracy theory.

The question now is whether the conspiracy charged as the predicate offense is invalid based on the Davis decision find the residual clause of the 924© charge. The answer is a resounding yes. The Government is now attempting to shift their theory away from their longstanding argument that under the conspiracy theory Edmond should be denied relief. It was successful on appeal even in light of the US Supreme

Court ruling in Rosemond. However, the Government cannot now argue the predicate has shifted. That is the old hidden ball trick. The US Supreme Court in Davis has invalidated the residual clause and the precedent applies here.

The fact that the government argued a co-conspirator theory of liability and that the jury was given a Pinkerton instruction does not change the fact that defendant was convicted of the substantive offenses of carjacking. “Under Pinkerton v. United States, 328 U.S. 640, 645-48 (1946), a conspirator may be convicted of a substantive offense that other conspirators commit during and in furtherance of a conspiracy. This includes a § 924(c) offense.” United States v. Woods, No. 17-20022, 2020 WL 999036, at *7 (E.D. Mich. Mar. 2, 2020). On appeal, the Sixth Circuit affirmed the Pinkerton instruction and found sufficient evidence for the jury to convict defendant of the substantive carjacking counts. United States v. Edmond, 815 F.3d 1032, 1040-41 (6th Cir. 2016). The substantive offense qualifies as a crime of violence under the elements clause, so it does not violate the holding in Davis. The carjacking convictions under a Pinkerton co-conspirator theory qualify as crimes of violence for the 924(c) counts. Therefore, contrary to defendant’s arguments, § 924(c)’s residual clause is not implicated, and Davis is not applicable. (R. 401, PgID 5286-5787)

The trial and appellate courts’ decisions, while framed correctly, fails to consider current case law as to the Pinkerton theory advanced by the prosecutor to charge the defendant under the only portion of 924© that remains constitutional under an analysis adopted by the Sixth Circuit in the two recent cases United States v. Swiney, 203 F.3d 397 (6th Cir. 2000), and United States v. Hamm, 952 F.3d 728 (6th Cir. 2020).

The general rule established by this Court in Pinkerton v. United States, 328 U.S. 640, 645 (1946), "permits the conviction of a co-conspirator for the substantive offense of other co-conspirators committed during and in furtherance of the conspiracy." United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) (conspirator held criminally liable for possessing cocaine with intent to distribute based on drugs found on co-conspirator), cert. denied, 500 U.S. 926 (1991); United States v. Lawson, 872 F.2d 179, 182 (6th Cir. 1989) (where defendant was convicted of conspiracy to make illegal firearms and co-conspirator was convicted for illegal manufacture of weapons, defendant may be held liable for substantive offense as well), cert. denied, 493 U.S. 834 (1989).

Under the Pinkerton decision, once defendant joins the conspiracy, they are responsible for any reasonably foreseeable substantive offenses committed by the coconspirators in furtherance of the conspiracy. United States v. Gilbert, 2018 U.S. App. LEXIS 4357 (6th Cir. Feb. 23, 2018).

As to guilt-stage liability for coconspirators' substantive offenses, Pinkerton has full force, and as to sentencing liability (under 21 U.S.C.S. § 841(b)(1)(C) as well as the United States Sentencing Guidelines) for coconspirators' conduct, Pinkerton has been narrowed. The scope of a defendant's relevant conduct for determining sentencing liability may be narrower than the scope of criminal liability. United States v. Hamm, 952 F.3d 728, 733 (6th Cir. 2020).

In United States v. Fuller, 2019 U.S. App. LEXIS 222 (6th Cir. Jan. 3, 2019) the Sixth Circuit held, based on Pinkerton liability, there was sufficient evidence to support defendant's convictions, which charged him as an aider and abettor with coercing and enticing a minor to engage in sexual activity.

In United States v. Nicholson, 2017 U.S. App. LEXIS 23217 (6th Cir. Nov. 17, 2017) the court instructed the jury on direct liability, aiding and abetting liability, and Pinkerton liability. Holding further that a defendant is guilty of aiding and abetting when he "takes an affirmative act in furtherance" of an offense "with the intent of facilitating the offense's commission." This is true even if that aid relates to only one (or some) of a crime's phases or elements. Under Pinkerton, all members of a conspiracy are responsible for the acts committed by the other members in advancement of the conspiracy, so long as they are reasonably foreseeable. Id.

The Pinkerton doctrine exists to punish conspirators for crimes committed by a co-conspirator that are not the object of the conspiracy itself but are foreseeable in meeting the goals of the conspiracy. United States v. Myers, 102 F.3d 227, 237 (6th Cir. 1996) (Pinkerton instruction properly given where judge explained elements of substantive offense in detail), cert. denied, 520 U.S. 1223 (1997); United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991) (defendant may be convicted under § 924(c) if co-conspirator used or carried a firearm in furtherance of conspiracy), cert. denied, 502 U.S. 1045 (1992); United States v. Davis, 809 F.2d 1194, 1203 (6th Cir. 1987) (conspirator need not know about acts of another conspirator to be held responsible for them), cert. denied, 483 U.S. 1007 (1987).

In addition, Judge Gorsuch, in writing the opinion of the court in United States v. Davis, 139 S. Ct. 2319 (2019) gave specific examples of non-violent crimes that could be made violent by (3)(c)(b)'s residual clause on page 16 or 17 of the opinion. One of those examples was someone who uses false documents and a co-conspirator uses those documents to commit a violent crime. Justice Gorsuch said using the case-specific-approach could make any nonviolent crime violent by association commented:

If the government were right, Congress would have mandated the case-specific approach in a prosecution for providing explosives to facilitate a crime of violence, 18 U. S. C. §844(o), but the (now-invalidated) categorical approach in a prosecution for providing information about explosives to facilitate a crime of violence, §842(p)(2). It would have mandated the case-specific approach in a prosecution for using false identification documents in connection with a crime of violence, §1028(b)(3)(B), but the categorical approach in a prosecution for using confidential phone records in connection with a crime of violence, §1039(e)(1). It would have mandated the case-specific approach in a prosecution for giving someone a firearm to use in a crime of violence, §924(h), but the categorical approach in a prosecution for giving a minor a handgun to use in a crime of violence, §924(a)(6)(B)(ii). It would have mandated the case-specific approach in a prosecution for traveling to another State to acquire a firearm for use in a crime of violence, §924(g), but the categorical approach in a prosecution for traveling to another State to commit a crime of violence, §1952(a)(2). And it would have mandated the case-specific approach in a prosecution for carrying armor-piercing ammunition in connection with a crime of violence, §924(c)(5), but the categorical approach in a prosecution for carrying a firearm while "in possession of armor piercing ammunition capable of being fired in that firearm" in connection with a crime of violence, §929(a)(1).There would be no rhyme or reason to any of this. Nor does the government offer any plausible account why Congress would have wanted courts to take such dramatically different approaches to classifying offenses as crimes of violence in these various provisions. To hold, as the government urges, that §16(b) requires the categorical approach while §924(c)(3)(B) requires the case-specific approach would make a hash of the federal criminal code. Davis at 2330

B. Applying the categorical approach in the case at bar, Pinkerton is not an element of the offense of conspiracy to commit carjacking, the defendant was not charged with carjacking but instead was charged with conspiracy to commit carjacking and pursuant to 371 and carjacking only listed as an overt act. The carjacking is only listed under the conspiracy. Appling Davis and the categorical application therefore would require the court to examine the elements which does not include a reasonably foreseeable element. The element of “reasonably foreseeable” is not an element of the offense and was only applied pursuant to 924©(3)(B)’s residual clause that has been deemed invalid.

This Court is faced with a nearly identical issue and analysis. To determine whether a specific conviction is a "crime of violence," the Court employs the "categorical approach" laid out in Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990) and Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). See United States v. Begay, 934 F.3d 1033, 1038 (9th Cir. 2019). Under the categorical approach, the court does not look to the facts underlying the conviction, but, instead, compares "the elements of the statute forming the basis of the defendant's conviction with the elements of a 'crime of violence.'" Id. (quoting Descamps, 570 U.S. at 257); see also United States v. Sahagun—Gallegos, 782 F.3d 1094, 1098 (9th Cir. 2015) (A court applying the categorical approach must "determine whether the [offense] is categorically a 'crime of violence' by comparing the elements of the [offense] with the generic federal definition"—here, the definition of "crime of violence" set forth in section 924(c)(3).).

The petitioner's crime cannot be a categorical 'crime of violence' if the conduct proscribed by the statute of conviction is broader than the conduct encompassed by the statutory definition of a 'crime of violence.'" United States v. Begay, 934 F.3d 1033 at 1038 (9th Cir. 2019). (Begay found that Second-degree murder did not constitute a crime of violence under the elements clause of 18 U.S.C.S. § 924(c)(3)(A) because it could be committed recklessly. That the defendant's 18 U.S.C.S. § 924(c) conviction for

discharging a firearm during and in relation to a crime of violence therefore could not stand under either the elements clause or residual clause of § 924(c)(3)

To find an offense overbroad, there must be a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct not encompassed by the generic federal definition. Gonzales v. Duenas—Alvarez, 549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007); accord United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013) (applying the "realistic probability" standard to a crime of violence determination under section 924(c)(3)). "Crimes of violence," as defined in § 924(c), requires purposeful conduct, i.e., an intentional use of force. Begay, 934 F.3d at 1039. See Duncan v. United States, No. 2:17-cv-00091-EJL, 2019 U.S. Dist. LEXIS 198866, at *4-5 (D. Idaho Nov. 15, 2019)

In Davis, this Court stated that in determining whether a particular offense qualifies as a "crime of violence" under Section 924(c)(3)(A)'s elements clause, courts must apply the "categorical approach." 139 S. Ct. at 2326. "In applying the categorical approach, we look only to the elements of the predicate offense statute and do not look at the particular facts of the defendant's offense conduct." United States v. St. Hubert, 909 F.3d 335, 348 (11th Cir. 2018) (citing United States v. Keelan, 786 F.3d 865, 870-71 (11th Cir. 2015)), abrogated on other grounds by Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757. "In doing so, 'we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts' qualify as crimes of violence." Id. (quoting Moncrieffe, 569 U.S. at 190-91).

If the crime, in general, "plausibly covers any non-violent conduct," then it is not a crime of violence under Section 924(c)(3)(A)'s elements clause. United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013); see also United States v. Gillis, 938

F.3d 1181, 1198-99 (11th Cir. 2019) (concluding that "McGuire's categorical approach ruling—that the text of § 924(c)(3)(A)'s elements clause requires use of the categorical approach in analyzing whether a felony offense qualifies as a crime of violence—was "necessary to [the] result," and therefore part of the holding, in that case").

In determining whether an offense constitutes a crime of violence under § 924(c), the Sixth Circuit uses a categorical approach. United States v. Rafidi, 829 F.3d 437 (6th Cir. 2016), citing Evans v. Zych, 644 F.3d 447, 453 (6th Cir. 2011). "Under the categorical approach, a court 'focuses on the statutory definition of the offense, rather than the manner in which an offender may have violated the statue in a particular circumstance.'" United States v. Rafidi, 829 F.3d 437 (6th Cir. 2016), citing United States v. Denson, 728 F.3d 603, 607 (6th Cir. 2013). A variant of this approach — the modified categorical approach — is used when the statute is divisible, i.e., it "sets out one or more elements of the offense in the alternative." United States v. Denson, 728 F.3d 603, 607 (6th Cir. 2013), quoting Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013). Under the modified categorical approach, a federal court may examine a limited set of documents "to determine whether the conviction necessarily depended on the commission of a crime of violence." United States v. Rede-Mendez, 680 F.3d 552, 556 (6th Cir. 2012).

This court is urged to use the modified categorical approach by which the Court "looks to a limited class of documents (for example, the indictment, jury instructions, of plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of . . . [and] can then compare that crime . . . with the relevant generic offense. . . ." Mathis v. United States, 136 S. Ct. 2243, 2248, 195 L. Ed. 2d 604 (2016)

Edmond argues that his convictions were not under 18 USC Sec. 924©(3)(A) but instead under 18 USC Sec. 924(C)(3)(B) which is the residual clause. The predicate offense for which Bernard Edmond was convicted is the conspiracy charge. Indeed, from the indictment, through opening arguments, jury instructions and even on appeal, the Government always argued the only predicate it could, conspiracy. Mr. Edmond's case is unique in that he was not present at the time of the carjacking or attempted carjackings. He clearly never possessed or used a firearm in the commission of the offenses charged. His offense was entirely predicated on being part of a conspiracy. This was exactly how the government argued the case at trial and on appeal. Indeed, the issue on appeal was under Pinkerton v. United States, 328 U.S. 640, 645-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), a conspirator may be convicted of a substantive offense that other conspirators commit during and in furtherance of a conspiracy. This includes a § 924(c) offense. See United States v. Myers, 102 F.3d 227, 238 (6th Cir. 1996)

Courts that have considered the effect of alternative predicate offense instructions on a § 924(c) charge, when one or more of the potential predicate offenses was invalid, have applied that reasoning. When the valid and invalid predicate offenses were not coextensive and instead involved different criminal activities, a reasonable probability exists that the jury would not have found a crime of violence absent the invalid predicate offense. United States v. Jones, 935 F.3d 266, 273-74 (5th Cir. 2019); United States v. Rodriguez, 2020 U.S. Dist. LEXIS 66715, 2020 WL 1878112, at 17 (S.D.N.Y. Apr. 15, 2020).

CONCLUSION

WHEREFORE, the Petitioner, BERNARD EDMOND, by and through his assigned attorney, SANFORD A. SCHULMAN, respectfully requests this most Honorable Court grant this Petition for Writ of Certiorari and reverse the Opinion and Order of the United States Court of Appeals for the Sixth Circuit Court and conclude that the convictions for the various offenses for which Bernard Edmonds was convicted under a conspiracy theory does not qualify as a crime of violence under the elements clause of section 924(c)(3)(A), and it cannot qualify under the now invalidated residual clause of section 924(c)(3)(B). There is no other qualifying predicate offense to support the conviction under section 924(c).

Respectfully submitted,

/s/ Sanford A. Schulman
SANFORD A. SCHULMAN P-43230
Counsel for Petitioner
BERNARD THOMAS EDMOND
500 Griswold Street, Suite 2340
Detroit, Michigan 48226
313-963-4740
Email: saschulman@comast.net

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