No. _____

In the

Supreme Court of the United States

_____

Deandre Hykeem Jackson,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether 18 U.S.C. §1951(a) is divisible into attempted and completed robberies for the purposes of the categorical approach?

PARTIES TO THE PROCEEDING

Petitioner is Deandre Hykeem Jackson, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deandre Hykeem Jackson seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Jackson*, No. 22-10744, 2023 WL 2238986 (5th Cir. Feb. 23, 2023). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on February 23, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE

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

> (3) 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
> (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. §1951 provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

A. Proceedings in District Court

The government obtained a three-count indictment against Deandre Hykeem Jackson alleging that he: 1) violated the Hobbs Act, 18 U.S.C. §1951(a) by robbing a 7-11 store, 2) brandished a firearm in connection with the robbery, in violation of 18 U.S.C. §924(c), and 3) possessed a firearm after a felony conviction, in violation of 18 U.S.C. §922(g). He reached a plea agreement with the government, in which he agreed to plead guilty to the first two charges in exchange for dismissal of the third. The plea agreement waived appeal, save certain express exceptions not relevant here. The factual resume admitted the Hobbs Act robbery and the attendant violation of 18 U.S.C. §924(c). The court imposed 78-months imprisonment on count one, and 84-months imprisonment on count two.

B. Proceedings in the Court of Appeals

Petitioner appealed, contending that completed Hobbs Act Robbery does not constitute a "crime of violence" under 18 U.S.C. §924(c)(3), because it is not divisible from attempted Hobbs Act Robbery, which this Court has held not to constitute a "crime of violence." He conceded that the error was not clear or obvious under current and law raised it to preserve review to this Court. The court of appeals affirmed with the following commentary, "Jackson correctly concedes the error he alleges is not clear or obvious under current law and that he therefore cannot prevail under the plain-error standard of review." [Appx. A]; *United States v. Jackson*, No. 22-10744, 2023 WL 2238986 (5th Cir. Feb. 23, 2023)(unpublished).

REASONS FOR GRANTING THE PETITION

A stray passage in *Taylor v. United States*, __U.S.__, 142 S.Ct. 2015 (2022), has caused the lower courts to disregard this Court's clear instructions in *Mathis v. United States*, 579 U.S. 500 (2016), regarding the divisibility of criminal statutes for the purposes of the categorical approach. This Court should grant certiorari to vindicate the authority of its controlling precedent and prevent disuniformity in federal law in this area.

The "categorical approach" is a particular methodology to decide whether a defendant's (or an alien's) offense – prior or current – falls within a defined class. *See Shular v. United States*, __U.S.__, 144 S.Ct. 779, 783 (2020). An affirmative finding can carry very serious consequences, such as an enhanced penalty range, liability for a new offense, or removability from the country. *See e.g. Shular* 144 S.Ct. at 783; *United States v. Davis*, __U.S.__, 139 S.Ct. 2319, 2327-2336 (2019); *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017). Courts using this approach will examine the scope of the statute setting for the offense and compare it to the boundaries of the defined class. *See Mathis v. United States*, 579 U.S. 500, 504 (2016). Statutes that sweep more broadly than the defined class generally do not trigger the adverse consequences; statutes that match or fall entirely within the defined class qualify the defendant (or the alien) for those consequences. *See Taylor v. United States*, 495 U.S. 575, 599 (1990).

A series of decisions from this Court address a critical question in application of the categorical approach: how to decide which part of a statute – which section, subsection, clause, or application -- constitutes the offense that must match or fall within the defined class. *Shepard v. United States*, 543 U.S. 13 (2005), holds that a court applying the categorical approach may not narrow the offense of conviction

using any document save certain judicial records of conclusive significance, such as the indictment, judicial confession, jury instructions, and judgment. *See Shepard*, 543 U.S. at 25. *Descamps v. United States*, 570 U.S. 254 (2013), holds that a statute may be divided for the purposes of the categorical approach only into those portions that are actually set apart by a disjunctive feature of the text. *See Descamps*, 570 U.S. at 260-261. Finally, *Mathis v. United States*, 579 U.S. 500 (2016), holds that some portions of a statute may constitute but one indivisible offense even if they are set off from each other disjunctively. *See Mathis*, 579 U.S. at 513-514. Thus, two disjunctively enumerated subsections of a statute may constitute but one offense such that either of them, if it reaches conduct falling outside the defined class of offenses, may save the defendant or alien from adverse consequences. *See id.* at 512-514. To decide whether a statute is "divisible" into multiple offenses, or whether, instead, it sets forth but one offense with multiple manners or means, the court must identify those facts as to which a jury must be unanimous to convict the defendant if he or she goes to trial. *See id.* at 506.

Mathis sets forth a detailed procedure to assist courts in the divisibility analysis. First, the question may be answered most easily by a case from the convicting jurisdiction clearly identifying the statute's alternatives as offenses or manners and means. *See Mathis*, 579 U.S. at 517-518 ("When a ruling of that kind exists, a sentencing judge need only follow what it says."). Second, if a judicial opinion does not answer the question definitively, the court applying the categorical approach can look at the punishments – distinct punishments are associated with distinct

offenses, not distinct manners and means of committing the same offense. *See id.* at 518. Third, the court should ask whether the statute sets forth alternatives as "illustrative examples," a scenario that marks it as indivisible. *Id.* at 518. Fourth, it should examine the statute for language that "itself identif[ies] which things must be charged (and so are elements) and which need not be (and so are means)." *Id*. Fifth, the court may examine the charging instrument in the defendant (or alien's) own case. *See id.* at 518-519. Finally, if none of these inquiries provide "certainty," the doubt should be resolved in favor of indivisibility, that is, in favor of the defendant or the alien. *See id*. at 519.

This Court has held that 18 U.S.C. §924(c)(3)(A), which subjects the defendant to criminal liability for possessing a firearm in connection with a "crime of violence," employs the "categorical approach" insofar as it decides whether the underlying offense constitutes a "crime of violence." *See Davis*, 139 S.Ct. at 2327-2336. And it has held that attempted Hobbs Act Robbery, criminalized by 18 U.S.C. §1951(a), does not constitute a "crime of violence" for the purposes of §924(c). *See Taylor v. United States*, __U.S.__, 142 S.Ct. 2015, 2020 (2022). This non-qualifying conduct – attempted Hobbs Act Robbery – appears in the same statute, indeed, the same subsection, as does completed Hobbs Act Robbery. *See* 18 U.S.C. §1951(a). As such, this Court's precedent would seem to require that courts evaluating a defendant's liability for §924(c) based on completed Hobbs Act Robbery employ the six-part process set forth in *Mathis* to decide whether Hobbs Act is divisible into completed and attempted robberies.

In fact, however, the lower courts have relied instead on *dicta* found in *Taylor* (2022) to avoid the *Mathis* analysis and declare the statute divisible. In *Taylor*, this Court said:

> What are the elements the government must prove to secure a conviction for attempted Hobbs Act robbery? Here again the parties share common ground. Under the portion of the Hobbs Act relevant here, to win a conviction for a *completed* robbery the government must show that the defendant engaged in the "unlawful taking or obtaining of personal property from the person ... of another, against his will, by means of actual or threatened force." From this, it follows that to win a case for *attempted* Hobbs Act robbery the government must prove two things: (1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a "substantial step" toward that end.

Taylor, 142 S.Ct. at 2020 (internal citations omitted)(quoting18 U.S.C. §1951(b), and citing *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007)).

Lower courts have taken this to mean that Hobbs Act is necessarily divisible into attempted and completed robberies. *See Pratcher v. United States*, No. 1:19-CV-00215-AGF, 2023 WL 2387500, at *3 (E.D. Mo. Mar. 7, 2023)("Petitioner invokes this divisibility analysis to argue that the Hobbs Act is indivisible as to attempted and completed robberies…. But *Taylor* itself disclaimed such an approach by explicitly distinguishing between the elements of a completed Hobbs Act robbery and an attempted one. For that reason, district courts around the country and one circuit court in an unpublished opinion have held that the Hobbs Act is divisible at least as between attempted and completed robberies.")(internal citations omitted, citing passage of *Taylor* recounted above and collecting cases); *see also United States v. Howald*, No. CR-21-04-H-BMM, 2023 WL 402509, at *3 (D. Mont. Jan. 25, 2023)

("*Taylor*'s reasoning required a determination that the statute was divisible…"); *United States v. Legendre*, No. CR 21-51, 2023 WL 2330036, at *3 (E.D. La. Mar. 2, 2023) ("this conclusion (that statute is divisible) is supported by the Supreme Court's inquiry in *Taylor*.").

That reasoning is doubtful. The defendant in *Taylor* was indisputably charged with attempted robbery, not completed robbery. So it was enough to defeat §924(c) liability that attempted robbery fell outside the definition of a "crime of violence" – the outcome of the case cannot turn on divisibility when the defendant's own prong of the statute is noqualifying. Divisibility analysis was neither necessary nor undertaken.

As seen above, the lower courts considering completed Hobbs Act Robbery have largely ignored the *Mathis* methodology provided to decide the divisibility question, focusing instead on a strained inference from an obliquely relevant passage in *Taylor*. In order to preserve the authority of this Court's precedent in this area, this Court should grant certiorari and decide whether Hobbs Act Robbery is divisible, either applying the *Mathis* methodology, identifying an exception, or discarding it. Notably, because the lower courts have attributed their divisibility conclusions to this Court's precedent in *Taylor*, it is likely a problem only this Court can fix. Failure to do so would not merely permit a conflict to persist between this Court's precedent and the decisions of lower courts, but may compromise the uniformity of federal law as respects divisibility generally. As the lower courts view it, this Court decided an important divisibility question without reference to the *Mathis* methodology, calling

into question whether *Mathis* still controls. A grant of certiorari is necessary to prevent further confusion and disuniformity.

The present case turns on whether the Hobbs Act is divisible into completed and attempted robberies. *See* [Appx. A]; *United States v. Jackson*, 2023 WL 2238986 (5th Cir. Feb. 23, 2023)(unpublished). It thus clearly presents the divisibility question. And while Petitioner did not preserve the question in the district court, this Court may address it and remand to decide whether relief is warranted on plain error review. *See Tapia v. United States*, 564 U.S. 319, 335 (2011)("Consistent with our practice, we leave it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed.")(internal citation omitted)(citing *United States v. Marcus*, 560 U.S. 258, 266 – 267 (2010)). Alternatively, it should grant certiorari in another case, hold the instant case pending resolution, and, if the other case is resolved in favor of the defendant, grant certiorari in the instant case, vacate the judgment below, and remand for reconsideration. *See Lawrence v. Chater*, 516 U.S. 163 (1996).

Finally, the presence of the appeal waiver should not deter the grant of certiorari, neither to decide the question presented in this case, nor pursuant to the GVR procedure. This is because the court below recognizes that a defendant cannot waiver the right to be free from conviction for conduct that does not constitute a federal offense. *See United States v. Trejo*, 610 F.3d 308, 312-313 (5th Cir. 2010); *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008); *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002); *United States v. Spruill*, 292 F.3d 207,

215 (5th Cir. 2002); *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001). As such, it will review the adequacy of the defendant's admissions notwithstanding a waiver.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 23rd day of May, 2023.

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