No._____

IN THE SUPREME COURT OF THE UNITED STATES

DARRON HENDERSON,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

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

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QUESTIONS PRESENTED

In *Mathis v. United States*, 579 U.S. 500, 506 (2016), this Court held that the test for whether a statute is "divisible," for purposes of applying the modified categorical approach, is juror unanimity: if unanimity on the pertinent statutory alternative is required for conviction, the alternative is an element and the statute is divisible; if unanimity is not required, the alternative is merely a means of commission and the statute is indivisible. The Court also reaffirmed that, under both the categorical and modified categorical approaches, facts are irrelevant and state law governs the elements of state offenses. *Id*. at 504, 517-18.

The questions presented are:

> Whether the Third Circuit's test for divisibility—which makes subsection organization dispositive, and which permits examination of facts if a statute is divisible in any way, even if it is indivisible as to the pertinent statutory alternatives—is consistent with *Mathis*.

> Whether federal courts, in applying the categorical and modified categorical approaches, may engage in plenary statutory construction of state statutes that is inconsistent with the statutory construction rules mandated by state law.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DARRON HENDERSON,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Darron Henderson respectfully requests that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 15, 2023.

OPINION BELOW

The precedential opinion of the court of appeals is published at 80 F.4th 207 (3d Cir. 2023), and is attached as Appendix A. The order denying panel and *en banc* rehearing is attached as Appendix B.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case presents methodological questions with respect to the categorical and modified categorical approaches to determining whether an offense qualifies as a predicate for various federal statutory sentence enhancements. Here, those questions arise under the "career offender" provision of the United States Sentencing Guidelines, which provides:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a) (Nov. 2021).

Pennsylvania has codified its rules of statutory construction. As pertinent here, those rules provide that if the statutory definition of a criminal offense lacks a *mens rea* element, recklessness suffices:

> (c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

18 Pa. C.S. § 302(c).

Pennsylvania first-degree robbery is defined, in pertinent part, as follows:

> A person is guilty of robbery if, in the course of committing a theft, he . . . (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury.

18 Pa. C.S. § 3701(a)(1)(ii).

STATEMENT OF THE CASE

This Court has set two clear rules for applying the categorical and modified categorical approaches when determining whether an offense qualifies as a predicate for various federal sentence enhancements: the modified categorical approach applies only to statutes that are divisible as between the pertinent statutory alternatives, and under both approaches facts are irrelevant and state law governs the elements of state offenses. *Mathis v. United States*, 579 U.S. 500, 506 (2016); *Johnson v. United States*, 559 U.S. 133, 138 (2010).

In this case, the Third Circuit violated both rules. First, it ruled Pennsylvania first-degree robbery divisible using a test abrogated by *Mathis*. Second, the Circuit engaged in plenary statutory construction of the robbery statute as to *mens rea*, setting aside the governing statutory construction rule mandated by Pennsylvania law and required to be followed by *Johnson*.

1. Mr. Henderson pleaded guilty to a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), after a handgun was found in his car during a traffic stop for a burned-out brake light. Mr. Henderson's base offense level under the U.S. Sentencing Guidelines was enhanced from 14 to 20 because—ten years earlier—he had been convicted of Pennsylvania first-degree robbery, an offense the district court held to be a "crime of violence" under U.S.S.G. § 4B1.2(a). Although Mr. Henderson's criminal history is otherwise minimal (consisting of simple assault/resisting arrest and some minor juvenile adjudications), the crime-of-violence enhancement doubled his Guidelines range.

2. On appeal, Mr. Henderson challenged only the crime-of-violence enhancement. He first argued that the first-degree robbery statute, 18 Pa. C.S. § 3701(a)(1)(i)-(iii), is indivisible. Divisibility is potentially dispositive in this case because the United States has correctly conceded that subsections (i) and (iii) of Pennsylvania first-degree robbery do not

require intentional physical force and are therefore not crimes of violence under the rule of *Borden v. United States*, 593 U.S. 420 (2021) (recklessness *mens rea* does not qualify as "use . . . against . . . another"). *See, e.g.*, Dkt. 239 in *United States v. Harris*, No. 17-1861 (3d Cir.), at 2-3. Alternatively, Mr. Henderson argued that even if the statute is divisible subsection (ii)—the basis for conviction here—is not generic robbery and may be committed recklessly.

3. The Third Circuit affirmed. It held that the Pennsylvania robbery statute as a whole—§ 3701(a)(1), which defines not just first-degree robbery, but also second- and third-degree robbery—is divisible, giving two reasons. First, the Circuit quoted its previous decisions *United States v. Blair*, 734 F.3d 218 (3d Cir. 2013) and *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018) for the proposition that the statute "clearly la[ys] out alternative elements" because it is organized into subsections. 80 F.4th 207, 211-12. And second, the Circuit noted that "various subsections trigger different penalties"—*i.e.*, first-degree robbery (subsections (i)-(iii)) has a different statutory maximum punishment than does second-degree robbery (subsections (iv) and (vi)) and third-degree robbery (subsection (v)). *Id*. Following *Blair*'s divisibility test, the Circuit deemed divisibility as between robbery degrees sufficient to trigger the modified categorical approach, and therefore conducted no analysis of whether first-degree robbery is divisible as between subsections (i)-(iii). *Id*.

Applying the modified categorical approach, the Circuit turned to subsection (ii) as that was the basis for conviction here. Subsection (ii) proscribes theft during which the defendant "threatens another with or intentionally puts him in fear of immediate serious bodily injury." 18 Pa. C.S. § 3701(a)(1)(ii). The Circuit held that subsection (ii) requires intentional physical force. 80 F.4th at 213-15. It conducted a plenary statutory construction analysis akin to one it would conduct on a federal statute, focusing on the "text, structure, and case law." *Id*. at 213.

Ultimately, the Circuit relied on a definition of "threat" from *Black's Law Dictionary* and this Court's interpretation of the Armed Career Criminal Act (ACCA, 18 U.S.C. § 924(e)) in *Borden*, likening subsection (ii)'s "threatens another" to ACCA's oppositional language "use . . . against . . . another." *Id*. at 213-15. The Circuit therefore held subsection (ii) to be a crime of violence under § 4B1.2(a)'s element-of-force clause, and did not address the enumerated-offenses clause. *Id*. at 215.

REASONS FOR GRANTING THE PETITION

Yet again with respect to the categorical and modified categorical approaches, a lower court has disregarded what this Court has "earlier said (and said and said)." *Mathis v. United States*, 579 U.S. 500, 515-16 (2016). *Certiorari* should be granted because the Third Circuit's divisibility test and override of the governing Pennsylvania statutory construction rule contravene *Mathis* and *Johnson v. United States*, 559 U.S. 133 (2010), respectively. This case is an appropriate candidate for summary reversal, as it involves a "fundamental error[] that this Court has repeatedly admonished courts to avoid." *Sexton v. Beaudreaux*, 585 U.S. 961, 967 (2018). The case should be remanded for *Mathis*- and *Johnson*-compliant analyses by the Circuit in the first instance. Alternatively, *certiorari* should be granted and the case listed for merits briefing and argument.

A. The Third Circuit's divisibility test contravenes *Mathis*.

The Third Circuit continues to deem Pennsylvania's first-degree robbery statute divisible based on *United States v. Blair*, 734 F.3d 218 (3d Cir. 2013), a case that was abrogated by *Mathis*. *Blair* announced a "one level divisibility" rule: if a statute is divisible at *any* level,

courts may rely on facts in *Shepard* documents[1] to apply a federal sentence enhancement—*even when conviction rested on a statutory provision that is overbroad and indivisible*. 734 F.3d at 225-26. No "recursive" divisibility analysis is required, and the factual "blinders are [] off." *Id*. at 226. *Blair* also deems subsection organization conclusive: it held first-degree robbery "obviously divisible" given its clear subsections, which the court called "alternative elements," without analysis. *Id*. at 225. Here, the Circuit followed *Blair*'s divisibility test by refusing to address whether first-degree robbery is divisible as between subsections (i)-(iii), deeming it sufficient that the robbery statute as a whole is divisible as between degrees.[2]

This is not the law after *Mathis*. There, the Court clarified that the ultimate question is whether *the statutory subsection of conviction* is indivisible and overbroad, and courts may *never* consider underlying facts (from *Shepard* documents or elsewhere)—where there is indivisibility, the "blinders" never come off. 579 U.S. at 513-14. The Court likewise clarified that the test for divisibility is not subsection organization, but juror unanimity: if unanimity on the statutory alternative is required for conviction, the alternative is an element and the statute is divisible; if unanimity is not required, the alternative is merely a means of commission and the statute is indivisible. *Id*. at 506.

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1 *Shepard v. United States*, 544 U.S. 13 (2005).

2 The divisibility error in *Blair* was slightly different. There, the robbery conviction was pursuant to subsection (iii) (proscribing theft while committing any first- or second-degree felony), and the court assumed subsection (iii) to be indivisible and overbroad as to predicate felony. The court nonetheless upheld an ACCA sentence by looking to the facts in the charging document, which revealed the underlying felony to be aggravated assault—a predicate the court said "clearly involves violence." 734 F.3d at 222-23, 225. The Third Circuit later ruled that Pennsylvania aggravated assault *is not*, in fact, an ACCA predicate. *United States v. Harris*, 68 F.4th 140 (3d Cir. 2023); *United States v. Jenkins*, 68 F.4th 148 (3d Cir. 2023).

Yet *Blair* continues to corrupt the Third Circuit's divisibility jurisprudence post-*Mathis*. With respect to Pennsylvania robbery, the problem began in *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). There, in *dictum*, the Circuit repeated *Blair*'s abrogated blinders-off and subsection-organization rules while adding a "see also" cite to *Mathis* for the proposition that the Pennsylvania robbery statute is divisible *by degree*. 899 F.3d at 232. There was no analysis of *Mathis*'s impact on *Blair*, or indeed any further discussion of divisibility at all—again, this was *dictum* as there were no *Shepard* documents in the *Peppers* record, making divisibility and the modified categorical approach irrelevant. *Id*. The problem snowballed after *Peppers*, as that case has repeatedly been cited by the Circuit—with no further analysis—as reaffirming *Blair* post-*Mathis*. *See, e.g.*, *United States v. McCants*, 952 F.3d 416, 426 (3d Cir. 2020); *United States v. Henderson*, 80 F.4th 207, 211-12 (3d Cir. 2023).

Meanwhile, the Circuit has never conducted a *Mathis*-compliant divisibility analysis of Pennsylvania's first-degree robbery statute. It has never addressed cases such as *Commonwealth v. Payne*, 868 A.2d 1257, 1262 (Pa. Super. Ct. 2005), which show that juror unanimity is not required as between the various subsections of first-degree robbery. It has never addressed Pennsylvania Standard Criminal Jury Instruction 15.3701A, which says first-degree robbery has only two elements: theft and any one of the alternatives in subsections (i)-(iii). And it has never addressed the Pennsylvania Supreme Court's approval of that instruction, in *Commonwealth v. Prosdocimo*, 578 A.2d 1273, 1276 (Pa. 1990). This Court should grant *certiorari*, summarily reverse, and remand for a *Mathis*-compliant divisibility analysis of Pennsylvania first-degree robbery by the Circuit in the first instance.

B. The Third Circuit's override of the governing Pennsylvania statutory construction rule contravenes *Johnson*.

State law—not the pronouncements of any federal court—governs as to the elements of a state offense, even in the present context of a federal court considering a federal sentence enhancement. *Johnson*, 559 U.S. at 138. The Circuit violated that precept here, and in the process overrode the governing Pennsylvania statutory construction rule grounded on a cardinal principle of Pennsylvania criminal law.

The Pennsylvania Supreme Court has made clear that if a criminal statute does not *expressly* state a *mens rea*, courts are not to infer one through statutory construction but instead must apply the default *mens rea* of recklessly found in 18 Pa. C.S. § 302(c). *Commonwealth v. Moran*, 104 A.3d 1136, 1149 (Pa. 2014).[3] That is a cardinal principle of Pennsylvania law grounded in the "paramount" position legislative intent holds in state jurisprudence. *Id*. at 1145, 1150. Just as federal courts interpreting federal law may prioritize statutory construction over the rule of lenity and deference to administrative agencies, Pennsylvania may prioritize § 302(c) over statutory construction. *See, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (resort to lenity only after exhaustion of traditional statutory construction tools); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (same, regarding resort to agency deference).

The *Moran* Court thus refused to "intuit[]" an "implicit" *mens rea* of intent from the Pennsylvania bribery statute's volitional terms "solicits," "accepts," and "agrees to accept," instead holding that "if there is no express wording indicative of a discrete mental state, § 302(c) applies." *Id*. at 1141, 1150. And the *Moran* Court rejected the contrary view of Justice Todd,

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[3] This is true even when—as with subsection (ii) of Pennsylvania first-degree robbery—a statute expressly states a *mens rea* for a different provision in the same offense. *See, e.g.*, *Commonwealth v. Kakhankham*, 132 A.3d 986, 994-95 (Pa. Super. Ct. 2015).

who argued that traditional tools of statutory construction—including dictionary definitions—should be applied before resort to § 302(c). *Id*. at 1152 & n.1 (Todd, J., concurring).

The Third Circuit recognized that the "threatens another" prong of subsection (ii) of Pennsylvania first-degree robbery does not include an express *men rea*. 80 F.4th at 213 (contrasting "explicit[]" mens rea for "puts in fear" prong). Yet instead of applying § 302(c), as Pennsylvania law requires, the Circuit conducted a plenary statutory construction analysis, as though it were interpreting a federal statute under federal statutory-construction rules. Thus, the Circuit inferred an implicit *mens rea* by looking to "text, structure, and case law," ultimately supplanting *Moran* and § 302(c) with a definition from *Black's* and an analysis derived from this Court's interpretation of ACCA in *Borden*. *Id*. at 213-15.

That is exactly what Pennsylvania law forbids—indeed the parallels are striking. The *Moran* Court refused to intuit intent from volitional terms such as "solicits," yet the Circuit inferred intent from the (arguably) volitional term "threatens another." 104 A.3d at 1150; 80 F.4th at 213-15. The *Moran* Court rejected Justice Todd's prioritization of traditional statutory construction tools—including a dictionary definition—over § 302(c), yet the Circuit used those tools to the point it "need not rely" on § 302(c). 104 A.3d at 1150; 80 F.4th at 213-15.[4] This

[4] That Pennsylvania generally approves use of dictionaries in statutory construction, 80 F.4th at 214, is irrelevant given the Pennsylvania Supreme Court's rejection of such use in favor of § 302(c) for determining *mens rea*. Nor is the Circuit correct when it says Pennsylvania case law suggests subsection (ii)'s "threatens another" requires subjective intent. *Id*. at 214-15 (citing Pennsylvania intermediate appellate court case). Just as frequently, Pennsylvania intermediate appellate courts describe this statutory text as imposing an objective *mens rea*—posing a threat, not intentionally threatening. *See, e.g.*, *Commonwealth v. Hopkins*, 747 A.2d 910, 914 (Pa. Super. Ct. 2000). Regardless, the Pennsylvania Supreme Court's decision in *Moran* and § 302(c) govern.

Court should grant *certiorari*, summarily reverse, and remand this case for a *Johnson*-compliant analysis of Pennsylvania first-degree robbery by the Circuit in the first instance.

CONCLUSION

For all of the foregoing reasons, the Court should grant *certiorari*, summarily reverse, and remand this case for further proceedings in accordance with *Mathis v. United States*, 579 U.S. 500 (2016) and *Johnson v. United States*, 559 U.S. 133 (2010). Alternatively, *certiorari* should be granted and the case listed for merits briefing and argument.

Respectfully submitted,

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