

No. 17-7678

IN THE SUPREME COURT
OF THE UNITED STATES

JASON DENNIS McGUIRE- **Petitioner**

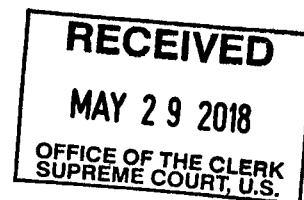
VS

UNITED STATES OF AMERICA- **Respondent(s)**

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

PETITIONER'S REPLY BRIEF

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QUESTION(S) PRESENTED

The Court of Appeals Erred In Denying A Certificate Of Appealability On Petitioner's Claim That Attempting to "set [] fire to, damage [], destroy [], disable [], or Wreck [] any Aircraft", In Violation of 18 U.S.C. §32(a), Is Not A "crime of violence" Under 18 U.S.C. §924(c).

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATEMENT OF THE CASE

On January 3, 2018, Petitioner filed a petition for a writ of certiorari presenting the question: Does **Johnson v. United States**, 135 S.Ct. 2551 (2015)'s Holding Extend to or In validate The Risk of Force Clause of The Definition of the Phrase "Crime of violence" In 18 U.S.C. §924(c)(1)(A).

On February 6, 2018, the petition was placed on the docket. After requesting two extensions of time to file a response, the Government filed in a brief in opposition on May 9, 2018, raising a new point: Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that attempting to "set [] fire to, damage [], destroy [],disable[], or wreck[] any aircraft," in violation of 18(a)(1)-(a)(8), is not a "crime of violence" under 18 U.S.C. 924(c).

Therefore, pursuant to this Honorable Court's **Rule15.6**, the Petitioner file this reply brief to address the new points raised in the Government's brief in opposition.

REASONS FOR GRANTING THE PETITION

I

The Eleventh Circuit's Application of The Categorical Approach To A Divisible Predicate Federal Statute -18 U.S.C. §32 (a)(1)(a)(8) (2010) On Direct Appeal Conflicts With This Court's Decision In *Descamps v. United States*, 133 S.Ct. 2276(2013) and *United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017)

Petitioner asserts, the Government primarily relies on *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), the direct appeal decision-- law of the case, to argue that applying 28 U.S.C. §2253(c)(2)'s standard, the court of appeals correctly declined to issue a COA on Petitioner's claim that attempting to damage, destroy, disable, or wreck an aircraft in flight in violation of 18 U.S.C. 32(a)(1) and (8) is not a crime of violence under Section 924(c)(3)." See Brief for U.S. in opposition at 10. The Government, then contends, "Petitioner's offense categorically qualifies as a 'crime of violence' under 18 U.S.C. 924(c)(3)(A), because it 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.*, at 10. To support its position, the Government asserts "[a]s the court of appeals explained in petitioner's direct appeal, his offense necessarily involved 'attempting to damage or disable an aircraft that was either flying or else ready to take off or arriving at a destination with people on board.'" *Id.*, at 10-11(quoted *McGuire*, 706 F.3d at 1337)). Following that path, the Government argues "[a]ttempting to set fire to, damaging, destroy, or wreck an aircraft with

people on board 'is unmistakably violent.' 'At a minimum, each of these actions has 'as an element, the use, attempted use, or threatened use of physical force against the... property of another'" Govt's Brief, at 11 (quoting McGuire , 706 F.3d at 1337)); (also quoting 18 U.S.C. 924(c)(3)(A)).

In addition, the Government further argues "[t]he same is true of 'attempting to disable an aircraft while people are on board,' which 'is itself an act of force in the meaningful sense.' It involves an 'active crime' done 'intentionally' against the property of another, with extreme and manifest indifference to the owner of that property and the wellbeing of the passengers." Govt's Brief at 11(quoting McGuire, 706 F.3d at 1337)(quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7, 9 (2004)).

Ultimately, the Government argues, "Petitioner does not identify any court of appeals that has disagreed with the Eleventh Circuit's determination that attempting to damage, destroy, disable, or wreck an aircraft in flight categorically qualifies as a 'crime of violence' under 18 U.S.C. 924(c)(3)(A)." Govt's Brief at 12.

To the contrary, Petitioner argues the law of the case doctrine--*United States v. McGuire*, supra is not binding here. It is well established, that under the law of the case doctrine, "an appellate decision is binding in all subsequent proceedings in the same case unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is

clearly erroneous and, if implemented, would work a manifest injustice." *Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1510-11 (11th Cir 1987)(en banc); *Pepper v. United States*, 179 LED 2d 196,224,562 U.S. 476 (2011)("Although we have described the 'law of the case as an amorphous concept,'as most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This doctrine directs a court's discretion, it does not limit the tribunal's power. Accordingly, the doctrine does not apply if the court is convinced that the prior decision is clearly erroneous and would work a manifest injustice.") (internal citations, s and quotation marks omitted)); See also *Castro v. United States*, 540 U.S. 375, 157 L.Ed 2d 778, 781 (2003).

First, Petitioner's case, on direct appeal the court applied *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, this Court held that driving under the influence of alcohol and causing serious injury, in violation of Fla. Stat.§316.193(3)(c)(2), was not a crime of violence under 18 U.S.C. 16(a)'s use-of-force clause because the "use of physical force" implied intentional conduct, and the Florida offense could be committed by mere negligence. *Id.* at 11, 125 S.Ct. at 383-84. Notably, this Court specifically noted, "We do not deal here with an attempted or threatened use of force." *Id.* at 8-9, 125 S.Ct.at 382. However, on direct appeal, the court below applied *Leocal* to Petitioner's

attempted violation of §32 (a)(1)--that's a divisible statute.

Second, an intervening change in the controlling law dictates a different result, and the prior decision is clearly erroneous and, if implemented, would work a manifest injustice. In *Descamps*, 133 S.Ct at 2284-85, this Court held that the modified categorical approach is a tool to be used when a statute that formed the basis of conviction is divisible. But the court below applied the categorical approach to evaluate the contemporaneous federal crime charged in the same indictment in Petitioner's case.

Thus, the law of the case, here *McGuire*, supra., should not be found binding on the Honorable Court, because its decision is clearly erroneous in light of this Court's statement in *Leocal* supra., that "We do not deal here with an attempted or threatened use of force". *Id.* at 8-9. In addition, *Descamps*, supra., is an intervening change in law that overruled the court's decision to apply the categorical approach to a divisible statute in *McGuire*, supra., and finally, the court's decision in *McGuire* supra., is inconsistent with the Third Circuit's explanation of the modified categorical approach to §924(c) cases in *United States v. Robinson*, 844F.3d 137, 141 (3d Cir. 2016).

Third, Petitioner's §2255 motion, he clearly alleged that "[t]he Judge made findings based on the categorical approach--that 'attempting to damage, destroy, disable, and wreck an aircraft within the special jurisdiction of the United States' is a 'crime of violence' and in order to

increase Petitioner's sentence under 18 U.S.C. 924(c)(1)(A); Rather than applying the modified categorical approach to the divisible statute." **Cv. Doc.#1 at 6.** Petitioner further argued that "[T]he indictment shows that the Government charged one or more elements of the offense in the alternative. The Government did not charge one of those two alternatives, and the Trial Judge did not instruct the jury accordingly. Thus, the jury did not find the relevant element, unanimously and beyond a reasonable doubt. Whereas, the Judge made such finding, when the court applied the wrong approach--categorical approach to find that 'attempting to damage, destroy, disable, and wreck an aircraft within the special jurisdiction of the United States' is a crime of violence in order to increase Petitioner's sentence under §18 U.S.C. §924(c)(1)(A) and (c)(3)(A)-(B). See **Cv. Doc. #2 at 6.**(citing **United States v. Estrella**, 758 F.3d 1239, 1245-46 (11th Cir. 2014) (quoting **Descamps v. United States**, 133 S.Ct. 2276 (2013))); also citing **United States v. McGuire**, 706 F.3d, 1333 (11th Cir.2013)).

Importantly, Petitioner had also urged the district court to abandon the law of his case, because controlling authority has since made a contrary decision of law applicable to that issue. See **Doc. #2 at 6-13**, (internal citation and quotations marks omitted.) To note, on direct appeal, the court used the "categorical approach to review the sufficiency of the evidence to support [his] §924(c) conviction....in **McGuire**, [706 F.3d 1333 (11th Cir. 2013)], the

trial judge -as opposed to the jury-had determined as a matter of law that the predicate offense was a crime of violence. It appears that the jury in McGuire was not called upon to determine whether the Government had indeed proved that the predicate criminal conduct amounted to a 'crime of violence', and presumably there were no jury findings as to the specific conduct supporting the §924(c) charge." See Application for issuance of COA, at 17 (quoting United States v. Rook, 2016 U.S. Dist. LEXIS 58659 (N.D. Ga., Mar. 25, 2016)(quoting United States v McGuire, 706 F.3d 1333, 1335-36 (11th Cir. 2013)).

Concurrent and supporting Petitioner's allegations, is Mays v. United States, 817 F.3 d 728 (11th Cir. 2016), wherein the Eleventh Circuit clarified that: "The Court in Descamps addressed our approach to determining whether a crime constitutes a violent felony under the enumerated clause." Mays, 817 F.3d at 731 (citing Descamps, 133 S.Ct at 2218)). The court further explained that "[t]here are two approaches for determining whether an offense is generic: the 'categorical approach' and the 'modified categorical approach.'" Under the categorical approach we "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the generic crime.'" See Id. (quoting Descamps)(quotation marks in original)). In contrast, under the modified categorical approach, we may look beyond the statutory elements of the prior conviction and consider a "limited class of documents, such as indictments and jury

instructions", to determine whether the conviction was for a generic offense. In *Descamps*, the Supreme Court held that this analysis can only be performed if the statute in question is "divisible", meaning that it "sets out one or more elements of the offense in the alternative." See *Mays*, 817 F.3d at 731 (quoting *Descamps* at 2281-82)(quotation marks in original)).

Petitioner, then argued that pursuant to *Descamps*, 18 U.S.C. §32(a)(1)-(a)(8), is a divisible statute--one that "sets out one or more elements of the offense in the alternative." " *Descamps*, 133 S.Ct. 2276, 2281 (2013); See also. *United States v. Howard*, 742 F.3d 1334, 1345-46 (11th Cir. 2014)("Descamps tells us that a state is divisible if it 'set out one or more elements of the offense in the alternative. For example, stating that burglary involves entry into a building or automobile,'")(quoting *Descamps*, 133 S.Ct.2281)); See also *United States v. Estrella*, 758 F.3d 1239, 1245-47 (11th cir. 2014) (If the statute were considered to be divisible, we could then proceed to analyze whether under a modified categorical test, the particular conviction meshed with the elements required for an offense to constitute a crime of violence).

Therefore in retrospect, the district judge was required to apply the modified categorical approach to §32(a)(1)-(a)(8),² instead the district judge employ the categorical

² "[I]n §924(c), the federal sentencing court and this Court examine whether a contemporaneous companion federal conviction, charged in the same federal indictment as the §924(c) charge itself, qualifies as a crime of violence."

approach. Had the judge applied the modified categorical approach--attempt to disable an aircraft by Petitioner's action for shooting a firearm into the air, would not have been found to be a "crime of violence" under §924(c)(3)(A)'s element clause where his companion federal conviction for "attempting to damage, destroy, disable, and wreck an aircraft within the special jurisdiction of the United States", in a violation of 18 U.S.C. §32(a)(1)-(a)(8), can be committed even without the "use, attempted use, or threatened use of physical force against the person or property of another." §924(c)(3)(A). In fact, §32(a)(1)-(a)(8) statute does not have an element requiring the use, threatened use, or attempted use of force" against the person or property of another", much less be qualified as a "crime of violence" and be construed as a companion conviction for §924 (c)(1)(A). Rather, it is a crime of property and not a crime against a person.

It is established "the modified categorical approach 'retains the categorical approach's central feature: a focus on the elements, rather than the fact of a crime.'" *Estrella*, 758 F.3d at 1247. This all to say that a sentencing court applying the modified categorical approach may not look beyond the elements to the evidence...to explore whether a person convicted of one crime could also have been

See *In re Jones*, 2016 U.S. App. LEXIS 23578 (11th Cir. July 27, 2016) (citing *In re Gordon*, 827 F.3d 1289, 1294 (11th Cir. 2016)).

convicted of another, more serious offense.'" Id. Here, Petitioner was convicted of a crime against property, but the district judge found Petitioner criminally liable for conduct that he did not intend...that he committed a crime against a person--thus a "crime of violence". Whereas, this Court has made clear that courts "must resist the urge, tempting though it may be, to apply an enhancement based on conduct in which a defendant actually engaged. Where the...jury made no finding of an element at the time a defendant was actually convicted of the earlier crime, it is decidedly not our role to step in and do it now. Rather, the enhancement must be based only on the elements for which the defendant was convicted at the time." Id., at 1247-48.

So for that, in **Estrella**, the court in applying the Fifth Circuit's position in **United States v. Alfaro**, 408 F.3d 204 (5th Cir. 2005), where the Fifth Circuit held that the statute under which Mr. Alfaro was convicted does not have an element requiring the use, threatened use, or attempted use of force against the person of another. It held that against-a-person requirement was not met because a defendant could violate the statute merely by shooting a gun at a building that happens to be occupied without actually shooting, attempting to shoot, or threatening to shoot another person. See **Estrella**, 758 F.3d at 1250.

In addition, the court in **Estrella**, also adopted the Tenth Circuit's position on this issue in **United States v. Ford**, 613 F.3d 1263 (10th Cir. 2010). In **Ford**, that court

considered whether a Kansas conviction for a criminal discharge of a firearm at an occupied building or is a violent felony under the Armed Career Criminal Act. Specifically, "the criminal complaint and the plea colloquy" both described the crime as 'criminal discharge of a firearm at an occupied vehicle.'" In concluding that Ford's conviction did not have an element requiring the use, attempting the use, or threatened use of physical force against another person, the Tenth Circuit drawn between "convictions for discharging a firearm at, or in the direction of a **person**, and conviction for discharging a firearm at, or in the direction of an occupied building or vehicle." The Tenth Circuit recognized that a statute with the elements that can be satisfied by directing force at an occupied building structure "requires force against a building or vehicle, but not against the person inside." See **Estrella**, 758 F.3d at 12 50. Thus, the court in **Estrella** concluded that "directing physical force against an occupied vehicle, without more, does not permit application of [§924 (c) (1) (A)]'s "crime of violence" enhancement...where an element would permit conviction whenever the defendant targets property that happens to be occupied, that element is 'akin to criminal damage to property', and covers conduct broader than the crimes against to which the [§924(c) (1) (A)] crime of violence enhancement is supposed to apply" See **Estrella**, 758 F.3d at 1251-52.

Therefore, the court below acceptance of **Descamps'**

application in **Estrella** as demonstrated above, ~~that~~ employing the "modified categorical approach"-the elements of Petitioner's crime--18 U.S.C §32(a)(1)(8)-attempted to damage an aircraft, or destroy an aircraft, or disable an aircraft, or wreck an aircraft, is an attempted crime to property, and simply does not have, much less contemplate any violence towards any person, and therefore does not fall within the ambit of §924(c)(3)(A)'s force clause.

But the Government, on the other hand, relies heavily on **United States v. Castleman**, 134 S.Ct. 1405 , 1415 (2014), to argue that "indirect use of force" is "use of physical force" under 18 U.S.C. 921(a)(33)(A). See **Govt's Resp. at 12**. Whereas, the Fifth Circuit rejected the Government's Castleman argument concerning **direct** and **indirect application of force**. In **United States v. Rico-Mejia**, 859 F.3d 318,322.(5th Cir. 2017), the court applied this Court's decision in **Mathis v. United States**, 136 S.Ct 2243, 2248-57, 195 L.Ed. 2d 604 (2016), that addressed when and how courts may use the modified categorical approach. See **Id.** at 322("This court has observed that Mathis instructs that there is a difference between alternative elements of an offense and alternative means of satisfying a single element, and that when a court confronts an alternative-phrased statute, it must first determine whether listed items in a statute are elements or means.") The court then found "[b]y its express terms, **Castleman's** analysis is not applicable to the physical force requirement for a crime of

violence , which "suggest a category of violent active crime" that have as an element a heightened form of physical force that is narrower in scope that that applicable in the domestic violence context." **Rico-Mejia**, 859 F.3d at 322 (quoting **Cattleman**, 134 S.Ct at 1141,n.4)).

Clearly, there's conflicts that exist between the Government's **Cattleman's** argument, the Fifth Circuit's decision in **Rico-Mejia**, and the court of appeals- Eleventh Circuit decision in **McGuire and Estrella**.

Therefore, the Government argument fails, that "Petitioner does not identify any court of appeals that has disagreed with the Eleventh Circuit's determination that attempting too damage, destroy, disable, or wreck an aircraft in flight categorically qualifies as a "crime of violence" under 18 U.S.C 924(c)(3)(A)." **Govt's Resp. at 12**; see also **Gonzalez v. Duenas-Alvarez**, 549 U.S. 183, 193 (2007) (A defendant must at least point to his own case in which the court's in fact did apply the statute in the special (nongeneric) manner for which he argues.

However, the government argues "no reason exists to consider petitioner's argument that the court of appeals erred in denying a COA on his claim that the alternative "crime of violence" definition in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Nor does any reason exist to remand this case to the court of appeals for further consideration in light of this court's decision in **Session v. Dimaya**, No.15-1498 (Apr.17, 2018)." **Govt's Resp.at 12**.

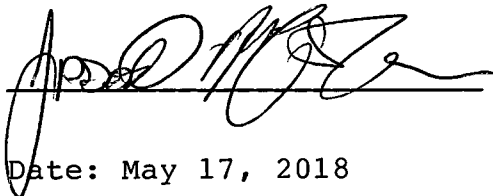
To the contrary, Petitioner argues issues here are clearly debatable pursuant to **Slack v. McDaniels**, 529 U.S. 473 (2000), in fact, on direct appeal, the court below applied §924(c)(3)(B)'s residual clause, when the court used the "categorical approach" and inquire into the nature of the offense, than the court found Petitioner's conviction for §32(a)(1)-(a)(8), "attempting to disable on aircraft while people are on board is itself an act of force in the meaningful sense." The court concluded that such conduct'" by its nature, involves a substantial risk [the perpetrator] will use force against a victim in completing the crime.'" **McGuire**, 706 F.3d at 1337-38. The court then held Petitioner's conviction is a "crime of violence."

Accordingly, based on all of the above reasons exist for this Court to consider Petitioner's argument that the court erred in denying a COA, and reasons also exist to remand Petitioner's case to the court of appeals for further consideration in light **Dimaya**.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: May 17, 2018