

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YOUNG,
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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QUESTION PRESENTED

This Court has consistently held that a “categorical” approach applies when determining whether an offense qualifies as a predicate supporting greater punishment under various federal criminal provisions. On this approach, qualifying predicates are identified strictly by reference to the offense’s statutory definition, rather than to the particular facts of a defendant’s case. The lower federal courts have at times deviated from the categorical approach, prompting this Court’s intervention to reaffirm it. *See, e.g., Descamps v. United States*, 570 U.S. 254 (2013). A major deviation occurred here, where the Third Circuit—in conflict with ten other courts of appeals—declined to apply the categorical approach in determining whether an offense qualifies as a predicate “crime of violence” supporting conviction under 18 U.S.C. § 924(c).

The question presented is:

Whether the categorical approach applies in determining whether an offense is a “crime of violence” supporting conviction under 18 U.S.C. § 924(c), a question that has split the circuits 10-1.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Petition	8
A. The Third Circuit’s approach is contrary to this Court’s precedent regarding the categorical and modified categorical approaches.	8
B. The federal courts of appeals are now split 10-1 over whether the categorical approach applies to § 924(c).	9
C. The Third Circuit’s approach is contrary to the text of § 924(c) and leads to absurd results.	11
D. The Third Circuit’s approach is contrary to the position of the United States before this Court in <i>Sessions v. Dimaya</i> , as well as in ongoing litigation before lower courts.	13
E. The Third Circuit’s decision is contrary to <i>Robinson</i> itself.	15
Conclusion	17
Appendices:	
Third Circuit Opinion	Appendix A

TABLE OF AUTHORITIES

FEDERAL CASES	PAGE(s)
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	i, 9, 12
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	3
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	8
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016).....	7, 9
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016).....	7, 9
<i>Moncrieffe v. Holder</i> , 133 S. Ct. 1678 (2013)	5
<i>Muscarello v. United States</i> , 524 U.S. 125 (1998)	15
<i>Ovalles v. United States</i> , 861 F.3d 1257 (11th Cir. 2017)	3
<i>Rosemond v. United States</i> , 134 S. Ct. 1240 (2014)	11
<i>Shuti v. Lynch</i> , 828 F.3d 440 (6th Cir. 2016)	10
<i>Smith v. United States</i> , 508 U.S. 223 (1993)	15
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	6, 8
<i>United States v. Amparo</i> , 68 F.3d 1222 (9th Cir. 1995)	10
<i>United States v. Castleman</i> , 134 S. Ct. 1405 (2014)	14
<i>United States v. Eshetu</i> , 863 F.3d 946 (D.C. Cir. 2017)	3

TABLE OF AUTHORITIES - continued

	PAGE(s)
<i>United States v. Fuertes</i> , 805 F.3d 485 (4th Cir. 2015)	10
<i>United States v. Galati</i> , 844 F.3d 152 (3d Cir. 2016)	14, 15
<i>United States v. Hernandez</i> , 228 F. Supp. 3d 128 (D. Me. 2017)	11
<i>United States v. Hill</i> , 832 F.3d 135 (2d Cir. 2016)	3, 10
<i>United States v. Jackson</i> , 865 F.3d 946 (7th Cir. 2017)	3
<i>United States v. Jennings</i> , 195 F.3d 795 (5th Cir. 1999)	10
<i>United States v. Jones</i> , 854 F.3d 737 (5th Cir. 2017)	3
<i>United States v. Kennedy</i> , 133 F.3d 53 (D.C. Cir. 1998)	10
<i>United States v. McGuire</i> , 706 F.3d 1333 (11th Cir. 2013)	10
<i>United States v. Prickett</i> , 839 F.3d 697 (8th Cir. 2016)	3, 10, 13
<i>United States v. Prickett</i> , 830 F.3d 760 (8th Cir. 2016)	13
<i>United States v. Rafidi</i> , 829 F.3d 437 (6th Cir. 2016)	10
<i>United States v. Robinson</i> 844 F.3d 137 (2016)	passim
<i>United States v. Serafin</i> , 562 F.3d 1105 (10th Cir. 2009)	10
<i>United States v. St. Hubert</i> , No. 16-10874, 2018 WL 1081206 (11th Cir. Feb. 28, 2018)	8, 10

TABLE OF AUTHORITIES - continued

	PAGE(s)
<i>United States v. Taylor</i> , 814 F.3d 340 (6th Cir. 2016)	3, 10
<i>United States v. Williams</i> , 864 F.3d 826 (7th Cir. 2017)	10

FEDERAL STATUTES

18 U.S.C. § 16(b)	3, 14
18 U.S.C. § 924(c)	<i>passim</i>
18 U.S.C. § 924(e)	3
18 U.S.C. § 1951	2, 4
18 U.S.C. § 1958	14
18 U.S.C. § 3231	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	1

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– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Young 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 December 4, 2017.

OPINION BELOW

The not-precedential opinion of the court of appeals affirming the district court’s judgment is attached as Appendix A.

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. This petition is timely filed pursuant to Rule 13.1 and the granting of petitioner’s application for an extension of time, docketed at No. 17A887. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 of the United States Code, Section 924(c)(1)(A)(i), mandates a sentence of not less than five years for using or carrying a gun “during and in relation to any crime of violence or drug trafficking crime.”

“Crime of violence,” in turn, is defined as any felony offense 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.

18 U.S.C. § 924(c)(3).

The Hobbs Act provides:

- (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.
- (b) As used in this section –
 - (1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951.

STATEMENT OF THE CASE

In *Johnson v. United States*, 135 S. Ct. 2551, 2557-60 (2015), this Court held the so-called residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e), to be unconstitutionally vague. Petitioner Michael Young contended in the court of appeals that *Johnson*’s holding necessarily invalidates the similarly worded residual clause in 18 U.S.C. § 924(c)—a question that has split the federal courts of appeals.¹ This Court may provide guidance on that question in *Sessions v. Dimaya*, No. 15-1498, which will decide whether *Johnson* applies to the residual clause in 18 U.S.C. § 16(b), worded identically to the residual clause at § 924(c)(3)(B).

Here, however, the court of appeals declined to engage that question. Instead, Mr. Young’s challenge was rejected under the novel approach adopted by the Third Circuit in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). There, the circuit held that the “categorical approach”—the established methodology whereby courts determine whether an offense qualifies as a predicate by looking strictly to its statutorily defined elements—does not apply under § 924(c). Instead, the circuit crafted a new approach whereby courts rely upon facts found by the jury or admitted by the defendant in order to determine whether the alleged predicate was a “crime of violence.” In doing so, the Third Circuit broke with ten other circuits, all of which

¹ Compare *United States v. Eshetu*, 863 F.3d 946, 953-55 (D.C. Cir. 2017) (§ 924(c) residual clause constitutional); *Ovalles v. United States*, 861 F.3d 1257, 1263-66 (11th Cir. 2017) (same); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017) (same); *United States v. Hill*, 832 F.3d 135, 145-50 (2d Cir. 2016) (same); *United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016) (same); and *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (same), with *United States v. Jackson*, 865 F.3d 946, 953-54 (7th Cir. 2017) (§ 924(c) residual clause unconstitutional).

apply the categorical approach dictated by this Court's precedent. Certiorari should be granted to reestablish a uniform methodology for determining what offenses qualify as predicates supporting the steep mandatory penalties provided by § 924(c).

1. Mr. Young was charged in the Eastern District of Pennsylvania with two counts of Hobbs Act robbery (in violation of 18 U.S.C. § 1951) (Counts One and Two); and one count of using, carrying, and brandishing a firearm (and aiding and abetting the same), during and in relation to a crime of violence (in violation of 18 U.S.C. § 924(c)) (Count Three). The Hobbs Act counts stemmed from the robberies of two corner stores in Philadelphia—the second of which was perpetrated with a gun, leading to the firearm charge.

The Hobbs Act counts were severed, and Mr. Young proceeded to trial on the second robbery and the firearm charge. He admitted his guilt with respect to the robbery, but maintained his innocence of the firearm charge. The jury ultimately convicted Mr. Young of Hobbs Act robbery and using or carrying a firearm, but acquitted him of brandishing the firearm. Mr. Young later stood trial for the first robbery, which resulted in a hung jury and mistrial. The government then agreed to forego further prosecution for the first robbery in exchange for Mr. Young's agreement not to appeal his conviction or sentence for the second robbery and firearm charge, except on limited grounds including the one raised here.

In March 2016, Mr. Young was sentenced to an aggregate 111-month term of imprisonment, to be followed by five years of supervised release. That represented 51 months on the Hobbs Act count, and a mandatory-minimum consecutive 60 months on the firearm count. Three years' supervised release was imposed on the Hobbs Act count, to run concurrently with five years of supervised release on the firearm count.

2. On appeal, Mr. Young challenged his firearm conviction on the ground that Hobbs Act robbery no longer qualifies as a predicate triggering § 924(c), because it is not categorically a crime of violence after *Johnson*. Section 924(c)(1)(A)(i) prohibits using or carrying a gun “during and in relation to any crime of violence or drug trafficking crime.” “Crime of violence,” in turn, is defined as any felony offense 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.

18 U.S.C. § 924(c)(3). Subsection (A) is known as the element-of-force clause, and subsection (B) is known as the residual clause.

Based on *Johnson*, Mr. Young argued that § 924(c)’s residual clause is unconstitutionally vague—leaving Hobbs Act robbery to qualify as a § 924(c) predicate, if at all, under the element-of-force clause. He argued that Hobbs Act robbery does not qualify under that clause, because § 1951(a) does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another.²

² Because the Third Circuit did not base its decision on this ground, the reach of Hobbs Act robbery is not before this Court. Based on the statutory language, Mr. Young principally argued that the least culpable conduct necessary for conviction of Hobbs Act robbery is taking something by placing someone in fear of future injury to his property—with “property” including money and intangible things of value. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (least culpable conduct test); Third Cir. Model Crim. Jury Instr. 6.18.1951-5 (defining “property” to include intangible things of value, and given to Mr. Young’s jury).

3. The Third Circuit avoided the question of whether *Johnson* invalidates § 924(c)'s residual clause by holding that Hobbs Act robbery qualifies as a predicate crime of violence under the element-of-force clause. In doing so, the court followed its ruling in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). That case involved brandishing a gun during a Hobbs Act robbery in violation of § 924(c)(1)(A)(ii), and here the Third Circuit extended *Robinson*'s holding to using or carrying a gun in violation of § 924(c)(1)(A)(i).

a. The *Robinson* majority (Judge Roth and then-Chief Judge McKee) held that the categorical approach simply does not apply in the § 924(c) context. 844 F.3d at 141-44. That approach is “not necessary,” the majority reasoned, because a predicate and § 924(c) offense are contemporaneously tried to a jury, and as a consequence “the record of all necessary facts [is] before the district court” such that any § 924(c) conviction “unmistakably shed[s] light” on whether the predicate offense was committed forcibly. *Id.* at 141. The majority recognized, though, that *Taylor v. United States*, 495 U.S. 575 (1990) and § 924(c)'s element-of-force clause prohibit a judicial inquiry into whether the predicate was, as a factual matter, committed forcibly. *Id.* at 143-44.

The majority therefore crafted a new approach. Courts are no longer to make a purely legal inquiry into the elements of the predicate offense to determine if it is a crime of violence, but should consider any facts found by the jury (or admitted by the defendant) with respect to the gun portion of the § 924(c) offense to determine whether the predicate offense was committed in a forcible way. 844 F.3d at 143-44. Thus, according to the majority,

[t]he question . . . is not “is Hobbs Act robbery a crime of violence?” but rather “is Hobbs Act robbery *committed while brandishing a firearm* a crime of violence?”

Id. at 144 (emphasis in original).³ Once a jury has found (or the defendant has admitted) that he brandished a gun, “[t]he answer to [the question of whether the predicate offense is a crime of violence] must be yes.” *Id.* Thus, in the majority’s view, the certainty of a jury finding (or defendant admission) of brandishing obviates the categorical approach and permits a court to “unmistakably” conclude that the Hobbs Act robbery was committed in a forcible way. *Id.* at 141.

The majority viewed this as a permissible extension of the modified categorical approach to the situation of contemporaneous offenses. 844 F.3d at 143. The majority acknowledged that Hobbs Act robbery can be committed without force, and did not contend that the statute is divisible. Nonetheless, the majority viewed the modified categorical approach as “inherent[ly]” applicable in the contemporaneous offense situation “because the relevant indictment and jury instructions are before the court.” *Id.* But instead of being used to identify the set of alternative elements under which the defendant was convicted, *Mathis*, 136 S. Ct. at 2251-54, the majority’s version of the modified categorical approach is designed to “shed light on the means by which the predicate offense was committed” and thereby “elucidate[e]” an “otherwise ambiguous element” in a predicate statute. *Id.* at 143, 144.

b. Judge Fuentes disagreed with this entire analysis. In an opinion concurring only in the judgment on the § 924(c) issue, he concluded that the categorical approach applies and that the modified categorical approach has no bearing here because Hobbs Act robbery is not divisible. 844 F.3d at 147-50. Those conclusions are compelled, Judge Fuentes reasoned, by this Court’s decisions in *Taylor* and *Mathis*, and by the text and legislative

³ The panel echoed this analysis in Mr. Young’s case, as well. App. A2-A3.

history of § 924(c). *Id.* Moreover, Judge Fuentes explained that applying the categorical approach avoids the “circularity and ambiguity” of the majority’s approach, which looks to the gun portion of a § 924(c) conviction to determine whether a predicate offense is a crime of violence. *Id.* at 148-49. Judge Fuentes concluded, however, that Hobbs Act robbery categorically qualifies as a predicate under the element-of-force clause, because it necessarily entails the use, attempted use, or threatened use of physical force. *Id.* at 150-51.

REASONS FOR GRANTING THE PETITION

If left uncorrected, the Third Circuit’s newly revised approach to determining whether a predicate offense is a crime of violence for purposes of § 924(c) threatens to wreak doctrinal havoc in this already complicated area of the law. Indeed, at least one circuit has already championed wider adoption of this new, non-categorical approach. *See United States v. St. Hubert*, 883 F.3d 1319, 1334-36 (11th Cir. 2018). The Third Circuit’s innovation is contrary to this Court’s precedent; contrary to the holdings of ten other courts of appeals; contrary to the statute’s text, leading to absurd results; and contrary to *Robinson* itself.

A. The Third Circuit’s approach is contrary to this Court’s precedent regarding the categorical and modified categorical approaches.

This Court has expressly held that the statutory text “has as an element”—the language at issue in § 924(c)—compels the categorical approach. *See Taylor v. United States*, 495 U.S. 575, 600 (1990) (addressing 18 U.S.C. § 924(e)); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (addressing 18 U.S.C. § 16(a)). The Third Circuit disregarded that straightforward holding because a tertiary rationale for the categorical approach discussed in *Taylor*, the practical and Sixth Amendment problems with judicial fact-finding about prior convictions, is supposedly not implicated when a court looks to a jury’s finding or defendant’s admission of a contemporaneous offense. 844 F.3d

at 141-43. But *Taylor*'s primary and independently sufficient rationale for the categorical approach was statutory text – indeed, classifying an offense by its elements is the very definition of a “categorical approach.”

This Court has also expressly barred extending the modified categorical approach to determine the means by which an indivisible predicate statute was violated. *See Descamps v. United States*, 570 U.S. 254, 260-64 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). The Third Circuit disregarded that precedent because, in the contemporaneous offense situation, “the indictment and jury instructions are before the court,” and because there is supposedly no Sixth Amendment problem when a defendant’s admission or jury’s finding is relied upon. 844 F.3d at 143. But those same documents are before courts in prior-conviction cases, as well, and *Descamps* specifically explained that it is irrelevant whether a defendant admits the means of violation:

[W]hether [the defendant] ever admitted to [the relevant means] is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [the predicate offense] not (as here) overbroadly, but instead alternatively, with one [set of elements] corresponding to the [qualifying] crime and another not.

570 U.S. at 265. The Third Circuit’s extension of the modified categorical approach is thus no more sound than were the extensions in *Mathis* and *Descamps*, and should meet the same fate.

B. The federal courts of appeals are now split 10-1 over whether the categorical approach applies to § 924(c).

The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits apply the categorical approach to determine whether an offense is a predicate for a

contemporaneously charged § 924(c) offense.⁴ No circuit has held otherwise.⁵ The Ninth Circuit’s decision in *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995), is instructive. There, the court explained that the categorical approach is compelled by the text and legislative history of § 924(c), and rejected the view—advanced by the Third Circuit here—that the categorical approach is unnecessary given any factual confidence surrounding contemporaneous offenses. 68 F.3d at 1225. The Third Circuit addressed neither *Amparo* nor any of the other precedents applying the categorical approach to decide if an offense is a predicate “crime of violence” under § 924(c). This split of authority is intolerable and calls for review on certiorari.

Robinson is already lending complexity to the identification of § 924(c) predicates by suggesting that, insofar as an offense does not categorically qualify, there follows an additional inquiry under a “modified” approach. In *United States v. St. Hubert*, 883 F.3d 1319, 1334-36 (11th Cir. 2018), the Eleventh Circuit volunteered an extended *dictum* endorsing *Robinson*’s

⁴ See *United States v. Hill*, 832 F.3d 135, 139 (2d Cir. 2016); *United States v. Fuertes*, 805 F.3d 485, 497-99 (4th Cir. 2015); *United States v. Jennings*, 195 F.3d 795, 797-98 (5th Cir. 1999); *United States v. Rafidi*, 829 F.3d 437, 444-45 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2147 (2017); *United States v. Williams*, 864 F.3d 826, 828 (7th Cir.), *cert. denied*, 138 S. Ct. 272 (2017); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016), *pet. for cert. docketed*, No. 16-7373; *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Serafin*, 562 F.3d 1105, 1107-08 (10th Cir. 2009); *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013); *United States v. Kennedy*, 133 F.3d 53, 56-57 (D.C. Cir. 1998).

⁵ One circuit’s cases are in internal discord, but the weight of its precedent follows the categorical approach. Compare *United States v. Rafidi*, 829 F.3d 437, 444-45 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2147 (2017) (holding categorical approach to apply in identifying § 924(c) predicates), and *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *pet. for cert. docketed*, No. 16-6392 (same), with *Shuti v. Lynch*, 828 F.3d 440, 449-50 (6th Cir. 2016), *pet. for cert. docketed*, No. 16-991 (decision issued after *Taylor*, but before *Rafidi*, suggesting categorical approach does not apply in § 924(c) context).

innovation. That court read *Robinson* to have adopted a newly expanded “modified” approach inasmuch as the defendant is adjudged guilty of “a contemporaneous federal crime charged in the same indictment.” *Id.* The Eleventh Circuit added that this rule might call for divergent applications of identical statutory language in § 16(b) and § 924(c). *Id.* Meanwhile, in the only circuit with jurisdiction over criminal appeals where the question remains open, a district court has followed *Robinson* to “conclude that categorical analysis is not appropriate” for purposes of identifying § 924(c) predicates. *United States v. Hernandez*, 228 F. Supp. 3d 128, 132 (D. Me. 2017) (alternative holding).

C. The Third Circuit’s approach is contrary to the text of § 924(c) and leads to absurd results.

Section 924(c) is simple: it prohibits using or carrying a gun during a limited and statutorily defined set of crimes, namely “crimes of violence” and “drug trafficking crimes.” 18 U.S.C. § 924(c)(1)(A)(i). In other words, § 924(c) prohibits “the temporal and relational conjunction of two separate acts”—the underlying crime of violence or drug trafficking crime and the use of a gun. *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014). “Crime of violence” is defined as a felony offense with an element of force. 18 U.S.C. § 924(c)(3)(A). As such, an offense’s status as a crime of violence has always been a purely legal issue for courts to determine pretrial, and at trial the jury must be instructed that the predicate offense is, as a matter of law, a crime of violence. *See, e.g.*, Third Cir. Model Crim. Jury Instr. 6.18.924A.⁶

⁶ *Accord* Fifth Cir. Pattern Crim. Jury Instr. 2.48; Sixth Cir. Pattern Crim. Jury Instr. 12.02; Seventh Cir. Pattern Crim. Jury Instr. 18 U.S.C. § 924(c)(1)(A); Eighth Cir. Model Crim. Jury Instr. 6.18.924C; Ninth Cir. Model Crim. Jury Instr. 8.71; Tenth Cir. Pattern Crim. Jury Instr. 2.45; Eleventh Cir. Pattern Crim. Jury Instr. 35.2.

The Third Circuit’s approach upends this statutory structure. Now, it cannot be determined pretrial (or pre-plea) whether an offense is a crime of violence, because that will depend on a jury finding or plea admission. And § 924(c) model instructions given throughout the country are now inaccurate, because juries can no longer be told that an offense is a crime of violence as a matter of law—instead, they will determine its status based on their use-or-carry finding. Indeed, the same statutory offense is now both a crime of violence and not, depending on how the case turns out.

This is absurd. By making the crime of violence determination turn on a use-or-carry finding, the Third Circuit has disregarded the statute’s (and this Court’s) denomination of the crime of violence a “separate act” distinct from the use of a gun, and instead imposes § 924(c) liability whenever the predicate offense plus the use or carriage involves force. And that will, of course, always be the case, rendering § 924(c) a tautology (or in Judge Fuentes’s words in *Robinson*, a “circularity”). Once the predicate offense itself need not have an element of force, every offense becomes a potential crime of violence. To paraphrase the Third Circuit, it is not whether mail fraud is a crime of violence, but whether mail fraud committed while carrying a firearm is a crime of violence. Indeed, all drug trafficking offenses involving guns are now crimes of violence, rendering half of § 924(c) surplusage.⁷

⁷ The Third Circuit tried to avoid the tautology by emphasizing that Hobbs Act robbery has an “ambiguous” force-type element. 844 F.3d at 144. That is a fudge, or as this Court called it in *Descamps*, a “name game.” 570 U.S. at 276 (rejecting attempt to recast statute missing requisite element as one containing an “overbroad” element). A predicate offense either has an element of force, or it does not. Because non-forcible scenarios, including threats to “an intangible economic interest,” *Robinson*, 844 F.3d at 144, can give rise to a Hobbs Act robbery conviction, the statute lacks an element of force.

D. The Third Circuit’s approach is contrary to the position of the United States before this Court in *Sessions v. Dimaya*, as well as in ongoing litigation before lower courts.

In its new approach to crime-of-violence determinations under § 924(c), the Third Circuit has not only broken with ten circuits, but rejected the government’s own position in *Robinson* itself, as well as before this Court in *Sessions v. Dimaya*, No. 15-1498. Indeed, the government continues to disavow *Robinson*’s approach in district courts within the Third Circuit. See Government’s Supplemental Sent’g Mem., filed Dec. 13, 2017, at Dkt. No. 48 in *United States v. Raul Rodriguez*, E.D. Pa. Crim. No. 16-288, at 3 n.1 (explaining that “government does not agree with the reasoning of *Robinson*” and opposing *Robinson*’s extension to question of whether Hobbs Act robbery constitutes “crime of violence” under ‘career offender’ sentencing guideline).

That is consistent with the government’s position in the other courts of appeals. For instance, when a panel of the Eighth Circuit held that the categorical approach does *not* apply to § 924(c), *United States v. Prickett*, 830 F.3d 760 (8th Cir. 2016), the government itself—through the Appellate Section of the Justice Department—filed a rehearing petition seeking to overturn that ruling. The government correctly argued that § 924(c)’s “statutory text alone requires a categorical approach,” and that any factual confidence surrounding contemporaneous offenses does not justify abandoning it.⁸ The Eighth Circuit corrected its error, and held that the categorical approach applies to § 924(c). *Prickett II*, 839 F.3d at 698.

⁸ United States’ Petition for Panel Rehearing in No. 15-3486 (8th Cir. Sept. 9, 2016), at 7 n.7 (addressing § 924(c)(3)(B)’s “by its nature” language, but equally applicable to § 924(c)(3)(A)’s “has as an element” language).

The government has taken the same position before this Court in *Dimaya*. In its reply brief in the certiorari proceedings, the government explained that 18 U.S.C. § 16(b)'s residual clause is identical to § 924(c)'s, and that because the categorical approach applies to both §§ 16(b) and 924(c), conflicting circuit decisions in §§ 16(b) and 924(c) cases supported the granting of certiorari. See Reply Brief for Petitioner, filed Aug. 31, 2016, in No. 15-1498, at 9-10 & nn.1-2. The government again called upon the equivalence between § 16(b) and “its counterpart in § 924(c)” when *Dimaya* was reargued this Term. See Transcript of Argument on Oct. 2, 2017, in No. 15-1498, at 58.

The government also declined to endorse *Robinson*'s innovation in *United States v. Galati*, 844 F.3d 152 (3d Cir. 2016), a decision issued on the same day as *Robinson* and likewise authored by Judge Roth. In *Galati*, the circuit extended *Robinson* to § 924(c) discharge offenses, holding that solicitation of murder for hire qualifies as a § 924(c) predicate when the evidence at trial indicated the jury must have found a confederate shot the intended victim, injuring but not killing him. 844 F.3d at 154-55; see 18 U.S.C. § 924(c)(1)(A)(iii) (providing 10-year mandatory minimum for “discharge” of firearm in “crime of violence”). The government opposed certiorari in *Galati*, submitting that any error in the Third Circuit's approach “did not affect the result,” on the view that 18 U.S.C. § 1958, providing for imprisonment of up to 20 years for participating in a murder-for-hire plot that results in personal injury, is categorically a crime of violence under *United States v. Castleman*, 134 S. Ct. 1405 (2014). See Br. in Opposition, filed Nov. 17, 2017, in No. 17-5229, at 9.

E. The Third Circuit’s decision is contrary to *Robinson* itself.

The rationale of *Robinson* and *Galati* is rooted in the requirements under § 924(c)(1)(A)(ii) & (iii) that a gun be brandished or discharged, respectively. *See Robinson*, 844 F.3d at 143; *Galati*, 844 F.3d at 154-55. When a jury has found—contemporaneously with its conviction for the predicate offense—that the defendant brandished or discharged a gun during the offense, it is clear that the predicate offense was committed through the “use, attempted use, or threatened use of physical force.” *Robinson*, 844 F.3d at 141. That is because brandishment necessarily threatens physical force insofar as the gun “is displayed or made known to another person in order to intimidate that person,” *id.* at 144 (citing 18 U.S.C. § 924(c)(4)), and discharge necessarily constitutes the use or attempted use of physical force, *Galati*, 844 F.3d at 154-55.

But the same is not true for the basic § 924(c) use-or-carry offense, and the decision below is therefore contrary to *Robinson* itself, as well as to all other pertinent authority. Unlike brandishment or discharge, using or carrying by itself does not necessarily entail the use, attempted use, or threatened use of physical force. *See Smith v. United States*, 508 U.S. 223, 228-29 (1993) (“using” includes bartering gun for drugs); *Muscarello v. United States*, 524 U.S. 125, 127-32 (1998) (“carrying” includes constructively possessing gun in locked glove compartment). Indeed, Mr. Young’s jury was instructed that “uses or carries a firearm” means simply “having a firearm or firearms available to assist or aid in the commission” of the robbery.

Moreover, Mr. Young was actually *acquitted* of brandishment. As discussed above, *Robinson* recognized the constitutional and statutory barriers to judicial fact-finding in crime-of-violence determinations, and therefore required courts to focus only on facts the jury actually

found (or the defendant necessarily admitted in pleading guilty). Here, the pertinent fact is clear from the verdict: Mr. Young did not brandish the gun.

Looking past the jury's finding to the testimony of witnesses or other evidence is expressly barred by *Robinson*, as well as by this Court's decisions. It would also be particularly inappropriate in this case. Mr. Young's relationship to, and responsibility for, the gun was the central issue at trial. The government attempted to convince the jury that Mr. Young was liable for brandishment through both accomplice and co-conspirator liability theories. The jury rejected that, necessarily concluding that Mr. Young did not have advance knowledge of the brandishment and that the brandishment was not foreseeable to him. Instead, the jury convicted Mr. Young of merely using or carrying the gun. And aside from returning an acquittal on brandishment, the jury made no findings regarding what Mr. Young's use or carriage entailed.⁹

⁹ It appears likely that the jury convicted on the only non-brandishment theory argued by the government—that Mr. Young carried the gun into the store shortly before the robbery. That, of course, does not entail the use, attempted use, or threatened use of physical force.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 4, 2017.

Respectfully submitted,

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