

No. 17-8415

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YOUNG,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

On petition for writ of certiorari to the
United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals
Counsel of Record

LEIGH M. SKIPPER
Chief Federal Defender

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Suite 540 West - Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

Counsel for Petitioner

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In his petition, Mr. Young warned that the Third Circuit’s doctrinally incoherent rejection of the categorical approach in cases arising under 18 U.S.C. § 924(c) threatens to wreak havoc in this fraught area of the law. Pet. at 8 (discussing *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016) and *United States v. Galati*, 844 F.3d 152 (3d Cir. 2016)). There were two firewalls that might have contained the impact to the Third Circuit: every other court of appeals has correctly held the categorical approach applicable under § 924(c), and the government had disavowed the Third Circuit’s approach as incorrect and contrary to this Court’s precedent. Pet. at 9-11, 13-14.¹ Those firewalls have begun to crumble, underscoring the need for the Court’s intervention now.

Two developments since the filing of Mr. Young’s petition presage the breach, and both were triggered by the Court’s recent decision in *Sessions v. Dimaya*, No. 15-1498 (Apr. 17, 2018), slip op. First, within hours of *Dimaya*’s announcement, a panel of the Eleventh Circuit

¹ The petition neglected to note that the First Circuit, in addition to the other circuits, applies the categorical approach under § 924(c). See *United States v. Taylor*, 848 F.3d 476, 491-95 (1st Cir. 2017).

ordered supplemental briefing on whether that circuit's precedent applying the categorical approach under § 924(c) should be overruled. *See Order, Ovalles v. United States*, No. 17-10172 (11th Cir. Apr. 17, 2018) (Tjoflat, Hull, and William Pryor, JJ.). As discussed in Mr. Young's petition, a different panel of the Eleventh Circuit, writing pre-*Dimaya*, strongly endorsed the Third Circuit's approach while recognizing it as contrary to circuit precedent. Pet. at 10-11 (discussing *United States v. St. Hubert*, 883 F.3d 1319, 1334-36 (11th Cir. 2018) (Marcus, Anderson, and Hull, JJ.)). Now, the Eleventh Circuit appears poised to follow the Third, broadening the impact of that court's faulty approach. At least one other court of appeals has ordered supplemental briefing on this question post-*Dimaya*. *See Order, United States v. Mathis*, No. 16-4633 (4th Cir. Apr. 19, 2018).

Second, the government has recently retreated from its position that statutory text and this Court's precedents require a categorical approach under § 924(c). *See Supplemental Brief for United States, United States v. Jenkins* and *United States v. Jackson*, Nos. 17-97 and 17-651 (Apr. 19, 2018) (endorsing reasoning of *Galati*). *Jenkins* and *Jackson* are before the Court on government petitions for writs of certiorari to the Seventh Circuit, which has held the residual clause in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague.² In its supplemental brief, the government requests that the Court grant the petitions, vacate the judgments, and remand the cases to the Seventh Circuit to permit the government to argue that the categorical approach does not apply under § 924(c). Supp. Br. at 1-7. The government justifies that request by noting that Justices Thomas, Kennedy, and Alito, dissenting in *Dimaya*, urged abandonment of the categorical approach and that Justice Gorsuch, concurring in the judgment, expressed an

² *Jenkins* and *Jackson* were most recently considered by the Court at its conference of April 20, 2018.

openness to reconsidering this area of the law in another case. *Id.* at 3 (discussing *Dimaya*, slip op. at 2, 20-32 (opinion of Thomas, J.), slip op. at 17-18 (opinion of Gorsuch, J.)).

That is an extraordinary change of position by the government. Not only did the government *concede* the applicability of the categorical approach under § 924(c) in *Dimaya*, it *affirmatively argued* that position to the Eighth Circuit, causing that court to reverse its short-lived holding to the contrary. Pet. at 13-14 (discussing government’s concessions in *Dimaya* and arguments in *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016)). The government’s original position is correct, and its new position aims to preserve the residual clause in § 924(c)(3)(B) at all costs—statutory text, logic, and this Court’s precedents notwithstanding. Pet. at 8-9, 11-12. But the Court has repeatedly refused to jettison the categorical approach, *see, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2561-62 (2015), and nothing has changed on that front recently. Indeed, Justice Gorsuch, upon whose comments in *Dimaya* the government principally relies, stayed his hand in part because the text of the residual clause may require a *stricter* categorical approach than the “ordinary case” inquiry previously developed by the Court—hardly an omen of the categorical approach’s demise. *Dimaya*, slip op. at 18 (opinion of Gorsuch, J.).

The government would have this issue percolate in the circuits, but here percolation is unneeded, unlikely, and too costly. This Court is well-versed in the categorical approach, and has before it in *Robinson* and *Galati* the alternative now advocated by the government. Every circuit has binding precedent on the issue, meaning that highly discretionary *en banc* proceedings would be required to explore the matter further. And perhaps most important, the years the government proposes to spend walking back its concessions and arguing that textually identical residual clauses must be interpreted differently are years that some of the most severe

mandatory-minimum sentencing provisions will be disparately applied based on the happenstance of geography. That is unacceptable.

The question presented in Mr. Young's case has always been important, but all the more so now that the Third Circuit's faulty approach is at risk of spreading and has gained favor with the government. This case provides a suitable vehicle for settling the matter now, and certiorari should be granted to do so.³

Respectfully submitted,

/s/ Brett G. Sweitzer

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LEIGH M. SKIPPER
Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 540 West, Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

³ The same question is presented in another certiorari petition currently pending before the Court. *See Ortiz v. United States*, No. 17-8251 (conference Apr. 27, 2018). That case, too, is a suitable vehicle and it is respectfully submitted that that petition should be granted as well, or held pending disposition of this case.