No. _____

In the

Supreme Court of the United States

_____

Maurice Lamont Davis,

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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QUESTIONS PRESENTED

I. Whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague?

II. Whether Hobbs Act robbery is a "crime of violence" as defined by 18 U.S.C. § 924(c)(3)?

III. Whether a prior Texas conviction for burglary is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

PARTIES TO THE PROCEEDING

Petitioner is Maurice Lamont Davis, 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 Maurice Lamont Davis seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Davis*, No. 16-10330, 2017 U.S. App. LEXIS 1740, 2017 WL 436037 (5th Cir. Jan. 31, 2017) (per curiam). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 31, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. § 924(c)(3), 18 U.S.C. § 924(e)(2)(B), and Tex. Pen. Code § 30.02(a), which state, respectively:

> 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. § 924(c)(3).

* * *

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B).

* * *

> BURGLARY. (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Pen. Code § 30.02(a).

STATEMENT OF THE CASE

On March 3, 2015, the government indicted Maurice Davis, Petitioner, and a co-defendant on eight counts stemming from a series of robberies in the Dallas, Texas area. These counts included Hobbs Act robbery (counts 1, 3, 4, 5, 6), violations of 18 U.S.C. § 924(c) (counts 2, 7), and felon in possession of a firearm (count 8). Defense counsel filed a motion to dismiss counts 2 and 7 on the basis that Hobbs Act Robbery is not a crime of violence in light of *Johnson v. United States*, which the district court denied. Mr. Davis then proceeded to trial and was convicted on counts 1-2 and 5-8.

In its presentence investigation report (PSR), U.S. Probation characterized Mr. Davis as an Armed Career Criminal, to which defense counsel objected on the basis that Mr. Davis's prior convictions in Texas for burglary of a building are not violent felonies for ACCA purposes. Defense counsel also objected to the 2-level guideline enhancement for obstruction of justice because Mr. Davis was not driving the vehicle at the time it was fleeing law enforcement. In its Addendum, U.S. Probation declined to make changes to the PSR in response to Mr. Davis's objections.

U.S. Probation calculated the guideline range for Counts 1, 5, 6, and 8 at 188-235 months, which reflected a total offense level of 33 and criminal history category of IV. It then calculated a 10-year and 25-year mandatory minimum term for the § 924(c) counts, each to run consecutive to the other sentences. This culminated in a guideline range of 608-655 months. At sentencing, the district court overruled Mr. Davis's objections, declined to rule of the objection to the obstruction enhancement as moot due to the ACCA finding, and sentenced Mr. Davis to 608 months imprisonment.

Petitioner appealed and the Fifth Circuit affirmed. In doing so, the Fifth Circuit held: (1) the § 924(c) residual clause is unaffected by this Court's reasoning in *Johnson v. United States*; (2) Hobbs Act Robbery is a "crime of violence" for purposes of § 924(c); and (3) in light of prior Fifth Circuit precedent, a prior conviction for Texas burglary supports the Armed Career Criminal Act's mandatory minimum enhancement. All three of these holdings were in error and all three require much-needed review from this Court.

REASONS FOR GRANTING THIS PETITION

I. The residual clause of 18 U.S.C. § 924(c), located at § 924(c)(3)(B), is unconstitutionally vague for the same reasons that this Court struck the residual clause of the Armed Career Criminal Act.

This Court's recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), radically altered federal vagueness and sentencing jurisprudence. *Johnson* held that the Armed Career Criminal Act's residual clause is unconstitutionally vague. By the same logic, 924(c)'s residual clause must be set aside as well. Counts Two and Seven of the indictment charged that Petitioner committed the offense defined by 18 § 924(c), that is, that they "did knowingly use, carry and brandish a firearm . . . during and in relation to a crime of violence." Section 924(c) defines "crime of violence" as follows:

> 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. § 924(c)(3) (emphasis added). The emphasized language will be described as 924(c)'s "residual clause." As shown below, § 924(c)'s residual clause is unconstitutionally vague and necessary to bring the robbery offense within the reach of 924(c)(3).

A. *Johnson* expressly overruled the "ordinary case" approach to determining whether a felony qualifies as a crime of violence.

In *Johnson,* this Court held that the Armed Career Criminal Act (ACCA)'s residual clause is unconstitutionally vague because the process by which courts categorize prior convictions as violent felonies is too "wide-ranging" and indeterminate. *Johnson*, 135 S. Ct. at 2557, As a result, ACCA "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id. Johnson* concluded that the test was unworkable and ultimately inconsistent with due process.

The Court began its analysis by explaining that, under *Taylor v. United States*, 495 U.S. 575 (1990), ACCA requires the categorical approach to determine whether a particular statute qualifies as a violent felony. *Id.* Courts must assess whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual might have committed it on a particular occasion." *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). The Court further clarified that the residual clause "*requires* a court to picture the kind of conduct that the crime involves 'in the *ordinary case*,' and to judge whether that abstraction presents a serious risk of potential injury." *Id.* (citation omitted) (emphasis added). The Court linked the "ordinary case" framework to *James v. United States*, 550 U.S. 192 (2007), in which it held, "[w]e do not view that approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony. . . Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *Id.* at 208

(citations omitted) (emphasis added). "As long as the offense is of a type that, *by its nature*, presents a serious risk of injury to another, it satisfies the requirements of [ACCA's] residual clause." *Id.* at 209 (emphasis added, brackets supplied). *Johnson* concluded that the process of determining what is embodied in the "ordinary case" rather than "real-world facts" is fatally flawed, rendering ACCA unconstitutionally vague. "Grave uncertainty" surrounds the method of "determin[ing] the risk posed by the "judicially imagined 'ordinary case.'" *Johnson*, 135 S. Ct. at 2557. "The residual clause offers no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Id.*

The *Johnson* Court considered and rejected different ways that a court might envision the hypothetical "ordinary case" since the statute offers no guidance. Specifically, the Court explained that a statistical analysis of reported cases, surveys, expert evidence, Google, and gut instinct are all equally unreliable in determining the "ordinary case." *Id.* (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc)). Although earlier ACCA cases tried to rely on statistical analysis and "common sense," *Johnson* concluded that these methods "failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." *Id.* at 2559 (referring to *Chambers v. United States*, 555 U.S. 122 (2009), and *Sykes v. United States*, 564 U.S. 1 (2011)).

This flaw alone establishes the residual clause's unconstitutional vagueness. The Court, however, explained that a closely related flaw exacerbates the problem.

The residual clause also "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. Although the level of risk required under the residual clause must be similar to the enumerated offenses (burglary, arson, extortion, or crimes involving use of explosives), *Johnson* rejected the notion that comparing a felony's "ordinary case" to the risk posed by certain enumerated offenses cures the constitutional problem.

Thus, *Johnson* not only invalidated the ACCA residual clause, but it invalidated the "ordinary case" analysis and statutory provisions that compel such an analytical framework. In other words, the only way to apply the residual clause is to use the "ordinary case" analysis, and the "ordinary case" analysis is impossible to apply in a constitutional manner.

B. This Court should apply *Johnson*'s reasoning to 18 U.S.C. § 924(c)(3)(B).

Section 924(c)'s residual clause has the same flaws that rendered ACCA's residual clause unconstitutionally vague. The statutory phrases are not identical, but the differences should have no impact on the constitutional analysis.

Although the risk at issue in ACCA is a risk of injury, and the risk at issue in Section 924(c) is a risk that force will be used, this difference is immaterial to the due process problem and has no impact on the *Johnson* decision. The Court's holding did not turn on the type of risk, but rather how a court assesses and quantifies the risk. That inquiry is the same under both the ACCA and § 924(c). Both statutes require courts first to picture the "ordinary case" embodied by a felony, and then to decide if it qualifies as a crime of violence by assessing the risk posed by the "ordinary case."

This Court has explicitly held that a court must use the same unpredictable "ordinary case" inquiry under § 924(c)(3):

> We use the so-called categorical approach when applying these definitions to the predicate offense statute. "The proper inquiry is *whether a particular defined offense, in the abstract, is a crime of violence* [.]" *United States v. Chapa–Garza*, 243 F.3d 921, 924 (5th Cir.2001) (applying 18 U.S.C. § 16(b)). We do not consider the facts underlying Williams's conviction; *his actual conduct is immaterial*. Instead, we examine only the statutory text of § 242 to determine whether it satisfies the definition of § 924(c)(3).

United States v. Williams, 343 F.3d 423, 431 (5th Cir. 2003) (emphasis added).

In litigating *Johnson*, the government itself, through the Solicitor General, agreed that the phrases at issue in *Johnson* and here pose the same problem. First noting that the definitions of a crime of violence in both § 924(c)(3)(B) and § 16(b) are identical, the Solicitor General stated, "Although Section 16 refers to the risk that *force* will be used rather than that *injury* will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." .*Johnson v. United States*, S. Ct. No. 13-7120, Supplemental Brief of Respondent United States at 22–23 (available at 2015 WL 1284964 at *22-*23). The Solicitor General was right. Section 924(c)(3)(B) and the ACCA are essentially the same and contain the same flaws.

Section 924(c)(3)(B) also presents the second flaw evident in ACCA. In addition to identifying the abstract "ordinary case" of a federal offense, the court must also

decide how much risk of intentional use of force is enough to bring the offense within § 924(c)(3)(B). Section 924(c) does not provide sufficient guidance, and that clause is unconstitutionally vague.

The Ninth Circuit recently held that the residual clause of § 16(b) is unconstitutionally vague in light of *Johnson*. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). Since the text of the two residual clauses is identical in all relevant respects, Mr. Davis urges this Court to hold that the residual clause of § 924(c) is unconstitutionally vague.

C. Courts below are divided on the status of § 924(c)'s residual clause, which requires intervention from this Court.

Courts below have struggled with the status of 18 U.S.C. § 924(c)(3)(B) after *Johnson*. Several circuits have held that the § 924(c) residual clause survives *Johnson*. *E.g., United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 698-700 (8th Cir. 2016). Other courts, primarily district courts in undecided circuits, have held that the residual clause is void for vagueness. *Duhart v. United States*, No. 16-61499-CIV, 2016 U.S. Dist. LEXIS 122220, at *13-18 (S.D. Fla. Sept. 9, 2016); *United States v. Bell*, 158 F. Supp. 3d 906, 924 (N.D. Cal. 2016); *United States v. Lattanaphom*, 159 F. Supp. 3d 1157, 1164 (E.D. Cal. 2016); *United States v. Edmundson*, 153 F. Supp. 3d 857, 862 (D. Md. 2015). Moreover, this Court's imminent decision in *Sessions v. Dimaya* will likely not resolve the § 924(c) issue because some courts are already treating § 924(c)(3)(B) different from § 16(b). *Compare United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016), *with Shuti v. Lynch*, No. 15-3835, 2016 U.S. App. LEXIS 12500, 2016 WL 3632539, at *8

(6th Cir. July 7, 2016). For federal law to be uniform, this Court must intervene.

II. Once the § 924(c) residual clause is excised, Hobbs Act robbery can no longer be labeled a "crime of violence."

Once § 924(c)(3)(B) is stricken or excised, Hobbs Act robbery fails to qualify as a crime of violence under the remaining portion of the "crime of violence" definition. Even without 924(c)'s residual clause, an offense will still qualify as a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). And the Fifth Circuit has stated, in dicta, that Hobbs Act robbery "requires proof of threats or force." *United States v. Martinez*, 28 F.3d 444, 446 (5th Cir. 1994). Yet, the statutory text is much broader than that. The Hobbs Act defines robbery to include taking "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(b)(1). The Fifth Circuit later clarified that a defendant commits this crime even if he never shows a weapon to the victim or even threatens them:

> Stevens testified that Smith approached the window of the courtesy booth and twice ordered her to "give me what you've got." She realized that she was being robbed and gave Smith approximately $1,300. Stevens stated that she did not consent to Smith's taking the money *but that she was in fear of her life because she had been robbed before. Smith did not tell Stevens that he had a gun*, but Stevens observed that he had both hands in his pockets. Stevens stated that she was concentrating on giving Smith what he wanted so that he would not hurt her. Richard Ganter, the store manager, testified that when Smith ran from the

> store, Ganter followed him, and Smith shot at Ganter with a small pistol.

United States v. Smith, 66 F.3d 319 (5th Cir. 1995) (emphasis added). The analysis in *Smith* focused on the *victim's fear*, rather than on any *threat of use of force*. Thus, a defendant is guilty of Hobbs Act robbery even if he never *makes a threat*, or *intends to make a threat*. Moreover, the defendant need not threaten to *use force*; it is sufficient to prove that the victim *feared injury*.

Just as "[t]here is . . . a difference between the use of force and the causation of injury," *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc), there is also a difference between threatened harm and threatened use of force. Thus, the Fifth Circuit held that the California offense of "criminal threat" and the Pennsylvania crime of terroristic threatening do not have "threatened use of force" as an element, even though both statutes require proof that the defendant threatened to harm the victim. *See United States v. Cruz-Rodriguez*, 625 F.3d 274, 276– 277 (5th Cir. 2010), and *United States v. Ortiz-Gomez*, 562 F.3d 683, 687 (5th Cir. 2009).

Courts should not graft the elements of § 924(c) onto Hobbs Act robbery to determine whether the latter is a crime of violence. As noted above, "[t]he proper inquiry is *whether a particular defined offense, in the abstract, is a crime of violence* [.]" *Williams*, 343 F.3d at 431 (quoting *Chapa–Garza*, 243 F.3d at 924). The particular way the defendant allegedly committed the robbery "is immaterial." *Id.* Section 924(c) applies only if predicate offense is a crime of violence *in the abstract*. The Hobbs Act does not require proof that the defendant possessed a firearm. The

fact that the government also alleges (as part of the § 924(c) offense) that the defendants utilized a weapon cannot be considered when deciding whether the underlying robbery itself is a crime of violence.

Section 924(c)(3)(B), like ACCA's residual clause, requires this Court to deduce the "ordinary case" of a Hobbs Act robbery and to assess the risk that a defendant will use physical force during and to perpetrate that abstract offense. The court must deduce what is the ordinary case of a robbery and what risk it presents. Since this is the identical analytical step that brought down the ACCA residual clause, § 924(c)(3)(B) cannot survive constitutional scrutiny under the due process principles reaffirmed in *Johnson*. And without subsection (c)(3)(B), the government cannot prove that federal robbery is a "crime of violence" for purposes of § 924(c).

III. In light of *Mathis v. United States*, Texas burglary is not a "violent felony" under the Armed Career Criminal Act.

The district court reversibly erred when it applied the Armed Career Criminal Act enhancement. The court concluded that Petitioner's three prior convictions for Texas "burglary of a building" were violent felonies. But Fifth Circuit precedent holds that one form of that offense—Texas Penal Code § 30.02(a)(3)—is *not* generic burglary. *See Constante*, 544 F.3d at 587. And *Mathis v. United States*, 136 S. Ct. 2243 (2016) holds that an offense is not "divisible"—that is, it cannot be separated into separate constituent "crimes" for purposes of ACCA analysis—unless the alternatives are true *elements*, requiring juror unanimity, rather than merely alternative means or theories. Texas burglary is not such an offense. It can no longer be considered divisible, and therefore violation of § 30.02(a) cannot be considered a

generic "burglary" for purpose of ACCA.

The ultimate question in this appeal is whether the district court was correct to apply the ACCA enhancement. That question is extremely significant, because the enhancement added at least ten years to Petitioner's sentence. But resolution of that question depends on a subsidiary, "technical" legal question: is Texas Penal Code § 30.02(a) a "divisible" offense? The answer, in light of *Mathis*, is "no."

A. If § 30.02(a) is not generic "burglary," it is not a violent felony.

Prior to this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), there were three different clauses in ACCA's definition of "violent felony." Violent felony meant any crime, punishable by one year or more in prison,that satisfied one of these three clauses:

- The "elements" clause: any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another";
- The "enumerated offense" clause: any crime that "is burglary, arson, extortion, [or] involves the use of explosives"; or
- The "residual clause": any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

18 U.S.C. § 924(e)(2)(B). *Johnson* struck down the residual clause as unconstitutionally vague. That decision is significant in this case, because some panels of the Fifth Circuit held (controversially) that Texas non-generic burglary satisfied ACCA's residual clause. *See*, *e.g.*, *United States v. Ramirez*, 507 F. App'x 353, 354 (5th Cir. 2013). Though there was disagreement on this point in unpublished opinions prior to *Johnson*, the question is now "academic" because "the residual

clause [is] unconstitutional and unenforceable." *United States v. Emeary*, 794 F.3d 526, 529 n.3 (5th Cir. 2015) (Dennis, J.).

The Fifth Circuit has also held that Texas burglary does not satisfy the elements clause: "No subsection of § 30.02(a) requires as an element the use, attempted use, or threatened use of force." *United States v. Castaneda*, 740 F.3d 169, 172 (5th Cir. 2013) (citing *United States v. Vargas–Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (en banc) and *United States v. Turner*, 305 F.3d 349, 350–51 (5th Cir.2002)). As the Court held in *Turner*, the elements of § 30.02(a) "do not necessarily involve use of physical force against the person of another." *Turner*, 305 F.3d at 351. Thus, after *Johnson*, the sole remaining question is whether the crime defined in Texas Penal Code § 30.02(a) is the generic offense of "burglary." Prior to *Mathis*, the answer was, "it depends." *See United States v. Conde-Castaneda*, 753 F.3d 172, 176 (5th Cir. 2014). After *Mathis*, the answer is "no."

B. Under Fifth Circuit law at the time of sentencing, burglary under § 30.02(a) was considered "divisible."

To determine whether an offense is generic burglary, this Court utilizes the categorical approach. Under that approach, a crime is either categorically violent or categorically non-violent. If an offense includes conduct that falls outside the relevant federal definition, then that offense is *not* a categorical match to the federal predicate definition and the sentencing enhancement does not apply. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). *Constante* illustrates the application of this approach to Texas burglary: Texas Penal Code § 30.02(a)(3) reaches conduct that falls outside the definition of generic burglary, so it is not a violent felony. *United States*

v. Constante, 544 F.3d 584, 587 (5th Cir. 2008) (citing *Taylor v. United States*, 495 U.S. 575 (1990)) ("[T]his is an appropriate case for this court definitively to conclude that a burglary conviction under § 30.02(a)(3) of the Texas Penal Code is not a generic burglary under the *Taylor* definition because it does not contain an element of intent to commit a felony, theft, or assault at the moment of entry. Therefore, Constante's burglary convictions are not violent felonies under 18 U.S.C. § 924(e).").

This Court has identified "a variant" of the categorical approach—"labeled (not very inventively) the 'modified categorical approach'—when a prior conviction is for violating a so-called 'divisible statute.'" *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). If—but only if—a statute is deemed "divisible," courts and prosecutors are allowed "to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.*

Prior to *Mathis*, it was well-settled in the Fifth Circuit that § 30.02(a) was divisible. *See Conde-Castaneda*, 753 F.3d at 176. As such, a district court was permitted to utilize the "modified categorical approach" to determine which subsection of § 30.02 was the focus of the defendant's prior Texas burglary conviction. *Id.* In *Conde-Castaneda*, the Court deemed § 30.02 to be a divisible statute "because . . . 'one alternative . . . matches an element in the generic offense [of burglary of a dwelling], but the other . . . does not.'" *Id.* (quoting *Descamps*, 133 S. Ct. at 2281). Though *Conde-Castaneda* was decided in the context of an analogous Guideline enhancement, the Fifth Circuit applied the case's holding in the context of ACCA too.

See United States v. Herrold, 813 F.3d 595, 597 (5th Cir. 2016) ("But his argument is foreclosed by our holding in *Conde–Castaneda,* in which we held that burglary of a building under Texas Penal Code § 30.02(a)(1) qualifies as generic burglary."); *accord United States v. Wallace*, 584 F. App'x 263, 264 (5th Cir. 2014) and *United States v. Fearance*, 582 F. App'x 416, 416–17 (5th Cir. 2014). Thus, at the time of sentencing, it was well-established in the Fifth Circuit that § 30.02(a) was a *divisible* offense.

C. Under *Mathis*, § 30.02(a) is *not* divisible.

Under the law applicable at the time of *sentencing*, the Texas statute was considered divisible because (a)(1) and (a)(3) constituted distinct statutory "alternatives." *C.f. Conde-Castaneda*, 753 F.3d at 177 ("To the contrary, *Descamps* reiterated that the modified categorical approach should apply when one *alternative* of a statute 'matche[d] an element in the generic offense, but the other . . . [did] not.'") (quoting *Descamps*, 133 S. Ct. at 2281) (emphasis added). In *Conde-Castaneda*, this Court saw no need to analyze whether (a)(1) and (a)(3) represented distinct *elements* of separate *crimes*. They were separate statutory *alternatives*, and that made the crime divisible.

After *Mathis*, the Court must ask an additional question: whether those "alternatives" constitute true alternative *elements* requiring jury unanimity. If so, the modified categorical approach applies and prosecutors and courts may utilize the approved documents to "narrow" the statute of conviction. But if the two statutory alternatives represent alternative *means* of committing a single offense—that is, if a jury may unanimously convict a defendant while disagreeing about which alternative

was proven—then the modified categorical approach has no application. *See Mathis*, 136 S. Ct. 2243 at 2250. "The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means." *Mathis*, 136 S. Ct. 2243 at 2256.

This Court has provided two mechanisms for accomplishing that task: (1) the Court may consult state-court decisional law to see if it "definitively answers the question." *Id.* (2) "And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a 'peek at the [record] documents' is for 'the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.'" *Mathis*, 136 S. Ct. 2243 at 2256-57 (quoting *Rendon v. Holder*, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinski, J., dissenting from denial of reh'g en banc)). If state law provides no definitive answer, and the conviction records likewise fail to specify, the enhancement still does not apply because Supreme Court precedent requires "certainty when determining whether a defendant was convicted of a generic offense." *Id.* (internal quotation omitted).

First, Texas decisional law demonstrates that subsections (a)(1) and (a)(3) of § 30.02 constitute alternative *means* of committing the single, indivisible offense of burglary. Those statutory "alternatives" are not alternative *elements* defining separate crimes. Second, just as the documents at issue in Mr. Davis's case charge burglary under subsections (a)(1) and (a)(3), this Court has encountered a surfeit of prior prosecutions which the state charged burglary under both alternative theories

in a single count.

1. Texas state courts have repeatedly held that subsections (a)(1) and (a)(3) represent alternative means or theories of a single offense of burglary.

Under Texas law, "[t]he gravamen of the offense of burglary clearly remains entry of a building or habitation without the effective consent of the owner, accompanied by either the required mental state, under §§ 30.02(a)(1) and (2), or the further requisite acts or omissions, under § 30.02(a)(3)." *DeVaughn v. State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (internal citations omitted). "[T]he attempted or completed theft or felony required by § 30.02(a)(3), merely supplants the specific intent which accompanies entry in §§ 30.02(a)(1) and (2)." *Id.* (citations omitted).

Following this clearly established facet of state law, Texas courts have repeatedly held that subsections (a)(1) and (a)(3) are alternative *means* of committing a *single offense*, and a jury need not be unanimous as to which means was proven when both are alleged in the charging document. *See Martinez v. State*, 269 S.W.3d 777, 783 (Tex. App.—Austin 2008, no pet.) (discussing *DeVaughn*, *supra*) ("We must decide whether the legislature intended, through this single substantive distinction between burglary as defined under subsections (a)(1) versus (a)(3), to create two distinct criminal offenses. Guided by the court of criminal appeals' prior analysis of section 30.02, we conclude it did not."); *accord Stanley v. State*, No. 03-13-00390-CR, 2015 WL 4610054, at *7 (Tex. App. July 30, 2015), pet. ref'd (Dec. 16, 2015) ("Burglary of a habitation may be committed three different ways. *See* Tex. Penal Code § 30.02(a)(1)–(3) . . . These different ways are not separate burglary offenses; they are

alternative means of committing the single offense of burglary.") (citing *Washington v. State*, No. 03–11– 00428–CR, 2014 WL 3893060, at *3–4 (Tex. App.–Austin Aug. 6, 2014, pet. ref'd) (mem. op.) (not designated for publication).

These rulings show that the state courts consistently construe subsections (a)(1) and (a)(3) as alternative *means* rather than separate *elements* of distinct crimes. Under *Mathis*, this is sufficient to render the law indivisible. There is no need to look any further into the question.

2. Texas prosecutors routinely charge both theories in a single count of an indictment.

If this were an unfamiliar statute, and if state decisional law were not so clear, this Court could also take a quick look at the charging document to shed light on whether Texas considered (a)(1) and (a)(3) to be separate offenses.

Notably, this is not the same as looking at the charging document to determine which subsection applied to the case-at-hand. The "Kozinski peek" is for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.'" *Mathis*, 136 S. Ct. 2243 at 2256-57 (quoting *Rendon*, 782 F.3d at 473–74 (Kozinski, J., dissenting from denial of reh'g en banc)).

Texas law provides that separate *crimes* must be charged in separate *counts*, whereas separate *means* may be charged by multiple paragraphs within a single count:

> When multiple offenses are properly joined in a single indictment, each offense should normally be alleged in a separate count. . . . A count may contain as many separate paragraphs as necessary. . . . As a general rule, a "count" is used to charge the offense itself and a "paragraph" is that

> portion of a count which alleges the method of committing the offense.

Owens v. State, 96 S.W.3d 668, 672–73 (Tex. App.—Austin 2003, no pet.) (citations omitted). As the Texas Court of Criminal Appeals has explained, even where the "means" or "method" allegations are charged in the conjunctive, they are submitted to the jury in the disjunctive:

> This Court has held that alternate pleading of the differing methods of committing one offense may be charged in one indictment. . . . And although the indictment may allege the differing methods of committing the offense in the conjunctive, it is proper for the jury to be charged in the disjunctive. . . . It is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive *for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted*. Indeed, the Supreme Court has determined that "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Kitchens v. State, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991) (emphasis added) (citations omitted). Here, Mr. Davis's burglaries were charged in the alternative, in a single count.

Therefore, under both criteria set forth in *Mathis* for indivisibility, the prior convictions for burglary of a building fail to support an ACCA enhancement.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits.

Respectfully submitted,

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_____
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fif h Circuit
FILED
January 31, 2017
Lyle W. Cayce
Clerk

No. 16-10330

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,

Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-94

Before HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:*

Andre Levon Glover appeals his conviction and sentence and Maurice Lamont Davis appeals his sentence[1] in this case arising out of a series of similar robberies at Murphy Oil locations across the Dallas Metroplex area during June of 2014.[2] We AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Although his prayer styles his challenges as directed only to his sentence, Davis seeks to vacate the convictions on Counts 2 and 7 as part of his requested resentencing.

[2] Counts 1 and 3–6 charged conspiracy and aiding and abetting Hobbs Act (18 U.S.C. § 1951) robberies; Counts 2 and 7 were firearms charges under 18 U.S.C. § 924(c)(1). Count

Glover's Challenge to his Hobbs Act Convictions. Glover challenges his convictions charging robberies in violation of the Hobbs Act which makes it unlawful to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a). Glover contends that the Government failed to prove the necessary impact on interstate commerce because all the robberies occurred within one state and only impacted merchandise (cartons of cigarettes) at local stores.[3] While conceding that the cigarettes themselves were manufactured out of state, Glover argues that the inventory and replacement inventory came from local Murphy Oil distribution centers or other stores. He also contends that the evidence was insufficient to connect him to two of the robberies (June 16 and 21).

This court reviews a challenge to the sufficiency of the evidence supporting a conviction by reviewing the evidence in the "light most favorable to the verdict to determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Lewis*, 774 F.3d 837, 841 (5th Cir. 2014) (citation omitted).

The Hobbs Act requires an effect on interstate commerce that is "identical with the requirements of federal jurisdiction under the Commerce Clause." *United States v. Villafranca*, 260 F.3d 374, 377 (5th Cir. 2001) (citation omitted). The defendant's activity on interstate commerce "need only be slight" but cannot be "attenuated." *Id.* (citation omitted). Here, cigarettes,

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8, asserted only against Davis, was for felon-in-possession of a firearm under 18 U.S.C. § 922(g)(1).

[3] Glover also argues that the Government should be required to prove a "substantial effect" on interstate commerce but concedes that this argument is foreclosed by precedent. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

a highly regulated commodity, travelled in interstate commerce and, following the robberies, had to be replaced by cigarettes that were manufactured and shipped from other states. While the Murphy Oil stores were local, the company itself is headquartered outside of Texas and conducts business in half the states. We conclude that the evidence was sufficient to support the interstate commerce nexus.

With respect to Glover's other sufficiency challenge, we note that Glover was apprehended following the second robbery on June 22. The similarities of the vehicles used, the clothing worn, the weapons employed, the items stolen, and the modus operandi between the June 22 robberies on the one hand and the June 16 and 21 robberies on the other are sufficient to support a conclusion by a rational juror beyond a reasonable doubt that the same person committed all of the robberies.

Glover's and Davis's Challenges to Counts 2 and 7. Both Glover and Davis contend that their convictions under 18 U.S.C. § 924(c) cannot stand in light of *Johnson v. United States,* 135 S. Ct. 2551 (2015), which found a different statutory section to be unconstitutionally vague. In *Johnson*, the Court found the following portion of 18 U.S.C. § 924(e)(2)(B)(ii), known as the residual clause, defining "violent felonies" unconstitutionally vague: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." In contrast to that language, § 924(c) involves the phrase "crime of violence" which, in turn, is defined, in relevant part, as a felony "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)(B).

Sitting en banc, we recently considered a similar argument involving 18 U.S.C. § 16(b), which contains the exact language of § 924(c)(3)(B), and held that the language is not unconstitutionally vague in light of *Johnson*. *United*

States v. Gonzalez-Longoria, 831 F.3d 670, 677 (5th Cir. 2016) (en banc), *petition for cert. filed*, (Sept. 29, 2016)(No. 16-6259). We reasoned that in contrast to the residual clause language at issue in *Johnson*, the risk of physical *force* in 18 U.S.C. § 16(b)—as opposed to the risk of physical *injury*—is more definite. *Id.* at 676. We concluded that by requiring the risk of physical force to arise "in the course of committing" the offense, the provision "does not allow courts to consider conduct or events occurring after the crime is complete." *Id.* (citation omitted).

We recognize the possibility that identical language in two different statutes could be differently construed but see no reason to do so here. We join several other circuits in concluding that *Johnson* does not invalidate § 924(c)(3)(B). *See United States v. Prickett*, 839 F.3d 697, 699–700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 145–49 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016), *petition for cert. filed*, (Oct. 6, 2016)(16-6392).[4] We therefore do not reach the question of whether the Hobbs Act robbery charges would include a "use of force" element under 18 U.S.C. § 924(c)(3)(A).

Davis's Challenge to the Armed Career Criminal Act (ACCA) Enhancement. Davis argues that his prior convictions under Texas law for burglary of a building are not "crimes of violence" for purposes of the ACCA because the statutes under which he was convicted, Texas Penal Code § 30.01(a)(1) and (a)(3), are not divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and some parts of these statutes do not qualify as "crimes of

[4] Glover's alternative argument that the jury should decide what constitutes a crime of violence is meritless. A determination of whether a Hobbs Act robbery and respective conspiracy offenses should be classified as a crime of violence is a question of law reserved for the judge. *United States v. Credit*, 95 F.3d 362, 364 (5th Cir. 1996).

violence." However, he concedes that this challenge is foreclosed by our recent decision in *United States v. Uribe*, 838 F.3d 667, 669 (5th Cir. 2016).

Glover's Challenge to the "Abduction" Sentencing Enhancement. Glover contends that the district court erroneously enhanced his sentence for abduction in the June 16 (Lancaster), June 21 (Dallas), and June 22 (Mansfield) robberies because the movement of store clerks does not constitute a forced accompaniment to a "different location" within the meaning of U.S.S.G. § 2B3.1(b)(4)(A). Glover notes that the original PSR, which listed a criminal history score of I and an offense level of 28, did not contain the enhancement, presumably referring to the June 21 robbery (Dallas) because the enhancement was present for the Lancaster and Mansfield robberies. After the Government objected, the probation officer agreed that the enhancement was appropriate for the June 21 robbery. However, both the Government and the probation officer noted that, because of groupings of multiple counts, the enhancement for June 21 (Dallas) did not affect the guidelines calculation.[5] Indeed, Glover was sentenced on Counts 1 and 3–6 premised on Guidelines calculations that yielded a criminal history score of I and an offense level of 28, the same as it was before the enhancement for the June 21 (Dallas) robbery. Glover was sentenced to 78 months, the bottom of the Guidelines range, for

[5] Glover does nothing to explain the math underlying the alleged error. However, an examination of the PSR illuminates the issue. The page to which Glover cites to support his argument that his sentence was enhanced by the abduction enhancement is a page from the Addendum to the PSR which states: "The inclusion of such [abduction] enhancement . . . does not affect the guideline computations." His brief states that his total offense level was increased by two levels due to this enhancement. This statement presumably refers to the two counts premised on the Lancaster and Mansfield robberies where the enhancement caused his offense level to be 24 which, in turn, was the "highest offense" level to which the multiple count adjustment of four was added. Had the enhancement not been in place for any count, the next "highest offense level" was 22. In turn, with the addition of the multiple count adjustment of four levels, his offense level would have been 26, rather than 28.

those counts.[6] Given the specifics of the calculations in this case, if either the June 16 (Lancaster) or the June 22 (Mansfield) enhancements were proper, then there would be no effect on his guidelines range making any error as to any other count harmless. *United States v. Castro-Alfonso*, 841 F.3d 292, 294 (5th Cir. 2016) (harmless error review applies to procedural sentencing errors).

We review the district court's application of the Sentencing Guidelines de novo and its factual findings for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (citation omitted). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *Id*. (citation omitted).

The Guidelines direct a court to enhance a defendant's sentence by four levels "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). The Guidelines define "abducted" to mean that "a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." § 1B1.1 cmt.n.1.

The term "different location" is interpreted on a case-by-case basis. *United States v. Hawkins*, 87 F.3d 722, 726–28 (5th Cir. 1996). The term is "flexible and thus susceptible of multiple interpretations" and is "not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like." *Id*. at 728. In *Hawkins*, this court held that, despite escaping, the victims were "abducted" when a gunman forced them to walk approximately 40 to 50 feet from a location near his truck to a location near a van in the same parking lot. *Id*. at 728.

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[6] Glover received consecutive sentences of 120 months and 300 months on Counts 2 and 7, respectively, for a total of 498 months.

During the robbery of the Lancaster Murphy Oil on June 16, the store clerk testified that Glover's accomplice grabbed her from behind and forced her to go from the main kiosk "to the back part of the storage building" where the inventory is kept. The clerk was told to open the door and then "he forced [her] down once [she] got in the [storage] room." The robbery of the Mansfield Murphy Oil on June 22 occurred under similar circumstances. The clerk testified that as she was dragging the candy rack out of the storage room, a robber held a gun to her head and told her to get back into the storage room. The PSR concluded from the Lancaster and Mansfield robberies that the clerks were forced "to move from one area to another area, namely, the outside of the kiosk to the inside of the storage room," constituting abduction under § 2B3.1(b)(4)(A). We agree and conclude that the district court did not err in applying this enhancement.

Concluding that all of Davis's and Glover's challenges fail, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA

v.

MAURICE LAMONT DAVIS

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:15-CR-00094-O(02)
U.S. Marshal's No.: 49303-177
John Kull, Assistant U.S. Attorney
Sam Ogan, Attorney for the Defendant

On November 19, 2015 the defendant, MAURICE LAMONT DAVIS, was found guilty by a jury on Count(s) One, Two, Five, Six, Seven and Eight of the Indictment filed on March 3, 2015, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951(a)	Conspiracy To Interfere With Commerce By Robbery	June 22, 2013	One
18 U.S.C. § 924(c)(1)(B)(i) & 2	Using, Carrying, and Brandishing A Firearm During And In Relation To, And Possessing And Brandishing A Firearm In Furtherance Of, A Crime Of Violence	June 16, 2013	Two
18 U.S.C. § 1951(a) & 2	Interference With Commerce By Robbery and Aiding And Abetting	June 22, 2013	Five
18 U.S.C. § 1951 (a) & 2	Interference With Commerce by Robbery And Aiding and Abetting	June 22, 2013	Six
18 U.S.C. § 924(c)(1)(C)(i) & 2	Using, Carrying, and Brandishing A Firearm During And In Relation To, And Possessing And Brandishing A Firearm In Furtherance Of, A Crime Of Violence	June 22, 2013	Seven
18 U.S.C. § 924(a)(2)	Using, Carrying, and Brandishing A Firearm During and In Relation To, and Possessing and Brandishing A Firearm In Furtherance Of, A Crime Of Violence	June 22, 2013	Eight

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of $600.00 as to Count(s) One, Two, Five, Six, Seven and Eight of the Indictment filed on March 3, 2015.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed March 17, 2016.

REED O'CONNOR
U.S. DISTRICT JUDGE

Signed March 23, 2016.

IMPRISONMENT

The defendant, MAURICE LAMONT DAVIS, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **One Hundred Eighty Eight (188) months as to Count One, Five and Six to run concurrently with each other; One Hundred Twenty (120) months as to Count Two to run consecutive to the sentence imposed on Counts One, Five and Six; Three Hundred (300) months as to Count Seven to run consecutive to Counts One, Two, Five and Six; and One Hundred Twenty (120) months as to Count Eight to run concurrent to the sentence imposed in Counts One, Two, Five, Six and Seven, for a total aggregate sentence of Six Hundred Eight (608) months.** The sentence shall run concurrent to any sentence imposed in the defendant's pending state charge for Burglary of a Building in the Dallas County Criminal Court 6 in Dallas, Case No. F-1539265, as it is not related to the instant offense. The sentence shall run concurrently with the defendant's pending state charges for Evading Arrest Detention in the Johnson County District Court in Cleburne, Texas, Case No. F-48701, and Evading Arrest Detention and Tampering With Identification in the Johnson County Court at Law 1 in Cleburne, Case Nos. MA201401186 and MA201401187, as they are related to the instant offense.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of Two (2) years as to Count(s) One, Two, Five, Six, Seven and Eight of the Indictment filed on March 3, 2015.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

(1) not leave the judicial district without the permission of the Court or probation officer;
(2) report to the probation officer as directed by the Court or probation officer and submit a truthful and complete written report within the first five (5) days of each month;
(3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
(4) support the defendant's dependents and meet other family responsibilities;
(5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
(6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
(7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
(8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
(9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
(11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
(12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and,
(13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer;

participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month; and

participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

FORFEITURE

Pursuant to 18 U.S.C. §982(a)(1) and 28 U.S.C. § 2461(c), it is hereby ordered that the defendant's interest in the following property is condemned and forfeited to the United States: **(1) a Remington, Model 870, 12 gauge short-barreled shotgun; and (2) ammunition recovered with the weapon and from the car.**

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE LAMONT DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Maurice Lamont Davis, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 1st day of May, 2017,

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***Counsel of Record*

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE LAMONT DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PROOF OF SERVICE

I, Brandon E. Beck, do certify that on this date, May 1, 2017, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via Federal Express Overnight. The Solicitor General, Bryan McKay, Assistant U.S. Attorney, and the petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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