

No. ___ - ___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

GEORGE STONEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of *Certiorari*
to the United States Court of Appeals
for the Third Circuit**

PETITION FOR WRIT OF *CERTIORARI*

HEIDI R. FREESE
Federal Public Defender

FREDERICK W. ULRICH
Assistant Federal Public Defender
100 Chestnut Street, Suite 306
Harrisburg, PA 17101
(717) 782-2237
Attorney ID# PA44855
Counsel for Petitioner,
George Stoney

Question Presented

1. Under the categorical approach, rather than the Third Circuit’s outlier contemporaneous act approach, does a conviction under the Hobbs Act, 18 U.S.C. 1951—as defined under the elements clause of 18 U.S.C. § 924(c)(3)(A) to include any felony that “has as an element . . . use of physical force”—qualify as a “crime of violence”?

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**PETITION FOR WRIT OF *CERTIORARI*
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Petitioner, George Stoney, by his attorney Frederick W. Ulrich, Assistant Federal Public Defender in the Office of the Federal Public Defender for the Middle District of Pennsylvania, respectfully petitions for a writ of *certiorari* to review the order entered in this case by the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The order of the United States Court of Appeals for the Third Circuit denying a Certificate of Appealability, dated May 30, 2018, is included in the Appendix. *See* (App. 1a.)

JURISDICTION

The Third Circuit entered its order denying a Certificate of Appealability on May 30, 2018. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1951 provides, in pertinent part:

- (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. § 924(c) provides, in pertinent part:

(3) 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.

STATEMENT OF THE CASE

Petitioner, George Stoney, pleaded guilty to Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and to using and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The charges stemmed from a robbery of a restaurant near Harrisburg, Pennsylvania.

The probation office prepared a presentence report, calculating Mr. Stoney’s guideline range on the Hobbs Act robbery to be 262 to 327 months, based on an offense level of 29 and a criminal history category of VI. Because Mr. Stoney’s Hobbs Act robbery conviction was deemed a crime of violence under Section 924(c), he was subject to a mandatory additional consecutive term of 84 months.

At his sentencing proceeding, the District Court imposed a 188-month sentence: 104 months for the Hobbs Act robbery and a consecutive term of 84 months for the Section 924(c) offense.

Mr. Stoney moved to correct his sentence under 28 U.S.C. § 2255, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Mr. Stoney argued, among other things, that following *Johnson*, Hobbs Act robbery is no longer a crime of violence, and so his mandatory consecutive sentence of 84 months for the Section 924(c) offense violated due process. *See* (App. 1a).

The District Court issued a memorandum opinion and order, denying Mr. Stoney's motion and declining to issue a certificate of appealability. *See* (App. 4a). Mr. Stoney requested a certificate of appealability, but the Third Circuit denied the request on the grounds that Third Circuit precedent establishes that Hobbs Act robbery qualifies as a “crime of violence” under the elements clause of Section 924(c), citing *United States v. Robinson*, 844 F.3d 137, 144 (3d Cir. 2016), *cert. denied* 138 S. Ct. 636 (2018). *See* (App. 1a). In determining that the Hobbs Act conviction was a crime of violence, the Third Circuit, unlike every other Court of Appeals to address the issue, did not apply the categorical approach because the Section 924(c) violation (brandishing a firearm) was contemporaneous with the Hobbs Act offense. *See* (App. 3a).

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

A. This Petition raises an issue on which the Courts of Appeals are divided, with the Third Circuit taking an outlier analytical approach, and which is of national importance because many defendants convicted for Hobbs Act robbery are improperly sentenced to an additional mandatory consecutive term of 84 months for committing a “crime of violence.”

When determining whether an offense is a predicate for a contemporaneously charged Section 924(c) offense, the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all apply the categorical approach. *See United States v. Hill*, 832 F.3d 135, 139-40 (2d Cir. 2016); *United States v. Fuentes*, 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 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016)(“*Prickett II*”); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Serafin*, 562 F.3d 1105, 1107-08 (190th 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). The Ninth Circuit’s analysis in *Amparo* exemplifies the reasoning of these courts, asserting that the text and legislative history of Section 924(c) compel the categorical approach. *See Amparo*, 68 F.3d at 1225.

In stark contrast, the Third Circuit in *Robinson* advances the idiosyncratic view that the categorical approach does not apply in the section 924(c) context because a predicate and Section 924(c) offense are contemporaneously tried to a

jury. As a result, the record of all necessary facts is before the district court such that any section 924(c) conviction unmistakably sheds light on whether the predicate offense was committed forcibly. *See Robinson*, 844 F.3d at 143.

The *Robinson* rationale adopts a singular approach to a determination of “crime of violence.” According to *Robinson*, courts—when determining whether the predicate offense was committed in a forcible manner—should not make a purely legal inquiry into the elements of the predicate offense. Rather, courts should consider any facts found by the jury (or admitted by the defendant) with respect to the firearm portion of the section 924(c) offense. *See id.* Thus, according to *Robinson*, “[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.

The Ninth Circuit in *Amparo* explicitly rejected the view that the categorical approach is unnecessary given any factual confidence surrounding contemporaneous offenses. *See Amparao*, 68 F.3d at 1225.

B. The Third Circuit’s decision is incorrect because conviction of Hobbs Act robbery does not qualify as a “crime of violence” under the elements clause of Section 924(c).

This Court, contrary to *Robinson*, has expressly held that the statutory text at issue in section 924(c)—“has as an element”—compels the categorical approach. *See Taylor v. United States*, 495 U.S. 575, 600 (1990)(addressing the categorical

approach with respect to 18 U.S.C. § 924(e)); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)(addressing the categorical approach with respect to 18 U.S.C. § 16(a)).

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, 259-64 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016).

Further, this Court has made clear that an indivisible predicate offense cannot sometimes be a crime of violence and sometimes not. *See Descamps*, 570 U.S. at 268. But *Robinson*'s rationale leads to that result: the Hobbs Act robbery of ABC is a crime of violence, but the Hobbs Act robbery of XYZ is not, if the jury acquitted on the section 924(c) charge with respect to XYZ.

C. This case presents an ideal vehicle to address the circuit split on this “crime of violence” issue.

This case presents an ideal vehicle to address whether courts should apply the categorical approach when considering whether a Hobbs Act conviction qualifies as a “crime of violence”—as most Courts of Appeal have held—or apply the contemporaneous act approach of the Third Circuit’s outlier decision in *Robinson*.

Mr. Stoney preserved his objection by, first, moving to correct his sentence under 28 U.S.C. § 2255, based on *Johnson*, and then, after the District Court denied the motion and declined to issue a certificate of appealability, filing in the Third Circuit an application for a certificate of appealability. The Third Circuit’s order that squarely addressed the issue, denying the application on the grounds that

established Third Circuit precedent held that Hobbs Act robbery qualifies as a “crime of violence” under the elements clause of Section 924(c). *See Robinson*, 844 F.3d at 144.

CONCLUSION

WHEREFORE, the Petitioner, George Stoney, respectfully requests that This Honorable Court grant his petition for a writ of *certiorari*.

Respectfully submitted,

/s/ Frederick W. Ulrich _____

FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender
Attorney ID# PA44855
100 Chestnut Street, Suite 306
Harrisburg, PA 17101
(717) 782-2237
Counsel for Petitioner,
George Stoney

Date: August 28, 2018

CERTIFICATE OF BAR MEMBERSHIP

I, Frederick W. Ulrich, Esq., Assistant Federal Public Defender, hereby certifies that I am a member of the Bar of this Court.

Respectfully submitted,

/s/ *Frederick W. Ulrich*
FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender

Date: August 28, 2018