

No. ____ - ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

NATHAN MOSLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR WRIT OF *CERTIORARI*

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Question Presented

1. In accord with the categorical approach, rather than the Third Circuit's outlier contemporaneous act approach, should a conviction under the Hobbs Act, 18 U.S.C. 1951 qualify as a "crime of violence", 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"?

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**PETITION FOR WRIT OF *CERTIORARI*
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Petitioner, Nathan Mosley, by his attorney Ronald A. Krauss, First 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. (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. Code § 1951 provides, in pertinent part:

- (a) Whoever in any way or degree. . . affects commerce. . . by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property . . . 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. Code § 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 Nathan Mosley, on June 24, 2014, 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 December 3, 2013, robbery of a restaurant near Harrisburg, Pennsylvania.

The probation office prepared a presentence report, concluding that Mr. Mosley’s guideline range on the Hobbs Act robbery was 262 to 327 months, based on an offense level of 29 and a criminal history category of VI. Because Mr. Mosley’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 December 3, 2015, sentencing proceeding, Mr. Mosley received a downward departure under Section 4A1.3 of the Sentencing Guidelines

and a downward variance under 18 U.S.C. § 3553(a). 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.

On May 10, 2016, Mr. Mosley, moved to correct his sentence under 28 U.S.C. § 2255, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Mr. Mosley argued, *inter alia*, 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.

The District Court issued a memorandum opinion and order, on May 16, 2017, denying Mr. Mosley’s motion and declining to issue a certificate of appealability. Mr. Mosely filed in the Third Circuit Court of Appeals an Application for Certificate of Appealability on August 18, 2017. The Third Circuit denied the application on the grounds that Third Circuit precedent established 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, did not apply the categorical approach, reasoning that the Section 924(c) violation (brandishing a firearm) was contemporaneous with the Hobbs Act offense.

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

A. This Petition raises an issue on which the Courts of Appeals are split, with the Third Circuit an analytical outlier, and is an issue that 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. 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 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016) (“*Pricket II*”); *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). 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, *Robinson* reasons, “the record of all necessary facts [is] before the district court” such that any section 924(c) conviction “unmistakably shed[s] light” on whether the predicate offense was committed forcibly. 844 F.3d at 141. 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, as the categorical approach dictates. 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. 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 (emphasis in original).

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

B. The Third Circuit’s outlier analysis 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*, 133 S. Ct. 2276, 2283-86 (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*, 133 S. Ct. at 2287. But *Robinson*’s rationale leads to that absurd result: while a Hobbs Act robbery of ABC is a crime of violence, a Hobbs Act robbery of XYZ—if the jury acquitted on the section 924(c) charge with respect to XYZ—is not.

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 Third Circuit’s outlier contemporaneous act approach in *Robinson*.

Petitioner preserved his objection by, first, moving to correct his sentence under 28 U.S.C. § 2255, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Then, after the District Court denied the motion and declined to issue a certificate of appealability, he filed in the Third Circuit an application for a certificate of appealability. The Third Circuit, in a May 30, 2018 order that squarely addressed the issue, denied that application, citing Third Circuit precedent holding that Hobbs Act robbery qualifies as a “crime of violence” under the elements clause of Section 924(c). *United States v. Robinson*, 844 F.3d 137, 144 (3d Cir. 2016), *cert. denied* 138 S. Ct. 636 (2018).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I, Ronald A. Krauss, Esq., First Assistant Federal Public Defender,
hereby certifies that I am a member of the Bar of this Court.

Respectfully submitted,

/s/ *Ronald A. Krauss*
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Date: August 28, 2018