

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAUL RODRIGUEZ,
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

In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court held the residual clause of 18 U.S.C. § 924(c) unconstitutionally vague, and in the process reaffirmed that the categorical approach applies to crime-of-violence determinations under that statute. *Davis* abrogates Third Circuit precedent holding that the categorical approach *does not* apply to crime-of-violence determinations under § 924(c). See *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). Mr. Rodriguez’s case was disposed of under *Robinson*, and the question presented is:

Whether this petition should be granted, the judgment of the Third Circuit vacated, and the case remanded (GVR) to the court of appeals for a determination in the first instance of whether Mr. Rodriguez’s predicate offense is categorically a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Raul Rodriguez 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 May 1, 2019.

OPINION BELOW

The court of appeals affirmed the district court’s judgment, filing a not-precedential opinion on May 1, 2019. The opinion is attached as Appendix A, and affirms under the Third Circuit’s previous decision in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). App. A. at 8-9. The relevant district court opinion—denying Mr. Rodriguez’s motion to dismiss Count Two of the indictment—is attached as Appendix B.

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 Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 924(c)(1)(A)(ii)-(iii) prohibits the brandishing or discharging 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).

STATEMENT OF THE CASE

In *Johnson v. United States*, 135 S. Ct. 2551, 2557-60 (2015), this Court held the residual clause in the Armed Career Criminal Act (18 U.S.C. § 924(e)) to be unconstitutionally vague. Mr. Rodriguez’s appeal questioned whether *Johnson*’s holding applies to the similarly worded residual clause in 18 U.S.C. § 924(c)—a question that has since been answered in the affirmative by this Court. See *United States v. Davis*, 139 S. Ct. 2319 (2019). Mr. Rodriguez’s appeal likewise questioned whether the predicate offense in this case, Hobbs Act robbery (18 U.S.C. § 1951), is categorically a crime of violence under element-of-force clause, § 924(c)(3)(A).

The Third Circuit avoided those questions by holding that the “categorical approach”—the familiar methodology for determining whether an offense qualifies as a predicate for purposes of various federal criminal provisions—simply does not apply when determining whether an offense is a crime of violence under § 924(c). The court of appeals instead applied its precedent *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016), which directs courts to examine not just the elements of the predicate, but also 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.

Robinson's fact-specific approach has been abrogated by *Davis*, where the Court reaffirmed that the categorical approach applies to crime-of-violence determinations under § 924(c) and held the statute's residual clause unconstitutionally vague. The Third Circuit erroneously disposed of Mr. Rodriguez's appeal two months before *Davis* was decided, and this petition should be granted, the judgment of the Third Circuit vacated, and the case remanded (GVR) to the court of appeals for a determination in the first instance of whether Mr. Rodriguez's predicate offense is categorically a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).

1. This case arose from the robbery of a check cashing business in Bethlehem, Pennsylvania, on November 12, 2014. Mr. Rodriguez and an accomplice entered the business while one employee was on duty, and the accomplice broke into the employee's secure workstation. Mr. Rodriguez then entered the workstation while the accomplice pointed a gun at the employee, demanding money and threatening to kill her. The employee provided money, and Mr. Rodriguez eventually took her into a bathroom and bound her hands and feet. Mr. Rodriguez threatened to kill the employee, and tied a gag around her head and instructed her to count to ten before attempting to escape. Mr. Rodriguez and the accomplice fled with \$11,140.

2. Mr. Rodriguez was charged with one count of Hobbs Act robbery, and aiding and abetting, in violation of 18 U.S.C. § 1951(a) and 2 (Count One), and one count of brandishing a firearm during and in relation to a crime of violence, and aiding and abetting, in violation of 18 U.S.C. §§ 924(c) and 2 (Count Two). He moved to dismiss the § 924(c) charge on the ground

that Hobbs Act robbery is no longer a crime of violence after this Court’s decision in *Johnson*. The district court denied that motion. App. B. Mr. Rodriguez then entered into a guilty plea agreement with respect to both counts of the indictment, while preserving his right to appeal the denial of the motion to dismiss.

3. On appeal, Mr. Rodriguez challenged his brandishing 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*.¹ Section 924(c)(1)(A)(ii)-(iii) prohibits the brandishing or discharging of 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. Rodriguez 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 as § 1951(a) does not have as an element the use, attempted use, or threatened use of

¹ The government appealed, as well, arguing that the district court erred in holding that Hobbs Act robbery is not a crime of violence under the U.S. Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2). The Third Circuit affirmed the district court on that point. App. A at 4-8.

physical force against the person or property of another. Because the Third Circuit did not base its decision on this ground, the reach of Hobbs Act robbery is not before this Court.

4. The Third Circuit affirmed Mr. Rodriguez’s § 924(c) conviction based on its previous decision in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). App. A at 8-9. In *Robinson*, the Third Circuit avoided the question of whether *Johnson* invalidates § 924(c)’s residual clause by holding that the categorical approach applies only to the assessment of prior convictions, and *does not* apply when the predicate and the federal criminal prohibition are contemporaneous offenses.

Addressing § 924(c) specifically, the Third Circuit ruled that “the remedial effect of the ‘categorical’ approach is not necessary” because the predicate offense and gun brandishing are adjudicated simultaneously by a jury. 844 F.3d at 141. The § 924(c) conviction will therefore “unmistakably shed light on” the means by which the predicate offense was committed, and the Sixth Amendment concerns of judicial fact-finding underlying the categorical approach are not implicated. *Id.* at 141, 143. That contrasts with the prior-conviction scenario, the court reasoned, where “[d]etermining facts of the earlier conviction could require a sentencing court to engage in evidentiary inquiries based on what occurred at a trial in the distant past.” *Id.* at 142.

Instead of a categorical approach focused solely on the elements of the predicate offense, *Robinson* directs courts to analyze contemporaneous offenses together, focusing on facts “that have either been found by the jury or admitted by the defendant in a plea.” 844 F.3d at 143. In other words, once the defendant has been convicted, the elements of the predicate offense and the elements of the gun brandishing offense can be “read together” to determine if, between them, they have the element of force required to establish a crime of violence under § 924(c). *Id.*

As the Court put it in the context of Hobbs Act robbery, “[t]he question, therefore, 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?’ The answer to this question must be yes.” *Id.* at 144.

REASONS FOR GRANTING THE PETITION

Two months after the Third Circuit disposed of Mr. Rodriguez’s appeal based on *Robinson*, this Court abrogated that case by reaffirming that the categorical approach applies to crime-of-violence determinations under § 924(c). *See United States v. Davis*, 139 S. Ct. 2319 (2019). Mr. Rodriguez’s petition should be granted, the judgment of the Third Circuit vacated, and the case remanded (GVR) to the court of appeals for a determination in the first instance of whether Mr. Rodriguez’s predicate offense is categorically a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).

Davis held the residual clause of § 924(c) unconstitutionally vague, and in the process reaffirmed that the categorical approach applies to crime-of-violence determinations under the statute. 139 S. Ct. at 2327-33. In *Davis*, the government urged the Court to distinguish between prior convictions and contemporaneous offenses—as *Robinson* does—and to hold the categorical approach inapplicable to the latter. *Id.* at 2327. The Court refused. It acknowledged that the Sixth Amendment concerns of judicial fact-finding are not present in the contemporaneous-offense scenario, but explained that the text and history of § 924(c)—independent of any Sixth Amendment or other concerns—compel the categorical approach. *Id.* at 2327-29.

As to text, the Court focused on the word “offense” in the preface to § 924(c)’s definition of “crime of violence”:

[T]he 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 Court first explained that “offense” as it relates to subsection (A)—the element-of-force clause—compels the categorical approach. 139 S. Ct. at 2328 (citing *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009)). Indeed, the Court noted that “everyone agrees” with this bedrock proposition, which was first articulated by this Court back in 2004. *Id.* at 2327-28 (discussing *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)); *see also id.* at 2339 (Kavanaugh, J., dissenting) (acknowledging same). The Court then explained that the term “offense” can carry only one meaning in the statute, and therefore compels the categorical approach with respect to subsection (B), as well—the residual clause. *Id.*

As to the history of § 924(c), the Court recounted that the statute originally prohibited the use of a gun in furtherance of any federal felony, but was amended in 1984 to narrow the class of predicate offenses to “crimes of violence.” 139 S. Ct. at 2331. But if the categorical approach were jettisoned, that “would go a long way toward nullifying” the amendment—for as the Court noted, “how many felonies don’t involve a substantial risk of physical force when they’re committed using a firearm—let alone when the defendant brandishes or discharges the firearm?” *Id.*

In short, *Davis* rejected the proffered distinction between prior convictions and contemporaneous offenses, reaffirmed that the categorical approach applies to both the element-of-force and residual clauses, and underscored the importance of respecting the narrowing

amendment of 924(c). That contradicts both the reasoning and holding of *Robinson*, rendering it abrogated. Indeed, this Court’s disapproving observation that, without the categorical approach, virtually any felony would qualify as a § 924(c) predicate if committed using a firearm is a repudiation of *Robinson*’s view that the pertinent question is whether Hobbs Act robbery—or any other offense—committed while brandishing a firearm is a crime of violence. 844 F.3d at 144.

This petition should be granted, the judgment of the Third Circuit vacated, and the case remanded to the court of appeals to determine, in the first instance, whether Mr. Rodriguez’s predicate offense is categorically a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).

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 May 1, 2019.

Respectfully submitted,



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