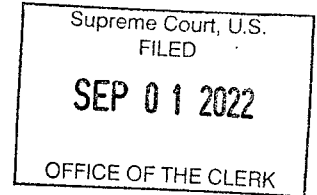


No. 22-5610 ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE THOMPSON — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Eastern District of Pennsylvania
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andre Thompson
(Your Name)

FCI Ray Brook PO Box 900
(Address)

Ray Brook NY 12977
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) When applying the categorical approach of 18 U.S.C. § 924(c)(3)(A) - the elements clause, are courts allowed or required to look to the nature of an offense and what it ordinarily involves, when determining if that offense qualifies as a predicate crime of violence?
- 2) When applying the categorical approach of 18 U.S.C. § 924(c)(3)(A) - the elements clause, are courts required or allowed to determine if the "elements" of an offense requires, involves or has as an element the use, ... of physical force, instead of determining if the offense itself has as an element the use, ... of physical force.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 3 2022, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

18 U.S.C. § 2113(d)

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both

18 U.S.C. § 924(c)(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

The case underlying this petition arises from a criminal action (Cr. No. 09-193-1) filed against Petitioner Andre Thompson in the Eastern District of Pennsylvania, for the January 17, 2009 robbery of the Third Federal Bank, 905 North Second Street, Philadelphia, PA.

On March 5, 2009 the Petitioner was charged in an indictment with conspiracy to commit armed bank robbery, in violation of 18 U.S.C. § 371 (count one); armed bank robbery, in violation of 18 U.S.C. § 2113(d) (count two); and carrying and using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (count three).

On September 28, 2009 the Petitioner plead guilty to all three counts in the indictment.

On July 11, 2011 the District Court imposed a sentence of imprisonment of 277 months, and 5 years supervised release.

On June 13, 2016 the Defenders Association filed a § 2255 motion on the petitioner's behalf, based on this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* invalidated the "residual clause" in the definition of a "violent felony" in the Armed Career Criminal Act. The Petitioner asserted that the "residual clause" in the definition of a "crime of violence" in § 924(c) was similarly invalid, and on that basis his bank robbery offenses no longer qualified as § 924(c) predicates.

On December 27, 2019, after the Third Circuit rejected the proposition that bank robbery is no longer a § 924(c) predicate, the Defenders Association withdrew the Petitioner's § 2255 motion.

On August 14, 2020 the Petitioner submitted a second and successive § 2255 motion, with permission from the Court of Appeals for the Third Circuit, based on this Court's decision in *United States v. Davis* 139 S. Ct. 2319 (2019) which invalidated the "residual clause" in the "crime of violence" definition of § 924(c).

In his § 2255 motion, the Petitioner asserted that, as a result of the decision in *Davis*, his bank robbery offense and conspiracy offense no longer qualifies as § 924(c) predicate crimes of violence; his sentence under the residual clause is constitutionally invalid; his indictment and guilty plea that's predicated on § 924(c) is constitutionally invalid; and the District Court's acceptance of his invalid guilty plea is a structural error.

On December 10, 2021 the District Court denied the Petitioner's § 2255 motion based solely on the Third Circuit's precedent decision in *United States v. Johnson* 899 F.3d 191 (3rd Cir. 2018), which held that armed bank robbery in violation of § 2113(d) qualifies as a crime of violence under the elements clause of § 924(c). None of the constitutional claims that were raised was decided on their merits because they were not addressed at all. A certificate of appealability was not issued.

On December 29, 2021 the Petitioner filed a request for a certificate of appealability with the Court of Appeals and was denied.

On May 11, 2022 the Petitioner filed for a Rehearing and En banc with the Court of Appeals and was denied on June 3, 2022.

Petitioner Thompson now seeks review of the Third Circuit's precedent decision in *Johnson* 899 F.3d 191 (3rd Cir. 2018), because that decision, which rests entirely on the erroneous interpretation and application of § 924(c)(3)(A), conflicts with relevant decisions of this Court; violates the Fifth Amendment's guarantee of due process; and is being used to uphold his unconstitutional sentence.

REASON FOR GRANTING THE WRIT

1.

The Third Circuit's interpretation and application of 18 U.S.C. § 924(c)(3)(A) replicates the work formerly performed by the residual clause and is in direct conflict with the precedents set by this Court.

In *United States v. Johnson* 899 F.3d 191 (3rd Cir. 2018), the Court of Appeals for the Third Circuit held that § 2113(d) armed bank robbery categorically qualifies as a § 924(c)(3)(A) predicate crime of violence by concluding that "assaulting someone, or putting a life in jeopardy by the use of a dangerous weapon meets the elements clause; it has as an element the use, attempted use, or threatened use of physical force," because "one cannot assault a person or jeopardize his or her life with a dangerous weapon unless one uses, attempts to use, or threatens physical force."

The error and issue with the court's conclusion is that, to reach that conclusion, while under the elements clause, the court looked to the nature of § 2113(d), how it's committed, and the kind of conduct it involves in an ordinary case of the offense.

Looking to the nature of an offense and the conduct it involves in an ordinary case of that offense was a required function of the residual clause.

The residual clause defined a "crime of violence" as an offense "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).

When determining whether an offense qualified as a predicate crime of violence for the purpose of enhancing a defendant's sentence, judges were required to use a categorical approach where they had to disregard how the defendant actually committed the offense and instead imagine the degree of risk that would attend the idealized ordinary case of that offense. See, *United States v. Davis* 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019); see also *Johnson v. United States* 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) ("Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in the ordinary case....")

The residual clause failed not because it adopted a "substantial risk" standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense.

The main feature and function of the residual clause was, looking to the nature of an offense and the conduct it involves. When the Third Circuit reached its decision in *Johnson* (3rd Cir.), it did just that.

When the court stated that "one cannot assault a person, or jeopardize his or her life with a dangerous weapon unless one uses,

attempts to use, or threatens physical force," *Id.* (emphasis added), the court was talking about how § 2113(d) is normally committed, and the conduct it ordinarily involves.

This Court has informed us that "the nature of a thing typically denotes its normal and characteristic quality, or its basic or inherent features," *Davis* 139 S. Ct. 2319. So when the Third Circuit talks about what § 2113(d) "normally or ordinarily entails," i.e., one cannot assault a person, or jeopardize his or her life with a dangerous weapon unless one uses, attempts to use, or threatens physical force," it is unequivocally speaking of the nature of § 2113(d) and what it involves in the ordinary case.

Looking to the nature of an offense and what it ordinarily involves is a requirement and function that's exclusive to the residual clause. The elements clause has a completely different requirement and function.

The elements clause defines a crime of violence as an offense that "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).

When determining whether an offense categorically qualifies as a predicate crime of violence under the elements clause, for the purpose of enhancing a defendant's sentence, courts are required to apply the categorical approach where they "look only to the statutory definitions, i.e., the elements - of a defendant's [instant] offenses, and not to the particular facts underlying those [offenses]," *Descamps v. United States* 133 S. Ct. 2276, 2283, 186 L. Ed. 438 (2013). Courts are also required to "focus solely on whether the elements of the [instant offense] sufficiently match the elements of the [enhancement provision]," *Mathis v. United States* 136 S. Ct. 2293,

195 L. Ed. 2d 604 (2016)

The comparison of elements that the categorical approach requires has the court line up the statutory elements of the instant offense alongside those of the enhancement provision to see if they match, see *Id.*

"Elements are the constituent parts of a crime's legal definition," *Mathis* 136 S. Ct. 2243, where at different stages in a proceeding, their role and function changes.

At trial, they are "the things the prosecution must prove to sustain a conviction," and "what the jury must find beyond a reasonable doubt to convict the defendant." *Id.* At a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.*

When it comes to determining whether an offense qualifies as a predicate crime of violence for the purpose of enhancing a sentence, elements are the constituent parts of a crime's legal (statutory) definition that a court compares to those of the enhancement provision's statutory definition to see if they match.

Under § 924 (c)(3)(A) the elements of an offense does not need to be proven or found beyond a reasonable doubt to qualify that offense as a predicate crime of violence. A court needs only to look to the offense's statutory definition to see if it has as one of its constituent parts the use, attempted use, or threatened use of physical force.

The elements clause does not require a court to look to the nature of an offense and what it involves in an ordinary case, nor does it require a court to determine whether the elements of an offense normally requires or ordinarily involves the use,

attempted use, or threatened use of physical force. But that is exactly what the Third Circuit has done when it qualified § 2113(d) as a § 924(c)(3)(A) predicate crime of violence.

The Third Circuit's version of § 924(c)(3)(A) does not comply with the rules governing the proper use and function of the elements clause and its categorical approach as instructed by this Court in *Descamps* and *Mathis*.

The Third Circuit's version of § 924(c)(3)(A) functions a lot like the residual clause because it looked to the nature of § 2113(d) and its elements and pictured the kind of conduct they involve in an idealized ordinary case. But unlike the original residual clause that determines if an offense "by its nature, involves a substantial risk" of physical force; and the original elements clause that determines if an offense "has as an element the use, ... of physical force," the Third Circuit's version of § 924(c)(3)(A) determines whether an offense and its elements by their nature, involves the use, attempted use, or threatened use of physical force.

The Petitioner's sentence is being upheld by this alternative version of § 924(c)(3)(A), and by doing so, the Third Circuit has violated the Petitioner's Fifth Amendment guarantee of due process because Congress did not mandate the version of § 924(c)(3)(A) that's being used, and the imposition of criminal punishment cannot be made to depend on a crime's imagined ordinary case. See *Davis* 139 S.Ct. 2319.

2.

§ 2113(d) does not categorically qualify as a § 924(c)(3)(A) predicate crime of violence.

18 U.S.C. § 2113(d) provides penalties for "whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device."

18 U.S.C. § 924(c)(3)(A) defines a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

"Elements are the constituent parts of a crime's legal (statutory) definition." Mathis 136 S. Ct. 2243 (emphasis added)

§ 2113(d) is not a § 924(c)(3)(A) "crime of violence" because it does not have as an element, i.e., a constituent part of its statutory definition, the use, attempted use, or threatened use of physical force.

The elements, or constituent parts of § 2113(d)'s statutory definition are assault and putting in jeopardy the life of any person by the use of a dangerous weapon or device. The use, attempted use, or threatened use of physical force is not a constituent part of § 2113(d)'s statutory definition.

Therefore, § 2113(d) does not categorically qualify as a § 924(c)(3)(A) predicate crime of violence.

This Court's prompt intervention is necessary

The Third Circuit has essentially created a new law with its alternative version of § 924(c)(3)(A) that looks to the nature of an offense and how its committed in an ordinary case.

What the Third Circuit has done is not much different than what the Fifth Circuit has attempted to do in *Davis*, 139 S.Ct. 2319. In *Davis*, the government proposed that this Court abandon the traditional categorical approach of § 924(c)(3)(B) that looked to the nature of an offense and what it involves in an ordinary case, for an alternative version of § 924(c)(3)(B) which held that the statute commanded a case-specific approach that would look at the defendant's actual conduct in the predicate crime.

Both the Third Circuit's and Fifth Circuit's version of a § 924(c)(3) statute does not operate in the way that Congress intended or in the way that this Court has instructed.

In *United States v. Taylor* 596 U.S. (2022), the government proposed a version of the elements clause that would have expanded the statutes reach in a way that would replicate the work formerly performed by the residual clause, collapsing the distinction between the two.

By looking to the nature of § 2113(d) and what it ordinarily involves, the Third Circuit's version of § 924(c)(3)(A) does the same work as the residual clause.

In both *Davis* and *Taylor*, this Court has rejected the alternative versions of the § 924(c)(3) statutes that were put forth because they conflicted with existing precedents set by this Court and Congress did not intend for them to function in those ways. The Third Circuit's version of § 924(c)(3)(A) needs to

be addressed by this Court.

This petition presents issues of importance beyond the particular facts and parties involved, and the matter at hand is much more serious than an erroneous factual finding or the misapplication of a properly stated rule of law.

The Third Circuit has been using a version of the elements clause and categorical approach that's designed to save the residual clause in the wake of its invalidation.

The "role of courts under the Constitution is not to fashion a new, clearer law to take its place," *Davis* 139 S.Ct. 2319. By crafting an alternative version of §924(c)(3)(A), the Third Circuit has effectively stepped outside its role and wrote a new law rather than applying the one Congress adopted. See *Id.*

The version of §924(c)(3)(A) that the Third Circuit has been using to increase defendant's sentences and sustain the Petitioner's increased sentence, was not mandated by Congress. Because it was not mandated by Congress it is no law at all. To sentence someone under a law that is not a law violates the Fifth Amendment's guarantee of due process.

The Third Circuit's decision in *Johnson* 899 F.3d 191 is clearly erroneous and would work a manifest injustice if that decision continues to govern.

This Court's prompt intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Anahe Thompson

Date: September 1, 2022