

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

HUBY RAMKISSOON,
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*

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Questions Presented

- A. Whether the “categorical approach” applies in determining if an offense is a “crime of violence” for purposes of Section 924(c) of Title 18 of the United States Code, an issue that currently divides the federal courts of appeal?
- B. Whether this Court’s holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies to the residual clause of Section 924(c)?

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**PETITION FOR WRIT OF *CERTIORARI*
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Petitioner, Huby Ramkissoon, 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.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit filed its order at 17-2199, and it is included in the appendix. *See* (App. 1a). The District Court filed its memorandum opinion and order at 3:12-CR-00266, and they are included in the appendix. *See* (App. 2a-9a).

JURISDICTION

On November 1, 2017, the Court of Appeals for the Third Circuit declined to grant a certificate of appealability, affirming the order of the District Court. The jurisdiction of the United States Supreme Court is invoked pursuant to Section 1254(1) of Title 28 of the United States Code, 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that no person shall “be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend V.

Section 924(c)(1)(A)(iii) of Title 18 of the United States Code, 18 U.S.C. § 924(c)(1)(A)(iii), prohibits the discharge 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).

INTRODUCTION

In *Johnson*, this Court concluded that the residual clause in the Armed Career Criminal Act, 18 U.S.C. 924(e), was unconstitutionally vague. Mr. Ramkissoo's motion to correct sentence and subsequent request for a certificate of appealability asserted that *Johnson* should apply to the similarly worded residual clause in Section 924(c), an issue in which there is a circuit divide. Compare *United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) with *United States v. Cardena*, 842 F.3d 959, 995-96 (7th Cir. 2016). This issue is currently pending *certiorari* in *Taylor v. United States*, 16-6392, and *Prickett v. United States*, 16-7373. Guidance in this area may be provided by *Sessions v. Dimaya*, No. 15-1498, involving whether *Johnson* applies to Section 16(b) of Title 18 of the United States Code, which is identical to the residual clause in Section 924(c).

Here, the District Court and the Third Circuit avoided this issue by reasoning that the categorical approach does not apply in the Section 924(c) context. In so doing, the Third Circuit split with nine other courts of appeal. Compare *United States v. Robinson*, 844 F.3d 137, 140 (3d Cir. 2016) with *United States v. Hill*, 832 F.3d 135, 139-40 (2d Cir. 2016).

For these reasons, this Court should grant *certiorari* to resolve the circuit divide.

STATEMENT OF THE CASE

On May 30, 2013, the Petitioner, Huby Ramkissoon, 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). *See* (App. 2a). The Probation Office prepared a presentence report. Mr. Ramkissoon's sentencing guideline range was determined to be 41 to 51 months based on an offense level of 21 and a criminal history category of II. Because he was convicted of violating Section 924(c), he was subject to a consecutive term of 84 months. *See* (App. 3a). On September 4, 2013, the Court sentenced Mr. Ramkissoon to 132 months. The sentence consisted of a term of imprisonment of 48 months on the robbery and a consecutive term of 84 months on the Section 924(c) offense. *See* (App. 3a).

On June 12, 2016, Mr. Ramkissoon, filed a motion to Correct Sentence under 28 U.S.C. § 2255 based on *Johnson*. *See* (App. 3a). Mr. Ramkissoon argued that following *Johnson*, Hobbs Act robbery is no longer a crime of violence and his consecutive sentence for using and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) violates due process and should be vacated. *See* (App. 3a).

On July 14, 2016, the government filed an unopposed motion to stay the proceedings until the Third Circuit decided *Robinson*. Following the opinion in

Robinson, the Government filed its response, and thereafter Mr. Ramkissoo filed a reply. The District Court issued an opinion and order on May 2, 2017, denying Mr. Ramkissoo's motion to correct sentence and declining to issue a certificate of appealability. *See* (App. 2a-9a). The Court based its ruling upon the Third Circuit's decision in *Robinson*. *See* (App. 6a-7a).

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

- A. The Third Circuit’s novel approach to determining whether a predicate offense is a crime of violence for purposes of Section 924(c) is at odds with this Court’s precedent, contrary to the holdings of nine other courts of appeals, and contrary to the statute’s text.**

As noted, the Third Circuit avoided the question of whether *Johnson* applies to Section 924(c) by denying a certificate of appealability based upon its ruling in *Robinson*. See (App. 6a-8a).¹ In that case, the Third Circuit held 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 in the Section 924(c) context. In its place, the Third Circuit crafted a new approach for determining whether an offense is a predicate crime of violence for Section 924(c): courts should 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 Section 924(c) offense to determine whether the predicate offense was committed in a forcible way. The Third Circuit saw this as a permissible extension of the “modified categorical approach.”

¹ On October 2, 2107, this Court denied *certiorari* in *Robinson*, No. 17-5139, and on January 8, 2018, denied *certiorari* in the related case, *Galati v. United States*, No. 17-5229.

This Court should grant further review to correct this major deviation from the categorical approach and to resolve the resulting conflict among the courts of appeals. The Third Circuit's approach is contrary to this Court's holdings on the categorical and modified categorical approaches, and employs the latter for a purpose the Court has expressly forbidden: to shed light on the means by which the predicate offense was committed. In deviating from this Court's holdings, the Third Circuit split with nine other courts of appeals, all of which hold that the categorical approach applies to Section 924(c). The Third Circuit's approach is irreconcilable with the text of Section 924(c), as well, leading to absurd results such as the inability to determine pretrial whether an offense is a crime of violence, the voiding of obviously correct statements of law in the model jury instructions of nearly every circuit, the rendering of Section 924(c) a tautology by which every offense is a potential crime of violence predicate, and the rendering of the same offense a crime of violence in some cases and not in others.

1. The federal courts of appeals are split 9-1 over whether the categorical approach applies to Section 924(c).

The Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits apply the categorical approach to determine whether an offense is a predicate for a contemporaneously charged Section 924(c) offense. *See Hill*, 832 F.3d at 139-40; *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); *Prickett*, 839 F.3d at 698; *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). No circuit has held otherwise.

The Ninth Circuit’s decision in *Amparo* is particularly instructive. There, the court explained that the categorical approach is compelled by the text and legislative history of Section 924(c), and rejected the view—advanced by the Third Circuit—that it is unnecessary given any factual confidence surrounding contemporaneous offenses. *See Amparo*, 68 F.3d at 1225. The Third Circuit failed to address the countervailing authority.

2. The Third Circuit’s approach is contrary to this Court’s precedent regarding the categorical and modified categorical approaches.

This Court has expressly held that courts look only to the statutory text, using the categorical approach. *See Taylor v. United States*, 495 U.S. 575, 600 (1990) (addressing 18 U.S.C. § 924(e)); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (addressing 18 U.S.C. § 16(a)). The Third Circuit disregarded that straightforward holding based on a tertiary rationale for the categorical approach discussed in *Taylor*, and reasoning that the practical and Sixth Amendment problems with judicial fact-finding about prior convictions is not implicated when

a court looks to a jury’s brandishing finding in a contemporaneous offense. *See Robinson*, 844 F.3d at 143-44. But *Taylor*’s primary and independently sufficient rationale for the categorical approach was statutory text—indeed, classifying an offense by its elements is the very definition of a “categorical approach.”

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). The Third Circuit disregarded that holding because, in the contemporaneous offense situation, “the indictment and jury instructions are before the court,” and because there is supposedly no Sixth Amendment problem when a defendant admission or jury finding is relied upon. *See Robinson*, 844 F.3d at 143. But those documents are before courts in prior conviction cases, as well, and *Descamps* specifically held that it is irrelevant whether a defendant admits the means of violation:

[W]hether [the defendant] ever admitted to [the relevant means] is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [the predicate offense] not (as here) overbroadly, but instead alternatively, with one [set of elements] corresponding to the [qualifying] crime and another not.

133 S. Ct. at 2286.

Finally, 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. Yet, that is the result of the Third Circuit’s approach here: in *Robinson*, one Hobbs Act robbery for which the defendant was convicted was deemed a crime of violence, but another was not because the jury acquitted on the § 924(c) charge with respect to the latter. *See Robinson*, 844 F.3d at 140, 143. The same would be true of federal murder-for-hire or any other offense.

3. The Third Circuit’s approach is contrary to the text of Section 924(c) and leads to absurd results.

Section 924(c) prohibits the discharge of a gun during a limited and statutorily defined set of crimes, namely “crimes of violence” and “drug trafficking crimes.” 18 U.S.C. § 924(c)(1)(A)(iii). In other words, Section 924(c) prohibits “the temporal and relational conjunction of two separate acts”—the underlying crime of violence or drug trafficking crime and the use of a gun. *See Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014). “Crime of violence” is defined as a felony offense with an element of force. 18 U.S.C. § 924(c)(3)(A). As such, an offense’s status as a crime of violence has always been a purely legal issue for courts to determine pretrial, and at trial the jury must be instructed that the predicate offense is, as a matter of law, a crime of violence. *See, e.g.*, THIRD CIR. MODEL CRIM. JURY INSTR. 6.18.924A.

Now, it cannot be determined pretrial (or pre-plea) whether an offense is a crime of violence, because that will depend on a jury finding or plea admission. And Section 924(c) model instructions given throughout the country are now inaccurate, because juries can no longer be told that an offense is a crime of violence as a matter of law—instead, they will determine its status based on their discharge finding. And as discussed above, an offense is now both a crime of violence and not, depending on how the case turns out.

By making the crime of violence determination turn on discharge, the Third Circuit has disregarded the statute's (and this Court's) denomination of the crime of violence as a "separate act" distinct from the use of a gun, and instead imposes Section 924(c) liability whenever the predicate offense plus discharge involves force. And that will, of course, always be the case, rendering Section 924(c) a tautology (or in Judge Fuentes's words in *Robinson*, a "circularity"). See *Robinson*, 844 F.3d at 148-49. Once the predicate offense itself need not have an element of force, every offense becomes a potential crime of violence. To paraphrase the Third Circuit, it is not whether mail fraud is a crime of violence, but whether mail fraud committed while brandishing a firearm is a crime of violence. Indeed, all drug trafficking offenses involving discharge of a gun are now crimes of violence, rendering half of Section 924(c) surplusage.

In light of the circuit divide on this issue, jurists of reason would find the issue at least debatable and adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

B. *Johnson* applies to the residual clause in Section 924(c)(3)(B).

In *Robinson* and *Galati* the Third Circuit declined to address the constitutionality of the residual clause set forth in Section 924(c)(3)(B). *Robinson*, 844 F.3d at 141; *Galati*, 844 F.3d at 155; *see also United States v. White*, 678 F. App'x 80, 82 (3d Cir. 2017) (non-precedential). Although *Johnson* addressed the residual clause in the ACCA, the residual clause in Section 924(c) is substantially similar and suffers from the same flaws that compelled the Supreme Court to declare the ACCA residual clause void for vagueness.²

The Third Circuit found the definition of crime of violence in Section 16(b) unconstitutionally vague. *See Baptiste v. Attorney General*, 841 F.3d 601 (3d Cir. 2016). This Court is currently considering the constitutionality of the residual clause in Section 16(b). *Sessions v. Dimaya*, No. 15-1498 (cert. granted Sept. 26, 2016; argued Jan. 17, 2017, re-argued Oct. 2, 2017). Notably, the United States Solicitor General identified the residual clause in Section 16(b) as “materially

² As noted, this issue is currently pending *certiorari* in *Taylor*, 16-6392, and *Prickett*, 16-7373.

identical” to the residual clause in Section 924(c). *See* Reply Brief for Petitioner in No. 15-1498 (U.S. Aug. 31, 2016) at 1, 3.

CONCLUSION

WHEREFORE, the Petitioner, Huby Ramkissoon, 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, Frederick W. Ulrich, Esquire, Assistant Federal Public Defender, hereby
certify that I am a member of the Bar of this Court.

Respectfully submitted,

/s/ Frederick W. Ulrich

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Date: January 29, 2018