No: ____

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY HYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
JANICE L. BERGMANN
Counsel of Record
Assistant Federal Public Defender
One East Broward Boulevard
Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Whether petitioner's prior conviction for Florida robbery in violation of Fla. Stat. § 812.13, is not a "violent felony" under the elements clause Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), because it does not have "as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). This question is before the Court in *Denard Stokeling v. United States*, No. 17-5554.

2. Whether a criminal offense with a reckless *mens rea* qualifies as a "violent felony" under the ACCA's elements clause.

3. If a completed offense categorically has "as an element the use, . . . or threatened use of physical force against the person of another," is it automatically true that the *attempted* commission of that offense is categorically an ACCA "violent felony" under the elements clause as well?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the denial of his 28 U.S.C. § 2255 motion.

OPINIONS BELOW

The opinion of the court of appeals is reported at 896 F.3d 1219, and reproduced in Appendix A-1. The district court's judgment denying Petitioner's 28 U.S.C. § 2255 motion is unpublished and reproduced in Appendix A-2.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on July 18, 2018. App. A-1. On October 1, 2018, Petitioner timely applied for an extension of time to file a petition for writ of certiorari, in No. 18A351. Justice Thomas granted the application on October 5, 2018, and extended the time to file the petition until December 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

18 U.S.C. § 924(e)

> **(e)(2)** As used in this subsection – . . .
> **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . , that –
> **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> **(ii)** is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

Fla. Stat. § 812.13 (2002)

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

* * *

(3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Fla. Stat. § 784.011(1) (1993)

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Fla. Stat. § 784.0121(1) (1993)

(1) An "aggravated assault" is an assault;

(a) With a deadly weapon without intent to kill, or

(b) With an intent to commit a felony.

Fla. Stat. § 777.04(1) (1997)

(1) A person who attempts to commit an offense prohibited by law and in such attempt does an act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt . . ..

Fla. Stat. § 782.04 (1997)

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to the effect the death of the person killed or any human being;

* * *

is murder in the first degree . . ..

STATEMENT OF THE CASE

For those convicted of being a felon in possession of a firearm, the Armed Career Criminal Act ("ACCA"), transforms the ten-year statutory maximum penalty into a fifteen-year mandatory minimum. 18 U.S.C. §§ 922(g), 924(e). The enhancement applies where the defendant has three prior convictions for either a "violent felony" or a "serious drug offense." § 924(e).

The ACCA defines of a "violent felony" as one that: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The definition in subsection (i) is known as the "elements" clause. The first half of subsection (ii) – "is burglary, arson, or extortion, involves the use of explosives" – is known as the "enumerated" offense clause. The remainder of subsection (ii) is known as the "residual" clause.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause was unconstitutionally vague. *Johnson*, however, left undisturbed the validity of the elements and enumerated-offense clauses. *Id.* at 2563. The following Term, this Court held that *Johnson* announced a new, substantive rule of constitutional law, and therefore had retroactive effect to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Petitioner is one of the many federal prisoners who filed a 28 U.S.C. § 2255 motion to vacate sentence in the wake of *Johnson* and *Welch*, raising the claim that his ACCA

sentence is no longer valid as a result of those decisions.

In 2008, Petitioner was convicted by a jury of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The district court determined that he qualified for the ACCA enhancement based on three prior Florida convictions – a 1993 aggravated assault in violation of Fla. Stat. § 784.021, a 1997 attempted first-degree murder in violation of Fla. Stat. §§ 777.04 & 782.04, and a 2002 strong-arm robbery in violation of Fla. Stat. § 812.13(1). The district court sentenced Petitioner to a 235-month term of imprisonment, well beyond the ten-year maximum without the ACCA enhancement. His conviction and sentence were affirmed on appeal. *Hylor v. United States*, 353 F. App'x 361 (11th Cir. 2009).

In 2016, Petitioner applied to the United States Court of Appeals for the Eleventh Circuit for leave to file a second or successive § 2255 motion premised on *Johnson* and *Welch*. The court of appeals granted the application, and Petitioner a filed a § 2255 motion in the district court asserting that he did not qualify for the ACCA enhancement after *Johnson* because his prior robbery, aggravated assault, and attempted murder convictions were not violent felonies under the still-viable elements clause, 18 U.S.C. § 924(e)(2)(B)(i). The district court, however, concluded that all three of these prior convictions qualified as ACCA predicates under the elements clause, and therefore denied Petitioner's § 2255 motion. App. A-2.

Specifically, the district court held that: (1) "attempted murder necessarily requires the use of force required by the ACCA's elements clause" given that: (a) the

Supreme Court held in *United States v. Castleman*, 572 U.S. 157, 134 S. Ct. 1405 (2014), "that the 'knowing or intentional causation of bodily injury necessarily involves the use of physical force,'" and "an individual cannot be convicted of attempted first degree murder without attempting to inflict bodily injury serious enough to result in death," *id.* at 10-11 (quoting *Castleman*, 134 S. Ct. at 1414); and (b) the Florida Legislature has classified murder as a "forcible felony" and therefore, "as a matter of state law, the commission of murder necessitates the use of physical force," *id.* at 12; (2) it was bound by this Court's decision in *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013), *abrogated on other grounds by Samuel Johnson*, 135 S. Ct. 2551 (2015), to conclude that Petitioner's Florida aggravated assault conviction is categorically violent under the elements clause, App. A-2 at 9; and (3) Mr. Hylor's strong-arm robbery offense is a qualifying ACCA predicate in light of the Eleventh Circuit's holding in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2264 (2017), "that all Florida robbery convictions under [Fla. Stat.] § 812.13 categorically qualify as violent felonies under the ACCA," App. A-2 at12.

The court of appeals affirmed in a published opinion. *Hylor v. United States*, 896 F.3d 1219 (11th Cir. 2018); App. A-1. The Eleventh Circuit concluded that it was bound by circuit precedent holding that Florida robbery and Florida aggravated assault are violent felonies under the ACCA elements clause. *See* App. A-1 at 9 (citing, *inter alia*, *United States v. Deshazior*, 882 F.3d 1352, 1355 (11th Cir. 2018) (aggravated assault), *cert. petition filed* (May 1, 2018) (U.S. No. 17-8766); *Fritts*, 841

F.3d at 941-942 (robbery); and *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011) (robbery)).

With respect to Petitioner's attempted murder conviction, the Eleventh Circuit held that because the substantive offense of Florida premeditated murder qualifies under elements clause, so too must Florida attempted murder. *Id.* at 8. The Court held, "[i]t makes no difference that Hylor was convicted of only *attempting* to kill his victim. The elements clause of the Act 'equates actual force with attempted force,' so 'the text of [section] 924(e) . . . tells us that actual force need not be used for a crime to qualify under the [Act].'" *Id.* (quoting *United States v. St. Hubert*, 883 F.3d 1319, 1334 (11th Cir. 2018), *vacated and superseded by* 909 F.3d 335 (11th Cir. 2018)). The Eleventh Circuit noted parenthetically that in *St. Hubert*, it "reli[ed] on a Seventh Circuit decision that held that 'when a substantive offense qualifies as a violent felony under the [Act], an attempt to commit that offense also is a violent felony' because the Act provides that 'an element of attempted force operates the same as an element of completed force' and 'conviction of attempt requires proof of intent to commit all elements of the completed crime.'" *Id.* at 8-9 (quoting *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017)).

Judge Jill Pryor concurred in the result only, agreeing that she was bound to do so because the majority's holding that "an attempted elements clause offense is always itself an elements clause offense" was "a correct application of *St. Hubert*'s holding and necessary reasoning." *Id.* at 12 (Jill Pryor, J., concurring in the result).

While "obediently" applying the holding and "necessary reasoning" of *St. Hubert*, Judge Pryor harshly criticized that reasoning, calling *St. Hubert*'s logic not only "flawed," but "plainly wrong," because (1) an attempt offense "may be completed without the perpetrator every actually using, attempting to use, or threatening to use physical force," and (2) "having the *intent* to commit a crime involving the use of force simply is not the same thing as using, attempting to use, or threatening to use force." *Id.* at 14-16 (Jill Pryor, J., concurring).

Judge Pryor explained that Florida's attempt offense only requires commission of an overt act which state law has defined as "'[s]ome appreciable fragment of the crime' that, if allowed to proceed, would lead to the completed offense absent interruption." *Id.* at 15 (Jill Pryor, J., concurring) (quoting *Hernandez v. State*, 117 So.3d 778, 784 (Fla. Dist. Ct. App. 2013). "Importantly, though," Judge Pryor noted, "the overt act 'does not have to be the ultimate or last possible act toward consummation of the crime.'" *Id.* (Jill Pryor, J., concurring) (quoting *Hernandez*, 117 So.3d at 785 (internal quotation marks in *Hernandez* omitted by Judge Pryor)).

As a result, Judge Pryor explained, "someone could be convicted of attempted first degree murder without engaging in any overt act of force, the act of force being the natural last act toward consummation of a murder." *Id.* at 15-16. (Jill Pryor, J., concurring). Indeed, Judge Pryor noted, "that is precisely what occurred in *Hernandez*," where the Florida appellate court upheld an "attempted first degree murder conviction where [the] defendant confessed to intending to murder his victim

and whose overt acts consisted of entering a bathroom stall, putting on a hat and gloves, and repeatedly insisting that the would-be victim join him in the stall." *Id.* at 16 (Jill Pryor, J., concurring). Thus, as Judge Pryor explained, an attempt offense in Florida "may be completed without the perpetrator every actually using, attempting to use, or threatening to use physical force," and "[y]et, under *St. Hubert*, the attempt crime's element of specific intent to commit the murder necessarily means that the offense involved the attempted use of physical force." *Id.* at 16 (Jill Pryor, J., concurring). This reasoning, in Judge Pryor's estimation, "is plainly wrong." *Id.* (Jill Pryor, J., concurring).

Although the Eleventh Circuit later vacated and superseded its decision in *St. Hubert*, it expressly adopted the reasoning of its earlier decision to again hold that where a completed offense qualifies under the elements clause, so too does an attempt to commit the same offense. *St. Hubert*, 909 F.3d at 337, 352.

REASON FOR GRANTING THE WRIT

I. The Court is at present considering in *Denard Stokeling v. United States*, No. 17-5554, whether Florida robbery is a "violent felony" under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), and should therefore hold the petition in this case pending the decision in *Stokeling*.

Question 1 in this petition presents the exact same question currently before the Court in *Denard Stokeling v. United States*, No. 17-5554: whether Florida robbery in violation of Fla. Stat. § 812.13 qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), because it has "as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i). Petitioner therefore respectfully requests that the Court hold his petition for a writ of certiorari pending the Court's decision in *Stokeling*.

Should the Court conclude in *Stokeling* that Florida robbery is not a violent felony under the ACCA's element's clause, the Eleventh Circuit's error in rejecting Petitioner's § 2255 motion would be manifest. A sentence cannot be enhanced under the ACCA unless the defendant has three qualifying prior convictions. *See* § 924(e)(1). The court of appeals below determined that there were only three qualifying prior convictions here, and Petitioner's Florida robbery conviction was one of them.

Although Mr. Stokeling was convicted of Florida robbery in 1997 and Petitioner was convicted of that offense in 2002, the language of Fla. Stat. § 812.13 did not change during that time. *Compare* Fla. Stat. § 812.13 (1997) *with id.* (2002).

And Florida decisional law defining the contours of a robbery offense was also exactly the same in 1997 and 2002. Florida Supreme Court cases going back nearly a century establish that Florida robbery can be committed using only a slight degree of force. *See Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922) ("[t]he degree of force is immaterial," and need only be sufficient to "overcome the victim's resistance"). *See also McCloud v. State*, 335 So.2d 257, 258 (Fla. 1976); *Robinson v. State*, 692 So.2d 883, 886-87 (Fla. 1997). Thus, the Court's decision in *Stokeling* is controlling here.

Petitioner therefore respectfully requests that the Court hold this petition pending its decision in *Stokeling*. And, should the Court conclude in *Stokeling* that Florida robbery does not qualify as an ACCA predicate, Petitioner respectfully requests that the Court grant his petition for a writ of certiorari, vacate the Eleventh Circuit's judgment affirming the denial of his § 2255 motion, and remand with instructions that the Eleventh Circuit grant him § 2255 relief.

II. Whether a criminal offense with a reckless *mens rea* qualifies as a "violent felony" under the ACCA's elements clause is an important question that has divided the circuit courts.

A. The circuits are openly divided on the question presented.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court interpreted the elements clause in 18 U.S.C. § 16(a), which uses language almost identical to the ACCA's elements clause to define the term "crime of violence." Rejecting the government's argument that § 16(a) lacked any *mens rea* component, the Court held that "'use' requires active employment," because "[w]hile one may, in theory, actively employ *something* in an accidental matter, it is much less natural to say that a person

actively employs physical force against another by accident." *Leocal*, 543 U.S. at 9. Thus, the Court held that § 16(a) "naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* Although *Leocal* reserved ruling on reckless conduct, *id.* at 13, within 10 years of that decision the courts of appeals had "almost uniformly' held in both ACCA and Sentencing Guidelines cases that "recklessness is not sufficient." *Castleman*, 134 S. Ct. at 1414 n.8 (citing *United States v. Palomino Garcia*, 606 F.3d 1317, 1335-36 & n.16 (11th Cir. 2010) and cases so holding from every other circuit except the First).

Confusion on that issue arose only after *Voisine v. United States*, 136 S. Ct. 2272 (2016), where this Court held that an offense with a reckless *mens rea* would satisfy the *different* elements clause in 18 U.S.C. § 921(a)(33)(A). That provision defines the term "misdemeanor crime of violence" in 18 U.S.C. § 922(g)(9) as an offense that has "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," but, unlike the ACCA, does *not* require that the "use" be "against the person of another."

In so holding, however, the Court noted in *Voisine* that its decision "concerning § 921(a)(33)(A)'s scope does not resolve whether § 16" (and, in turn, the ACCA) "includes reckless behavior," since "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their context and purposes." *Id.* at 2280 n.4. The circuits are now divided over whether reckless conduct satisfies the ACCA's elements clause.

The First and Fourth Circuits stand on one side of the divide. In *Bennett v. United States*, 868 F.3d 1 (1st Cir. 2017), a First Circuit panel including former Justice Souter found the different language, history, and context of the ACCA significant, and that the question of whether reckless conduct met the ACCA's elements clause was *not* controlled by *Voisine*. The *Bennett* panel ultimately remained "unsure" whether reckless assaults were covered by the ACCA, *id.* at 7-21, but because it found "grievous ambiguity" on that question, it applied the rule of lenity to hold that an offense with a reckless *mens rea* would not meet the ACCA's elements clause, *id.* at 23. Although *Bennett* was thereafter withdrawn and vacated as moot due to the death of the defendant, *see* 870 F.3d 34 (1st. Cir. 2017), the First Circuit has since followed its reasoning in two subsequent decisions. *See United States v. Windley*, 864 F.3d 36, 37–39 & n.2 (1st Cir. 2017); *United States v. Rose*, 896 F.3d 104, 109–10 (1st Cir. 2018) (following *Windley*).

The Fourth Circuit has approached the issue differently from the First, but concluded similarly post-*Voisine* that an offense with a reckless *mens rea* does not meet the ACCA's elements clause. *See United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018) (noting the government had "effectively conceded" that an offense with a reckless *mens rea* did not meet the ACCA's elements clause and agreeing); *see also United States v. Middleton*, 883 F.3d 485, 498–500 & n.3 (4th Cir. 2018) (Floyd, J., concurring in part and concurring in the judgment, joined by Harris, J.) (agreeing with First Circuit's reasoning in *Bennett*).

By contrast, Eighth, Tenth, and D.C. Circuits have held that, in light of *Voisine*, reckless conduct does qualify as a "violent felony" under the ACCA's elements clause. *See United States v. Haight*, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018) (Kavanaugh, J.), *cert. petition filed* (Sept. 20, 2018) (U.S. No. 18-370); *United States v. Pam*, 867 F.3d 1191, 1207–08 & n.16 (10th Cir. 2017); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016). And the Fifth and Sixth Circuits have held similarly in Guidelines cases. *See United States v. Mendez-Henriquez*, 847 F.3d 214, 220–22 (5th Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017).

The lower courts have expressly recognized this conflict of authority and openly disagreed with their sister circuits. *See, e.g.*, *Haight*, 892 F.3d at 1281 ("We recognize that the First Circuit has reached a contrary conclusion, but we respectfully disagree with that court's decision."); *Pam*, 867 F.3d at 1208 n.16 (noting that *Bennett* "raises questions as to whether . . . *Voisine* should be extended to the ACCA," but finding itself bound by circuit precedent); *Verwiebe*, 874 F.3d at 262–64 (recognizing that the First Circuit "has come out the other way," but criticizing its reasoning); *Middleton*, 883 F.3d at 499 n.3, 500 (Floyd, J., concurring in part and concurring in the judgment) (agreeing with the First Circuit and criticizing Sixth, Eighth, and Tenth Circuit decisions).

B. The acknowledged circuit conflict warrants review.

Due to the circuit conflict, individuals with identical criminal histories are now subject to disparate treatment based solely on the circuit in which they are

sentenced. Hundreds of federal defendants are subject to the ACCA enhancement each year. And that enhancement transforms a ten-year statutory maximum into a fifteen-year mandatory minimum. Individuals should not face at least five additional years in prison based solely on the happenstance of geography.

That geographic disparity is particularly untenable given the frequency with which the question presented arises. That frequency is reflected by the number of post-*Voisine* cases addressing whether reckless conduct satisfies the elements clause. And *Voisine* was decided only two years ago. Those cases, moreover, span the nation and address various offenses from different jurisdictions. *See, e.g.*, *Haight*, 892 F.3d at 1280–81 (D.C. assault with a dangerous weapon); *Verwiebe*, 874 F.3d at 262 (federal assault); *Bennett*, 868 F.3d at 4 (Maine aggravated assault); *Pam*, 867 F.3d at 1207–08 (New Mexico shooting at or from a motor vehicle); *Windley*, 864 F.3d at 37–39 (Massachusetts assault and battery with dangerous weapon); *Mendez-Henriquez*, 847 F.3d at 220–22 (California discharging firearm at occupied motor vehicle); *Fogg*, 836 F.3d at 956 (Minnesota drive by shooting).

Lastly, the conflict on this important, recurring issue is intractable. The First Circuit has, on at least three separate occasions, held that reckless conduct does not satisfy the ACCA, and it has done so in the face of contrary decisions from other circuits. And that intractable conflict derives from confusion about the relationship between *Leocal* and *Voisine*. Only this Court can resolve the confusion.

C. This case is an excellent vehicle to resolve the conflict.

Should the Court determine in *Stokeling* that Florida robbery qualifies as a

violent felony under the ACCA, this case provides the Court with an excellent opportunity to resolve the conflict in the lower courts on whether an offense with a reckless *mens rea* satisfies the ACCA's elements clause. Petitioner's ACCA enhancement was based on only three prior convictions, one of which was for Florida aggravated assault. And the Eleventh Circuit expressly concluded below that Florida aggravated assault conviction satisfies the ACCA's elements clause, relying on binding circuit precedent in *Turner*. App A-1 at 9.

Moreover, Florida case law makes abundantly clear that aggravated assault requires only a reckless *mens rea*. *See LaValley v. State*, 633 So.2d 1126, 1127 (Fla. Dist. Ct. App. 1994) ("'reckless disregard for the safety of others' [may] substitute for proof of intentional assault on the victim") (quoting *Kelly v. State*, 552 So.2d 206, 208 (Fla. Dist. Ct. App. 1989) (citing *DuPree v. State*, 310 So.2d 396, 398 (Fla. Dist. Ct. App. 1975); and *Green v. State*, 315 So.2d 499, 499–500 (Fla. Dist. Ct. App. 1975); *accord Golden*, 854 F.3d at 1258 (Pryor, J., concurring in result) (recognizing that "the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness"). Thus, this case quarely presents the question on which the circuits have divided.[1]

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[1] The pending certiorari petition in *Haight* presents this question as well, but the underlying D.C. Circuit opinion there was authored by Justice Kavanaugh, who would presumably recuse if review were granted in that case. Granting review here, by contrast, would not risk resolution by an eight-Member Court. The pending petitions in *Christopher Brooks v. United States*, No. 18-6547, and *Renaldo Santos v. United States* (U.S. filed December 17, 2018), also present this question and do not have the vehicle problems found in *Haight*. On November 29, 2018, the

D. Reckless conduct does not satisfy the ACCA's elements clause.

The First Circuit has persuasively explained why reckless conduct does not satisfy the ACCA's elements clause, notwithstanding *Voisine*. The major reason is that there are material distinctions between the text, context, and purpose of the elements clause in § 16(a)/ACCA and that in § 921(a)(33)(A). When analyzing these provisions, this Court has repeatedly emphasized such distinctions. *See Voisine*, 136 S. Ct. at 2280 n.4; *Castleman*, 572 U.S. at 163–68 & n.4; *Curtis Johnson v. United States*, 559 U.S. 133, 143–44 (2010); *Leocal*, 543 U.S. at 9. Indeed, even the government recognized in *Voisine* that "[t]he definition of a 'misdemeanor crime of violence' under Section 922(g)(9) does not embody the same meaning as the term 'crime of violence' under 18 U.S.C. 16." *Voisine*, 136 S. Ct. 2272, U.S. Br. 12, 2016 WL 1238840 (Jan. 19, 2016).

As a textual matter, the First Circuit properly emphasized that, like § 16(a), the ACCA's elements clause requires that the use of force be directed "against the person or another"—language that *Leocal* found significant, 543 U.S. at 9 – whereas § 921(a)(33)(A) requires the use of force without any such qualification. *Bennett*, 868 F.3d at 8–9. "And, in context, the word 'against' arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly)

Court called for the government to respond to the petition in *Brooks*. That response is due on January 2, 2019. If the Court grants review in *Haight*, *Brooks*, *Santos*, or another case presenting this question, Petitioner respectfully requests that the Court hold this case pending the decision in the case in which the petition for writ of certiorari is granted.

causing the victim's bodily injury in committing an aggravated assault." *Id.* at 18.

That is particularly true given that the elements clause in § 16(a) and the ACCA define the terms "crime of violence" and "violent felony," respectively, not "misdemeanor crime of violence." *See id.* at 22 (observing that assault committed by reckless conduct "does not necessarily reveal a defendant to pose the kind of risk that Congress appears to have had in mind in defining 'violent felony' under ACCA."). And this Court has repeatedly emphasized the importance of those underlying statutory terms. *See, e.g.*, *Curtis Johnson*, 559 U.S. at 139 ("Ultimately, context determines meaning," and "[h]ere we are interpreting the phrase 'physical force' as used in defining . . . the statutory category of 'violent felonies'") (brackets omitted); *Leocal*, 543 U.S. at 11 ("In construing . . . § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'").

Lastly, as a matter of statutory purpose, the ACCA targets offenders who would be likely to "deliberately point the gun and pull the trigger," not those who merely "reveal a callousness toward risk." *Bennett*, 868 F.3d at 21 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)). By contrast, § 921(a)(33)(A) was designed to broadly reach all criminal acts of domestic violence, even those "that one might not characterize as 'violent' in a nondomestic context." *Id.* (quoting *Castleman*, 572 U.S. at 16). Thus, while including reckless conduct in *Voisine*, comported with the statutory purpose, doing so in the ACCA context would not.

III. Whether the attempted commission of an offense automatically and categorically qualifies as an ACCA predicate if the completed crime is categorically an ACCA violent felony is an important question that merits this Court's attention.

A. The decision below is in conflict with *James v. United States*, 550 U.S. 192 (2007).

The fact that a completed offense is categorically a violent felony does not necessarily lead to the conclusion that an attempt to commit that offense automatically is also categorically a violent felony. In *James v. United States*, 550 U.S. 192, 201 (2007), *overruled on other grounds* by *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court rejected that very logic.

The Eleventh Circuit in *James* had presumed that every attempt to commit a "violent felony" – in that case, burglary – enumerated in 18 U.S.C. § 924(e)(2)(B)(ii), was necessarily a "violent felony" within the residual clause. *United States v. James*, 430 F.3d 1150, 1156-57 (11th Cir. 2005), *aff'd*, 550 U.S. 192. In so doing, it relied on prior circuit case law holding that an attempt to commit an offense that was a violent felony under the residual clause was also a violent felony under the residual clause. *Id.* at 1156 (citing *United States v. Wilkerson*, 286 F.3d 1324, 1326 (11th Cir. 2002)). But this Court rejected such presumptive reasoning. The Court instead delved deeply into Florida law to determine the showing required to support a conviction for Florida attempted burglary, and then considered whether that conduct was sufficient to qualify the attempted burglary offense as a "violent felony" under the ACCA.

The Court first noted that although "Florida's attempt statute requires only that a defendant take 'any act toward the commission' of a completed offense," the Florida courts had "considerably narrowed its application." *James*, 550 U.S. at 202. Specifically, the Court concluded that although the statutory language could be read to "sweep[] in merely preparatory activity that poses no real danger of harm to others – for example, acquiring burglars' tools or casing a structure while planning a burglary," the Florida Supreme Court had read the statute, "in the context of attempted burglary," to "require[e] an 'overt act directed toward entering or remaining in a structure or conveyance," such that "[m]ere preparation is not enough." *Id.* Once the Court had carefully examined Florida law in this way, it characterized the "pivotal issue" in *James* as "whether overt conduct directed toward entering or remaining in a dwelling, with the intent to commit a felony therein," qualifies as a violent felony under the ACCA.

Only after determining precisely what Florida law required to support a conviction for attempted burglary did the Court concluded that the risk created by such conduct was sufficient to qualify Florida attempted burglary as a "violent felony" within the ACCA's residual clause. *James*, 550 U.S. at 201-05. It did not merely assume that simply because burglary was a qualifying ACCA predicate, *attempted* burglary automatically qualified as well. Instead, the Court accepted Florida's delineation of the reach of its criminal attempt statute, and then considered whether the conduct so delineated qualified as an ACCA predicate. Moreover, *James* was clear that mere "preparatory conduct that does not pose the same risk of

violent confrontation and physical harm posed by an attempt to enter a structure" would not meet the then-all-inclusive residual clause. *Id.* at 204-05.

The court below, however, did précised what *James* refused to do. It concluded that because first-degree murder categorically qualifies as an ACCA predicate, then automatically so too must an attempt to commit that offense. App. A-1 at 8 ("It makes no difference that Hylor was convicted only of *attempting* to kill his victim. The elements clause of the Act equates actual force with attempted force' and so the text of § 924(e) . . . tells us that actual force need not be used for a crime to qualify under the Act.") (internal quotation marks omitted).

But not only did the Eleventh Circuit adopt the automatic rule rejected in *James*, but it also did so with respect to an offense that allows a conviction premised on mere preparatory conduct that does not involve violent force. As explained by Judge Jill Pryor in her concurring opinion below, "someone could be convicted of attempted first degree murder without engaging in any overt act of force." App. A-1 at 15-16 (Jill Pryor, J., concurring).

Thus, the decision below conflicts directly with *James* when it adopted an automatic rule rather than considering the specific elements of the attempt offense, and when it concluded that mere preparatory conduct is sufficient to qualify as a "violent felony" under the ACCA.

B. This question warrants review and this case is an excellent vehicle in which to consider it.

The Eleventh Circuit has not only determined that the attempted commission of any completed offense that is an ACCA violent felony is automatically a violent felony; but it has extended this reasoning to other statutes with language comparable to the ACCA's elements clause. For example, in *St. Hubert* it held that the federal offense of *attempted* Hobbs Act robbery automatically qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) simply because Hobbs Act robbery so qualifies. 909 F.3d at 351-352. Indeed, given the Eleventh Circuit's expansive reasoning in *St. Hubert* and the decision below, there is no limit to the state and federal offenses to which that court's automatic rule regarding attempted offenses would apply.

Moreover, this case presents an excellent vehicle for the Court to consider this question should the Court elect not to decide the petition based on questions one and two. Petitioner's ACCA enhancement was based solely on three prior convictions, one of which was for Florida attempted first degree murder. And the Eleventh Circuit expressly concluded below that Florida attempted first degree murder satisfies the ACCA's elements clause. *See* App. A-1 at 8-9.

C. Florida attempted first-degree murder does not satisfy the ACCA's elements clause.

Two elements comprise an attempt to commit a crime in Florida: (1) a specific intent to commit the crime, and (2) an overt act towards its commission. *Williams v. State*, 967 So.2d 735, 755 (Fla. 2007). Florida law has described the

"overt act" element requires only that "some appreciable fragment of the crime must be committed." *State v. Coker*, 452 So.2d 1135, 1136 (Fla. Dist. Ct. App. 1984). The decisional law delineating the scope of conduct that can sustain a conviction for Florida attempted first-degree murder, however, confirms that the "appreciable fragment of the crime" sufficient to convict a defendant of an attempt offense in Florida need not itself involve the use, attempted use, or threatened use of violent force against any person or property.

For example, in *Hernandez v. State*, 117 So.3d 778, 785 (Fla. Dist. Ct. App. 2013), upon which Judge Jill Pryor relied in her concurring opinion, the defendant convinced a classmate to follow him into a school bathroom, and "[o]nce inside, Hernandez entered a handicapped stall, had on a jacket, placed a hat on his head, put on gloves, and repeatedly insisted that [the classmate] join him in the stall." But the classmate "balked at entering the stall," and left without being touched or injured in any way. *Id.* at 781. The state appellate court found the evidence sufficient to support a conviction for attempted first degree murder because the defendant characterized these actions as "steps he planned to take in order to accomplish the murder" of his classmate. *Id.* at 785.

As Judge Pryor explained, *Hernandez* makes clear that an attempt offense in Florida "may be completed without the perpetrator every actually using, attempting to use, or threatening use of physical force," App. A-1 at 16 (Jill Pryor, J., concurring). It therefore does not have, "as an element, the use, attempted use, or threatened use of physical force against the person of another" as required by the ACCA's elements

clause. *See* § 924(e)(2)(B)(ii). And yet the court below nonetheless concluded that the attempt offense qualified as an ACCA predicate based on an automatic rule rejected by this Court in *James*.

CONCLUSION

The Court should hold this petition pending its decision in *Stokeling v. United States*, No. 17-5554, and thereafter, grant the petition.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
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