No. ____

IN THE

Supreme Court of the United States

LAVELL PHILLIPS,

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

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QUESTION PRESENTED

Under the Armed Career Criminal Act ("ACCA"), a "violent felony" is defined as, *inter alia*, a felony that "has 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). Here, the Eleventh Circuit held that the Florida offense of attempted first-degree murder satisfied that definition. It broadly reasoned that because *completed* first-degree murder satisfied that definition, an *attempt* to commit that offense did so as well because it necessarily required the "attempted use" of physical force.

The question presented is:

Where a completed offense satisfies the ACCA's elements clause, does the attempted commission of that offense necessarily do so as well?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 2018 WL 5832232 and reproduced as Appendix A. App. 1a. The district court's order denying the 28 U.S.C. § 2255 motion is unreported but reproduced as Appendix B. App. 6a.

JURISDICTION

The Eleventh Circuit issued its decision on November 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In Florida, first-degree murder is "[t]he unlawful killing of a human being . . . [w]hen perpetrated with a premeditated design to effect the death of the person killed or any human being." Fla. Stat. § 782.04(1)(a)1. And "[a] person who attempts to commit an offense prohibited by law and in such attempt does any 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. § 777.04(1).

The Armed Career Criminal Act ("ACCA") defines "violent felony" as a felony that, *inter alia*, "has 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).

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

For those convicted of being a felon in possession of a firearm, the ACCA transforms the ten-year statutory maximum penalty into a fifteen-year mandatory minimum. 18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(e). The enhancement applies where the defendant has a three "violent felonies" or "serious drug offenses."

The ACCA contains three definitions of a "violent felony"—a felony 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 the definition in subsection (ii) is known as the "enumerated" offense clause. And the second half of the definition in subsection (ii) is known as the "residual" clause.

In *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause was unconstitutionally vague. *Samuel Johnson*, however, left undisturbed the validity of the elements and enumerated-offense clauses. *Id.* at 2563. The following Term, this Court held that *Samuel Johnson* announced a new, substantive rule of constitutional law, and it therefore had retroactive effect to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Following *Johnson* and *Welch*, numerous federal prisoners filed

motions to vacate, pursuant to 28 U.S.C. § 2255, arguing that their ACCA sentences were no longer valid given the retroactive invalidation of the residual clause.

B. PROCEDURAL BACKGROUND

In 2005, a jury found Petitioner guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He was subject to the ACCA enhancement based on five prior Florida convictions, three of which were for attempted first-degree murder. He was sentenced to 204 months' imprisonment.

Within one year of *Samuel Johnson*, Petitioner filed an initial § 2255 motion, arguing that his ACCA enhancement was no longer valid without the residual clause. As relevant here, he argued, *inter alia*, that his Florida attempted first-degree murder convictions were not violent felonies because they did not satisfy the ACCA's still-viable elements clause.

The district court denied Petitioner's § 2255 motion. App. 7a. It concluded that Petitioner's attempted first-degree murder convictions "qualify as 'violent felonies' under the elements clause of the ACCA since they all have as an element the use, attempted use, or threatened use of physical force—extraordinary violence—against the body of another human being." App. 6a.

After granting a certificate of appealability on that issue, the court of appeals affirmed, relying exclusively on its recent decision in *Hylor v. United States*, 896 F.3d 1219 (11th Cir. 2018), *petition for cert. pending* (U.S. No. 18-7113) (filed Dec. 17, 2018). App. 3a–5a. The court explained that *Hylor* had "concluded 'Florida attempted first-degree murder is a violent felony because it requires the attempted

use of physical force that is capable of causing pain or injury.'" App. 4a (quoting *Hylor*, 896 F.3d at 1222). In *Hylor*, the court reasoned that, although first-degree murder could be committed by poison, such conduct still involved a "use of physical force" because it was "an intentional act that is 'capable of causing physical pain or injury.'" *Hylor*, 896 F.3d at 1223 (quotation omitted). And, the court continued, "[i]t makes no difference that Hylor was convicted of only *attempting* to kill his victim" because "[t]he elements clause of the Act 'equates actual force with attempted force.'" *Id*. (quoting *United States v. St. Hubert*, 883 F.3d 1319, 1334 (11th Cir. 2018), *superseded by* 909 F.3d 335 (11th Cir. 2018))). Judge Jill Pryor acknowledged that circuit precedent required this result, but she disagreed with it because "the reasoning underlying *St. Hubert*'s [attempt] holding [wa]s wrong." *Id*. at 1225–27 (Jill Pryor, J., concurring in result). *Hylor*'s holding "dictate[d] the result in this case, regardless of whether the *Hylor* Court considered every argument Petitioner now raises on appeal." App. 5a.

REASONS FOR GRANTING THE PETITION

I. THE REASONING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

In *St. Hubert*, the Eleventh Circuit held that, where a completed offense satisfies the elements clause, an attempt to commit that offense "necessarily" does so as well, reasoning that an attempt to commit such an offense necessarily involves the "attempted use" of physical force. *See* 909 F.3d at 351–53. But that sweeping reasoning—applied to Florida attempted murder in *Hylor* and the decision below—is incompatible with the categorical approach enshrined in this Court's precedents,

as well as this Court's mode of analysis in *James v. United States*, 550 U.S. 192 (2007), *overruled on other grounds by Johnson*, 135 S. Ct. at 2563.

a. Under the categorical approach, federal courts "may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps v. United States*, 570 U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). And "because [federal courts] examine what the state conviction necessarily involved, not the facts underlying the case, [they] must presume that the conviction 'rested upon nothing more than the least of th[e] acts criminalized,' and then determine whether even those acts" satisfy the elements clause. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010)). In ascertaining the least culpable conduct criminalized, federal courts must consider—and, indeed, are bound by—a state court's interpretation of the elements of a state offense. *Curtis Johnson*, 559 U.S. at 138.

Where that offense is for attempt, the least culpable conduct may be qualitatively different from—and far less violent than—the least culpable conduct necessary to complete the offense. Even where an attempt offense requires an overt act, "it is readily conceivable that a person may engage in an overt act—in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block from the bank, and approaching the bank door before being thwarted—without having used, attempted to use, or threatened to use force." *Hylor*, 896 F.3d at 1226 (Jill Pryor, J., concurring in result). "Would this would-be robber have

intended to use, attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? Definitely not." *Id.* Thus, such an attempt offense would not satisfy the elements clause, even if the completed offense would. The Eleventh Circuit's contrary *per se* rule—equating attempt crimes with their completed counterpart—contravenes the categorical approach.

b. This Court's analysis in *James* illustrates that misapplication. This Court affirmed the Eleventh Circuit's holding that Florida attempted burglary was a "violent felony" under the residual clause. 550 U.S. at 195. However, it departed from the Eleventh Circuit's reasoning. In the decision under review, the Eleventh Circuit had presumed that, where a completed offense satisfied the residual clause, then any attempt (or conspiracy) to commit that offense would do so as well. *See United States v. James*, 430 F.3d 1150, 1156–57 (11th Cir. 2005) (citing *United States v. Wilkerson*, 286 F.3d 1324, 1326 (11th Cir. 2002) and *United States v. Rainey*, 362 F.3d 733, 736 (11th Cir. 2004)). Rather than accepting that simplistic equation, this Court scrutinized the elements and scope of the attempt offense.

The Court "beg[a]n by examining what constitutes attempted burglary under Florida law." *James*, 550 U.S. at 202. Delving deep into state law, the Court determined that, while the face of "Florida's attempt statute requires only that a defendant take 'any act toward the commission' of burglary," the Florida courts had consistently required an "overt act," such that "[m]ere preparation [wa]s not enough." *Id.* at 202–03 (quoting Fla. Stat. § 777.04(1); other citations omitted). Having carefully examined Florida attempt law, and distinguished attempt law in

other states, *see id*. at 204–06, the Court characterized the "pivotal issue" as "whether overt conduct directed toward entering or remaining in a dwelling, with the intent to commit a felony therein," satisfied the residual clause, *id*. at 203.

Examining Florida's attempt law in detail would have been unnecessary had this Court agreed with the Eleventh Circuit's reasoning in *James* that an attempt to commit a violent felony was itself a violent felony. Rather than adopting such an automatic *per se* rule, the Court recognized that attempted burglary was distinct from completed burglary. Thus, under the categorical approach, that attempt offense and its elements had to be analyzed separately for purposes of the ACCA. The Eleventh Circuit's reasoning in *St. Hubert*—applied in *Hylor* and the decision below—ignores that analytical distinction between attempted and completed offenses and reinstates the *per se* rule that this Court declined to embrace in *James*.

II. THE DECISION BELOW REACHED THE WRONG RESULT

This time, that *per se* rule led the Eleventh Circuit to the wrong result. In Florida, first-degree murder is the premeditated killing of a human being. Fla. Stat. § 782.04(1)(a)1. And attempted first-degree murder requires: "(1) the specific intent to commit the crime, and (2) an overt act toward its commission." *Hernandez v. State*, 117 So.3d 778, 784 (Fla. Dist. Ct. App. 2013). While the "overt act" "is an act that must go beyond mere preparation," it "does not have to be the ultimate or last possible act toward consummation of the crime." *Id*. (citations omitted); *see* Fla. Stat. § 777.04(1) (overt act is "any act toward the commission of [the] offense," even if the defendant "fails in the perpetration or is intercepted or prevented in the

execution thereof"). "This means that 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." *Hylor*, 896 F.3d at 1226 (Jill Pryor, J., concurring in result). "Yet, 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—despite the fact that the offense may be completed without the perpetrator ever actually using, attempting to use, or threatening to use physical force. This is plainly wrong." *Id*. at 1226–27.

Concretely illustrating the point is the Florida appellate court's decision in *Hernandez*. It upheld an attempted first-degree murder conviction where the defendant entered a bathroom stall, put on a hat and gloves, and invited the intended murder victim join him in the stall; the intended victim, however, did not enter. *Hernandez*, 117 So.3d at 781, 785. Although that conduct sufficed for attempted first-degree murder in Florida, it plainly did not involve the use, attempted use, or threatened use of physical force. While the defendant intended to use such force inside the stall, the victim declined to enter; so no actual, attempted, or threatened use of force occurred. Thus, there is no basis to presume, as the Eleventh Circuit has, that attempted first-degree murder necessarily involves an attempted use of force. The case law concretely refutes that presumption.

Finally, in addition to contravening the categorical approach and state substantive attempt law, the Eleventh Circuit's treatment of attempt crimes effectively re-writes the ACCA. Had Congress intended attempt crimes to

automatically qualify as violent felonies whenever their substantive counterpart did, Congress could have easily said so. Indeed, the Sentencing Commission has done exactly that in the Guidelines. *See* U.S.S.G. § 4B1.2, cmt. n.1 ("'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such crimes."). Thus, Congress could have easily drafted the ACCA to produce the *per se* rule that the Eleventh Circuit has adopted. Congress' failure to do so is telling.

III. THE QUESTION PRESENTED WARRANTS REVIEW

The question presented is important and recurring. Moving forward, all attempt crimes in the Eleventh Circuit will automatically be deemed violent felonies whenever their completed counterpart is. And that is true even if the attempt crime need not require the use, attempted use, or threatened use of physical force, as the ACCA's text requires. Moreover, other circuits are making the same analytical mistake, uncritically presuming that all attempted violent felonies are themselves violent felonies—without regard for whether their commission requires the use, attempted use, or threatened use of physical force. *See, e.g.*, *Hill v. United States*, 877 F.3d 717, 718–20 (7th Cir. 2017) (so holding, despite admitting that "it is possible to attempt murder without using, attempting, or threatening physical force"). Given that virtually all violent felonies have an attempt counterpart, this Court should not sanction such a dramatic and a-textual expansion of the ACCA. Indeed, the result is that numerous federal prisoners will be erroneously subject to a harsh fifteen-year mandatory minimum penalty.

This case provides the Court with an excellent opportunity to intervene and correct that injustice. Petitioner's ACCA enhancement depended on whether his attempted first-degree murder convictions satisfied the elements clause. Thus, that was the "only issue in this case" when it came to the court of appeals. App. 4a. That court adversely resolved that issue based exclusively on the precedential decision in *Hylor*. App. 4a–5a. And, applying *St. Hubert*'s reasoning, that decision squarely held that "[i]t makes no difference that Hylor was convicted of only *attempting* to kill his victim," because "when a substantive offense qualifies as a violent felony under the Act, an attempt to commit that offense also is a violent felony under the Act." *Hylor*, 896 F.3d at 1223 (quotation omitted). Accordingly, the question is squarely presented here and would be dispositive of this case.

IV. ALTERNATIVELY, THE COURT SHOULD HOLD THIS CASE FOR *STOKELING*

If the Court does not grant certiorari on the question presented here or in another case, then it should hold this case pending *Stokeling v. United States* (U.S. No. 17-5554) (argued Oct. 9, 2018), where the Court is currently considering whether Florida robbery satisfies the elements clause. The reason is twofold.

a. If the petitioner in *Stokeling* prevails, then this Court would presumably grant certiorari in *Hylor*, vacate the judgment below, and remand for further proceedings. That is so because, in *Hylor*, the petitioner had only three qualifying prior ACCA convictions, and Florida robbery was one of them. *See Hylor*, 896 F.3d at 1220–21; *Hylor*, Cert. Pet. 9–10. And if this Court vacates the Eleventh Circuit's decision in *Hylor*, that would vitiate the foundation of the decision below.

b. *Stokeling* may also abrogate the legal standard applied in the decision below—namely, that an offense satisfies the elements clause whenever it is "capable of causing pain or injury." App. 4a (quoting *Hylor*, 896 F.3d at 1222). Plucking such language from *Curtis Johnson*, 559 U.S. at 140, the en banc Eleventh Circuit has adopted that "capable" standard for the elements clause. *See United States v. Vail-Bailon*, 868 F.3d 1293, 1299–1302 (11th Cir. 2017) (en banc). But the parties in *Stokeling* vigorously disputed whether that standard was correct. Thus, if *Stokeling* repudiates the "capable" standard for the elements clause, then that would abrogate the legal standard applied below, warranting vacatur of the decision below and a remand for reconsideration in light of *Stokeling*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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