NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MICHAEL ST. HUBERT,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the definition of "crime of violence" in the residual clause of 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague, given the Court's holding in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) that the identical residual clause definition in 18 U.S.C. § 16(b) is unconstitutionally vague in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015)?

2. If a completed offense is categorically a "crime of violence" within 18 U.S.C. § 924(c)(3)(A)'s elements clause because it has the use or threat of "*violent* force" as an element, is the *attempted* commission of that offense automatically and categorically a "crime of violence," irrespective of whether the substantial step required for conviction is violent, and even if the attempt offense does not require specific intent?

3. Given Congress' express "Clarification of Section 924(c) of Title 18, United States Code" in Section 403 of the First Step Act, does that clarifying amendment apply to a defendant convicted and sentenced to a consecutive 25-year term on one of two § 924(c) counts in a first § 924(c) prosecution prior to the enactment of the Act, but whose sentence has not yet been finally imposed because his case remains on direct review?

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Michael St. Hubert ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Petitioner's convictions and sentence, *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. Nov. 15, 2018), is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming

Petitioner's convictions and sentence was entered on November 15, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means –

> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and 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. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 5 years;
> >
> > **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; . . .
>
> **(c)(1)(C)** In the case of a second or subsequent conviction under this subsection, the person shall –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 25 years; and
> >
> > (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.
>
> **(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. . . .

The First Step Act of 2018, Pub. L. No. 115-391, enacted on December 21, 2018, amended §924(c)(1)(C) in Title IV, Section 403 of the Act, entitled "Clarification of Section 924(c) of Title 18, United States Code," which provides:

(a) IN GENERAL. – Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

(b) APPLICABILITY TO PENDING CASES. – This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

18 U.S.C. § 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his family or anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

The Charges, Motion to Dismiss, and Plea

Petitioner Michael St. Hubert ("Petitioner") was charged in a multi-count indictment with several counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Counts 1, 3, 5, 7, and 9); a single count of attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count 11); two counts of using and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 8, alleging that Count 7 was the predicate "crime of violence;" and Count 12 alleging that Count 11 was the predicate "crime of violence"); and a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Although Petitioner moved to dismiss the two § 924(c) counts for failure of the predicate offenses to qualify as "crimes of violence" under either the elements or residual clauses of § 924(c)(3), the district court summarily denied that motion.

Thereafter, pursuant to a negotiated plea agreement, Petitioner pled guilty to the two § 924(c) charges – Counts 8 and 12. At the change of plea, the government proffered that: (1) "On January 21st, 2015 . . . [t]he defendant . . . brandished a firearm and directed three store employees to the rear of the store. He demanded that the employees place money from the store's safe inside one of the store's plastic bags and threatened to shoot them"; (2) "On January 27, 2015 . . . the defendant . . . held a firearm against the side of one employee and directed a second employee to open the store safe"; and (3) "During execution of a search warrant for the defendant's vehicle, law enforcement located a firearm and ammunition." The proffer did not indicate whether the firearms brandished in (1), (2), and (3) were loaded, or whether they were the same firearm.

On February 16, 2016, the district court sentenced Petitioner to 32 years imprisonment, consisting of 7 years on Count 8, followed by a consecutive 25 years on Count 12.

The Appeal to the Eleventh Circuit, and the Decision in *St. Hubert I*

On appeal to the Eleventh Circuit, Petitioner argued that his Count 8 and 12 § 924(c) convictions could not be sustained for two reasons. First, he argued, § 924(c)(3)(B) which – identically to 18 U.S.C. § 16(b), and similarly to the ACCA's residual clause in 18 U.S.C. § 924(e)(2)(B) – defines "crime of violence" as an offense "that by its nature, involves a substantial risk that physical force against the person of property of another may be used in the course of committing the offense," was unconstitutionally vague after *Johnson v. United States*, 135 S.Ct. 2551 (2015). Second, Petitioner argued, the predicate offenses for both Counts 8 and 12 – Hobbs Act Robbery, in Count 7, and attempted Hobbs Act Robbery in Count 11 – categorically failed to qualify as "crimes of violence" under § 924(c)(3)(A), as neither offense had "as an element the use, attempted use, or threatened use of physical force against the person or property of another."

On February 28, 2018, the Eleventh Circuit affirmed Petitioner's § 924(c) convictions and consecutive sentences. *United States v. St. Hubert*, 883 F.3d 1319 (Feb. 28, 2018) ("*St. Hubert I*"). While agreeing with Petitioner as a threshold matter that his challenges to his § 924(c) convictions were constitutional, jurisdictional, and not waived by his plea, *id.* at 1324-27, the court nonetheless rejected his claims on the merits. *Id.* at 1327-37.

With regard to the "crime of violence" definition in § 924(c)(3)(B), the court noted that it had "already rejected a *Johnson*-based void-for-vagueness" challenge to that provision in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), and it was "bound to follow *Ovalles*." 883 F.3d at 1328. However, the court implicitly recognized that *Dimaya* might well undercut

Ovalles, and therefore argued that *Dimaya* was "inapposite" for several reasons. *See id.* at 1336-37 (reiterating the *Ovalles* panel's arguments for distinguishing § 16(b) from § 924(c)(3)(B)). In the event § 924(c)(3)(B) were declared unconstitutionally vague and void as well, however, the court found that the elements clause in § 924(c)(3)(A) provided an "independent and alternative ground" upon which to uphold Petitioner's Count 8 and Count 12 convictions. *See id.* at 1328, 1334. With regard to the Count 8 conviction, the court noted that it had "already held" in *In re Saint Fleur*, 824 F.3d 1337 1340 (11th Cir. 2016), that a substantive Hobbs Act robbery "independently qualifies as a crime of violence under the § 924(c)(3)(A)'s use-of-force clause." *St. Hubert*, 883 F.3d at 1329. And it agreed with the views of other circuits that had found a substantive Hobbs Act robbery offense to categorically be a "crime of violence" under § 924(c)(3)(A). *Id.* at 1332-33.

With regard to the Court 12 conviction – which had triggered the harsh, consecutive 25-year sentence – the court acknowledged that it had not yet squarely considered the separate question of whether an *attempted* Hobbs Act robbery was a "crime of violence" within § 924(c)(3)(A). *Id.* at 1329, 1333. In addressing that question of first impression, it ruled – as the government had argued — that *attempted* Hobbs Act robbery was indeed a "crime of violence," reasoning that because the underlying substantive offense was categorically violent, "the attempted taking of [] property in such manner must also include at least the "attempted use' of force." *Id.* at 1333-34 (citing as support *United States v. Wade*, 458 F.3d 1273, 1278 (11th Cir. 1006); *Hill v. United States*, 877 F.3d 717, 718-19 (7th Cir. 2017); *United States v. Armour*, 840 F.3d 904, 908-09 (7th Cir. 2016)).

In reaching that conclusion, the court embraced the Seventh Circuit's reasoning in *Hill* that because "a defendant must intend to commit every element of the completed crime in order

to be guilty of attempt," an attempt to commit *any* crime "'should be treated as an attempt to commit every element of that crime.'" *Id*. at 1334 (citing *Hill*, 877 F.3d at 719). Although *Hill* was an ACCA case involving an attempted murder predicate, the court below found *Hill* completely "analogous." *Id*. at 1334. "Under *Hill*'s analysis," it found, the intent to commit violence was an element of a Hobbs Act robbery crime due to the "taking in a forcible manner" requirement, and given that intent, an attempted Hobbs Act robbery was a "crime of violence." *Id.* (noting with significance, "under *Hill*'s analysis," that § 924(c)(3)(A) "equates the use of force with attempted use of force;" "thus, the text of § 924(c)(3)(A) makes clear that actual force need not be used for a crime to qualify under § 924(c)(3)(A)").

Because Petitioner attempted to commit a "crime of violence" (Hobbs Act robbery), the court found, he intended to commit violence, that intent met the elements clause, and for that alternative and independent" reason, his *attempted* Hobbs Act robbery was a "crime of violence" under § 924(c). *Id.* & n. 15; 1336-37.

The Stay of the Mandate in *St. Hubert I*

The same day the decision issued, the mandate was "withheld pursuant to the Court's Instructions." *See* Eleventh Circuit docket in Case No. 16-10874.

The Decision in *Dimaya* and the En Banc Proceedings in *Ovalles II*

Less than two months later, in *Sessions v. Dimaya*, 138 S.Ct. 1204 (April 17, 2018), this Court held that a "straightforward application" of *Johnson* rendered the identically-worded residual clause in 18 U.S.C. § 16(b) unconstitutionally vague, *id.* at 1213, because "§16(b) has the same '[t]wo features] that 'conspire[d] to make [ACCA's residual clause unconstitutionally vague," *id.* at 1216, namely, "both an ordinary-case requirements and an ill-defined risk threshold"). *Id.* at 1223. Implicitly rejecting much of the Eleventh Circuit's reasoning in

Ovalles, the Court held that "none of the minor linguistic disparities in the statutes makes any real difference." *Id.*

As the Chief Justice noted, the holding in *Dimaya* necessarily "call[ed] into question" convictions under the identically-worded §924(c)(3)(B). 138 S.Ct. at 1241 (Roberts, C.J., dissenting). And for that reason, soon after *Dimaya*, the Eleventh Circuit vacated *Ovalles*, and granted rehearing en banc, 889 F.3d 1259 (11th Cir. May 15, 2018), to determine whether §924(c)(3)(B) was now unconstitutionally vague in light of *Dimaya*, or whether that conclusion could be avoided by overruling *United States v. McGuire*, 706 F.3d 1333, 1336-67 (11th Cir. 2013), to the extent *McGuire* mandated use of the categorical approach for determining whether a prior offense was a "crime of violence" under §924(c)(3)(B).

The Eleventh Circuit continued to stay the mandate in Petitioner's case pending the en banc proceedings in *Ovalles*. Indeed, a July 26, 2018 docket entry in Case No. 16-10974 states "Mandate withheld pursuant to Court's Instructions."

Finally, on October 18, 2018, a divided Eleventh Circuit issued its decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. Oct. 4, 2018) (en banc) (*Ovalles II*). The majority concluded that §924(c)(3)(B) was *not* unconstitutionally vague, by abandoning the categorical approach with regard to that provision, and adopting instead a "conduct-based approach that accounts for the actual, real-world facts of the crime's commission." *Id.* at 1253. It justified its decision to "jettison" the categorical approach, by the canon of "constitutional doubt," *id.* at 1234, otherwise known as "constitutional avoidance." According to the *Ovalles II* dissenters, however, in relying upon that canon to save §924(c)(3)(B) from being void for vagueness after *Dimaya*, the *Ovalles II* majority had ignored this Court's contrary precedents in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *Dimaya*, which dictated that the plain text of § 924(c)(3)'s

residual clause requires application of the categorical approach. *See id*. at 1277-99 (Jill Pryor, J., joined by Wilson, Martin, and Jordan, JJ., dissenting).

The Eleventh Circuit's Request for Supplemental Briefing After *Ovalles II*

The Eleventh Circuit, notably, continued to hold the mandate in Petitioner's case all through this time, even while he sought review of the decision in *St. Hubert I*, after review was denied, and even after *Ovalles II* issued. Accordingly, since the decision in *St. Hubert I* was still not final due to the continued holding of the mandate, on October 12, 2018, the panel directed the parties to file simultaneous supplemental briefs addressing the following issue:

> Whether, in light of *Ovalles v. United States*, [905 F.3d 1231] (Oct. 4, 2018) (en banc), St. Hubert's predicate Hobbs Act robbery and attempted Hobbs Act robbery, as he admitted committing them in his written plea agreement and plea colloquy, constitute a crime of violence under 18 U.S.C. § 924(c)(3)(B)'s residual clause?

In its supplemental brief, the government argued that holding one victim at gunpoint while making demands on another, as occurred during the attempted robbery, "involves a substantial risk that physical force may be used in the course of committing the offense." The government ignored the fact that there was no evidence the gun was loaded, and addressed no other issues.

In his supplemental brief, Petitioner argued that *Ovalles II* was wrong for the reasons stated by the dissenters, and that it was improper for a court of appeals to apply a "conduct-based approach in the first instance, akin to "harmless error review," to an already-convicted defendant. However, he argued, even applying a conduct-based approach, neither of his predicate offenses constituted "crimes of violence" within § 924(c)(3)(B), because the record evidence did not show the gun was loaded in either incident, and without such evidence, the government did not prove beyond a reasonable doubt that his conduct "involved a substantial risk that physical force

against the person or property of another may be used in the course of committing the offense."

Finally, he argued, the panel had erroneously held in *St. Hubert I* that any and every attempt to commit a crime of violence under § 924(c) was itself a crime of violence. 883 F.3d at 1333-1334. He asked the panel to reconsider its prior ruling in that regard based upon *James v. United States*, 550 U.S. 192, 201 (2007), *overruled on other grounds* by *Johnson v. United States*, 135 S.Ct. 2551 (2015), which had rejected that precise type of presumptive logic. He pointed out that the Eleventh Circuit in *James* had presumed that every attempt to commit an enumerated "violent felony" (such as burglary) in 18 U.S.C. § 924(e)(2)(B)(ii), was necessarily a "violent felony" within the residual clause. 430 F.3d at 1155-58. But this Court had refused to sanction such reasoning, and had clearly stated that "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 even meet the then-all-inclusive residual clause. *James*, 550 U.S. at 204-05. Petitioner urged the panel to find similarly that preparatory conduct sufficient for an attempted Hobbs Act robbery offense (temporally or locationally separated from the crime scene or designated victim) such as that in *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016), did not meet the much-narrower elements clause.

The Decision in *St. Hubert II*

On November 18, 2018, the Eleventh Circuit panel vacated its prior opinion in light of *Dimaya*, and issued a new opinion. *United States v. St. Hubert*, 909 F.3d. 335 (11th Cir. Nov. 15, 2018) ("*St. Hubert II*"). That new opinion readopted and reinstated the jurisdictional and substantive Hobbs Act robbery rulings from *St. Hubert I* "as previously written." *Id.* at 337, 340-51. While the panel reaffirmed both § 924(c) convictions under the residual clause, it did so now based upon *Ovalles II*, embracing the new conduct-based approach." *See id.*at 344-45.

Applying *Ovalles II*'s conduct-based approach to Petitioner's "admitted conduct," the panel noted with significance that at the plea hearing, Petitioner admitted that on January 21, he "brandished a firearm at store employees and threatened to shoot them, before stealing approximately $2,300." From that, the panel "readily conclude[d]" that Petitioner's conduct in the substantive Hobbs Act robbery (the conduct underlying his Count 8 conviction) "involved a substantial risk that physical force may have been used against a person or property." *Id.* at 345. The panel only addressed the January 27 attempted Hobbs Act robbery underlying the Count 12 conviction briefly, stating in footnote 15 that it was affirming the Count 8 conviction as well "based on the residual clause in § 924(c)(3)(B). *See Ovalle*s, 861 F.3d at 1267." *St. Hubert*, 909 F.3d at 352 n. 15. The panel did not explain why the particular facts Petitioner admitted as to the attempted Hobbs Act robbery "involved a substantial risk that physical force may have been used against a person or property." And it ignored the fact (emphasized by Petitioner in his supplemental brief) that there was no record evidence that the gun brandished on either occasion was loaded.

The panel devoted far more attention in *St. Hubert II*, to the question of whether – under the categorical approach – an attempted Hobbs Act robbery meets the elements clause. While stating that it was "readopt[ing] and reinstat[ing]" Section IV of its prior panel opinion on that issue, it acknowledged that it had also added "some additional analysis along the way." *Id.* at 337. Specifically, the panel re-adopted its prior discussion stating that to be convicted of an "'attempt' of a federal crime," a defendant "must (1) have the specific intent to engage in the criminal conduct with which he is charged; and (2) have taken a substantial step toward the commission of the offense that strongly corroborates his criminal intent." *Id.* at 351 (citing *United States v. Jockisch*, 857 F.3d 1122, 1129 (11th Cir. 2017); *United States v. Yost*, 479 F.3d

815, 819 (11th Cir. 2007); and *United States v. Murrell*, 368 F.3d 1283, 1286-87 (11th Cir. 2004)). But notably, none of these cases were attempted Hobbs Act robbery cases. They involved the very different crime of attempted solicitation of a minor.

Second, the panel re-adopted and continued to follow the analysis in *Hill v. United States*, 877 F.3d 717, 718-19 (7th Cir. 2017), which had in turn adopted Judge Hamilton's concurring opinion in *Morris v. United States,* 827 F.3d 696 (7th Cir. 2016), in explaining why "an attempt to commit a violent felony under the ACCA is also a violent felony." *Id.* at 352. The panel continued to believe *Hill*'s analysis was "analogous" and controlled the § 924(c) case before it here, stating – again, without support – that "an attempt to commit Hobbs Act robbery requires that St. Hubert intended to commit every element of Hobbs Act robbery." *Id.*

What the panel added to its prior discussion of this issue in *St. Hubert I* was explicit recognition that as "St. Hubert argues," (1) "a robber could plan the robbery and travel with a gun to the location of the robbery but be caught before entering the store and still be guilty of attempted Hobbs Act robbery," and therefore, (2) "the substantial step required an attempt conviction will not always involve an actual or threatened use of force." *Id.* at 352-33. Nonetheless, the panel rejected Petitioner's suggestion that this was relevant to the elements clause analysis in any way. It stated:

> [A]s before, we agree with the Seventh Circuit that even if the completed substantial step falls short of actual or threatened force, the robber has attempted to use actual or threatened force because he has attempted to commit a crime that would be violent if completed. *See Hill*, 877 F.3d at 718-19. Thus, we reject St. Hubert's claim that the substantial step itself in an attempt crime must always involve the actual or threatened use of force for an attempt to commit a violent crime to qualify under § 924(c)(3)(A)'s elements clause.

Id. at 353. In so stating, the panel did not mention *Wrobel*, and completely ignored Petitioner's argument that a contrary finding was compelled by this Court's decision in *James*.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's holding that 18 U.S.C. § 924(c)(3)(B) is constitutional after *Johnson* and *Dimaya* conflicts with decisions of other circuits, and that circuit conflict will be resolved in *Davis.*

In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court held the definition of "crime of violence" under 18 U.S.C. § 16(b) was void for vagueness in violation of due process for the same reasons the Court held the similar residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) void for vagueness in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Indeed, the Court found, "a straightforward application of *Johnson*" effectively "resolve[d]" the case before it, since *Johnson* singled out two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague," and the same two features made § 16(b) vague as well. *Dimaya,* 138 S. Ct. at 1213, 1223 (citing *Johnson,* 135 S. Ct at 2557). Specifically, like the ACCA's residual clause, § 16(b) required the court to identify a crime's "ordinary case" in order to measure the crime's risk, but "[n]othing in § 16(b) helps courts to perform that task." 138 S. Ct. at 1215. And § 16(b)'s "substantial risk" threshold is no more determinate that the ACCA's "serious potential risk" threshold. *Id.* Thus, the same "[t]wo features" that "conspire[d] to make" the ACCA's residual clause unconstitutionally vague – "the ordinary case requirement and an ill-defined risk threshold" – likewise conspired to make § 16(b) unconstitutionally void. *Id.* at 1216, 1223 (citing *Johnson,* 135 S. Ct. at 2557).

Although the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is identical to § 16(b) and until now, operated in precisely the same way as § 16(b) (with the same categorical "ordinary case" approach and risk threshold), after *Dimaya* the Eleventh Circuit endeavored to avoid the constitutional vagueness finding that *Dimaya* compelled. While every judge on the Eleventh Circuit candidly recognized in *Ovalles v. United States* 905 F.3d 1231 (11th Cir. 2018)

("*Ovalles II*") that *Dimaya* had completely undercut the reasoning in *Ovalles I*, and rendered § 924(c)(3)(B) unconstitutional so long as the categorical approach continued to apply to that provision, 905 F.3d at 128-1240,[1] the majority of the court chose to reinterpret the statute in lieu of invalidating it. *See id.* at 1233. Under the guise of applying the "constitutional avoidance" doctrine, the *Ovalles II* majority "jettisoned" the categorical approach, claiming that a "conduct-based" approach was also a "plausible" reading of § 924(c)(3)(B). *Id.* at 1251-52 (holding that "the tie (or the toss-up, or even the shoulder-shrug) goes to the statute-saving option – which, here, is the conduct-based interpretation;" acknowledging that it did not "conclude that textual, contextual, and practical considerations *compel* a conduct-based reading of § 924(c)'s residual clause," or that such is the "*best* read;" "It is enough for us to conclude" that § 924(c)(3)(B) "is at least 'plausibl[y]' (or 'fairly possibl[y]') understood to embody the conduct-based approach.") (citations omitted).

While the First and Second Circuits have agreed with the Eleventh Circuit's analysis, and found § 924(c)(3)(B) constitutional after *Dimaya* on a similar rationale, *see United States v. Douglas*, 907 F.3d 1 (1st Cir. Oct. 12, 2018), *pet for cert. pending* (U.S. 18-7331) (filed Jan. 7, 2019); *United States v. Barrett*, 903 F.3d 166, 177-85 (2d Cir. 2018), *pet. for cert. pending* (U.S. 18-6985) (filed Dec. 3, 2018), the Fourth, Fifth, Tenth, and D.C. Circuits have sharply disagreed. Each of these circuits has readily found §924(c)(3)(B) unconstitutionally vague in light of *Dimaya*. *See United States v. Davis*, 903 F.3d 483 (5th Cir.), *cert granted*, 2019 WL 98544

[1] *See Ovalles II*, 905 F.3d at 1233 ("In the wake of those decisions, all here seem to agree that if § 924(c)(3)'s residual clause is interpreted to require determination of the crime-of-violence issue using . . . 'the categorical approach,' the clause is doomed."); *id.* at 1239-40 ("it seems clear that if we are required to apply the categorical approach in interpreting § 924(c)(3)'s residual clause . . . then the provision is done for."); *id.* at 1244 (recognizing the "near-certain death" that would result to § 924(c)(3)(B), if the categorical approach were retained); *id.* at 1251 n. 9 (responding to the dissent's criticism of rewriting the statute by stating that the Court had "saved it from the trash heap," and arguing that the dissent's insistence on retaining the categorical approach "guarantees its invalidation").

(U.S. Jan. 4, 2019) (No. 18-413); *United States v. Salas*, 889 F.3d 681, 684-86 (10th Cir.), *petition for cert. pending* (U.S. 18-428) (filed Oct. 3, 2018)*; United States v. Eshetu*, 898 F.3d 36, 37-38 (D.C. Cir.), *petition for reh'g pending,* No. 15-3020 (D.C. Cir. filed Aug. 31, 2018); *United States v. Simms*, 914 F.3d 229, 2019 WL 311906 (4th Cir. Jan. 24, 2019) (en banc).

Since the Court has granted certiorari in the Fifth Circuit's case – *Davis* – to resolve the circuit conflict, it should hold this petition pending *Davis*. And, for the reasons set forth by the dissenters in *Ovalles II*, and the en banc majority in *Simms*, the Court should not only find § 924(c)(3)(B) unconstitutionally vague; it should squarely reject – as even a *plausible* reading of the statute – the "conduct-based" approach adopted by the Eleventh Circuit in *Ovalles II*.

A. The only plausible reading of § 924(c)(3)(B) requires the categorical approach, which renders that provision unconstitutionally vague and void.

The Fourth Circuit in *Simms* has decisively refuted every component of the Eleventh Circuit's "constitutional avoidance" argument. As a threshold matter, it rejected the suggestion that the categorical approach is simply a "savings construction" adopted to "avoid the risk of unfairness that comes with reviewing conduct that underlies long-past convictions." 2019 WL 311906 at *7. "The Supreme Court did not invent the categorical approach out of whole cloth, as the Government would have us believe," the Fourth Circuit explained. "The text and structure of § 924(c)(3)(B) unambiguously require courts to analyze the attributes of an 'offense that is a felony ... by its nature' – that is, categorically." *Id.* at *8. That was not only clear from *Dimaya* and this Court's pre-*Dimaya* precedent (including *Shepard v. United States*, 544 U.S. 13, 19 (2005); *Taylor v. United States*, 495 U.S. 575, 600-02 (1990); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)), the Fourth Circuit noted. S*imms*, 2019 WL 311906 at **4-8. The Fourth Circuit went well beyond these precedents, to conduct its own review § 924(c)(3)(B) "on a clean slate." And

after doing so, it notably found *no "plausible" construction* of the statutory text that would support a conduct-based approach." *Id.* at **9-11 (emphasis added).

In its *de novo* review of the statute, the Fourth Circuit emphasized first that the plain text of § 924(c)(3)(B), which is "a court's first and foremost guide to its meaning" required the ordinary-case categorical approach through the combination of the phrase 'offense that is a felony' with the qualifier 'by its nature.'" *Id.* at *9. Second, the Fourth Circuit found that the government's reading would not only render the "by its nature" language "superfluous," but also require the Court to interpret the statute's "single reference to an 'offense that is a felony' in contradictory ways for the elements and residual clause," which would render the statute "a chameleon." *Id.* at **9-10. And finally, the Fourth Circuit noted, the "presumption of consistent meaning" likewise prohibited the government's construction because one could not interpret the "materially identical 34-word phrase in § 924(c)(3)(B) and § 16(b) in entirely different ways," when those provisions were created "in the same legislative enactment." *Id.* at *11.

"Where, as here, there is an 'absence of more than one plausible construction," the Fourth Circuit concluded, "the canon of constitutional avoidance 'simply has no application." *Id.* at *18 (citing *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018)). Indeed, where there is only one plausible reading of a statute, a federal court "lack[]s the power" to avoid the "constitutional infirmity" in the language Congress wrote, because that would "usurp the legislative role." "Given the text and context of § 924(c)(3)(B)," the Fourth Circuit concluded, "accepting the Government's new interpretation would amount to judicially rewriting the statute," *id.* at **18-19, which is impermissible.

Even if the Court were to disagree that there is only one plausible reading of § 924(c)(3)(B), the avoidance cannon can *only* apply "*if* a reasonable alternative interpretation

poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989) (emphasis added); *Dimaya*, 138 S.Ct. at 1254 (The canon does not apply if the alternate reading "create[s] problems of its own.") (Thomas, J., dissenting). And here, a "conduct-based approach" would clearly pose myriad constitutional problems.

For starters, if a "crime of violence" is a "case specific" question that hinges on specific facts rather than the "ordinary case," countless defendants like Petitioner who pled guilty to §924(c) did so without "real notice of the true nature of the charge," which is "the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618 (1998). Each of those defendants was also "misinformed as to his right to have the charged ["crime of violence"] proved to a jury" and to defend himself before a jury under a conduct-based approach, and thus was denied due process, because his plea "was not knowing [and] voluntary." *United States v. Gonzalez*, 420 F.3d 111, 134 (2nd Cir. 2005).

For defendants who went to trial, the indictment did not "fairly inform" such defendants of the charge against which they were to defend, *Hamling v. United States*, 418 U.S. 87, 117 (1974), so that they could factually-dispute the "crime of violence" allegation in the indictment before the jury. At the time they were charged and went to trial, whether an offense was a "crime of violence" was a purely legal issue to be decided by the judge. Applying a conduct-based approach retrospectively to such defendants, would mean that the indictment would "no longer be the instrument of the grand jury who presented it," *Stirone v. United States*, 361 U.S. 212, 216 (1960), since the grand jury had alleged a "crime of violence" in the "ordinary case" (the analysis under the categorical approach), *not* that the defendant's "case specific" conduct qualified as a "crime of violence."

If the Court were to hold that the "conduct-based approach" was always the correct test for §924(c)(3)(B), such defendants were denied their Sixth Amendment right to have a jury decide that issue in the first instance. For defendants who went to trial without that understanding, the trial judge effectively directed a verdict for the prosecution in violation of the Sixth Amendment, which is *per se* reversible error, irrespective of the evidence. *See Rose v. Clark*, 478 U.S. 570, 578 (1986); *United States v. Martin Linen Supply Co.*, 430 U.s. 564, 572-73 (1977); *Carpenters v. United States*, 330 U.S. 395, 408 (1947). And indeed, if *Davis* were to set forth a *new* residual clause test, whether a defendant went to trial or pled (like Petitioner), it would clearly violate the *ex post facto* clause to apply that new test to pre-*Davis* conduct that did not violate §924(c) under then-applicable law. *See Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (The Constitution "bar[s] retroactive criminal prohibitions emanating from courts as well as from legislatures."); *Marks v. United States*, 430 U.S. 188, 196 (1977)(same).

In short, adopting a "conduct-based" reading of § 924(c)(3)(B) would spawn multiple new unconstitutionalities. And for that reason as well, the Court should squarely reject the First, Second, and Eleventh Circuit's resort to the "constitutional avoidance" doctrine to avoid the import of *Dimaya*. The Court should clarify for the lower courts that there is *only one* "plausible" construction of § 924(c)(3)(B); it requires the categorical approach; and that approach renders § 924(c)(3)(B) unconstitutionally vague for the reasons stated in *Dimaya*.

B. Even if the Court were to adopt a conduct-based construction of § 924(c)(3)(B), the Eleventh Circuit erroneously found brandishing an unloaded firearm would meet § 924(c)(3)(B) under such an approach.

Even *if* retrospective application of a new "conduct-based" approach to defendants who were charged and pled guilty when the categorical approach governed and § 924(c)(3)(B)'s residual clause was unconstitutionally vague, did not pose the myriad constitutional problems

outlined above, the court below still erred in holding that the brandishing of a firearm without proof that the firearm was loaded at the time met the residual clause under a conduct-based approach.

As a threshold matter, Petitioner admitted *no* factual conduct whatsoever in his plea agreement. He admitted only the bare elements of the two § 924(c) charges. *Descamps v. United States*, 570 U.S. 254, 2699-70 (2013). And, although he did agree to the correctness of the factual proffer by the AUSA at his plea colloquy, the conduct the AUSA proffered did *not* indicate that Petitioner employed the sort of "*violent* force" necessary for the government to meet its burden. In that regard, as Petitioner argued below, the government's factual proffer failed to note whether the firearm was loaded at the time of Mr. St. Hubert's brandishing in either the January 21 or 27 incidents (or even whether the same firearm was at issue in those incidents, and was also the firearm found during the search). And without any evidence that that Petitioner brandished a loaded firearm, there was no proof – and certainly not proof beyond a reasonable doubt – that his conduct "involved a substantial risk that physical force" may be used. Without bullets, the gun was rendered impotent and could not have posed any "risk that physical force against the person or property of another may be used in the course of committing the offense." In fact, Petitioner pointed out, the *Ovalles II* majority had candidly acknowledged that the mere possession of a gun is insufficient to demonstrate that the offense "involved a substantial risk of physical force." *Ovalles II*, 905 F.3d at 1250 n. 8.

Brandishing an unloaded gun is akin to mere possession of a gun. It is nothing like the conduct the defendant admitted in *Ovalles II*, namely, that her co-conspirators hit a child in the face with a baseball bat, and in making their escape, had fired an AK-47 assault rifle at the family and someone who had come to their aid. *Id.* at 1253-54. While such facts, which

involved the actual use of force, did not permit a viable argument that there was not a substantial risk that force "may" be used, the record before the Court here is different because there is no evidence that the firearm was loaded. Even if brandishing an unloaded firearm constitutes a "threatened use" of force, a "threatened use" of force is only relevant under the elements clause, not the residual clause. And in any event, without being loaded, such a threat was hollow. It could not, itself, create a "substantial risk that physical force against the person or property of another may be used."

As such, Petitioner's attempted Hobbs Act robbery would not constitute a crime of violence under § 924(c)(3)(B)'s residual clause, even under a conduct-based approach.

II. The Eleventh Circuit's holding that an *attempted* Hobbs Act robbery automatically qualifies as an "crime of violence" within § 924(c)'s elements clause simply because Hobbs Act robbery is categorically a "crime of violence," and irrespective of the fact that an attempted Hobbs Act robbery does not require specific intent, conflicts with this Court's decision in *James v. United States,* 550 U.S. 192 (2007) and the Seventh Circuit's decision in *United States v. D.D.B.,* 903 F.3d 684 (7th Cir. 2018).

In *Curtis Johnson v. United States,* 559 U.S 133 (2010), this Court construed the "physical force" language in the ACCA's elements clause to require "*violent* force," which it explained was a "substantial degree of force" "capable of causing pain or injury to another person." *Id.* at 140. The elements clause in § 924(c)(3)(A) is worded identically to § 924(e)(2)(B)(i), except that it may be satisfied by any offense that "has as an element the use of threat of physical force," that is, "*violent* force," against a "person *or property*." And indeed, there is no dispute that the categorical approach continues to govern the elements clause analysis under § 924(c)(3)(A). Every member of this Court in *Dimaya* was in agreement that the categorical approach applied to the identical elements clause in § 16(a). Accordingly, if an *attempted* Hobbs Act robbery does not categorically qualify as a "crimes of violence" under the

elements clause, Petitioner's Count 12 conviction, and 25-year consecutive sentence must be vacated. The Court should grant certiorari and so hold here for the following reasons.

A. The decision below conflicts 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 by the very same court of appeals.

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 upon certiorari, 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.

First, the Court noted, 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 conclude 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 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. And, *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.

In the decision below, the Eleventh Circuit did precisely what *James* refused to do. It concluded that because a substantive Hobbs Act robbery is categorically a "crime of violence" within § 924(c)'s elements clause, an attempt to commit that offense must categorically qualify as well. But not only did the Eleventh Circuit adopt the automatic rule rejected in *James*, it also did so with respect to an offense that plainly allows a conviction premised on mere preparatory conduct that does not involve violent force. And similar preparatory conduct for a Hobbs Act

robbery offense (temporally or locationally separated from the crime scene or designated victim) should not meet the much-narrower elements clause.

B. The decision below conflicts with the Seventh Circuit's decision in *United States v. D.D.B*.

The caselaw on *attempted* Hobbs Act robbery confirms that the "substantial step" needed for conviction need not itself involve the use, attempted use, or threatened use of violent force against any person or property. Indeed, it may involve no more than planning, preparing for, travelling to, beginning one's travel to an agreed-upon robbery destination – without intending to ever engage in violencet. *See, e.g., United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016)(defendants made plans to travel from Chicago to New York to rob a diamond merchant, they believed he would turn the diamonds over *without the need to do anything to him*, and they travelled as far as New Jersey in a rented van before they were arrested) (emphasis added); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007) (defendant and his compatriots planned a robbery, surveilled the target, prepared vehicles, and gathered at the designated assembly point on the day scheduled for the robbery); *United States v. Gonzalez*, 322 Fed. App'x. 963, 969 (11th Cir. 2009)(defendants simply planned a robbery, and travelled to a location in preparation for it).

To the extent the court below blindly adopted – and has continued to adhere to – the Seventh Circuit's presumption in *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017) that the mere "intent" to commit a violent crime alone suffices to qualify an attempt offense as a violent crime, it erred for multiple reasons.

As a threshold matter, the other-circuit cases *Hill* relied upon including *United States v. Wade*, 458 F.3d 1273, 1278 (11th Cir. 2006)) were either distinguishable, abrogated, or both. None focused upon whether an attempt should categorically be treated the same as the object of

the attempt under the ACCA. In *James*, this Court expressly rejected the reasoning in *Wade* (which had followed the Eleventh Circuit's wrong decision in *James*). See 458 F.3d at 1277-78. *Hill* ignored that.

Second, *Hill* adopted the concurring opinion in *Morris v. United States*, 827 F.3d 696 (7th Cir. 2016), which proposed that an attempt to commit an ACCA violent felony should categorically be an ACCA "violent felony," based upon the completely unsupported assumption – of no relevance in a § 924(c) case, and one expressly rejected in *James* – that Congress must have intended the ACCA to include attempts. *See* 827 F.3d at 699 ("I suspect the Congress that enacted ACCA would have wanted the courts to treat such attempts at violent felonies as violent felonies under the Act.").

Third, *Hill* was an ACCA case predicated upon an Illinois attempted murder conviction. The issues there were not "analogous" to whether an attempted Hobbs Act robbery is a crime of violence within §924(c)(3)(A), for the same reasons the attempted carjacking offense in *Ovalles* is not analogous: namely, there is no "intent to kill" requirement in a Hobbs Act robbery, as there is in attempted murder or attempted carjacking case.

Most importantly, however, in continuing to adhere to *Hill* in *St. Hubert II*, the court below neglected to determine whether *Hill* even remained good law in the Seventh Circuit. And in fact, after the decision in *St. Hubert I* – which adopted *Hill*'s inapposite reasoning *in toto*, and applied it to a completely different statute and predicate – the Seventh Circuit made clear in *United States v. D.D.B.* 903 F.3d 684 (7th Cir. 2018), that the rule in *Hill* must be limited to attempt offenses that require specific intent to commit the underlying offense. Writing for a unanimous Seventh Circuit panel, Judge Rovner explained in *D.D.B*, that the "critical" premise of *Hill* – and Judge Hamilton's concurrence in *Morris* which *Hill* adopted – was that "the attempt

law contains an intent provision because 'one must intend to commit every element of the completed crime in order to be guilty of attempt." *Id.* at 690. But while that premise is true "[i]n most criminal attempt statutes," such as the Illinois statute at issue in *Hill*, Judge Rovner explained, it was *not* true for Indiana attempted robbery. That statute, as interpreted by the Indiana courts, does not require the state to show any intent – *i.e.*, that the defendant intended to commit the robbery; rather, the state must simply show that he took a substantial step towards commission of the robbery crime. *Id.*

And in this unique regard, attempted Hobbs Act robbery is analogous to Indiana robbery. Section 1951(a) of the Hobbs Act statute includes the inchoate offense of "attempted Hobbs Act robbery," together with the completed crime. The Eleventh Circuit has repeatedly emphasized that there is no specific intent requirement for a completed Hobbs Act robbery under § 1951(a) – indeed, "the only *mens rea* required for a Hobbs Act robbery conviction is that the offense be committed knowingly." *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001). Accordingly, there can be no intent requirement for an attempted Hobbs Act robbery conviction under § 1951(a) either. *See also United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir. 1993 (distinguishing Hobbs Act robbery, from common law robbery, in that the latter requires specific intent but the former does not).

For the same reasons the Seventh Circuit in *D.D.B.* held that that attempted Indiana robbery was not a "violent felony" within the ACCA's elements clause, Petitioner's attempted Hobbs Act robbery conviction is not a "crime of violence" within § 924(c)'s elements clause. Plainly, had Petitioner appealed his conviction to the Seventh Circuit, that court would have been compelled by *D.D.B.*, to find that an attempted Hobbs Act robbery conviction is not categorically a "crime of violence."

C. Because of the important and far-reaching nature of the decision in *St. Hubert*, these conflicts warrant review and resolution, and this case is an excellent vehicle in which to do that.

The fallout from the Eleventh Circuit's wholesale adoption of *Hill*, without considering either *James* or *D.D.B.*, has been swift, expansive, and extremely prejudicial not only to defendants identically-situated to Petitioner with § 924(c) convictions, but to defendants sentenced under the two harshest recidivist enhancements in the Criminal Code. Before the panel vacated *St. Hubert I* and issued its new decision, in *Hylor v. United States*, 896 F.3d 1219 (11th Cir. July 18, 2018), *pet. for cert. pending* (U.S. Dec. 17, 2018) (No. 18-7113), the Eleventh Circuit extended the reasoning of *St. Hubert I* to the ACCA, holding that attempted murder is categorically a "violent felony" within the ACCA's elements clause, based upon the defendant's mere *intent* to commit murder, a violent crime. *Hylor*, 896 F.3d at 1223. 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 1225 (Jill Pryor, J., concurring in the result) (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1301-04 (11th Cir. 2001), where the court categorically rejected any exception to the requirement that prior precedent be followed, even where the prior panel overlooked a valid argument or precedent, and mandated that subsequent panels "obediently" follow prior panel precedents even if convinced they are wrong).

While "obediently" applying the holding and "necessary reasoning" of *St. Hubert*, Judge Pryor harshly criticized that reasoning for some of the very reasons Petitioner has done so here. *St. Hubert*'s logic was not only "flawed," but "plainly wrong," Judge Prior explained, 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 1225-26 (Jill Prior, J., concurring) (noting that in an attempted robbery, it is "readily conceivable" that a person may engage in an overt act such as simply renting a van, without having used or attempted to use force).

Hylor confirms that because of its rigid "prior panel precedent" rule, the Eleventh Circuit will continue to extend its erroneous attempt ruling in Petitioner's case well beyond the § 924(c) context, to the elements clause of the ACCA. And the Eleventh Circuit has not stopped at the ACCA. Recently, in denying a motion for certificate of appealability in a § 2255 case where a defendant convicted of attempted Hobbs Act robbery was sentenced to mandatory life imprisonment pursuant to 18 U.S.C. § 3559(c), the Eleventh Circuit held it "clear" based upon *St. Hubert* that attempted Hobbs Act robbery" met § 3559(c)(2)(F)(ii)'s elements clause. *Richitelli v. United States*, Order at 8 (No. 17-10482) (11th Cir. Feb. 7. 2019). In finding that conclusion not even "debatable" among reasonable jurists, *id.* at 7-8, the Eleventh Circuit ignored that this Court had GVR'd in *Richitelli* after *Dimaya* based upon the Solicitor General's concession that § 3559(c)(2)(F)(ii)'s residual clause was "similar to" § 16(b), and the Eleventh Circuit had "incorrect[ly]" denied Richitelli a COA on grounds that grounds that attempted Hobbs Act robbery categorically met § 3559(c)(3)(F)(ii)'s elements clause. The Solicitor General explained:

> The Hobbs Act includes robberies committed "by means of actual or threatened force or violence, or fear of injury" to the victim's "person *or property*, 18 U.S.C. §1951(b)(1) (emphasis added), while Section 3559(c) refers only to the use or threatened use of force "against the *person* of another," 18 U.S.C. §3559(c)(2)(F)(ii) (emphasis added).

Memorandum of United States, *Richitelli v. United States*, at 2 (May 29, 2018)(No. 17-8244); *see Richitelli v. United States*, 139 S.Ct. 59 (Oct. 1, 2018) (granting certiorari, vacating, and remanding for further consideration of the mandatory life sentence pursuant to §3559(c), in light of *Dimaya*).

As a result of the Eleventh Circuit's extension of *St. Hubert*'s reasoning to the ACCA and § 3559(c), and its unforgiving "prior panel precedent rule," Eleventh Circuit defendants with a host of state and federal attempt offenses involving no force or attempted use of force,[2] and/or no specific intent to commit a violent offense, now qualify for the two most draconian enhancements in the Criminal Code. And an even greater snowballing effect of those erroneous rulings is possible now that Section 401 of the just-enacted First Step Act specifically incorporates the "serious violent felony" definition in § 3559(c)(2)(F)(ii) as a new basis for § 851 enhancements in drug cases, while Section 402 of the First Step Act (which otherwise broadens the applicability of the Safety Valve), precludes a Safety Valve reduction if the defendant has a prior 2-point "violent offense" as defined in 8 U.S.C. § 16. There will be no independent analysis of these issues by a reviewing court in the Eleventh Circuits, in § 924(c), ACCA, of even § 3559 cases, unless this Court intervenes. *St. Hubert* has effectively closed the book, and preclude meaningful judicial review, of any attempt crime used as a § 924(c), ACCA, or § 3559(c) predicate.

Although *Hill* will not have a similarly-broad impact in the Seventh Circuit, due to that Court's significant limitation of *Hill* in *D.D.B,* other circuits have not recognized the Seventh Circuit's limitation of *Hill.* The Fourth Circuit, notably, has broadly cited both *Hill* and *St.*

[2] Florida's attempt offense only requires commission of "'[s]ome appreciable *fragment* of the crime,'" *Hylor*, 2018 WL 3454488 at *6 (Jill Pryor, J., concurring)(quoting *Hernandez v. State*, 117 So. 3d 778, 784 (Fla. Dist. Ct. App. 2013)(emphasis added; internal quotation marks omitted).

Hubert in a manner that will sweep in every possible attempt offense as ACCA predicate. *See, e.g., United States v. Holland*, ___ Fed. Appx. ___, 2018 WL 4361158 at *3 (4th Cir. Sept. 13, 2018) (citing *Hill* and *St. Hubert* as confirming that "[s]everal circuits have held that attempting to commit a substantive offense that qualifies as violent felony also constitutes a qualifying violent felony"J).

The prejudice from the erroneous decision below will only increase unless the Court grants certiorari to clarify the law in this regard. This case presents an excellent vehicle for the Court to do so, since the attempt/elements clause issue was pressed and passed upon below, and will be case-dispositive here. Petitioner's attempted Hobbs Act robbery offense cannot be a "crime of violence" within the residual clause for the reasons set forth in Issue I; it can only qualify under the elements clause, and should not for the above reasons. Notably, Petitioner received a consecutive 25 year sentence for his Count 12 conviction, which was predicated upon his attempted Hobbs Act robbery. A ruling in his favor on that issue would have a tremendous impact, reducing his sentence from 32 to 7 years.

III. Whether 18 U.S.C. § 924(c)(1)(C), as expressly "clarified" by Congress in Section 403 of the First Step Act of 2018, applies to a defendant convicted and sentenced to a consecutive 25-year term on one of two § 924(c) counts in a first § 924(c) prosecution prior to the enactment of the Act, but whose sentence has not yet been finally imposed because his case remains on direct review, is an important issue that should be immediately resolved for pipeline defendants.

The First Step Act of 2018, enacted on December 21, 2018, expressly "clarifi[ed]" that the consecutive mandatory sentence under § 924(c)(1)(C) applies only to a "violation of [§ 924(c)] that occurs after a prior conviction under [§ 924(c)] has become final." Before the Act, at the time Petitioner was sentenced, a second § 924(c) count of conviction in a single indictment required a 25-year mandatory minimum penalty to be imposed consecutive to the sentences for

each other count of conviction. That was due to this Court's opinion in *Deal v. United States*, 508 U.S. 129 (1993), which interpreted the phrase "second or subsequent conviction" to mean each additional offense in the same case with no intervening final conviction. Hence, a defendant with two or more § 924(c) counts in a single indictment was subject to a mandatory minimum of 5 years on the first count (or as here, 7 if he brandished a firearm), and 25 years on each additional count. In light of the First Step Act of 2018, Pub. L. No. 115-391, enacted on December 21, 2018, the district court's 25-year consecutive sentence on Count 12 here was imposed in error.

Title IV, Section 403 of the Act – which Congress specifically entitled "Clarification of Section 924(c) of Title 18, United States Code" – amended 18 U.S.C. § 924(c)(1)(C), by "clarify[ying]" that the 25-year (or life) penalty for a "second or subsequent conviction" under § 924(c)(1)(C) is triggered only if the defendant violates § 924(c) after a prior § 924(c) conviction has become final. *See* First Step Act of 2018, Pub. L. No. 115-391, at § 403(a). Had Petitioner been sentenced under the First Step Act, he would have received 7 years for brandishing a firearm during the January 21, 2015 Hobbs Act robbery (Count 8), but he would *not* have received the consecutive 25 year sentence for brandishing a firearm during the January 27, 2015 attempted Hobbs Act robbery (Count 12). Rather, he would have received a consecutive 7 years for the Count 12 offense.

Section 403(b), entitled "Applicability to Pending Cases," provides that "the amendments made by this section . . . shall apply to any offense that was committed before the date of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]," First Step Act of 2018, Pub. L. No. 115-391. While Petitioner was sentenced prior to the date of enactment, Congress' "clarification" applies to his "pending case" on direct review,

because a sentence is not "final" (and is not finally "imposed") so long as a case is still "pending" on direct appeal. *See The General Pickney*, 5 Cranch 281, 283 (1809) (recognizing in an admiralty case, that "*an appeal* suspends a sentence altogether," and it is not final "until the final sentence of the appellate court be pronounced," with the "cause in the appellate court to be heard *de novo*, as if no sentence had been passed;" noting "This has been the uniform practice not only in cases of appeal from the district to the circuit courts of the United States, but in this court also.") (Marshall, C.J.); *Griffith v. Kentucky*, 479 U.S. 314, 321 at n. 6 (1987) (holding in a criminal case that "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"); *see also United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997) ("A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' . . . because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error.").

The specific question before the Sixth Circuit in *Clark* was whether the safety valve statute, 18 U.S.C. § 3553(f), "should be applied to cases pending on appeal when it was enacted." *Id*. at 17. As here, Congress stated that § 3553(f) applied "to all sentences imposed on or after" the date of enactment, and did "not address the question of its application to cases pending on appeal." *Id*. (citing Pub. L. No. 103-322, § 80001(a), 108 Stat. 1796, 1985-1986 (1994)). The Sixth Circuit not only found that the sentence was not yet "imposed" when the sentence was still being reviewed on direct appeal, but that applying the safety valve to cases pending on appeal when it was enacted was "consistent with its remedial intent." *Id*.

That is true here as well.

Senator Mike Lee, one of the primary sponsors of what became Section 403, explained that he first became aware of the problem created by this Court's interpretation of § 924(c)(1)(C) in *Deal* when a defendant named Weldon Angelos was sentenced to 55 years in the District of Utah. Senator Lee stated: "Because Mr. Angelos had a gun on his person at the time of these transactions, because of the way he was charged, and *because of the way some of these provisions of law have been interpreted-including a provision of law in 18 USC, section 924(c)*-Mr. Angelos received a sentence of 55 years in prison." 162 Cong. Rec. S5045-02, 162 Cong. Rec. S5045-02, S5049 (July 13, 2016) (emphasis added). Senator Lee recognized that *Deal*'s interpretation as applied to Mr. Angelos was cruel, arbitrary and capricious: "What on Earth was this judge thinking? How could such a judge be so cruel, so arbitrary, so capricious as to sentence this young man to 55 years in prison for selling three dime-bag quantities of marijuana?" *Id*. "The judge didn't have a choice," and indeed "took the unusual-the almost unprecedented, almost unheard of-step of issuing a written opinion prior to the issuance of the sentence, disagreeing with the sentence the judge himself was about to impose." *Id*. at S5049-50. The judge stated: "This is a problem. This young man is about to receive a sentence that is excessive under any standard. It is a longer sentence than he would have received had he engaged in many acts of terrorism or kidnapping." *Id*. at S5050. "But, the judge said: This is a problem I cannot address. This is a problem I am powerless to remedy. Only Congress can fix this problem. " *Id*. at S5050. Section 403 of the First Step Act fixes the problem, by clarifying that that the majority in *Deal* was wrong and § 924(c)(1)(C) has been applied erroneously for years, inconsistent with Congress' original intent.

While the Eleventh Circuit disagreed with the Sixth Circuit's interpretation of the term "imposed" in the specific context of the § 3553(f) issue there presented, *see United States v.*

Palaez, 196 F.3d 1203, 1205 & n. 4 (11th Cir. 1999) (holding instead that "*for purposes of whether a sentence 'imposed' on or after the effective date of § 3553(f)*, we hold a sentence is imposed when the district court enters the final judgment") (emphasis added), the word "imposed" in § 403(b) must be construed in its broader statutory context. And here, that broader statutory context includes four crucial pieces of text: namely, Congress' express statements in Section 403 that (1) the amendment was a "clarification" to be applied to (2) "any offense that was committed before the date of enactment," (3) if a "case" was still "pending" because (4) the "sentence for the offense has not been imposed as of such date of enactment." In enacting § 3553(f), Congress made no mention – either express or implied – of that provision's applicability to pending cases. *See Clark*, 110 F.3d at 17. While § 3553(f) was an entirely new provision, § 403 of the First Step Act re-enacts but clarifies an old provision, by providing different, reduced, penalties. There are thus even stronger reasons – both in the text and relevant caselaw – for applying § 403 of the First Step Act to § 924(c) cases pending on direct appeal, than there were for the statute that enacted the Safety Valve.

This Court has long held that a repeal of a criminal statute while an appeal is pending, including any "repeal and re-enactment with different penalties ... [where only] the penalty was reduced," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), must by applied by the court of appeals, absent "statutory direction ... to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The "statutory direction" in this case, far from suggesting that a "contrary" presumption should govern, states expressly that the amendments "shall apply to any offense that was committed before the date of enactment of this Act." First Step Act of 2018, Pub. L. No. 115-391, at § 403(b). This language also confirms that the general federal "saving statute," 1 U.S.C. 109 (1871), which states that the repeal of a statute does not extinguish a

penalty incurred under such statute unless the repealing Act so provides, cannot bar the application of Section 403 here.

Here, there is no "statutory direction" in the First Step Act that would bar application of the reduced penalty structure to cases on direct appeal. To the contrary, Congress indicated its intent that Section 403 be applied to pipeline cases, by expressly titling Section 403 "Clarification of Section 924(c)," and addressing applicability of that "clarification" to "pending" cases in § 403(b). Its statement in § 403(b) that the amendment shall apply to any offense committed before the date of enactment if a sentence for the offense has not been "*imposed*" as of such date, suggests that Congress intended the amendment to apply to cases on direct appeal, but not to those on collateral review. The word "imposed" – read in conjunction with "pending cases" and Congress' intent to "clarify" its original intent – indicates that Congress intended its now-clarified language to apply to cases on direct appeal. *See Johnson v. United States*, 559 U.S. at 139-40 (statutory "context determines meaning").

Where Congress has enacted a new law prohibiting prosecution for certain conduct, this Court has held such a law must apply to defendants previously convicted of such conduct if they are still challenging their convictions on direct appeal, even if Congress did not mention direct appeal in the enactment. *Hamm v. City of Rock Hill*, 379 U.S. 306, 308, 317 (1964). In *Hamm*, the Court vacated the convictions of defendants who had staged "sit-ins" at lunch counters that refused to provide services based on race. After the defendants were convicted of trespass, but before their convictions became final on direct review, Congress passed the Civil Rights Act of 1964, which prohibited prosecution for their conduct. In applying the new Civil Rights Act to vacate these defendants' convictions, the Court traced the rule requiring such a result to *United*

States v. Schooner Peggy, 1 Cranch 103, 110 (1801), where Chief Justice Marshall had explained over 150 years earlier:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Hamm, 379 at 312-13. The "reason for the rule," the Court said in *Hamm*, is that "'[p]rosecution for crimes is but an application or enforcement of the law, and, if the prosecution continues, the law must continue to vivify it.'" *Id*. at 313 (quoting *United States v. Chambers*, 291 U.S. 217, 226 (1934)). That principle "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose," and is to be "read wherever applicable as part of the background against which Congress acts," even where Congress made no allusion to the issue in enacting the new law. *Id*. at 313-14.

This Court in *Hamm* declined to find that the general "saving statute," 1 U.S.C. § 109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a *greater* schedule of penalties was held to abate the previous prosecution." *Id*. at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id*. Here, Section 403 substitutes a *lesser* schedule of penalties: a sentence of 14 years for a sentence of 32 years, which does not abate the "prosecution" at all. Where, as here, the law merely "clarifies" Congress' original intent that a lesser sentence be imposed – thus confirming that the law has been misapplied for years – there is even more reason to apply such a law to pipeline cases, not yet final.

In civil contexts, lower courts have long applied a clearly-clarifying statutory amendment to cases pending on direct appeal. *See Brown v. Thompson*, 374 F.3d 253, 259-60, 261 n.6 (4th Cir. 2004) (applying Medicate Prescription Drug, Improvement and Modernization Act of 2003 to a case on direct appeal, since that Act "merely clarified" prior law; noting with significance that Congress "formally declared" the amendment was "clarifying" in its title); *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1057 (9th Cir. 2002) (holding it "well-established that the enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; in legal theory it simply states the law as it was all the time, and no question of retroactive application is involved. Where an amendment to a statute is remedial in nature and merely serves to clarify the existing law, the Legislature's intent that it be applied retroactively may be inferred"); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[I]f the amendment clarifies prior law rather than changing it, no concerns about retroactive application arise and the amendment is applied to the present proceeding as an accurate restatement of prior law").

While this Court has rejected the suggestion that a statute is "clarifying" if there is no textual indication in that regard, or any possible ambiguity in the prior statutory language, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S 631, 647-48 (2005), here Congress specifically designated one section of the First Step Act – the amendment to § 924(c)(1)(C) – as a "clarification" of the prior statutory provision, in the title to Section 403, without any similar designation in the titles of other sections. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Even though a showing of ambiguity in the prior statute is not necessary where – as here – Congress has expressly designated a statutory amendment as "clarifying," the original language of § 924(c)(1)(C) was in fact quite ambiguous. The defendant in *Deal*, notably, started from the premise that the phrase "second or subsequent conviction" in § 924(c)(1)(C) was ambiguous. Although both the majority and dissent asserted that their conflicting interpretations of the statute were clear from the language, that itself indicates that the language was ambiguous. The dissent, in fact, invoked the rule of lenity as an alternative ground for its ruling, if the plain meaning of the "second or subsequent conviction" language were "not as obvious" as it believed. 508 U.S. at 141-42 (Stevens, J., dissenting) (pointing out that § 924(c)(1)(C)'s "history belies the notion that its text admits of only one reading, that adopted in [*United States v. Rawlings*, 821 F.2d 1543 (1987)]" and "endorsed by the Court today"). As Justice Stevens noted, the lower courts (and the government) had followed the dissent's interpretation of the statute for 19 years before the majority's interpretation surfaced for the first time in *Rawlings*. *Id.* at 142-43 (Stevens, J., dissenting). An interpretation contrary to that adopted in *Deal* could not have been followed for 19 years if the phrase "second or subsequent conviction" were "unambiguous."

Irrespective of whether § 924(c)(1)(C) has remained ambiguous after *Deal*, there can be no dispute that Congress definitively rejected the *Deal* majority's interpretation of the phrase "second or successive conviction" by enacting Section 403 of the Fair Step Act, and expressly titling its amendment a "clarification." And indeed, a "clarifying" amendment to a criminal statute is not only applicable to cases on direct appeal for all of the foregoing reasons; it is also applicable by analogy to the uniform rule applied by the courts of appeals regarding "clarifying amendments" to the Guidelines. While parties can and often do dispute whether a Guideline amendment is clarifying or substantive *if* the Sentencing Commission *does not* state that the

amendment was intended to be clarifying, *see United States v. Descent*, 292 F.3d 703, 708 (11th Cir. 2002), where the Commission *does* specifically designate an amendment to the Guidelines as "clarifying," the amendment applies without question to cases on direct appeal "regardless of the sentencing date." Every circuit in this country follows this rule,[3] reasoning that "clarifying amendments do not represent a substantive change in the Guidelines, but instead "provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline." *Descent*, 292 F.3d at 707-08.

For similar reasons, Congress' express "clarification" of § 924(c)(1)(C) by Section 403 of the First Step Act to preclude a consecutive 25-year penalty absent a prior final conviction, likewise evidences Congress' original intent, and thus should be applied to cases that are not yet final on direct appeal. Accordingly, this Court should vacate Petitioner's consecutive 25 year sentence on Count 12, and remand for resentencing in accordance with the First Step Act.

Even if a different reading of Congress' use of the words "pending," "imposed," and "clarification" in § 403 were possible, such a reading should be rejected based upon principles favoring lenity in the interpretation of criminal provisions. This Court has "repeatedly emphasized that the touchstone of the rule of lenity is statutory ambiguity." *Moskal v. United States*, 498 U.S. 103, 107 (1990) (internal quotations and citation omitted). While the rule is

[3] *See, e.g., United States v. Godin*, 522 F.3d 133, 135 (1st Cir. 2008) (noting that where the Sentencing Commission has not specifically made an amendment "retroactively applicable," it would not be applicable to defendants whose sentences have become "final" because it "is no longer subject to review on direct appeal in any court;" however, in the "peculiar" posture of a case where the "pending appeal has not yet resulted in a final disposition," a clarifying amendment may be applied); *United States v. Perdono*, l927 F.2d 111, 116-17 (2nd Cir. 1991); *United States v. Remoi*, 404 F.3d 789, 795 (3rd Cir. 2005); *United States v. Deigert*, 916 F.2d 916 (4th Cir. 1990); *United States v. Maseratti*, 1 F.3d 330, 340 (5th Cir. 1993); *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016); *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11th Cir. 2016); *United States v. Caballero*, 936 F.2d 1292, 1922 & n. 8 (D.C. Cir. 1991).

inherently contextual, *id.* at 108, lenity is reserved for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute. *Id.* (internal quotations and citation omitted).

The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). The rule rightly "places the weight of inertia upon the party that can best induce Congress to speak more clearly," it prevents the courts from having to "play the part of a mind reader," and it is a "venerable" requirement that the federal courts have applied for roughly two centuries. *Id.* at 515. "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.).

Should the Court harbor any doubt over resolution of this issue, Petitioner respectfully requests that the Court resolve it in favor of lenity, vacate his sentence and remand for resentencing under the First Step Act. At the very least, the Court should grant this petition, vacate the judgment, and remand Petitioner's case to the district court for the Southern District of Florida for reconsideration of his sentence in light of Congress' "clarification" of § 924(c)(1)(C). *See Burns v. Hein*, 419 U.S. 989 (1974) (vacating judgment, and remanding case to district court for reconsideration in light of Department of Agriculture's clarifying amendment to its regulations).

To interpret Section 403 otherwise – as inapplicable to pipeline defendants whose consecutive § 924(c)(1)(C) sentences are currently before this Court on direct review – would implicate Petitioner's rights under the Due Process and Equal Protection Clauses, and under the

Eighth Amendment. Such a construction is not only contrary to the rule of lenity; it is precluded by the doctrine of constitutional avoidance. *Hooper v. California*, 155 U.S. 648, 657 (1895).

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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