

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

SUPPLEMENTAL BRIEF OF PETITIONER

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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?

TABLE OF AUTHORITIES

Cases:

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| <i>United States v. St. Hubert,</i> | |
| 909 F.3d 335 (11 th Cir. Nov. 15, 2018) (“ <i>St. Hubert II</i> ”), | |
| <i>reh’g en banc denied, ____ F.3d ____,</i> | |
| 2019 WL 126227 (11th Cir. Mar. 19, 2019)..... | 1-2 |
| <i>Hylor v. United States,</i> | |
| 896 F.3d 1219 (11th Cir. 2018), | |
| <i>pet. for cert. filed Dec. 17, 2018 (No. 18-7113)</i> | 1 |
| <i>Richardson v. United States,</i> | |
| <i>pet. for cert. filed Dec. 10, 2018 (No. 18-7036)</i> | 2 |

Statutory and Other Authority:

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|---------------------------------------------------------------------------------|---|
| 18 U.S.C. § 924(c) | 2 |
| 18 U.S.C. § 3559..... | 2 |
| 21 U.S.C. § 841..... | 2 |
| 21 U.S.C. § 851 | 2 |
| First Step Act of 2018, Pub. L. No. 115-391, Title IV, § 401 | 2 |
| First Step Act of 2018, Pub. L. No. 115-391, Title IV, § 402 | 2 |
| Sup. Ct. R. 15.8..... | 1 |
| Pet. Reply Br., <i>Hylor v. United States</i> , No. 18-7113 (Mar. 8, 2019)..... | 2 |

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioner Michael St. Hubert wishes to alert the Court to the Eleventh Circuit Court of Appeals' published decision yesterday in his case, narrowly denying rehearing en banc after (unbeknownst to him) a member of the Court in active service requested a poll on whether the case should be reheard on banc. *United States v. St. Hubert*, ___ F.3d ___, 2019 WL 126227 (11th Cir. Mar. 19, 2019) (attached). The six separate opinions issued with respect to the denial of rehearing en banc evidence a deep fracture within the Eleventh Circuit on whether orders issued by three-judge panels on applications for leave to file second or successive motions to vacate should resolve the merits of open issues, whether such orders should be published, and if they are, whether those published orders should have precedential value in cases on direct appeal like the instant one.

But indeed, as indicated by Judge Jill Pryor's dissent, which notably was joined by Judges Charles Wilson and Beverly Martin, there is also now a fracture within the Eleventh Circuit on the precise substantive question Petitioner has raised in Issue II of his petition: namely, whether an attempt to commit an offense that qualifies as a "crime of violence" or "violent felony" within the elements clause "itself necessarily constitutes an elements clause offense." *Id.* at *30. When the petition for certiorari was filed in this case, only Judge Jill Pryor had voiced concerns about the "all attempts qualify" rule established by the panel's published decision in this case. *See Hylor v. United States*, 896 F.3d 1219, 1224-1225 (11th Cir. 2018) (Jill Pryor, J., concurring in result), *pet. for cert. filed* Dec. 17, 2018 (No. 18-7113). Now it is clear, however, that two additional members of the court agree that the rule is not only illogical but "legally flawed." 2019 WL at *31. However, these three judges are powerless to overturn that rule since a majority of the court plainly supports it and has indicated by denying rehearing en banc on that issue now, that the rule will not be reconsidered without this Court's intervention.

Notably, although the government responded to other questions in the pending *Hylor* petition, it declined to respond to Hylor's challenge to the "all attempts qualify" rule. In his reply, Hylor asked the Court to call for a response to that question in his case. *See* Pet. Reply Br. at 10, *Hylor v. United States*, No. 18-7113 (Mar. 8, 2019). And Petitioner asks the Court to call for a response on that question in his case as well – particularly now that the Eleventh Circuit has confirmed by its denial of rehearing en banc that it will not reconsider its "all attempts qualify" rule; the conflict with the Seventh Circuit identified in the Petition at 24-25 is therefore intractable; the panel's "flawed logic" in this case has already been extended to ACCA and § 3559 cases; and it will extend to recidivist enhancements under 21 U.S.C. § 841/§ 851 and to the safety valve, given Sections 401 and 402 of the First Step Act of 2018, unless this Court intervenes. Petition at 26-29. As Judge Jill Prior has noted, district courts within the Eleventh Circuit already "lead the pack" in imposing sentences under the ACCA and § 924(c). *See* 2019 WL 1262257 *31 & n.2 (noting that in 2016, the Sentencing Commission's data indicates that the most ACCA sentences were imposed in the Eleventh Circuit and only the Fourth Circuit surpassed the Eleventh in handing down more sentences under § 924(c)). For that reason, Judge Pryor rightly stated, "It is critically important that we of all circuits get this right." *Id.* at *31,

Finally, with regard to Issue III in the petition, Petitioner notes that in *Richardson v. United States*, 18-7038, where a similar issue was raised in a supplemental brief, the Court called for a response from the government. The Court should call for a response here as well.

Respectfully submitted,

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March 20, 2019