NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Robert L. Bolden, Sr.

Petitioner-Appellant

v.

United States of America

Respondent-Appellee

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit
(8th Circuit Docket No. 17-1087)

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether an inchoate offense, whose non-inchoate form would constitute a crime of violence under the elements clause of 18 U.S.C. §924(c)(3)(A), automatically also qualifies as a crime of violence under the elements clause, without need to analyze the minimum elements, proof, or *mens rea* necessary to sustain conviction for the inchoate offense.

2. Whether an inchoate offense, which requires proof only of general criminal intent and a substantial—but not necessarily violent—step toward commission, qualifies as a crime of violence under the elements clause of 18 U.S.C. §924(c)(3)(A).

3. Whether attempted bank robbery, which under Eighth Circuit precedent requires proof only of general criminal intent and a substantial—but not necessarily violent—step toward commission, qualifies as a crime of violence under the elements clause of 18 U.S.C. §924(c)(3)(A).

4. Whether the Eighth Circuit erred in denying a certificate of appealability on the denial of Petitioner's claim challenging the constitutionality of his §924(c) conviction, particularly after this Court's decision in *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319 (June 24, 2019).

LIST OF PARTIES

Robert L. Bolden, Sr. – Petitioner in this Court, Appellant in the Court of Appeals

Government of Canada – Amicus Curiae in Support of Appellant in the Court of Appeals

United States – Respondent in this Court, Appellee in the Court of Appeals

RELATED PROCEEDINGS

Following a jury trial, Petitioner was found guilty of four counts of federal offenses related to an attempted armed bank robbery that resulted in death, and was sentenced to death. *United States v. Bolden*, No. 4:02-cr-00557-CEJ (E.D. Mo.) (Judgment 8/25/2006). The judgment was affirmed on direct appeal, and this Court denied discretionary review. *United States v. Bolden*, 545 F.3d 609 (8th Cir. 2008), *cert. denied*, 558 U.S. 1077 (2009).

Petitioner initiated proceedings under 28 U.S.C. §2255, and timely moved to amend his motion to include a claim that his §924(c) conviction was invalid in light of *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). *Bolden v. United States*, No. 4:10-cv-02288-CEJ (E.D. Mo.) (Motion to Amend & Proposed Amendment 4/18/2016).

In an abundance of caution, while Petitioner's §2255 motion was pending in the district court, Petitioner sought authorization from the Court of Appeals to file a successor §2255 motion based on *Johnson.* The Court of Appeals denied

authorization in a one-sentence judgment. *Bolden v. United States*, No. 16-2437 (8th Cir. 12/20/2016) (Appx. D).

The district court ultimately denied Petitioner's §2255 motion and motion to amend in light of *Johnson*. *Bolden v. United States*, No. 4:10-cv-02288-CEJ (E.D. Mo.) (Memorandum & Order 3/21/2016), 171 F. Supp. 3d 891; *id.* (Memorandum & Order 11/18/2016), 2016 WL 6822126, 2016 U.S. Dist. LEXIS 160111 (Appx. C).

The Court of Appeals granted a certificate of appealability (COA) on three issues in Petitioner's §2255 proceeding, but denied COA on Petitioner's *Johnson* §924(c) claim. *Bolden v. United States*, No. 17-1087 (8th Cir.) (Order 5/23/2018) (Appx. B).

Following this Court's decision in *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319 (2019), Petitioner moved to expand the COA in light of *Davis*, which the Court of Appeals denied in a one-sentence order. *Bolden v. United States*, No. 17-1087 (8th Cir.) (Order 9/05/2019) (Appx. A).

Petitioner's appeal remains pending in the Court of Appeals on the unrelated issues on which COA was granted. *Bolden v. United States*, No. 17-1087 (8th Cir.).

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(e), and Supreme Court Rule 11, as Petitioner seeks review of the Court of Appeals' September 5, 2019 denial of his motion to expand the certificate of appealability to include an additional issue raised in his 28 U.S.C. §2255 proceeding. Although Petitioner's appeal involving unrelated issues remains pending in the Court of Appeals, *see Bolden v. United States*, No. 17-1087 (8th Cir. 5/23/2018, Order granting COA in part and denying COA in part), this Court's immediate review of the *Johnson/Davis* issues presented herein is of imperative public importance and justifies deviation from normal appellate practice. Sup. Ct. R. 11.

Particularly post-*Davis*, there is significant need for this Court's guidance on appropriate application of the §924(c)(3)(A) elements clause. And substantial questions regarding the scope of the elements clause have reached this Court. *E.g.*, *Walker v. United States*, No. 19-373 (U.S.); *St. Hubert v. United States*, No. 19-5267 (U.S.); *Kidd v. United States*, No. 19-6108 (U.S.). This petition presents yet another substantial and broadly applicable iteration: the appropriate application of the elements clause to inchoate or attempt offenses.

In the wake of *Davis*, some practitioners and jurists appear inclined to apply the elements clause in a misguidedly broad manner, so as to avoid the consequences predicted in the *Davis* dissenting opinion. *See United States v.*

Davis, 139 S.Ct. 2319, 2353 (2019) (Kavanaugh, J., dissenting) (predicting offenses which would no longer qualify as crimes of violence under §924(c)). There is a concerning trend among lower courts to simply hold that, if a non-inchoate (or completed) offense satisfies the elements clause, its inchoate (or incomplete) version likewise satisfies the elements clause—without any need to analyze the elements or *mens rea* necessary to sustain conviction of the inchoate offense. This is contrary to the text of §924(c)(3)(A), which requires "*as an element* the use, attempted use, or threatened use of physical force" (emphasis added); this Court's jurisprudence; and even, in some instances, the government's own litigation position. Inconsistency and a circuit split have developed as to this issue.

Although perhaps salient that judges would want to protect the public from violent crime, any omissions in §924(c)(3) must be corrected by Congress and not by judges. *See Davis*, 139 S.Ct. at 2323-24 (Maj. Op.) (discouraging judges from writing new law rather than applying the law as Congress has written). This Court's intervention is once again necessary to restore separation of powers in our federal criminal courts, guide lower courts' application of a statute whose reach has recently been modified by *Davis*, and reinforce the rule of lenity in faithfully applying a criminal statute in our federal courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

. . . .

(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.

. . . .

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section

18 U.S.C. §2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

. . . .

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

STATEMENT OF THE CASE

During his capital jury trial, Petitioner was charged, as relevant, with attempted bank robbery in violation of 18 U.S.C. §2113(a) and (e) (Count II); and using a firearm during and in relation to a crime of violence "to wit: the attempted armed robbery of a bank as charged in Count II" in violation of 18 U.S.C. §924(c)(1) and (j)(1) (Count III).[1] (Appendix ("Appx.") E).

Petitioner's jury was instructed that he could be found guilty of attempted bank robbery if two elements were met—intent and any substantial step:

> The crime charged in Count 2 of the indictment is an attempt to rob a federally insured bank. A person may be found guilty of an attempt[] if he intended to rob a bank and voluntarily and intentionally carried out some act which was a substantial step toward that bank robbery.

Trial Tr., Vol. 12, at 3175 (Appx. G).

The jury returned a general verdict form finding Petitioner guilty on all counts. (Appx. F). During the penalty phase, the jury returned verdicts of death on the two death-eligible counts—attempted bank robbery involving a killing (§2113(a) and (e), Count II) and using a firearm during and in relation to a crime of violence resulting in death (§924(c)(1) and (j)(1), Count III). The judgment was affirmed on direct appeal. *United States v. Bolden*, 545 F.3d 609 (8th Cir. 2008), *cert. denied*, 558 U.S. 1077 (2009).

[1] Mr. Bolden was also charged with, and convicted of, the remaining counts in the indictment: conspiring to commit bank robbery (Count I) and being a felon with a firearm (Count IV), under 18 U.S.C. §§ 371 and 922(g)(1).

After Petitioner's conviction became final, he filed a timely motion to vacate his conviction and sentence under 28 U.S.C. §2255. During his §2255 proceedings, this Court decided *Johnson (Samuel) v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 2563 (2015), and *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016) (holding *Johnson* applied retroactively to cases on collateral review). In response, Petitioner filed in the district court a motion to amend his §2255 motion to include a claim challenging his §924(c) conviction based on *Johnson (Samuel)* and *Welch.*

The district court denied the motion to amend, reasoning that *Johnson* did not apply to Petitioner's case because *Johnson* invalidated the residual clause of the Armed Career Criminal Act (ACCA) in §924(e)(2)(B), and did not call into question the validity of the §924(c)(3)(B) residual clause. Alternatively, the district court reasoned, attempted bank robbery qualified as a crime of violence under the elements/force clause of §924(c)(3)(A) because several circuit courts had concluded bank robbery satisfied the elements clause and one circuit court had concluded that *attempted* bank robbery satisfied the elements clause. (Appx. C), *Bolden v. United States*, No. 4:10-cv-02288-CEJ, 2016 WL 6822126, 2016 U.S. Dist. LEXIS 160111 (E.D. Mo. 11/18/2016), *citing, inter alia*, *United States v. Armour*, 840 F.3d 904 (7th Cir. 2016).

Petitioner sought a certificate of appealability (COA) on this and numerous other issues. The Court of Appeals, without providing reasons or analysis for its decision, granted a COA on three issues unrelated to this claim, but denied COA as to Petitioner's *Johnson* §924(c) issue. (Appx. B), *Bolden v. United States*, No. 17-1087 (8th Cir.) (Order 5/23/2018).

Following this Court's decision in *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319 (2019), Petitioner moved to expand the COA in light of *Davis* to include the issue of whether his §924(c) conviction was unconstitutional in light of *Johnson (Samuel)* and *Davis.*

First, Petitioner argued *Davis* applied retroactively to cases on collateral review, such as Petitioner's. *Davis* is retroactive because it rests on *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 2563 (2015), which was held to apply retroactively to cases on collateral review in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016). Specifically, the retroactivity reasoning in *Welch* applies with equal force to the holding in *Davis*: *Johnson (Samuel)* was held retroactive because it "struck down part of a criminal statute that regulates conduct and prescribes punishment," namely the ACCA residual clause in 18 U.S.C. §924(e)(2)(B), "thereby alter[ing] the range of conduct or the class of persons that the law punishes." *Id*. (quoting *Schriro v. Summerlin*, 542 U. S. 348, 353 (2004)). Likewise, *Davis* struck down part of a criminal statute that regulates

conduct and prescribes punishment, namely the §924(c)(3)(B) residual clause, thereby altering the range of conduct that the law punishes. *See id.*; *see also Davis*, 139 S.Ct. at 2353-54 (Kavanaugh, J., dissenting) (noting examples of conduct no longer regulated by § 924(c)).

In its response, the government conceded *Davis*'s retroactivity. U.S. Resp. in Opp., at 5 (8th Cir. No. 17-1087, 8/19/2019). Thus, Petitioner's §924(c) conviction could no longer be premised on the risk/residual clause of §924(c)(3)(B), and instead required analysis of the elements/force clause of §924(c)(3)(A).

Second, Petitioner argued, *inter alia*, the inchoate, attempt nature of his §924(c) predicate offense meant the predicate failed to satisfy the elements clause of §924(c)(3)(A). Under circuit precedent, attempted bank robbery required only two elements: general intent to engage in criminal activity, and conduct amounting to a substantial step toward commission of the crime. *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997); *United States v. Johnston*, 543 F.2d 55, 57-58 (8th Cir. 1976) (holding attempt bank robbery under § 2113(a) is a general intent crime, thus voluntary intoxication does not serve as a defense). This substantial step need not involve proof of "as an element the use, attempted use, or threatened use of physical force," *see* §924(c)(3)(A), as demonstrated by circuit precedent affirming attempted bank robbery convictions even when the government's proof

had fallen far short of demonstrating any use, attempted use, or threatened use of force. *E.g.*, *United States v. Carlisle*, 118 F.3d at 1272-74 (8th Cir. 1997); *United States v. Johnson*, 962 F.2d 1308, 1310-12 (8th Cir. 1992); *United States v. Crawford*, 837 F.2d 339, 339-40 (8th Cir. 1988) (per curiam). Moreover, mere general intent to commit the offense did not necessarily result in "attempted use … of physical force," *see* §924(c)(3)(A).

Like the conspiracy predicates noted in *Davis*, which did not constitute crimes of violence under the elements clause, attempted bank robbery as a predicate "does not necessarily require proof that a defendant used, attempted to use, or threatened to use force." *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018) (per curiam) ("conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force"), *aff'd in part by Davis*, 139 S.Ct. at 2324-25, 2336 (affirming vacatur of §924(c) convictions predicated on conspiring to commit Hobbs Act robbery). *Accord In re Matthews*, 934 F.3d 296, 301 (3d Cir. Aug. 14, 2019) (government concedes conspiring to commit Hobbs Act robbery does not meet § 924(c) elements clause); *Creighton v. United States*, No. 18-2616 (8th Cir. Docket 8/1/2019), U.S. Att'y (E.D. Mo.) Suppl. Statement of Position, at 5-6 (government concedes §924(c) conviction predicated on conspiracy should be vacated on remand). At the very least, §924(c)'s applicability to Petitioner's attempted bank robbery was debatable

among reasonable jurists. *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 774 (2017) (COA standard).

In opposition, relying on precedent analyzing §924(c)'s application to *non-inchoate* bank robbery offenses, the government argued that any bank robbery offense—inchoate or not—is categorically a crime of violence under the elements clause. U.S. Resp. in Opp., at 9 (8th Cir. No. 17-1087, 8/19/2019). The government also cited out-of-circuit precedent holding that various attempted crimes satisfied the §924(c)(3)(B) elements clause and similarly worded provisions. *Id.* at 12-13, *citing United States v. St. Hubert*, 909 F.3d 335, 351-353 (11th Cir. 2018), *cert. pet. pending*, No. 19-5267 (U.S.); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016); *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013) (O'Connor, Ret. J.).

The Court of Appeals denied Petitioner's motion to expand the COA in a one-sentence order, which did not provide reasoning or explanation for the court's decision. (Appx. A), *Bolden v. United States*, No. 17-1087 (8th Cir.) (Order 9/05/2019).

ARGUMENT

Mr. Robert L. Bolden, Sr. is serving a sentence of death, in part due to his invalid conviction for using a firearm during and in relation to an inchoate, attempted crime of violence under §924(c)(1), (j)(1) (Count III). The inchoate,

attempted crime of violence did not require proof of, "as an element, the use, attempted use, or threatened use of physical force," and required mere general criminal intent to sustain a conviction. The inchoate crime of violence alleged was "to wit: the attempted armed robbery of a bank as charged in Count II." Count II charged Mr. Bolden with attempted bank robbery involving a killing under 18 U.S.C. §2113(a), (e).[2] (Appx. E), Superseding Indictment.

The government has conceded this Court's opinion in *Davis* applies retroactively to Petitioner's case. Thus, Petitioner's §924(c) conviction rises or falls based on analysis of the elements/force clause of §924(c)(3)(A).

Analysis of the elements/force clause directs the focus to the elements of the offense of conviction rather than to the particular facts of Petitioner's offense. This Court stated as much when describing the categorical/elemental approach used in analyzing the substantially identically worded elements clause of 18 U.S.C. §16(a). *See Davis*, 139 S.Ct. at 2328, *quoting Leocal*, 543 U.S. 1, 7 (2004). And the Court "normally presume[s] that the same language in related statutes carries a consistent meaning." *Id.* at 2329, *citing Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990).

[2] Mr. Bolden was also convicted of the remaining counts in the indictment: conspiring to commit bank robbery (Count I) and being a felon with a firearm (Count IV), under 18 U.S.C. §§ 371 and 922(g)(1).

Properly framed as an elemental/categorical approach, attempted bank robbery does not satisfy the elements clause, as conviction does not require proof of "as an element the use, attempted use, or threatened use of physical force." Notably, the text of §924(c)(3) does not explicitly include the inchoate offenses of conspiring or attempting to commit a crime of violence. Section 924(c)(3), after all, does not state that a crime of violence "means an offense, *or conspiracy or attempt thereof*, that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force." The Sentencing Guidelines, in contrast, explicitly state that conspiring or attempting to commit a crime of violence constitutes a crime of violence under the Guidelines. USSG § 4B1.2, cmt. 1. The omission in §924(c)(3) should be understood to indicate meaning.

Attempted bank robbery requires proof of only two elements under circuit precedent: general intent to engage in criminal activity, and conduct that amounts to a substantial step toward commission of the crime. *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997); *United States v. Johnston*, 543 F.2d 55, 57-58 (8th Cir. 1976) (holding attempt bank robbery under § 2113(a) is general intent crime).

Conviction for attempted bank robbery has been sustained without proof, as an element, of any use, attempted use, or threatened use of physical force. *E.g.*, *United States v. Johnson*, 962 F.2d 1308, 1310-12 (8th Cir. 1992) (attempted bank

robbery established, where defendants circled bank in vehicle with disguises and weapons, then fled at sight of police); *United States v. Crawford*, 837 F.2d 339, 339-40 (8th Cir. 1988) (per curiam) (same, where defendant cased bank and received some tools—clothing, mask, gloves, and car—from undercover informant, but was arrested before travelling to the bank, with no weapon in his possession, and without proof of any physical force); *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997) (same, where defendant cased bank and created fake pipe bomb and demand note, but was arrested before travelling to bank). *Cf. United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016) (defendants made plans to travel to rob diamond merchant, believed no force would be necessary, and were arrested prior to arrival at destination); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007) (defendant and accomplices planned robbery, surveilled target, prepared vehicles, and gathered at assembly point on day of planned robbery); *United States v. Gonzalez*, 322 Fed. Appx. 963, 969 (11th Cir. 2009) (unpublished) (defendants planned robbery and travelled to location).

Moreover, the force required to satisfy the elements clause requires intentionality, and "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (interpreting identical language in force/elements clause of 18 U.S.C. § 16(a)). But attempted bank robbery, as a general intent crime, requires no proof any specific

intent nor intentionality to use force. *See Johnston*, 543 F.2d at 57-58 (holding attempted bank robbery is general intent crime); *see also United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010) (federal bank robbery statute does not require a knowing or intentional *mens rea* regarding use of force or intimidation); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) ("The district court correctly concluded the *mens rea* element of bank robbery did not apply to the element of intimidation[.]"). *E.g.*, *Johnson*, 962 F.2d at 1310-12; *Crawford*, 837 F.2d at 339-40; *Carlisle*, 118 F.3d at 1273.

The statutorily required elemental approach—which evaluates whether conviction for the offense can be sustained without proof of "as an element the use, attempted use, or threatened use of physical force," *see* § 924(c)(3)(A)—demonstrates the general intent and minimal proof necessary to prove attempt bank robbery render this inchoate offense outside the realm of the elements clause.

As aptly stated by Circuit Judge Jill Pryor, "[I]t is incorrect to say that a person necessarily attempts to use physical force . . . just because he attempts a crime that, if completed, would be violent"; that is, intending to commit an offense is not the same as attempting to commit each element of that offense. *United States v. St. Hubert*, 918 F.3d 1174, 1211-12 (11th Cir. 2019) (Jill Pryor, J., with Wilson and Martin, J.J., dissenting from denial of rehearing en banc), *cert. pet. pending*, No. 19-5267 (U.S.).

Without a reasoned opinion for the Court of Appeals' denial of Petitioner's request for COA on this issue, it is impossible to know precisely on what basis the Court of Appeals concluded this issue was not debatable among jurists.

However, Petitioner can comment on the automatic approach endorsed by the government. The government argued, in essence, because completed bank robbery is a crime of violence under the elements clause, inchoate attempted bank robbery is also a crime of violence under the elements clause. U.S. Resp. in Opp., at 6-13 (8th Cir. No. 17-1087, 8/19/2019). Even the cases cited by the government that addressed inchoate attempt offenses applied this automatic approach, as opposed to an elemental approach. *Id.* at 12-13, *citing United States v. St. Hubert*, 909 F.3d 335, 351-353 (11th Cir. 2018), *cert. pet. pending*, No. 19-5267 (U.S.); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016); *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013) (O'Connor, Ret. J.). The government even cited to an Eighth Circuit opinion applying this automatic approach, holding that the inchoate offense of aiding and abetting a crime of violence itself also automatically constituted a crime of violence. *Id.* at 7-8, *citing Kidd v. United States*, 929 F.3d 578, 581 (8th Cir. 2019) (per curiam), *cert. pet. pending*, No. 19-6108 (U.S.).

This automatic approach, however, is contrary to this Court's jurisprudence, has given rise to a circuit split, and is even contrary to the government's own

litigation position. Given the state of this legal morass, and the tremendous and divergent consequences to defendants' life and liberty and the public's safety that rests on application of the §924(c) elements clause, this Court's guidance is essential in this unsettled area of law.

1. The Government's Automatic Approach Was Inconsistent with this Court's Jurisprudence.

The automatic approach the government espoused below is inconsistent with this Court's jurisprudence. First, the government argued that an inchoate crime of violence necessarily also constituted a crime of violence under the elements clause. If that were true, then, for example, inchoate conspiracy to commit Hobbs Act robbery would constitute a crime of violence. But, the government readily acknowledges time and again that inchoate conspiracy to commit Hobbs Act robbery is not a crime of violence under the elements clause. *See Davis*, 903 F.3d at 485 (5th Cir. 2018) ("conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force"), *aff'd in part by Davis*, 139 S.Ct. at 2324-25, 2336 (affirming vacatur of §924(c) convictions predicated on conspiring to commit Hobbs Act robbery). *Accord In re Matthews*, 934 F.3d 296, 301 (3d Cir. Aug. 14, 2019) (government concedes conspiring to commit Hobbs Act robbery does not meet §924(c) elements clause); *United States v. Ledbetter*, 929 F.3d 338, 360-61 (6th Cir. 2019) (government concedes

conspiracy to commit Hobbs Act robbery not a crime of violence under elements clause).

Thus, the fact that a completed offense is categorically a "violent felony" does not necessarily lead to the conclusion that an inchoate version of the offense automatically is also categorically a "violent felony." In *James v. United States*, this Court rejected that very logic. 550 U.S. 192, 201 (2007), *overruled on other grounds* by *Johnson v. United States*, 135 S. Ct. 2551 (2015). 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). In so doing, it relied on circuit precedent 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 on certiorari, this Court rejected such presumptive reasoning. The Court instead carefully analyzed Florida law to determine the proof necessary to support a conviction for Florida attempted burglary. Only then did the Court consider whether that conduct was sufficient to qualify the attempted burglary offense as a "violent felony" under ACCA. *James*, 550 U.S. at 201-05. Notably, the Court did not assume that simply because

burglary was a qualifying ACCA predicate, *attempted* burglary automatically qualified as well.

2. Application of §924(c)(3)(A) to Inchoate Offenses Has Produced a Circuit Split.

This issue has given rise to a circuit split, as some judges apply the automatic approach endorsed by the government below, others apply an elemental approach of identifying the elements necessary to obtain conviction on the inchoate offense, and still others apply something in between.

For example, the Eleventh Circuit applies this automatic approach, in which an inchoate form of a crime of violence is itself also a crime of violence under the elements clause. *United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018). *Cf. Kidd*, 929 F.3d at 581 (8th Cir. 2019) (because aider and abetter is punished same as principal, aiding and abetting a crime of violence also constitutes crime of violence under the elements clause).

The Seventh Circuit, in the middle, has noted a caveat to the automatic approach: it applies only when the attempt offense requires proof of specific intent to commit every element of the completed offense. *United States v. D.D.B.*, 903 F.3d 684, 690-93 (7th Cir. 2018). Only then can one conclude the defendant specifically intended and attempted to use violent force. *Id.* In contrast, however, if the attempt offense requires a lesser scienter, such as "knowingly" engaging in the *actus reus* or substantial step, then the premise is absent: it cannot be said the

defendant specifically intended and attempted to use violent force. *Id.* In short, the Seventh Circuit would conclude an attempt conviction is categorically a crime of violence if it required proof of specific intent to commit every element of the completed offense; but would conclude an attempt conviction is *not* categorically a crime of violence if it required any lesser scienter, such as general criminal intent or "knowingly" engaging in conduct that forms the substantial step. *See id.* The corollary seems to be, if the *mens rea* of the attempt offense is easier to prove, then it is less likely to fit within the ambit of the elements clause. *See id.*

Finally, still others require a purely elemental approach, categorically examining the least conduct required to obtain conviction for the attempted offense, then comparing those elements to the §924(c)(3)(A) elements clause. *Boston v. United States*, 939 F.3d 1266, 1273-74 (11th Cir. 2019) (Jill Pryor, J., concurring in judgment) ("A person who aids or abets another in committing armed robbery *may* use, attempt to use, or threaten to use physical force, or he may only be a getaway driver. Transforming that role in a crime into one that *necessarily* involves the use, attempted use, or threatened use of physical force contradicts ACCA's [element clause] text."); *St. Hubert*, 918 F.3d at 1211-12 (11th Cir. 2019) (Jill Pryor, J., dissenting); *In re Hernandez*, 857 F.3d 1162 (11th Cir. 2017) (Martin, J., with Jill Pryor, J., concurring in result) (noting plausible applications of attempted Hobbs Act extortion might not all require attempted use

or threatened use of force); *Cf. Allen v. United States*, 836 F.3d 894, 896 (8th Cir. 2016) (Melloy, J., dissenting) (acknowledging application of elements clause to bank robbery statute merits further examination).

Perhaps the best illustration of the split is the analysis that would apply if the Seventh Circuit precedent of *D.D.B.* were applied to Petitioner's attempted bank robbery conviction. Petitioner's attempted bank robbery required no specific intent, instead required only general criminal intent, *see Johnston*, 543 F.2d at 57-58 (as opposed to specific intent to commit every element of the non-inchoate offense), and required no *mens rea* at all as to the use of violence or intimidation, *see United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010) (federal bank robbery statute does not require a knowing or intentional *mens rea* regarding use of force or intimidation); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) ("The district court correctly concluded the *mens rea* element of bank robbery did not apply to the element of intimidation[.]"). Thus, application of the rule in *D.D.B.*, 903 F.3d at 690-93, suggests Petitioner's attempted bank robbery conviction, based on the lack of any specific intent requirement, categorically does not qualify as a crime of violence under the elements clause.

3. The Government's Own Litigation Position in Other Cases Undermines Its Automatic Approach Endorsed Here.

Judges, it turns out, are not the only ones struggling to make heads or tails of this post-*Davis* landscape. The government's own litigation position on some

inchoate offenses—namely conspiracies to commit crimes of violence—undermines its argument to automatically convert other inchoate offenses into crimes of violence.

The government has routinely conceded that conspiring to commit a crime of violence does not qualify as a crime of violence under the elements clause because it does not necessarily require proof of, "as an element the use, attempted use, or threated use of physical force," *see* §924(c)(3)(A). *Davis*, 903 F.3d at 485 (5th Cir. 2018) ("conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force"), *aff'd in part by Davis*, 139 S.Ct. at 2324-25, 2336 (affirming vacatur of § 924(c) convictions predicated on conspiring to commit Hobbs Act robbery); *In re Matthews*, *Matthews*, 934 F.3d at 301 (3d Cir. Aug. 14, 2019) (government concedes conspiring to commit Hobbs Act robbery does not meet § 924(c) elements clause); U.S. Att'y (E.D. Mo.) Suppl. Statement of Position, at 5-6, *Creighton v. United States*, No. 18-2616 (8th Cir. Docket 8/1/19) (government concedes § 924(c) conviction predicated on conspiracy should be vacated on remand); *United States v. Ledbetter*, 929 F.3d 338, 360-61 (6th Cir. 2019) (government concedes conspiracy to commit Hobbs Act robbery not a crime of violence under elements clause).

But, the proof necessary for conviction on conspiracy is strikingly similar to, and just as minimal and categorically non-violent as, the proof necessary for conviction on attempting a crime of violence or aiding and abetting a crime of violence. All three require intent and minimal conduct, which need not include any use, attempt use, or threatened use of violent force. *Compare United States v. Juvenile Male*, 923 F.2d 614, 618-20 & n.7 (8th Cir. 1991) (conspiracy to commit a violent crime requires agreement—i.e., intent—to commit offense and overt act in furtherance); *with United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997) (attempted bank robbery requires proof defendant intended to engage in criminal activity and his conduct amounted to substantial step toward commission of the crime), *and Rosemond v. United States*, 572 U.S. 65, 71 (2014) (elements of aiding and abetting: intent to facilitate commission of offense, and affirmative act in furtherance thereof).

With no appreciable difference in the elemental proof required for these three types of inchoate offenses—conspiracy, attempt, and aiding-and-abetting—there is no appreciable reason for the government's automatically treating conspiracy offenses as *not* crimes of violence, while automatically treating attempt offenses and aiding-and-abetting offenses as crimes of violence. The government itself apparently has a difficult time cogently applying the elements clause to inchoate offenses. Indeed, would a conspirator's offense still fall outside the ambit

of §924(c)(3)(A) if s/he is the person who engages in the requisite overt act (technically qualifying as an attempt)? Or would the aider-and-abettor's offense still fall within the ambit of §924(c)(3)(A) if her/his affirmative act in furtherance is merely the agreement to conspire?

The government's line-drawing is just as messy as the circuit split identified above, and just as far from the statutory text. Guidance from this Court is required to clarify §924(c)(3)(A)'s application to inchoate offenses.

4. The Court of Appeals Denial of a Certificate of Appealability on This Issue Demonstrates Yet Another Circuit Split On the Treatment of post-*Davis Johnson* Claims.

Without a reasoned opinion, or even citation to the appropriate standard, the Court of Appeals' treatment of this evolving legal issue highlights yet another circuit split. (Appx. A, B). Some circuits zealously heed this Court's instruction to grant a COA when the issues are debatable in an evolving legal doctrine. *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 773-74 (2017) (prohibiting resolution of the merits of an issue at the COA stage); *Miller-El v. Cockerell*, 537 U.S. 322, 338 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). *E.g.*, *United States v. Lee*, No. 18-16965, 2019 U.S. App. LEXIS 24979 (9th Cir. 2019) (granting COA, as issue is debatable whether second-degree murder under 18 U.S.C. §1111 is crime of violence under §924(c)(3)(A)); *United States v. Buck*, No. 18-17271, 2019 U.S. App. LEXIS 24977 (9th Cir. 2019) (granting COA, as issue is debatable whether

armed postal robbery under 18 U.S.C. §2114 is crime of violence under §924(c)(3)(A)); *Brown v. United States*, No. 17-13933-A, 2019 U.S. App. LEXIS 21236 (11th Cir. 2019) (granting COA, as issue is debatable whether conspiracy Hobbs Act robbery under 18 U.S.C. §1951 is crime of violence under §924(c)(3)(A)).

While other circuits may be inclined to resolve the issues abruptly prior to merits briefing. *E.g.*, *Allen*, 836 F.3d at 896 (Melloy, J., dissenting) (arguing application of elements clause to bank robbery statute merits further examination); *St. Hubert*, 918 F.3d at 1197-98 (Wilson, J., dissenting).

Particularly here, where there are colorable, debatable arguments regarding the application of §924(c)(3)(A) to Petitioner's inchoate attempt bank robbery offense, failure to grant COA was demonstrable error—likely to be oft repeated as other Courts of Appeals wade through post-*Davis Johnson* claims. Petitioner therefore respectfully requests this Court's discretionary review to provide appropriate relief.

CONCLUSION

Petitioner respectfully requests this Court grant the Writ, or alternatively order a COA in the Court of Appeals be granted on this issue. Alternatively Petitioner respectfully requests this Court hold this petition in abeyance pending this Court's resolution of *Walker v. United States*, No. 19-373 (U.S.), *St. Hubert v.*

United States, No. 19-5267 (U.S.), and *Kidd v. United States*, No. 19-6108 (U.S.), three cases which pose similar weighty post-*Davis* §924(c) issues as Petitioner attempted to articulate in this petition.

Respectfully submitted,

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Dated: December 4, 2019

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Robert L. Bolden, Sr., Petitioner-Appellant

v.

United States of America, Respondent-Appellee

CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT

I, Jennifer Merrigan, counsel for Petitioner, hereby certify that the Petition for Writ of Certiorari in the above-captioned case complies with the 40-page limit set in Supreme Court Rule 33.2(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer Merrigan, counsel for Petitioner, hereby certify that on this date I caused the Petition for Writ of Certiorari to be served on the following persons via U.S. Mail at the locations below, pursuant to Supreme Court Rule 29:

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