No. 19-6878

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. BOLDEN, SR., PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROBERT A. PARKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals was required to grant a certificate of appealability on the question whether intentionally committing an act of violence resulting in the death of another person during an attempted bank robbery is a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (8th Cir.):

United States v. Bolden, No. 06-3264 (Nov. 4, 2008)

Supreme Court of the United States:

Bolden v. United States, No. 09-5694 (Dec. 7, 2009)

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 19-6878

ROBERT L. BOLDEN, SR., PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

_____

BRIEF FOR THE UNITED STATES IN OPPOSITION

_____

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is unreported. The order of the district court (Pet. App. C1-C5) is not reported in the Federal Supplement but is available at 2016 WL 6822126. A prior order of the district court is reported at 171 F. Supp. 3d 891.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2019. The petition for a writ of certiorari was filed on

December 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of conspiring to commit bank robbery, in violation of 18 U.S.C. 371 (Count 1); killing a person in the course of an attempted bank robbery, in violation of 18 U.S.C. 2113(a) and (e) (Count 2); using a firearm to commit first-degree murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (2000) and 18 U.S.C. 924(j)(1) (Count 3); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) (Count 4). 02-CR-557 Judgment 1-2. The district court sentenced petitioner to death on Counts 2 and 3, and to concurrent terms of five years of imprisonment on Count 1 and ten years of imprisonment on Count 4. Id. at 3. The court of appeals affirmed, 545 F.3d 609, and this Court denied a petition for a writ of certiorari, 558 U.S. 1077.

In 2010, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255. D. Ct. Doc. 2 (Dec. 6, 2010) (2255 Mot.). The district court denied that motion, see 171 F. Supp. 3d 891, as well as petitioner's subsequent request to amend the motion to add a claim under Johnson v. United States, 135 S. Ct. 2551 (2015), see Pet. App. C1-C5, and also denied petitioner's request for a certificate of appealability (COA), D. Ct. Doc. 273, at 1-2 (Jan. 17, 2017) (COA Order). The court of appeals granted petitioner's

request for a COA in part and denied it in part, see Pet. App. B1, and denied petitioner's subsequent motion to expand the COA in light of United States v. Davis, 139 S. Ct. 2319 (2019), see Pet. App. A1.

1. On October 7, 2002, petitioner and two accomplices -- Dominick Price and Corteze Edwards -- attempted to rob a branch of Bank of America in St. Louis, Missouri. 545 F.3d at 612-613. In the morning, petitioner and Price "cased" the bank, and petitioner formulated a plan to disarm the bank's security guard in the parking lot at gunpoint, take the guard into the bank as a hostage, rob the tellers, and flee in petitioner's car. Id. at 613. Petitioner subsequently recruited Edwards to assist in the robbery. Ibid.

Early that afternoon, petitioner and his accomplices drove to a parking lot near the bank. 545 F.3d at 613. When security guard Nathan Ley assumed a position outside the bank, petitioner approached him and pulled out a gun. Ibid. Ley reached for petitioner's gun in an effort to wrest it away. Ibid. After a brief struggle, petitioner freed himself from Ley's grasp and shot Ley in the jaw, causing Ley to collapse to the ground. Ibid. As Ley was falling, petitioner stepped back and shot Ley again in the head. Ibid. Ley died from his wounds later that day. Ibid.

Price and Edwards fled on foot when petitioner fired the shots. See 545 F.3d at 613; see also 5/4/06 Tr. 2246-2248. Petitioner drove home in his car and hid the murder weapon in his

yard. 5/4/06 Tr. 2254, 2259. He later called Ley "stupid" and complained that Ley's desire "to be a hero" had turned the endeavor into a "'wasted trip.'" Id. at 2255, 2257. Petitioner told Price that he shot Ley because "it was either shoot the guard or spend the rest of his life in jail." Id. at 2257. He also expressed anger that Price and Edwards had not stayed to complete the robbery following the shooting. Id. at 2255.

2. A federal grand jury charged petitioner with conspiring to commit bank robbery, in violation of 18 U.S.C. 371 (Count 1); killing a person in the course of an attempted bank robbery, in violation of 18 U.S.C. 2113(a) and (e) (Count 2); using a firearm to commit first-degree murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (2000) and 18 U.S.C. 924(j)(1) (Count 3); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) (Count 4). Pet. App. E1-E5. In connection with Counts 2 and 3, the indictment also charged the factual predicates necessary to impose a capital sentence under 18 U.S.C. 3591(a)(2), namely, that petitioner intentionally killed the victim or intentionally engaged in acts of violence that resulted in the victim's death. Pet. App. E5-E6.

A jury found petitioner guilty on all counts and determined that he should be sentenced to death on Counts 2 and 3. 545 F.3d at 612-613; see Pet. App. F1-F2. In accordance with the jury's sentencing verdict, the district court sentenced petitioner to death on Counts 2 and 3. 02-CR-557 Judgment 3; see 18 U.S.C. 3594.

The court additionally sentenced petitioner to concurrent terms of five years of imprisonment on Count 1 and ten years of imprisonment on Count 4. 02-CR-557 Judgment 3. The court of appeals affirmed, 545 F.3d 609, and this Court denied a petition for a writ of certiorari, 558 U.S. 1077.

3. In 2010, petitioner filed a motion for postconviction relief under Section 2255, challenging his conviction and sentence on numerous grounds, including alleged ineffective assistance of counsel at the guilt and penalty phases of his trial and violations of his right to consular notification. See 2255 Mot. 2-401; see also D. Ct. Doc. 54, at 2-200 (Aug. 11, 2011) (Amended 2255 Mot.). The district court denied relief. 171 F. Supp. 3d at 899-930.

Petitioner subsequently sought leave to amend his motion to add a claim that his firearm conviction on Count 3 should be vacated because it was not premised on a valid "crime of violence." D. Ct. Doc. 235, at 1-2 (Apr. 18, 2016); see D. Ct. Doc. 236, at 4-14 (Apr. 18, 2016) (Proposed Amendment). Section 924(c)(3) defines a "'crime of violence'" as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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(c)(3)(B). Petitioner argued that the underlying crime of violence in Count 3 -- the crime for which he was convicted in Count

2, killing a person in the course of an attempted federal bank robbery -- does not qualify as a crime of violence under Section 924(c)(3)(A), and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson, supra, which held that the "residual clause" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), was void for vagueness, 135 S. Ct. at 2557. See Proposed Amendment 4-14.

The district court denied petitioner's request to amend his Section 2255 motion. Pet. App. C1-C5. The court explained that petitioner's Count 2 conviction qualifies as a crime of violence because the bank robbery statute includes "as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. 924(c)(3)(A), in the form of a requirement that the defendant use "force and violence" or "intimidation," 18 U.S.C 2113(a). Pet. App. C3-C5. The court therefore determined that petitioner would not be entitled to relief even if the alternative definition of a crime of violence in Section 924(c)(3)(B) were unconstitutionally vague under Johnson. Id. at C4-C5. The court further determined that petitioner had "failed to make a substantial showing of the denial of a constitutional right," and thus denied his request for a COA. COA Order 1 (citing 28 U.S.C. 2253(c)); see id. at 2.

4. The court of appeals denied petitioner's request for a COA on whether attempted bank robbery is a crime of violence, but granted a COA on several other issues raised in petitioner's Section 2255 motion. Pet. App. B1; see Pet. C.A. Appl. for COA

198-202. While petitioner's appeal on those issues was pending, this Court held in Davis, supra, that the definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. 139 S. Ct. at 2336. In light of Davis, petitioner sought leave to expand the COA to renew his claim that the crime for which he was convicted in Count 2 does not qualify as a crime of violence under Section 924(c)(3). Pet. C.A. Appl. to Expand COA 3-10. The court of appeals denied petitioner's request. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals erred in denying a COA on his claim that attempted bank robbery does not qualify as a crime of violence under 18 U.S.C. 924(c)(3)(A). This Court should deny the petition for a writ of certiorari. As a threshold matter, the petition arises in an interlocutory posture, and further proceedings may obviate any need for this Court to address the question presented here. Moreover, the decision below was correct. The underlying crime of violence in this case is the aggravated capital offense of killing a person in the course of an attempted bank robbery, not attempted bank robbery alone. Petitioner identifies no grounds on which reasonable jurists would debate whether that offense qualifies as a crime of violence. In any event, attempts to commit violent offenses, including bank robbery, also qualify as crimes of violence under Section 924(c)(3)(A). Lastly, petitioner fails to identify (Pet. 18-24) a genuine circuit conflict on any of the relevant issues.

1. As petitioner acknowledges (Pet. 1), his petition seeks a writ of certiorari before judgment in the court of appeals. The court of appeals granted a COA on several issues raised in his motion for postconviction relief under 28 U.S.C. 2255, and petitioner's appeal on those issues "remains pending." Pet. iv. The court of appeals' decision denying his request for a COA to consider whether attempted bank robbery qualifies as a crime of violence under Section 924(c)(3)(A) was therefore interlocutory, a fact which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari).

That course is particularly appropriate here. Petitioner received death sentences on Count 2 (killing a person in the course of an attempted bank robbery) and Count 3 (carrying a firearm and committing murder in relation to a crime of violence). 02-CR-557 Judgment 3. As a result, petitioner can obtain effective relief from his capital sentence only if he successfully challenges his sentences on both counts. But petitioner's challenge to whether his bank-robbery offense qualifies as a crime of violence relates solely to Count 3, and thus would not in itself warrant relief from his capital sentence on Count 2. In contrast, each of

petitioner's claims currently pending before the court of appeals -- relating to the alleged violation of his right to consular notification, ineffective assistance of counsel in gathering and presenting mitigating evidence, and suppression of immigration records containing mitigating evidence -- challenges the validity of his death sentences on both counts. Pet. App. B1; see Pet. C.A. Appl. for COA 10-96.

If petitioner prevailed on any of his remaining Section 2255 claims, the most likely result would be vacatur of his convictions or death sentences on Counts 2 and 3. On remand from the court of appeals, petitioner might then prevail altogether, thereby obviating his need to seek relief in this Court at all. But even if petitioner does not obtain ultimate relief from the courts below, waiting until all of his claims are resolved before considering any one in isolation would accord with this Court's traditional practice and promote judicial efficiency. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent * * * judgments"). Petitioner does not identify any compelling reason for the Court to intervene at this time.

2. In any event, the court of appeals correctly denied a COA on the question of whether petitioner's conviction on Count 2 qualifies as a crime of violence under Section 924(c)(3)(A) for

purposes of his conviction on Count 3. To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). That standard requires the prisoner to demonstrate "that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right." Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Petitioner fails to make such a showing here.

a. As an initial matter, petitioner errs in framing the issue (see, e.g., Pet. 12) as turning solely on the question of whether attempted bank robbery is a crime of violence. The relevant crime of violence for the conviction on Count 3 is not attempted bank robbery in isolation, but instead the aggravated capital offense of killing another person in the course of an attempted bank robbery. Count 3 of the indictment specified the underlying crime of violence as the "attempted armed robbery of a bank as charged in Count [2]." Pet. App. E4. Count 2, in turn, charged petitioner with the aggravated offense of attempted bank robbery during which he "kill[ed]" the victim, in violation of 18 U.S.C. 2113(a) and (e). Pet. App. E4; see id. at E3-E4. In addition, in connection with Count 2 and consistent with the capital sentencing requirements in 18 U.S.C. 3591(a)(2), the indictment charged petitioner with intentionally killing the victim or intentionally engaging in acts of violence that resulted in the victim's death. Pet. App. E5-E6.

The jury made each of the requisite findings in finding petitioner guilty on Count 2. Pet. App. F1 (Count 2 guilty verdict); 02-CR-557 D. Ct. Doc. 442, at 2 (May 23, 2006) (Count 2 penalty verdict). Those findings would apply equally to Count 3, and reasonable jurists would not debate whether intentionally committing an act of violence resulting in the death of another person during an attempted bank robbery requires the use of physical force within the meaning of Section 924(c)(3)(A). See, e.g., United States v. Castleman, 572 U.S. 157, 169 (2014) ("[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force."). Accordingly, the court of appeals correctly determined that petitioner did not make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), and was not entitled to a COA. See Pet. App. A1.

b. Even if petitioner's conviction on Count 3 were predicated on attempted bank robbery alone, the result would be the same. That offense also qualifies as a crime of violence under Section 924(c)(3)(A).

Petitioner does not meaningfully dispute that substantive bank robbery qualifies as a crime of violence under Section 924(c)(3)(A). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Lloyd v. United States, No. 18-6269 (filed Jan. 9, 2019), Section 2113 includes "as an element the use, attempted use, or threatened use

of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), in the form of a requirement that the defendant take or attempt to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a). See Br. in Opp. at 6-13, Lloyd, supra (No. 18-6269).[1] Every court of appeals to have considered the question has so held, see id. at 8-9, and this Court has repeatedly denied petitions for writs of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) (and similarly worded statutes and provisions of the Sentencing Guidelines) to bank robbery offenses.[2]

Because substantive bank robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A), attempted bank robbery likewise qualifies. To be convicted of a federal attempt

---

[1] We have served petitioner with a copy of the government's brief in opposition in Lloyd.

[2] See, e.g., Gould v. United States, No. 18-9793 (Nov. 25, 2019) (armed bank robbery); Estell v. United States, No. 19-6131 (Nov. 12, 2019) (bank robbery); Pastor v. United States, 140 S. Ct. 412 (2019) (No. 19-5812) (bank robbery); Mitchell v. United States, 140 S. Ct. 285 (2019) (No. 19-5070) (bank robbery); Lopez-Galvan v. United States, 140 S. Ct. 178 (2019) (No. 18-9522) (armed bank robbery); Watson v. United States, 140 S. Ct. 171 (2019) (No. 18-9469) (bank robbery); Karahalios v. United States, 140 S. Ct. 73 (2019) (No. 19-5107) (bank robbery); Lockwood v. United States, 139 S. Ct. 2648 (2019) (No. 18-8799) (armed bank robbery); Cirino v. United States, 139 S. Ct. 2012 (2019) (No. 18-7680) (armed bank robbery); Winston v. United States, 139 S. Ct. 1637 (2019) (No. 18-8525) (armed bank robbery); Hearn v. United States, 139 S. Ct. 1620 (2019) (No. 18-7573) (armed bank robbery); Landingham v. United States, 139 S. Ct. 1620 (2019) (No. 18-7543) (armed bank robbery); Scott v. United States, 139 S. Ct. 1612 (2019) (No. 18-8536) (armed bank robbery).

offense, a defendant must (1) have the intent to commit each element of the substantive crime, and (2) take a "substantial step" toward its commission. United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007); United States v. Carlisle, 118 F.3d 1271, 1273 (8th Cir.), cert. denied, 522 U.S. 974 (1997); see United States v. Armour, 840 F.3d 904, 909 n.3 (7th Cir. 2016). That standard requires conduct that goes "beyond mere preparation," is "necessary to the consummation of the crime," and "strongly corroborate[s] [the defendant's] criminal intent." United States v. Spurlock, 495 F.3d 1011, 1014 (8th Cir.), cert. denied, 552 U.S. 1054 (2007); see Swift & Co. v. United States, 196 U.S. 375, 402 (1905) ("The distinction between mere preparation and attempt is well known in the criminal law."); accord Pet. App. G, at 109 (jury instructions). Accordingly, every court of appeals to consider the question has recognized that an attempt to commit a crime that requires the use, attempted use, or threatened use of physical force is itself a "crime of violence" under Section 924(c)(3)(A) and similarly worded provisions,[3] and this Court has

[3] See, e.g., United States v. St. Hubert, 909 F.3d 335, 351-353 (11th Cir. 2018) (recognizing that attempted robbery under the Hobbs Act, 18 U.S.C. 1951, is a crime of violence under Section 924(c)(3)(A)), cert. denied, 139 S. Ct. 1394 (2019), and petition for cert. pending, No. 19-5267 (filed July 18, 2019); Ovalles v. United States, 905 F.3d 1300, 1304-1307 (11th Cir. 2018) (per curiam) (same for attempted carjacking), cert. denied, 139 S. Ct. 2716 (2019); Armour, 840 F.3d at 907-909 (same for attempted bank robbery); United States v. McGuire, 706 F.3d 1333, 1337-1338 (11th Cir.) (O'Connor, J.) (same for attempted destruction of occupied aircraft), cert. denied, 569 U.S. 912 (2013); see also Arellano Hernandez v. Lynch, 831 F.3d 1127, 1132 (9th Cir. 2016) ("The

repeatedly denied review of petitions for writs of certiorari raising the question whether attempts to commit bank robbery or other federal robbery offenses qualify as crimes of violence under Section 924(c)(3)(A).[4] The same result is warranted here.

Petitioner invokes (Pet. 17-18) this Court's decision in James v. United States, 550 U.S. 192 (2007), overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015), for the proposition that an attempt offense does not automatically qualify as a crime of violence simply because the completed offense does. But even if the ACCA's express inclusion of "burglary" as

---

'attempt' portion of Arellano Hernandez's conviction does not alter our determination that the conviction is a crime of violence. We have 'generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of violence.'") (citation omitted), cert. denied, 137 S. Ct. 2180 (2017).

[4] See, e.g., Burke v. United States, No. 19-5312 (Nov. 4, 2019) (attempted Hobbs Act robbery); Barriera-Vera v. United States, 140 S. Ct. 263 (2019) (No. 19-5063) (attempted bank robbery); Gray v. United States, 140 S. Ct. 63 (2019) (No. 18-9319) (attempted Hobbs Act robbery); Ovalles v. United States, 139 S. Ct. 2716 (2019) (No. 18-8393) (attempted carjacking); Myrthil v. United States, 139 S. Ct. 1164 (2019) (No. 18-6009) (attempted Hobbs Act robbery); St. Hubert v. United States, 139 S. Ct. 246 (2018) (No. 18-5269) (same); Corker v. United States, 139 S. Ct. 196 (2018) (No. 17-9582) (same); Beavers v. United States, 139 S. Ct. 56 (2018) (No. 17-8059) (same); Berry v. United States, 138 S. Ct. 2665 (2018) (No. 17-8987) (attempted carjacking); Chance v. United States, 138 S. Ct. 2642 (2018) (No. 17-8880) (attempted Hobbs Act robbery); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248) (same); Sampson v. United States, 138 S. Ct. 1583 (2018) (No. 17-8183) (same); Robbio v. United States, 138 S. Ct. 1583 (2018) (No. 17-8182) (same); James v. United States, 138 S. Ct. 1280 (2018) (No. 17-6295) (same); Griffith v. United States, 138 S. Ct. 1165 (2018) (No. 17-6855) (attempted bank robbery); Galvan v. United States, 138 S. Ct. 691 (2018) (No. 17-6711) (attempted carjacking); Wheeler v. United States, 138 S. Ct. 640 (2018) (No. 17-5660) (attempted Hobbs Act robbery).

a "'violent felony'" did not automatically qualify attempted burglary as a "'violent felony'" under the ACCA's residual clause -- which covered offenses that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii) -- that would not mean that attempted bank robbery fails to qualify as a "crime of violence" under the materially different language of Section 924(c)(3)(A). See James, 550 U.S. at 197. As explained above, an attempt to commit bank robbery necessarily requires the "use, attempted use, or threatened use of physical force." 18 U.S.C. 924(c)(3)(A).[5]

3. Petitioner does not identify a conflict between the decision below and any decision of another court of appeals. The

[5] Petitioner suggests (Pet. 16-17, 20-23) that the government's position in this case is inconsistent with its acknowledgment in other cases that conspiracy to commit a violent offense may not itself qualify as a crime of violence under Section 924(c)(3)(A). But Section 924(c)(3)(A) refers to the "attempted use * * * of physical force," not a "conspiracy to use physical force." 18 U.S.C. 924(c)(3)(A). And the two types of offenses are distinct. "[A] conspiracy is not an attempt," Hyde v. United States, 225 U.S. 347, 387 (1912) (Holmes, J., dissenting), but is instead "an agreement to commit an unlawful act," Iannelli v. United States, 420 U.S. 770, 777 (1975). Many federal conspiracy offenses do not require proof of any overt act, see United States v. Shabani, 513 U.S. 10, 13-14 (1994), and those that do typically require only that at least one of the conspirators engage in conduct tending to "effect the object of the conspiracy," Braverman v. United States, 317 U.S. 49, 53 (1942) -- even if that conduct would be insufficient to constitute a substantial step, see, e.g., Hyde, 225 U.S. at 388 (Holmes, J., dissenting) (noting that "if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose," whereas attempt requires "dangerous proximity to success"); United States v. Nelson, 66 F.3d 1036, 1044 (9th Cir. 1995) ("[T]he overt act * * * need not have as immediate a connection to the intended crime as the 'substantial step' required for an attempt.") (citation omitted).

only case petitioner cites (Pet. 18-20) as evidence of a conflict over whether attempt offenses qualify as crimes of violence -- United States v. D.D.B., 903 F.3d 684 (7th Cir. 2018) -- involves an idiosyncratic state-law definition of attempt that has no bearing here. There, the Seventh Circuit determined that Indiana attempted robbery is not a qualifying offense under a federal statute with language similar to Section 924(c)(3)(A), based on Indiana's "anomalous" attempt statute, which, unlike "most criminal attempt statutes," does not require proof that the defendant intended to commit the substantive crime. Id. at 690-691. Federal law, in contrast, requires proof of intent to commit the substantive offense, see, e.g., Resendiz-Ponce, 549 U.S. at 106-107, and the jury was properly instructed on that requirement in this case, see Pet. App. G, at 109. Confirming the absence of any conflict, the Seventh Circuit has held that attempted federal bank robbery is a crime of violence under Section 924(c)(3)(A), see Armour, 840 F.3d at 907-909 & n.3.

Petitioner also contends (Pet. 23-24) that the court of appeals' denial of a COA in this case conflicts with unpublished orders from other circuits granting COAs to consider whether other offenses qualify as crimes of violence. But he does not identify any decision that granted a COA on whether attempted bank robbery qualifies as a crime of violence. And to the extent petitioner alleges (ibid.) high-level tension between the circuits over their general willingness to grant COAs, such tension would not warrant

this Court's intervention. Any variations in outcome in the cases petitioner cites are likely attributable to differences in the merit of particular claims or to the courts of appeals' differing practices for evaluating and disposing of COA requests. See In re Burwell, 350 U.S. 521, 522 (1956) (per curiam) (holding, in the context of an application for a certificate of probable cause under 28 U.S.C. 2253 (1952), that "[i]t is not for this Court to prescribe" the procedures courts of appeals must "follow for the entertainment of such applications on their merits").[6]

[6] Petitioner's request (Pet. 24-25) to hold his petition for a writ of certiorari in abeyance pending the disposition of other petitions for writs of certiorari should be denied. The petition for a writ of certiorari in Kidd v. United States, No. 19-6108 (filed Sept. 27, 2019), was denied on January 13, 2020. The petition for a writ of certiorari in Walker v. United States, No. 19-373 (filed Sept. 19, 2019), was originally granted but subsequently dismissed on January 27, 2020. In any event, that case addressed whether the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i), includes reckless conduct, an issue not presented here. And although the petition for a writ of certiorari in St. Hubert v. United States, No. 19-5267 (filed July 18, 2019), raises the question of whether attempted Hobbs Act robbery qualifies as a crime of violence, the Court has already denied a writ of certiorari on precisely that question in a previous petition arising from the same case, see 139 S. Ct. 246, and, as noted, has repeatedly denied other petitions for writs of certiorari raising the same question, see p. 14 n.4, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROBERT A. PARKER
Attorney

FEBRUARY 2020