NO. 19-6878

IN THE SUPREME COURT OF THE UNITED STATES

Robert L. Bolden, Sr.

Petitioner-Appellant

v.

United States of America

Respondent-Appellee

(CAPITAL CASE)

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

PETITIONER'S REPLY TO THE

BRIEF FOR THE UNITED STATES IN OPPOSITION

Jennifer Merrigan
Counsel of Record
Phillips Black
1901 S. 9th Street, 510
Philadelphia, PA 19148
Tel: (816) 695-2214
j.merrigan@phillipsblack.org

Kelly D. Miller
Asst. Federal Public Defender
Federal Public Defender Office
Middle District of Pennsylvania
100 Chestnut Street, Suite 300
Harrisburg, PA 17101
Tel: (717) 782-3843
Fax: (717) 782-3966
kelly_miller@fd.org

ARGUMENT

Mr. Bolden merely asks for a certificate of appealability (COA) or remand with instruction to grant one on this issue. Attempted bank robbery does not require proof, "as an element," of intentional "use, attempted use, or threatened use of physical force against the person or property of another."[1] 18 U.S.C. §924(c)(3)(A). The killing component of the bank robbery statute, 18 U.S.C. §2113(e), does not require proof of specific intent to kill, and can be established through mere negligence or recklessness.[2] Even an unintentional, fatal car accident while fleeing the bank satisfies the killing elements of §2113(e).[3] Thus, it appears reasonably debatable whether an attempted offense, which can be established without proof of any intentionally violent conduct, that results in a *mens rea*-free killing categorically

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[1] *See* Petition at 12-14. *E.g.*, *United States v. Carlisle*, 118 F.3d 1271, 1273 (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). *See also United States v. Pickar*, 616 F.3d 821, 826 (8th Cir. 2010); *United States v. Yockel*, 320 F.3d 818, 824-25 (8th Cir. 2003). *Cf. United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007); *United States v. Gonzalez*, 322 Fed. Appx. 963, 969 (11th Cir. 2009) (unpublished).

[2] *United States v. McDuffy*, 890 F.3d 796, 797-98, 802 (9th Cir. 2018); *United States v. Vance*, 764 F.3d 667, 675 (7th Cir. 2014); *United States v. Jackson*, 736 F.3d 953, 957-59 (10th Cir. 2013); *United States v. Allen*, 247 F.3d 741, 782-83 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002); *United States v. Poindexter*, 44 F.3d 406, 408-09 (6th Cir. 1995).

[3] *Jackson*, 736 F.3d at 955, 957-59; *United States v. Parks*, 583 F.3d 923, 924-25 (6th Cir. 2009) ("the *mens rea* for killing a person while fleeing a bank robbery [is] strict liability").

"has as an element the" *Leocal*-required *intentional* "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §924(c)(3)(A); *Leocal v. Ashcroft*, 543 U.S. 1, 8-9, 13 (2004). Any analysis beyond this point would appear to constitute a merits analysis—an inappropriate inquiry at the COA stage. *See Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 773-74 (2017) (prohibiting resolution of merits of an issue at the COA stage). Accordingly, COA, remand with instruction to issue a COA, or abeyance while this Court decides other closely related post-*Davis*[4] issues—including whether a reckless *mens rea* satisfies the elements clause,[5] and whether an attempt offense automatically satisfies the elements clause[6]—is appropriate.

In an abundance of caution, Mr. Bolden briefly addresses government arguments not previously addressed in his Petition.

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[4] *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (June 24, 2019).

[5] Whether an offense with a reckless *mens rea* can categorically satisfy the nearly identical elements clause of 18 U.S.C. §924(e)(2)(B)(i) was the issue presented in *Walker v. United States*, No. 19-373 (U.S.), which was set for briefing prior to petitioner Walker's death in January 2020. This issue is also presented in *Burris v. United States*, No. 19-6186 (U.S.), and *Borden v. United States*, No. 19-5410 (U.S.), both of which the government has conceded are appropriate vehicles for addressing the issue. S.G. Response to Suggestion of Death, *Walker*, No. 19-373 (U.S. 1/23/2020).

[6] This issue is raised in *St. Hubert v. United States*, No. 19-5267 (U.S.).

The killing component of the bank robbery statute, 18 U.S.C. §2113(e), does not alter the analysis offered in the Petition. The killing component in §2113(e) does not require specific intent to kill or any additional scienter beyond the *mens rea* necessary for conviction of the underlying bank robbery offense. *United States v. McDuffy*, 890 F.3d 796, 797-98, 802 (9th Cir. 2018); *United States v. Vance*, 764 F.3d 667, 675 (7th Cir. 2014); *United States v. Jackson*, 736 F.3d 953, 957-59 (10th Cir. 2013); *United States v. Allen*, 247 F.3d 741, 782-83 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002); *United States v. Poindexter*, 44 F.3d 406, 408-09 (6th Cir. 1995). After all, the statutory language is "Whoever, in committing any offense defined in this section, . . . *kills* any person." 18 U.S.C. §2113(e) (emphasis added). "The common understanding of the word 'kill,' in contrast with the term 'murder,' . . . does not include an element of scienter." *Poindexter*, 44 F.3d at 409. The §2113(e) killing component "applies even when the bank robber accidentally kills someone." *McDuffy*, 890 F.3d at 797-98, 802. "The [§2113(e)] enhancement does not require a separate *mens rea*; the only *mens rea* required is the *mens rea* necessary to commit the underlying bank robbery." *Id. Accord Jackson*, 736 F.3d at 957-58 ("scienter requirement comes from 'knowingly' committing the underlying bank robbery"). Even an accidental, fatal car crash while fleeing establishes the killing elements of §2113(e). *Jackson*, 736 F.3d at 955, 957-59. The *mens rea* for killing a person while avoiding apprehension is "strict liability." *United*

States v. Parks, 583 F.3d 923, 924-25 (6th Cir. 2009). As unintentional, negligent, or reckless conduct may satisfy §2113(e), it does not require proof "as an element" of the *Leocal*-required *intentional* "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §924(c)(3)(A).

Attempt bank robbery—even one resulting in an accidental death—likewise fails to qualify under the elements clause. *See* Petition at 11-14. Minimal conduct and an amorphous intent to engage in criminality are all that are required to satisfy the elements of attempted bank robbery.[7] Circling the bank in a vehicle with disguises and weapons, and fleeing at the sight of police, is enough. *United States v. Johnson*, 962 F.2d 1308, 1310-12 (8th Cir. 1992). This required no showing, "as an element" of *intentional* "use, attempted use, or threatened use of physical force against the person or property of another." *Id.*; 18 U.S.C. §924(c)(3)(A). And, while fleeing, if the defendant had become involved in a fatal car accident, that killing would not require proof, "as an element" of *intentional* "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §924(c)(3)(A). *Compare Johnson*, 962 F.2d 1308, 1310-12, *with Jackson*, 736 F.3d at 955, 957-59, *and Parks*, 583 F.3d at 924-25 ("the *mens rea* for killing a person while fleeing a bank robbery [is] strict liability").

[7] *Crawford*, 837 F.2d at 340; *Carlisle*, 118 F.3d at 1273; *United States v. Johnston*, 543 F.2d 55, 57-58 (8th Cir. 1976).

Likewise, casing the bank, receiving some tools from an informant—clothing, mask, gloves, and car—and travelling during the scheduled time of the robbery, *without any weapon*, is enough. *United States v. Crawford*, 837 F.2d 339, 339-40 (8th Cir. 1988) (per curiam). Again, no proof of intentional "use, attempted use, or threatened use of physical force against the person or property of another" was required. *Id.*; 18 U.S.C. §924(c)(3)(A). A fatal car accident while driving to the staging location for the robbery could not transcend the offense into a crime of violence: attempted §2113(a) and (e) could be established by mere general intent, a substantial step, and someone's accidental death. *Compare Crawford*, 837 F.2d at 339-40, *with Jackson*, 736 F.3d at 955, 957-59, *and Parks*, 583 F.3d at 924-25.

If a completed offense would constitute a crime of violence or violent felony, the inchoate attempted version of that offense does not *automatically* qualify as a crime of violence or violent felony under the elements clause. Circuit and district judges have recognized this principle. *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (Jill Pryor, J., joined by Wilson and Martin, JJ., dissenting from the denial of rehearing en banc); *Lofton v. United States*, No. 6:16-cv-6324, 2020 WL 362348, 2020 U.S. Dist. LEXIS 10764, at **7-26 (W.D.N.Y. Jan. 22, 2020) (attempted Hobbs Act robbery is not categorically a crime of violence under §924(c)(3)(A)); *United States v. Tucker*, No. 18-cr-119, 2020 WL 93951, 2020 U.S. Dist. LEXIS 3055, at **13-19 (E.D.N.Y. Jan. 8, 2020) (same). The government's

argument to the contrary is a merits argument best suited for merits briefing. Gov. Brief in Opposition ("BIO") at 12-15.

The government points to case-specific death-qualifying special findings made by the grand jury and petit jury. BIO at 10-11. These case-specific special findings were not charged in Count II—the offense specifically designated as the predicate crime of violence for Count III—and thus do not constitute an element of the predicate offense. *See* Appx. E. Moreover, consideration of case-specific special findings strays from the categorical analysis required under §924(c)(3)(A) and precedent. *Davis*, 139 S. Ct. at 2327-28; *Mathis v. United States*, 136 S. Ct. 2243, 2248, 2251-52 (2016); *Leocal*, 543 U.S. at 7 (elements clause "requires us to look to the elements . . . of the offense of conviction, rather than to the particular facts relating to petitioner's crime"). That is, for conviction on Count II, the government was not required to prove, "as an element" (*see* §924(c)(3)(A)), any of the special findings invoked for capital sentencing.

Even if one accepts the government's position that case-specific special sentencing findings are relevant, the government ignores that the least culpable *mens rea* enumerated in these special findings is the *mens rea* of "*reckless* disregard for human life." Appx. E, Special Finding 2(e), p. 6. It is still an open question whether an offense with a *mens rea* of recklessness categorically constitutes a crime of violence under the elements clause of §924(c)(3)(A) or §924(e)(2)(B)(i). *See Walker*

v. United States, No. 19-373 (U.S.); *Burris v. United States*, No. 19-6186 (U.S.); *Borden v. United States*, No. 19-5410 (U.S.). Notably, at least one court of appeal has held it does not: the reckless *mens rea* sufficient to prove second-degree murder under 18 U.S.C. §1111 categorically removes that offense from the elements clause. *United States v. Begay*, 934 F.3d 1033, 1036, 1038-41 (9th Cir. 8/19/2019) (second-degree murder under §1111 can be proved by reckless *mens rea*, and thus is not categorically a crime of violence).

The government asks the Court to punt because unrelated claims and issues remain pending in the Court of Appeals. BIO at 8-9. But litigation on this *Johnson/Davis* claim is effectively final, as the Court of Appeals denied a COA on the issue. Appx. A, B.

This Court's jurisdiction explicitly extends to review of cases in the courts of appeals "before or after rendition of judgment or decree." 28 U.S.C. §1254(1); *cf.* 28 U.S.C. §1257 (review of *state-court* decisions, in contrast, is limited to *final* judgments and decrees). Petitioner's case is particularly appropriate for exercise of before-judgment jurisdiction. In the typical case where a COA is not required, awaiting final judgment makes sense: it fosters better presentation of the issues, as all parties will have engaged in merits briefing and argument in the court of appeals, and the court of appeals will have issued a reasoned opinion. In Petitioner's case, however, no merits briefing or reasoned opinion have occurred and none are

anticipated. The only way merits briefing and a reasoned opinion will occur is if this Court intervenes and issues a COA on this issue or remands with instruction to do so.

While a salient goal of the collateral order doctrine is to avoid piecemeal litigation, this Court's intervention at this point would actually foster that goal. If this Court grants a COA and remand, all of Petitioner's COA-worthy issues can be resolved in the Court of Appeals in one round of appellate proceeding.

Particularly in important matters of federal criminal jurisprudence, this Court has been willing to entertain certiorari prior to final judgment from the court of appeals. *E.g.*, *United States v. Booker*, 543 U.S. 220, 229 (2005); *Mistretta v. United States*, 488 U.S. 361, 362 (1989); *United States v. Nixon*, 418 U.S. 683, 686-87 (1974). Petitioner respectfully suggests his would be an appropriate case in which to do so, by granting COA or remanding with instruction to do so.

Contrary to the government's argument (BIO at 8-9), if Petitioner establishes this claim on remand, he is entitled to appropriate relief. Mr. Bolden's §924(c) conviction violates due process and separation of powers because it was dependent upon the unconstitutionally vague §924(c)(3)(B) residual clause. *See Davis*, 139 S. Ct. at 2324-25, 2336. As Count II did not charge an offense that is categorically a crime of violence under the §924(c)(3)(A) elements clause, Mr. Bolden's §924(c) conviction constituted a miscarriage of justice, legal nullity, and jurisdictional defect

in the proceedings. *See Davis v. United States*, 417 U.S. 333, 346-47 (1974) (when an intervening decision establishes that a prisoner was convicted of "an act that the law [no longer] make[s] criminal," "such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under §2255"); *United States v. Brown*, 752 F.3d 1344, 1352 (11th Cir. 2014) (jurisdictional defect exists "when the indictment affirmatively alleges conduct that does not constitute a crime at all because that conduct falls outside the sweep of the charging statute"); *United States v. Barboa*, 777 F.2d 1420, 1423 n.3 (10th Cir. 1985) ("If Barboa pled guilty to something which was not a crime, he is not now precluded from raising this jurisdictional defect, which goes 'to the very power of the State to bring the defendant into court to answer the charge brought against him.'" (*quoting Blackledge v. Perry*, 417 U.S. 21, 30 (1974))).

Moreover, Mr. Bolden's unconstitutional conviction on Count III (under §924(c) and (j)) improperly skewed and tainted the jury's guilt- and penalty-phase determinations as to the remaining counts. For example, the unconstitutional conviction on Count III added improper aggravating weight to the jury's penalty-phase determination on the appropriate sentence on Count II (under §2113(a) and (e)). After all, conviction of two death-qualifying offenses reasonably likely affected jurors' weighing of aggravation and mitigation and reasonably likely affected the balance struck by at least one juror. *Cf. Clemons v. Mississippi*, 494

U.S. 738, 752 (1990) (if one aggravating circumstance is invalidated, Eighth Amendment right to individualized sentence requires actual reweighing of mix of aggravation and mitigation).

CONCLUSION

Petitioner respectfully requests this Court grant a Writ of Certiorari, and grant a Certificate of Appealability on this issue or remand with instruction that the Court of Appeals do so. Alternatively, Petitioner respectfully requests this Court hold his petition in abeyance pending this Court's resolution of *Burris v. United States*, No. 19-6186 (U.S.), *Borden v. United States*, No. 19-5410 (U.S.), and *St. Hubert v. United States*, No. 19-5267 (U.S.)—three cases which pose similarly weighty post-*Davis* §924(c) issues that affect the analysis in Petitioner's case. *See*, *supra*, at 1-2 & nn.5, 6.

Respectfully submitted,

/S/ JENNIFER MERRIGAN
JENNIFER MERRIGAN, ESQUIRE
MO Bar #56733
1901 S. 9th Street, 510
Philadelphia, PA 19148
Tel: (816) 695-2214
j.merrigan@phillipsblack.org

/S/ KELLY D. MILLER
KELLY D. MILLER, ESQUIRE
Asst. Federal Public Defender
Federal Bar #307889PA
100 Chestnut Street, Suite 300
Harrisburg, PA 17101
Tel: (717) 782-3843
Fax: (717) 782-3966
kelly_miller@fd.org

Dated: February 19, 2020

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CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT

I, Jennifer Merrigan, counsel for Petitioner, hereby certify that the Reply to Brief In Opposition in the above-captioned case complies with the 15-page limit set in Supreme Court Rule 33.2(b).

Respectfully submitted,

/S/ JENNIFER MERRIGAN
JENNIFER MERRIGAN, ESQUIRE
MO Bar #56733
1901 S. 9th Street, 510
Philadelphia, PA 19148
Tel: (816) 695-2214
j.merrigan@phillipsblack.org

Dated: February 19, 2020

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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:

Donald Francis Donovan, Carl Micarelli, Morgan A. Davis
DEBEVOISE & PLIMPTON LLP
919 Third Avenue, New York, New York 10022-3916
Telephone: (212) 909-6000
Attorneys for Amicus Curiae the Government of Canada

Allison Behrens, Michael Reilly
United States Attorney for the Eastern District of Missouri
111 South 10th Street, St. Louis, MO 63101
Attorneys for the United States

Solicitor General of the United States
Department of Justice, Room 5616
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

All parties required to be served have been served.

Respectfully submitted,

/S/ JENNIFER MERRIGAN
JENNIFER MERRIGAN, ESQUIRE
1901 S. 9th Street, 510
Philadelphia, PA 19148
Tel: (816) 695-2214
j.merrigan@phillipsblack.org

Dated: February 19, 2020