No._____

In The
Supreme Court of the United States

LAMARCUS HARVEY.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Bank Robbery, (the basis for attempted bank robbery) which may be committed by unintentionally intimidating a victim, or by presenting to the teller a demand note does not have as an element "the use, attempted use, or threatened use of physical force against the person or property of another"

II. Attempted Bank Robbery may be committed without the use, attempted use or threatened use of physical force, and therefore fails to qualify as a "crime of violence" under 18 U.S.C. § 924 (c)'s elements clause

III. While the Eleventh Circuit (and many other circuits) has held fast to the notion that bank robbery by intimidation qualifies as a "crime of violence" under § 924 (c)'s elements clause, some other circuits have recently determined similar state statutes to not qualify as "violent felonies" under the elements clause of the Armed Career Criminal Act, creating a conflict amongst the Circuit courts.

LIST OF PARTIES

Petitioner, Lamarcus Harvey, was the Defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the Plaintiff in the district court and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner files this Petition as an individual, and is a non-corporation,

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

Mr. Harvey is unaware of any proceedings directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Lamarcus Harvey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, 18-13108 (11th Cir. 2020), is unpublished and is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Harvey's criminal case under 18 U.S.C. § 3231. On January 23, 2020 the Eleventh Circuit Court of Appeals affirmed the district court's judgment and sentence. *See* Appendix A. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

18 U.S.C. § 924(c) provides in pertinent part:

> (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 which 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 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less that 7 years;

(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.

18 U.S.C. § 1951provides is relevant part:

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

(b) As used in this section-

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

18 U.S.C. § 2113(a) provides in pertinent part:

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

STATEMENT OF THE CASE

On April 4, 2018, Mr. Harvey pled guilty by written plea agreement to attempted bank robbery, in violation of 18 U.S.C. § 2113 (a) (count two) and possessing a firearm during and in relation to a "crime of violence" in violation of 18 U.S.C. § 924 (c) (count three), and on July 12, 2018 he was sentenced to serve 102 months of imprisonment (42 months in count two and 60 months in count three, to run consecutive).

On April 17, 2018, shortly after Mr. Harvey had entered his plea of guilty, the Supreme Court entered its opinion in *Sessions v. Dimaya*, 584 U.S. ____, 138 S.Ct.1204 (2018), invalidating as vague 18 U.S.C. § 16(b) which defined "violent felony" for immigration purposes.

On May 22, 2018, Mr. Harvey file a motion to dismiss the §924(c) count in light of the holdings in *Johnson v. United States*, 559 U.S. 133, 135 S.Ct. 2331, 192 L.Ed.2d 569 (2015) and *Sessions v. Dimaya* . The motion was denied.

On July 25, 2018 Mr. Harvey appealed to the Eleventh Circuit Court of Appeals arguing that Mr. Harvey's conviction under 18 U.S.C. § 924 (c) was invalid because the crime of attempted bank robbery does not qualify as a "crime of violence" under either § 924(c)(3)(A) (the elements clause) or § 924(c)(3)(B) (the residual clause).

During the pendency of the appeal, the Supreme Court issued the opinion in *Davis v. United States*, 588 U.S. _____ (2019) determining 18 U.S.C. § 924(c)(3)(B)

(the residual clause) to be unconstitutionally vague. Mr. Harvey continued to challenge whether attempted bank robbery qualifies as a "crime of violence" under the elements clause, contending that because the offense of attempted bank robbery could be committed by "intimidation", it does not qualify as a "crime of violence" because intimidation does not necessarily involve "physical" force as required by *Johnson v. United States* and as repeated in *Stokeling v. United States.* Mr. Harvey asserted that intimidation does not carry with it the requisite *mens rea*, and that it merely requires "intellectual or emotional force", which was specifically distinguished from "physical force".

On October 3, 2019, Mr. Harvey filed supplemental authority, listing the cases of *United States v. Shelby*, ____ F.3d ____, 2019 WL 450831 (9th Cir. 2019); *United States v. Jones*, 914 F.3d 893 (4th Cir. 2019) and *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) to show that the Ninth District Court of Appeals and Fourth District Court of Appeals have determined that various offenses did not qualify as predicate offenses under 18 U.S.C. § 924 (e)(2) (B)(i)(A.C.C.A.)because the offense charged could have been committed without "physical force".

On January 23, 2020 the Eleventh Circuit Court of Appeals affirmed Mr. Harvey's conviction and sentence. The court opined that:

> We have previously held that a substantive violation of §2113(a) is a "crime of violence" because a "taking 'by force and violence' entails the use of physical force" and " a taking 'by intimidation' involves the threat to use such force." *In re: Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016)(per curiam)(quoting *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016). We have also held that, when a substantive federal offense qualifies as a crime of violence under

the elements clause of §924(c), an attempt to commit that offense is itself a crime of violence, "given §924(c)'s 'statutory specification that an element of attempted force operates the same as an element of completed force, and the rule that conviction of attempt requires proof of intent to commit all elements of the completed crime.'" *United States v. St, Hubert*, 909 F.3d 335, 352 (11th Cir. 2018) (citation omitted) *abrogated on other grounds by United States v. Davis*, 139 S.Ct.2319 (2019).

REASONS FOR GRANTING THE WRIT

In *United States v. Davis*, No. 18-431, 2019 WL 2570623, at *13 (U.S. June 24, 2019), the Court determined § 924(c)'s residual clause to be unconstitutionally vague, thereby abrogating the Eleventh Circuit's contrary precedent in *Ovalles*. The question on this appeals remains, however, whether Mr. Harvey's attempted bank robbery conviction is considered a "crime of violence" under § 924(c)'s elements clause. Because it is not, this Court should grant Mr. Harvey's petition and reverse the Eleventh Circuit's contrary precedent.

Further, the holdings of the Fourth Circuit Court of Appeals (that Assault, Beating or Wounding a law enforcement officer under South Carolina law for purposes of the ACCA), and of the Ninth Circuit Court of Appeals (that First Degree Robbery under Oregon law for purposes of ACCA) do not qualify as "crimes of violence" squarely bring to the forefront a conflict between appellate circuits as to the interpretation and the reasoning of what constitutes a "crime of violence" under federal law.

I. Bank Robbery (the basis for Attempted Bank Robbery), which may be committed by unintentionally intimidating a victim, or by presenting to the teller a demand note, do not have as an element "the use, attempted use, or threatened use of physical force against the person or property of another".

For an offense to qualify under § 924(c)'s elements (force) clause, it must have "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). Whether bank robbery qualifies as a "crime of violence" under § 924(c)'s force clause is a question

that must be answered categorically– that is, by reference to the elements of the offense, and not by the actual facts of the defendant's conduct. *Stokeling v. United States*, 586 U.S. ____, 139 S.Ct. 544, 202 L.Ed2d 512 (2019) (upholding the use of the categorical approach in analysis of § 924(c)'s force clause). Pursuant to the categorical approach, in the case at bar, if bank robbery may be committed without "the use, attempted use, or threatened use of physical force" then that crime may not qualify as a "crime of violence" under § 924(c)'s force clause.

In *Johnson v. United States*, 559 U.S. 133 (2010), the Court defined "physical force" to mean violent force- that is, force capable of causing physical pain or injury to another person" *Johnson, Id* at 140. In *Stokeling v. United States*, the Court further determined that the level of force necessary to overcome a victim's resistance is inherently violent in the sense contemplated by *Johnson* because robbery that must overpower a victim's will- even a feeble or weak-willed victim necessarily involves a physical confrontation and struggle. *Stokeling*, 139 S.Ct at 553.

However, to qualify as a "crime of violence" under the "use-of-force" or the "elements" clause, the predicate crime must have a *mens rea* of at least "knowingly" or "intentionally". See *Leocal v. Ashcroft*, 543 U.S. 1, 10-11, 125 S.Ct. 377, 382-83, 160 L.Ed.2d 271 (2004); *United States v. Palomina Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010). Because bank robbery can be committed without the "use" of "physical force", it does not qualify as a "crime of violence" under §924(c)'s force clause.

Under 18 U.S.C. § 2113(a), bank robbery may be committed "by force and violence, or by intimidation". Because the statute lists alternative means and not alternative elements, the Court must presume that Mr. Harvey was convicted of the least culpable act- bank robbery by intimidation. *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Moncrieffe v. Holder*, 133 S.Ct 1678 (2013).

According to the Eleventh Circuit's pattern jury instruction, a person may be convicted of bank robbery by "intimidation" where an ordinary person in the teller's position could infer a threat of bodily harm from the defendant's acts". 11th Cir. Pattern Jury Instructions 76.1 (citing *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005)). Notably, it does not require proof of a defendant's state of mind, as required by *Leocal* and *Palomino Garcia*. Indeed, "whether a particular act constitutes intimidation is viewed objectively" *Id.* The defendant need not *intend* for the act to be intimidating. *Id.* Yet, under *Leocal* and *Palomino Garcia* s defendant does not "use" force unless some degree of intent is required. See *Leocal* 543 U.S. at 9, (concluding that the "use" of physical force "most naturally suggests a higher degree of intent than negligent or merely accidental conduct"). Because a bank robbery under § 2113 (a) may be committed by unintentionally intimidating a victim, a conviction does not categorically require the "use" of physical force.

Moreover, a person may "intimidate" a victim without the threatened use of violent "physical force". For instance, the Eleventh Circuit has held that simply presenting a demand letter to a bank teller can support a conviction for bank

robbery through intimidation. *See United States v. Cornillie*, 92 F. 3d 1108, 1110 (11th Cir. 1996). Presenting a demand letter does not necessarily require the threatened use of physical force, violent "physical force" or force "capable of causing physical pain ord injury to another person" as required by *Johnson*.

Further, in *Johnson v. United States*, 559 U.S. 133 (2010), the Court analyzed the term "physical force" and determined that the term "physical" is a modifier which "plainly refers to force exerted by and through concrete bodies-distinguishing physical force from, for example intellectual force or emotional force" *Johnson*, at 138, 130 S.Ct. 1265,

The Court in *Stokeling* reaffirmed that analysis of the term. *Stokeling* at 139 S.Ct 552.

Merriam-Webster describes "intimidating" as "causing a loss of courage or self confidence; producing feelings of fear or timidity"[1]

Mr. Harvey concedes that in certain instances intimidation may involve the risk of physical violence, but urges that such is not always the case. Intimidation may not necessarily be willful, and if, under the categorical approach, analysis should focus on the least of the acts criminalized, then 18 U.S.C. 924(c) should fall, because intimidation does not necessarily involve "force exerted by and through concrete bodies" as required under the *Johnson* and *Stokeling*, but intellectual force or emotional force, which has been specifically distinguished from "physical force"

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[1] See https://merriam-webster.com/dictionary/intimidating.

by the court.

Based upon the foregoing, Mr. Harvey respectfully submits that attempted bank robbery does not categorically qualify as a "crime of violence" under § 924(c)'s force clause.

Given the important and recurring nature of this issue, Mr. Harvey respectfully seeks this Court's review.

II. Attempted Bank Robbery may be committed without the use, attempted use or threatened use of physical force, and therefore fails to qualify as a "crime of violence" under 18 U.S.C. 924 (c)'s elements clause.

The foregoing issue becomes even more substantial when considering attempted bank robbery, which is the offense charged in the case at bar. Because the offense is not typically carried through to fruition, assessment of whether an attempt qualifies as a "crime of violence" becomes more convoluted.

In *United States v. St. Hubert*, 909 F.3d 335 (11th Circ. 2018), cert. denied 139 S.Ct 1394 (2019)(partially overruled on other grounds), the Eleventh Circuit, in the context of the Armed Career Criminal Act, addressed whether attempted Hobbs Act robbery[2] qualified as a "violent felony"[3] in order to enhance his sentence for being a felon in possession of a firearm under 18 U.S.C. 924 (e).

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[2] A person commits Hobbs Act robbery when he "obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery...or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to" commit robbery under the statute. *St. Hubert III*, citing 18 U.S.C. Section 1951(a).

[3] The definition of "violent felony" under the elements clause in 924(e)(2)(B)(i)(Armed Career Criminal Act) is virtually identical to that of a "crime of violence" under 924(c)(3)(A).

In relying heavily on the analysis of previous Seventh Circuit cases, the Eleventh concluded that attempted Hobbs Act robbery qualifies as a "violent felony". The Eleventh noted that in order to be convicted of an "attempt", a defendant must:

1. have the specific intent to engage in the criminal conduct for which he is charged; and
2. have taken a substantial step toward the commission of the offense that strongly corroborates his criminal intent.

St. Hubert, id. at 352 citing *United States v. Jockisch*, 857 F.3d 1122, 1129 (11th Cir.) cert. denied, ___U.S.___. 138 S. Ct. 284, 199 L.Ed2d 181 (2017). They further stated that the intent element of a federal attempt offense requires the defendant to have the specific intent to commit each element of the completed federal offense. *St. Hubert*, id citing to *United States v. Murrell*, 368 F.3d 1283, 1286-87 (11th Cir. 2004), and that to "constitute a substantial step, the defendant must do more than merely plan or prepare for the crime; he or she must perform objectively culpable and unequivocal acts toward accomplishing the crime" *St. Hubert*, id at352, citing to *United States v. Ballinger*, 395 F.3d 1218, 1238 n.8 (11th Cir. 2005) (en banc).

In the final step of the analysis, the Eleventh circuit determined that like a completed Hobbs Act robbery, attempted Hobbs Act robbery qualifies as a crime of violence under elements clause in § 924 (c)(3)(A) because that clause specifically includes the "attempted use of force". The court opined:

Therefore, because the taking of property from a person

> against his will in the forcible manner required [by § 1951(b)(1)] necessarily includes the use, attempted use, or threatened use of physical force, then by extension the attempted taking of such property from a person in the same forcible manner must also include at least the "attempted use" of force.

St. Hubert, id at 352, citing to *Hill v. United States*, 877 F.3d 717, 718-19 (7th Cir. 2017), ("When a substantive offense would be a violent felony under § 924 (e) and similar statutes, and attempt to commit the offense also is a violent felony"), cert. denied, ___U.S. ___, 139 S.Ct 352, ___L.Ed.2d, 2018 (U.S. Oct. 9, 2018). The court also cited *United States v. Armour*, 840 F.3d 904, 908-09 (7th Cir. 2016), holding that attempted armed bank robbery qualifies as a crime of violence under §924 (c)(3)(A).

Mr. Harvey asserts that the logic applied in the *St. Hubert* case was flawed.

He argues that there exists a disconnect in the logic applied when determining whether attempt cases should be classified as "crimes of violence" merely based upon designation as such of the underlying offense. He notes that such flaw was poignantly discussed by Judge Jill Pryor, in her concurring opinion in *Hylor v. United States*, 896 F.3d 1219 (11th Cir. 2018)[4] and in her dissenting opinion in *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. 2019) *(St. Hubert, III)*[5]

In both of these opinions, Judge Prior agreed that the textual definition of a

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[4] The *Hyler* case addressed whether the offense of attempted first degree murder constitutes a"violent" within the meaning of the elements clause of the Armed Career Criminal Act. In that case, the Eleventh Circuit applied the same reasoning presented in *St. Hubert*.

[5] Subsequent to the opinion in 909 F.3d 335 (*St. Hubert II*), Mr. Hubert sought review en banc, the en banc review was denied, with opinion, at 918 F.3d 1174 (*St. Hubert III*).

crime of violence in the elements clause equates the "use of force" with "attempted force" and that therefore it is made clear that actual force need not be used for a crime to qualify as a crime of violence under the statute.

In *St. Hubert, III*, she further agreed that a completed Hobbs Act robbery itself qualifies as a crime of violence, pursuant to § 924(c)'s elements clause, and that therefore, the attempt to commit the Hobbs Act robbery requires that Mr. St. Hubert intended to commit every element of Hobbs Act robbery, including the taking of property in a forcible manner. That is, because "a defendant must intend to commit every element of the completed crime in order to be guilty of attempt" *St Hubert, III*, id at 1212.

Mr. Harvey argues here, as did Judge Pryor in previous cases, that the logical disconnect occurs when applying the final component of the analysis. Logic does not allow that, based upon the mere fact of a conviction upon the attempted offense, the defendant intended to commit every element of the substantive offense. The **intent** to commit and offense is not equal to an **attempt** to commit the offense.

In her example, Judge Pryor illustrates the difference by suggesting an attempted robbery scenario in which overt acts include renting a get-away van, parking a van a block from the bank, and approaching the bank's door before being thwarted without having used, attempted to use, or threatened to use force[6].

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[6]Mr. Harvey cites to this example because the facts in the example are hauntingly similar to his arrest at issue in the instant case.

Upon this fact pattern, Judge Pryor argues:

> Would this would-be robber have *intended* to use, attempt to use, or threaten to use force? Sure. But would he necessarily attempted to use force? No. So an individual's conduct may satisfy all the elements of an attempt to commit an elements-clause offense without anything more than intent to use elements-clause force and some act (in furtherance of the intended offense) that does not involve the use, attempted use, or threatened use of such force.

St. Hubert III, id at 1213.

Mr. Harvey asserts that in the case at bar, the stretch from **intending** to commit an offense to **attempting** to commit the offense is an impermissible leap for the court to take.

Based upon the foregoing, Mr. Harvey respectfully submits that attempted bank robbery does not categorically qualify as a "crime of violence" under § 924(c)'s force clause.

Given the important and recurring nature of this issue, Mr. Harvey respectfully seeks this Court's review.

II. While the Eleventh Circuit (and many other circuits) has held fast to the notion that bank robbery by intimidation qualifies as a "crime of violence" under § 924 (c)'s elements clause, some other circuits have recently determined similar state statutes to not qualify as "crimes of violence" under the elements clause of the Armed Career Criminal Act.

Mr. Harvey was convicted of attempted bank robbery, in violation of § 2113(a) and 2, (count two) and possessing a firearm during and in relation to a "crime of violence" in violation of § 924(c) (count three). He was sentenced to 42

months of imprisonment for the attempted bank robbery charge, and an additional 60 months of imprisonment for the 924(c) count. In his appeal, he argued that the offense of attempted bank robbery does not categorically qualify as a predicate offense under 924(c)'s elements clause because the least of the criminalized acts penalized under the statute is "intimidation", which does not necessarily require the specific intent necessary to commit the crime.

In its opinion, the Eleventh Circuit determined that attempted bank robbery through intimidation categorically qualifies as a "crime of violence", under the elements clause of the statute § 924 (c). citing *In re: Sams*, 830 F. 3d 1234. 1239 (11th Cir. 2016) and to *United States v. St, Hubert*, 909 F.3d 335, 352 (11th Cir. 2018).

The language of § 924 (c)'s elements clause defines a "crime of violence" as, *inter alia*, one that "has as an element the use, attempted use, or threatened use of physical force against the person of another"

This language is virtually identical to the language describing a "violent felony" under 18 U.S.C. § 924 (e) (Armed Career Criminal Act) which defines the term "violent felony" as, *inter alia*, one that "has as an element the use, attempted use, or threatened use of physical force against the person of another".

While the Eleventh Circuit (and many other circuits) has held fast to the notion that bank robbery by intimidation qualifies as a "crime of violence" under § 924 (c)'s elements clause, some other circuits have recently determined similar state statutes to not qualify as "crimes of violence" under the elements clause of the

Armed Career Criminal Act.

In *United States v. Shelby*, ___ F.3d ___, 2019 WL 450831 (9th Cir. 2019), Mr. Shelby appealed the district court's denial of his 28 U.S.C. § 2255 motion in which challenged prior convictions for first degree robbery under Oregon law[7], alleging that conviction under such statute did not qualify as a "violent felony" predicate offense under the Armed Career Criminal Act (ACCA). In reversing the district court, the Ninth Circuit Court of Appeals determined that Mr. Shelby's prior convictions did not qualify as "violent felonies" under the ACCA's "use of force" or "elements" clause because the least chargeable offense under that statute allowed that the offense could be committed if the perpetrator was merely armed with a deadly weapon, regardless of whether he actually used it or made representations about it.

Mr. Harvey argues that the same argument is valid when considering robbery by intimidation, in that neither the Oregon statute nor the federal robbery by intimidation statute allows for consideration of the *mens rea* of the defendant. The Ninth Circuit has determined that offense not to qualify as a "violent felony" for purposes of the ACCA.

Similarly, in *United States v. Jones*, 914 F.3d 893 (4th Cir. 2019), Mr. Jones appealed the district's court's denial of his 28 U.S.C. § 2255 motion requesting that

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[7] See Appendix B for full text of Oregon first degree robbery statute, and third degree robbery statute.

his sentence for assault, beating, or wounding a law enforcement officer[8] be set aside or corrected because under recent Supreme Court decisions, his prior South Carolina conviction no longer qualified as a predicate offense under the ACCA. In reversing and remanding the case for re-sentencing, the Fourth Circuit noted that the least culpable offense that can reasonably be charged under the statute in question is "assault" and because assault can be committed without the use of violent physical force against another, that offense is not a "violent felony" under the ACCA's use of force clause.

In *Jones*, because the offense at issue did not specifically define "assault", the Fourth Circuit looked to South Carolina's definition of the term and stated:

> The Supreme Court of South Carolina has defined an "assault in various but similar ways. For example, an assault is an "attempted battery or an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery

Jones at 905, citing *State v. Sutton,* 92 S.C. 427, 75 S.E.2d 283, 285-286 (2000).

The Court further noted that "In other decisions, the state supreme court has described an assault as 'intentionally creating a reasonable apprehension of bodily harm' in another person by words or conduct." *Jones, Id,* citing *In re: McGee*, 278 S.C. 506, 299 S.E.2d 334 (1983).

It was upon consideration of these definitions of "assault" that the Fourth

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[8] See Appendix C for the complete text of the South Carolina's assault, beating or wounding a law enforcement officer statute.

Circuit Court of Appeals determined that their assault, beating, or wounding a law enforcement officer statute cannot qualify as a violent felony for purposes of the ACCA.

Mr. Harvey asserts that the language in the definitions for assault analyzed by the Fourth Circuit Court of Appeals can also be applied to the concept of intimidation because they each involve the idea of creating apprehension of bodily harm in the victim. Mr. Harvey contends that like Oregon's statue relating to assault, beating, or wounding a law enforcement officer, the bank robbery by intimidation offense should not qualify as "crime of violence" under 18 U.S.C. 924 (c), and that by extension, attempted bank robbery does not qualify.

In considering the applicability of § 924(c)'s elements clause, the Fourth Circuit has defined the issue more simply. In *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc), Mr. Simms had pled guilty to conspiracy to commit Hobbs Act robbery in Count 1, and the brandishing of a firearm in furtherance of the offense in violation of §924 (c)(3) in Count 2. He challenged his conviction of Count 2 on appeal. In the pre-*Davis* opinion, the court of appeals determined that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violent" under §924 (c)(3)'s elements clause because proof of the conspiratorial agreement does not, of necessity, require proof of actual, attempted, or threatened use of physical force. The court stated simply " When a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not 'categorically' a crime of violence under the force clause". *Simms*, id at 233.

Mr. Harvey acknowledges that the cases cited in support of the argument that a conflict in jurisdictions exists involve primarily cases falling under the Armed Career Criminal Act, and not 18 U.S.C. 924 (c), but asserts that the language in the force clause at issue is identical to that set forth in the Armed Career Criminal Act.

This Court has made clear that similar language must be interpreted consistently. In *Johnson*, supra, the Court held that Florida's offense of felony battery did not qualify as a predicate offense for a heightened sentence under the Armed Career Criminal Act. The Court was called upon to interpret the definition of a "violent felony" as it applies to Florida's felony battery offense. The Court found that such offense fell under the "residual clause" of § 924(e)(2)(B)(ii), and then determined that the wording in such statue is impermissibly vague.

Im *Sessions v. Dimaya*, 584 U.S. ___, 138 S.Ct. 1204, 200 L.Ed.2d 512 (2019), the Court was called upon to evaluate the term "crime of violence" within the context of the Immigration and Nationality Act. The specific language at issue was 8 U.S.C. § 16(b), the residual clause of which defines a "crime of violence" as "...any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

In determining that §16(b) of the Immigration and Nationality Act to be void for vagueness, the Supreme Court relied on its prior decision in the *Johnson* case, stating that "*Johnson* is a straightforward decision, with equally straightforward

application here". *Dimaya* at 1213.

In *United States v. Davis*, 588 U.S. ____, 139 S.Ct. 2319, 204 L.Ed 2d 757 (2019), the Court again crossed the bridge. In *Davis*, the Supreme Court, noting the resemblance between the residual clauses under the Armed Career Criminal Act and under 18 U.S.C. 924(c), and relying on the opinions in *Johnson* and *Dimaya*, found the residual clause of 18 U.S.C. 924(c)(3)(B) to be unconstitutionally vague.

Mr. Harvey asserts that by interpreting the same language within different statutes inconsistently, the courts of appeal have established a conflict amongst themselves, and involvement of the Supreme Court is necessary to order to resolve such conflict, and to promote consistency throughout the circuits.

Given the important and recurring nature of this issue, Mr. Harvey respectfully seeks this Court's review.

CONCLUSION

For the above reasons, Mr. Harvey respectfully requests that this Court grant his petition.

Respectfully submitted,

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