No. 19-_____

IN THE
Supreme Court of the United States

BRANDON LEE EDWARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals have universally held that a conviction for a completed offense is categorically a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause when it includes the use, attempted use, or threatened use of physical force against the person or property of another. But what of an *attempted* commission of that crime?

The Eleventh Circuit insists that a conviction for an attempt to commit a crime that, if completed, would categorically fit within the elements clause, automatically qualifies, too. But this "attempts always count" rule is highly controversial. This Court rejected it in *James v. United States*. That opinion requires a fresh examination into whether *the attempt itself* includes the use, attempted use, or threatened use of physical force. Mr. Edwards asks the Court, then, to resolve this query: Is the attempted commission of an offense, like Hobbs Act robbery, automatically and categorically a crime of violence, whether or not the substantial step required for the conviction is violent and even if the attempt offense does not require specific intent?

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Petitioner Brandon Lee Edwards respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The unpublished order of the Eleventh Circuit denying Mr. Edwards' application for a certificate of appealability is included in the appendix below. Pet. App. 1. The district court's order denying Mr. Edwards' 28 U.S.C. § 2255 motion is also included here. Pet. App. 4.

JURISDICTION

The Eleventh Circuit filed an order denying the application for a certificate of appealability on December 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil cases in the courts of appeals. The 150-day deadline (per the Court's general order of March 19, 2020) would have landed on Sunday, May 24, 2020, but instead falls on the next business day: May 26, 2020. Under Supreme Court Rules 13(3) and 13.1, then, Mr. Edwards has filed this petition on time.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A) states in part:

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.

18 U.S.C. § 924(c)(3)(A), the definition of "crime of violence," provides:

[T]he 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.

18 U.S.C. § 1951, titled "Interference with commerce by threats or violence," and known as the Hobbs Act, provides in 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 so to do, 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) (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 a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

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INTRODUCTION

Let's say a defendant is convicted of an *attempt* to commit a crime that, if completed, would categorically fit within § 924(c)'s elements clause. For example, the Hobbs Act forbids a person from obstructing commerce "by robbery or extortion or attempt[ing] or conspire[ing] do to do." Must the court freshly evaluate that independent crime—the attempt itself—to determine if its elements (apart from the completed crime's elements) necessarily and always include the use, attempted use, or threatened use of physical force? Yes, it must. This is the path dictated by this Court's opinion in *James v. United States*, 550 U.S. 192 (2007).

On the other hand, the Eleventh Circuit ignores that inquiry entirely. Both here in Mr. Edwards' case, and originally in a published opinion, *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), the Court chose not to engage the distinct elements of the attempt crime at all. It declared that because a substantive Hobbs Act robbery is categorically a crime of violence within § 924(c)'s elements clause, any attempt to commit that offense must categorically qualify as well. The Court does not evaluate the elements of an attempt crime at all. It ignores the fact that an attempt does not require specific intent and requires proof only that a defendant took a substantial step toward the target crime, yet that step need not be violent, or even criminal. Again, the Eleventh Circuit simply asks whether the completed version of the crime—the Hobbs Act robbery itself—fits within § 924(c)'s elements clause. If so, then the attempt categorically counts, too.

The Eleventh Circuit, through its "attempts always count" rule in *St. Hubert*, has repeated the very sin that this Court corrected in *James v. United States*. The Court should grant the petition for a writ of certiorari for several reasons:

First, the question here is the source of a fractured conflict in the lower courts. The entrenched conflict will continue, and likely widen, until this Court resolves the question presented.

Second, this question is one of national importance that arises frequently in the lower courts. The government often charges and convicts defendants with violations of § 924(c) based upon attempts (Hobbs Act robbery, carjacking, and more) as purported crimes of violence. The § 924(c) crime leads to a vast increase in a defendant's term of imprisonment (a consecutive term of five, seven, or ten years in prison for a first such violation). This Court has already been asked to resolve this question in a number of cases, including the pending petition in *St. Hubert*, No. 19-5267, the Eleventh Circuit's principal case on this question. It is important that a statute apply uniformly throughout the country. On this question, uniformity has proved elusive.

Third, this case is a strong vehicle for the Court to answer the question presented. The facts are undisputed, there are no jurisdictional hurdles for the Court to navigate, and both the district court and the Eleventh Circuit resolved Mr. Edwards' appeal based solely upon *St. Hubert* and the question presented here.

Fourth, the Eleventh Circuit's attempt rule is simply wrong. Again, the court insisted in *St. Hubert* that "attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause because that clause expressly includes 'attempted use' of force." But no fewer than three dissenting Eleventh Circuit judges rejected the panel's "flawed logic as to attempt crimes." The crime of attempted Hobbs Act robbery, they have noted, requires simply the intent to rob plus a substantial step toward that robbery, neither of which requires "the use, attempted use, or threatened use of force," the foundation of the § 924(c) elements clause. The intent to rob does not require force (or attempted force) at all because even when an offender intends merely to bluff, or to make an empty threat, he is guilty of the crime. As for the substantial step, a would-be robber who intends no actual force can engage in peaceable conduct, such as "renting a getaway van, parking the van a block from the [target], and approaching the [target] before being thwarted." He is guilty of an attempted Hobbs Act robbery, but he has carried out the crime without having used, attempted to use, or threatened to use force. This inevitably means that the crime of attempted Hobbs Act robbery, Mr. Edwards' own crime, categorically is not a § 924(c) crime of violence.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

In January 2014, Mr. Edwards pled guilty to five federal crimes: attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count One); use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (Count Two); Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Three); Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Four); and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) (Count Five). The "crime of violence" that formed the foundation of the § 924(c) crime in Count Two was the attempted Hobbs Act robbery described in Count One. At the sentencing hearing, the district court imposed a term of 63 months in prison on the attempted and completed robberies, a concurrent term of 180 months in prison on the § 922(g) crime, plus a consecutive term of 84 months in prison on the § 924(c) crime, for a total sentence of 264 months in prison.

Two years later, Mr. Edwards filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255. In light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), he challenged the § 924(c) conviction because that statute's residual clause, he argued, was void for vagueness and the underlying crime of violence—attempted Hobbs Act robbery—was a crime of violence no more. Mr. Edwards later recast his claim under *United States v. Davis*, once this Court struck down the § 924(c) residual clause. The district court denied Mr. Edwards' § 2255 motion. The court relied upon the Eleventh Circuit's binding precedent in *United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018), where that court held that attempted Hobbs Act robbery qualifies as a crime of violence under §

924(c)(3)(A)'s elements clause. It did so because the Hobbs Act statute targets not only persons who commit robbery, but persons who "attempt to do so," a phrase that purportedly resonates with § 924(c)(3)(A)'s elements clause, which applies to the "attempted use" of force. The district court denied Mr. Edwards a certificate of appealability based upon *St. Hubert*. On December 26, 2019, a judge of the Eleventh Circuit also relied upon *St. Hubert* to deny a certificate of appealability. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

In light of *Davis*, where this Court held that the § 924(c)(3)(B) residual clause is void for vagueness, 139 S. Ct. 2319, 2336 (2019), we say that Mr. Edwards' own § 924(c) conviction is unlawful because the crime of attempted Hobbs Act robbery is no longer a crime of violence at all. Yet the Eleventh Circuit opinion in *United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018), where that court held that an attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause without resort to the now-defunct residual clause, obstructs Mr. Edwards' path to relief. The Eleventh Circuit, through *St. Hubert*, has wrongly insulated him from this Court's rules in both *James* and *Davis*. This Court is presently considering a petition for writ of certiorari in *St. Hubert* on several questions, including this one. *See St. Hubert v. United States*, No. 19-5267 (distributed for conference May 28, 2020). It should visit this question here, too.

1. The Eleventh Circuit's invented rule in *St. Hubert* is deeply flawed, according to at least three Eleventh Circuit judges and multiple district court judges.

What do we make of *Davis* here in Mr. Edwards' case, where he, too, was convicted of an inchoate crime, albeit an attempt rather than a conspiracy? The Eleventh Circuit insisted in *St. Hubert* that "attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause because that clause expressly includes 'attempted use' of force." 909 F.3d at 351. But the *St. Hubert* rule immediately drew criticism. In dissent from a later order denying a petition for rehearing en banc, three

Eleventh Circuit judges declared that the original panel used "flawed logic as to attempt crimes." 918 F.3d 1174, 1212 (11th Cir. 2019) (Jill Pryor, J., joined by Wilson and Martin, JJ., dissenting from denial of rehearing en banc). The crime of attempted Hobbs Act robbery requires simply the intent to rob plus a substantial step toward that robbery, neither of which requires the use, attempted use, or threatened use of force, the foundation of the § 924(c) elements clause. *Id.*

One side note: An attempt requires "the intent to commit the underlying offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 111 (2013) (Scalia, J., dissenting). Thus, an "attempted use" of force, one of the alternatives set forth in § 924(c)(3)(A), requires intent to *use* force. But the crime here does not include the "attempted use" of force at all. An attempted Hobbs Act robbery requires intent to acquire property "by means of actual *or threatened* force." 18 U.S.C. § 1951(b)(1). And a threat of force can be empty, as with pointing an unloaded or inoperable gun. *See, e.g., United States v. Millan-Isaac*, 749 F.3d 57, 61 (1st Cir. 2014) (holding that a Hobbs Act robbery with an inoperable gun is still a robbery). A would-be robber who intends to bluff, when he takes a substantial step towards making his empty threat, attempts not to *use* force (he has no intention of using any) but merely to *threaten* it. And § 924(c)(3)(A) does not extend to crimes that can be committed by an "attempted threat" of force. The statute forbids only the "use, attempted use, or threatened use" of force. The crime, then, is not a crime of violence.

We return to the logic of the *St. Hubert* dissenting judges. As for the attempt's requisite substantial step, a would-be robber who intends no actual force can engage in

a substantial step that is peaceable conduct, say "renting a getaway van, parking the van a block from the [target], and approaching the [target] before being thwarted." 918 F.3d at 1212. He is guilty of an attempted Hobbs Act robbery, but he has carried out the crime "without having used, attempted to use, or threatened to use force." *Id.*

With these examples in place, the *St. Hubert* dissenters turned their attention back to the original panel. "By the alchemy of transmuting intent . . . into attempt," those who say attempted Hobbs Act robbery is a crime of violence claim "anyone convicted of an attempt to commit a crime must have been found beyond a reasonable doubt to have attempted to use force." *Id.* That view, though "does not align with the actual elements of an attempt offense." *Id.*

This dissenting view is exactly right. A federal conviction for attempt requires proof that a defendant (1) had the intent to commit the object crime and (2) engaged in conduct amounting to a substantial step towards its commission. *See, e.g., United States v. Farhane*, 634 F.3d 127, 145 (2d Cir. 2011). "The 'substantial step' requirement for attempt derives from the . . . Model Penal Code, which in the early 1960's sought to 'widen the ambit of attempt liability.'" *Id.* at 146. "Thus, a 'substantial step' must be 'something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.'" *Id.* at 147. Besides these elements, attempted Hobbs Act robbery has a jurisdictional requirement: the intended robbery, if committed, would have resulted in an "any obstruction, delay, or other effect on commerce." *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016).

None of that is the "use, attempted use, or threatened use of physical force." § 924(c)(3)(A). Intent to rob is simply a mental state and thus requires no actual, attempted or threatened force. The same is true of intending a robbery that, if committed, would affect interstate commerce. That leaves the conduct element: taking a substantial step towards committing a robbery. "A defendant may be convicted of attempt even where significant steps necessary to carry out the substantive crime are not completed." *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003). For example, "reconnoitering the place contemplated for the commission of the crime" shall "not be held insufficient as a matter of law" to constitute a substantial step. MODEL PENAL CODE § 5.01(2)(c). Where would-be robbers "reconnoitered the place contemplated for the commission of the crime and possessed the paraphernalia to be employed in the commission of the crime, . . . either type of conduct, standing alone, was sufficient as a matter of law to constitute a 'substantial step.'" *United States v. Jackson*, 560 F.2d 112, 120 (2d Cir. 1977).

The *St. Hubert* dissenters are not alone. Several district courts in other parts of the country have embraced their view of attempted Hobbs Act robbery. In *United States v. Taylor*, the court "concur[ed] with Judge Pryor and two other judges of the 11th Circuit that, 'it is incorrect to say that a person necessarily attempts to use physical force within the meaning of 924(c)'s elements clause just because he attempts a crime that, if completed would be violent.'" 2020 WL 93951, at *6 (E.D.N.Y. Jan. 8, 2020)." In *Lofton v. United States*, the court engaged in a thorough exploration of *St. Hubert*, both the panel opinion and dissent from the denial of rehearing, and sided with the dissenters. 2020

WL 362348 at *5-*9 (W.D.N.Y. Jan. 20, 2020). Wrote the court:

> As Judge Pryor explained in *St. Hubert*, "*[i]ntending* to commit each element of a crime involving the use of force simply is not the same as *attempting* to commit each element of that crime." 918 F.3d at 1212 (emphases in original). While proof of intent to commit each element of the substantive offense is necessary to convict someone of an attempt crime, proof of attempt to commit each element of the substantive offense is not. *Id.* . . . [I]t was not necessary, in order to sustain the convictions as supported by legally sufficient evidence, to introduce proof that the defendants attempted to actually commit the act of taking property from another person, in their presence, against their will, by creating in them a fear of injury.

Id. at *9. *See also United States v. Cheese*, 2020 WL 705217, at *2-*4 (E.D.N.Y. Feb. 12, 2020) ("Because a defendant who takes a substantial step in furtherance of Hobbs Act robbery can do so without the use, threatened use, or attempted use of force, attempted Hobbs Act robbery cannot be a crime of violence under the categorical analysis."). In the end, these district courts, following the lead of the *St. Hubert* dissenters, held that attempted Hobbs Act robbery is not a § 924(c) crime of violence.

The widening gap shows that the question requires resolution by this Court. There is much at stake here. In the end, Mr. Edwards' § 924(c) conviction is unlawful after *Davis* because his predicate offense does not qualify as a

crime of violence under § 924(c)(3)(A) and he is now serving an additional seven years in prison for a phantom crime.

2. The Eleventh Circuit's holding that an attempted Hobbs Act robbery automatically qualifies as a crime of violence under § 924(c)'s elements clause betrays this Court's decision in *James v. United States*, 550 U.S. 192 (2007).

In *Curtis Johnson v. United States*, this Court construed the "physical force" language in the ACCA's elements clause to require "*violent* force," which it explained was a "substantial degree of force" "capable of causing pain or injury to another person." 559 U.S. 133, 140 (2010). The elements clause in § 924(c)(3)(A) is identical to the ACCA's elements clause, except that it may be satisfied by any offense that includes violent force against a person *or property*. In this way, if an *attempted* Hobbs Act robbery does not categorically require the use or threat of *violent* force against person or property, the crime cannot serve as a foundation for any § 924(c) conviction.

A. The decision below, and the Eleventh Circuit's *St. Hubert* rule, betrays the holding in *James v. United States*, 550 U.S. 192 (2007).

The fact that a completed offense is categorically a crime of violence does not inevitably mean that an *attempt* to commit that offense automatically is also categorically a crime of violence. In *James v. United States*, this Court rejected that very logic by the very same court of appeals. 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, the Eleventh Circuit relied on prior circuit case law holding that an attempt to commit an offense that was an ACCA violent felony under the residual clause was also a violent felony under the residual clause. *Id.* at 1156. But in *James* this Court rejected this presumptive reasoning. The Court instead peered into Florida law to determine the evidence required to support a conviction for Florida attempted burglary, and only then considered whether that conduct independently qualified the attempted burglary offense as an ACCA violent felony.

First, the Court noted, although "Florida's attempt statute requires only that a defendant take 'any act toward the commission' of a completed offense," the Florida courts had "considerably narrowed its application." *James*, 550 U.S. at 202. The Court concluded that although the statutory language could be read to "sweep[] in merely preparatory activity that poses no real danger of harm to others—for example, acquiring burglars' tools or casing a structure while planning a burglary," the Florida Supreme Court had read the statute, "in the context of attempted burglary," to "require[d] an 'overt act directed toward entering or remaining in a structure or conveyance," such that "[m]ere preparation is not enough." *Id.* Once the Court carefully examined Florida law in this way, it characterized the "pivotal issue" in *James* as "whether overt conduct directed toward entering or remaining in a dwelling, with the intent to commit a felony therein," qualifies as a "violent felony" under the ACCA.

Only after determining precisely what Florida law required to support a conviction for attempted burglary did the Court conclude that the risk created by such conduct was, indeed, sufficient to qualify Florida attempted burglary as a "violent felony" within the ACCA's residual clause. *James*, 550 U.S. at 201-05. Put another way, the Court did not assume that simply because burglary was a qualifying ACCA predicate, an *attempted* burglary automatically qualified, too. Instead, the Court accepted Florida's defined boundaries of its own criminal attempt statute, and then considered whether that conduct qualified as an ACCA predicate. And *James* was clear that mere "preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure" would not meet the then-all-inclusive residual clause. *Id*. at 204-05.

In *St. Hubert*, the Eleventh Circuit did precisely what *James* refused to do. It concluded that because a substantive Hobbs Act robbery is categorically a crime of violence within § 924(c)'s elements clause, an attempt to commit that offense must categorically qualify as well. But not only did the Eleventh Circuit adopt an automatic rule just like the one the Court rejected in *James*, it also did so with respect to an offense that plainly allows a conviction premised on mere preparatory conduct that does not involve violent force. And, as we described above, this is exactly why the crime of attempted Hobbs Act robbery stands apart from Hobbs Act robbery itself. The fate of one is not tied to the other. This was *St. Hubert's* principle mistake, a mistake that has now bled into Mr. Edwards' own case.

B. The Eleventh Circuit's flawed holding in *St. Hubert* was based on a mistaken expansion of the Seventh Circuit's decision in *Hill v. United States.*

The case law on *attempted* Hobbs Act robbery confirms that the "substantial step" needed for a conviction need not itself involve the use, attempted use, or threatened use of violent force against any person or property. Indeed, as we described above, the crime may involve no more than planning, preparing for, travelling to, or even beginning one's travel to an agreed-upon robbery destination—all without intending to ever engage in violence. *See, e.g.*, *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016) (defendants made plans to travel from Chicago to New York to rob a diamond merchant, they believed he would turn the diamonds over *without the need to do anything to him*, and they travelled as far as New Jersey in a rented van before they were arrested) (emphasis added); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007) (defendant and his compatriots planned a robbery, surveilled the target, prepared vehicles, and gathered at the designated assembly point on the day scheduled for the robbery); *United States v. Gonzalez*, 322 Fed. Appx. 963, 969 (11th Cir. 2009) (unpublished) (defendants simply planned a robbery, and travelled to a location in preparation for it).

In *St. Hubert*, the Eleventh Circuit held that *attempted* Hobbs Act robbery was a crime of violence because the underlying substantive offense was categorically violent, "the attempted taking of [] property in such manner must also include at least the "attempted use' of force," 883 F.3d at 1333-34, and cited *United States v. Wade*, 458 F.3d 1273,

1278 (11th Cir. 1006); *Hill v. United States*, 877 F.3d 717, 718-19 (7th Cir. 2017); and *United States v. Armour*, 840 F.3d 904, 908-09 (7th Cir. 2016)).

How did the *St. Hubert* panel go astray? The court embraced and adopted the Seventh Circuit's reasoning in *Hill* that because "a defendant must intend to commit every element of the completed crime in order to be guilty of attempt," an attempt to commit *any* crime "should be treated as an attempt to commit every element of that crime." 883 F.3d at 1334 (citing *Hill*, 877 F.3d at 719). Although *Hill* was an ACCA case involving an attempted murder predicate, the Eleventh Circuit found *Hill* entirely "analogous." *Id.* at 1334. "Under *Hill*'s analysis," it found, the intent to commit violence was an element of a Hobbs Act robbery crime due to the "taking in a forcible manner" requirement, and given that intent, an attempted Hobbs Act robbery was a "crime of violence." *Id.* (noting with significance that "under *Hill*'s analysis," § 924(c)(3)(A) "equates the use of force with attempted use of force;" "thus, the text of § 924(c)(3)(A) makes clear that actual force need not be used for a crime to qualify under § 924(c)(3)(A)"). Because St. Hubert attempted to commit a crime of violence (Hobbs Act robbery), the court found he necessarily intended to commit violence, that intent met the elements clause, and for that reason, his *attempted* Hobbs Act robbery was a crime of violence under § 924(c)(3)(A). *Id.* & n. 15; *id.* 1336-37.

Yet the *St. Hubert* panel chose poorly by blindly adopting the Seventh Circuit's apparent presumption in *Hill* that the mere "intent" to commit a violent crime alone suffices to qualify an attempt offense as a violent crime. This presumption was wrong for several reasons. To begin

with, the out-of-circuit cases *Hill* relied upon, including *Wade*, 458 F.3d at 1278, were either distinguishable, abrogated, or both. None focused upon whether an attempt should categorically be treated the same as the object of the attempt under the ACCA. In *James*, this Court expressly rejected this very reasoning in *Wade* (which had followed the Eleventh Circuit's errant decision in *James*). *See* 458 F.3d at 1277-78. *Hill* ignored that crucial nuance. Second, *Hill* adopted the concurring opinion in *Morris v. United States*, which proposed that an attempt to commit an ACCA violent felony should categorically be an ACCA violent felony based upon the unsupported assumption—of no relevance in any § 924(c) case, and one expressly rejected in *James*—that Congress must have intended the ACCA to include attempts. 827 F.3d 696, 699 (7th Cir. 2016) ("I suspect the Congress that enacted ACCA would have wanted the courts to treat such attempts at violent felonies as violent felonies under the Act.") Third, *Hill* was an ACCA case predicated upon an Illinois attempted murder conviction. The issues there were not "analogous" to whether an attempted Hobbs Act robbery is a crime of violence within §924(c)(3)(A), that is, there is no "intent to kill" requirement in a Hobbs Act robbery, as there is in attempted murder case.

Indeed the Eleventh Circuit has repeatedly emphasized that there is no specific intent requirement for a completed Hobbs Act robbery under § 1951(a)—indeed, "the only *mens rea* required for a Hobbs Act robbery conviction is that the offense be committed knowingly." *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001). So there can be no specific intent requirement for an attempted Hobbs Act robbery conviction under § 1951(a) either. *See also United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir. 1993)

(distinguishing Hobbs Act robbery, from common law robbery, in that the latter requires specific intent but the former does not). For this reason, too, an attempted Hobbs Act robbery is not a crime of violence under § 924(c)'s elements clause.[1]

C. Because of the important and far-reaching nature of the attempted Hobbs Act rule in *St. Hubert*, and given the Eleventh Circuit's refusal to reconsider that opinion en banc, the issue warrants review and resolution in this Court, and this case is an excellent vehicle in which to do that.

The fallout from the Eleventh Circuit's wholesale adoption of *Hill*, without considering *James*, has been swift, expansive, and prejudicial not only to defendants like Mr. Edwards convicted of § 924(c), but also to defendants sentenced under the two harshest recidivist enhancements in the United States Criminal Code. In *Hylor v. United States*, the Eleventh Circuit extended the reasoning of *St. Hubert* to the ACCA and held that attempted murder is categorically a "violent felony" within the ACCA's elements clause based upon the defendant's mere *intent* to commit murder, a violent crime. 896 F.3d 1219, 1223 (11th Cir. 2018). Judge Jill Pryor concurred in the result only, agreeing that she was bound to do so because the majority holding that "an attempted elements clause offense is always itself an elements clause offense" was "a correct application of *St. Hubert*'s holding and necessary reasoning." *Id.* at 1225 (Jill Pryor, J., concurring in the

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[1] This portion of Mr. Edwards' petition for writ of certiorari, and others, are drawn heavily from the pending petition in *St. Hubert v. United States*, No. 19-5267.

result) (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1301-04 (11th Cir. 2001), where the court categorically rejected any exception to the requirement that prior precedent be followed, even where the prior panel overlooked a valid argument or precedent, and mandated that subsequent panels "obediently" follow prior panel precedents even if convinced they are wrong).

While "obediently" applying the holding and "necessary reasoning" of *St. Hubert*, Judge Pryor harshly criticized that outcome for some of the very reasons Petitioner has done so here. *St. Hubert*'s logic was not only "flawed," but "plainly wrong," Judge Prior explained, because (1) an attempt offense "may be completed without the perpetrator every actually using, attempting to use, or threatening to use physical force," and (2) "having the *intent* to commit a crime involving the use of force simply is not the same thing as using, attempting to use, or threatening to use force." *Id.* at 1225-26 (Jill Prior, J., concurring) (noting that in an attempted robbery, it is "readily conceivable" that a person may engage in an overt act such as simply renting a van, without having used or attempted to use force).

The *Hylor* opinion confirms that the Eleventh Circuit will continue to extend its erroneous *St. Hubert* attempt rule beyond the § 924(c) context to the elements clause of the ACCA. And the Eleventh Circuit has not stopped at the ACCA. The court later denied an application for certificate of appealability in a § 2255 case where a defendant convicted of attempted Hobbs Act robbery was sentenced to mandatory life imprisonment pursuant to 18 U.S.C. § 3559(c). In *Richitelli v. United States*, the court said it was "clear," based upon *St. Hubert*, that attempted Hobbs Act robbery fit within the § 3559(c)(2)(F)(ii) elements clause.

Order at 8 (No. 17-10482) (11th Cir. Feb. 7. 2019). In finding that the conclusion was not even "debatable" among reasonable jurists, *id.* at 7-8, the Eleventh Circuit ignored the fact that this Court had GVR'd *Richitelli* after *Dimaya* based upon the Solicitor General's concession that § 3559(c)(2)(F)(ii)'s residual clause was "similar to" § 16(b), and the Eleventh Circuit had "incorrect[ly]" denied Richitelli a COA on grounds that attempted Hobbs Act robbery categorically met § 3559(c)(3)(F)(ii)'s elements clause. The Solicitor General explained:

> The Hobbs Act includes robberies committed "by means of actual or threatened force or violence, or fear of injury" to the victim's "person *or property*, 18 U.S.C. §1951(b)(1) (emphasis added), while Section 3559(c) refers only to the use or threatened use of force "against the *person* of another," 18 U.S.C. §3559(c)(2)(F)(ii) (emphasis added).

Memorandum of United States, *Richitelli v. United States*, at 2 (May 29, 2018) (No. 17-8244); *see Richitelli v. United States*, 139 S. Ct. 59 (Oct. 1, 2018) (granting certiorari, vacating, and remanding for further consideration of the mandatory life sentence pursuant to §3559(c), in light of *Dimaya*).

As a result of the Eleventh Circuit's extension of *St. Hubert*'s reasoning to the ACCA and to § 3559(c), defendants with a host of state and federal attempt offenses involving no force or attempted use of force— for example, Florida's attempt offense only requires commission of "[s]ome appreciable *fragment* of the crime," *Hylor*, 896 F.3d at 1226 (Jill Pryor, J., concurring) (quoting *Hernandez v. State*, 117 So. 3d 778, 784 (Fla. Dist. Ct. App.

2013)—and no specific intent to commit a violent offense, now qualify for the two most draconian enhancements in federal criminal law.

That is not all. Courts throughout the country—both at the circuit court and district court levels—have now followed *St. Hubert* to deny relief on attempt crimes used as predicates for both § 924(c) and the ACCA. *See, e.g.*, *United States v. Dominguez*, — F.3d —, 2020 WL 1684084, at *2 (9th Cir. Apr. 7, 2020); *United States v. Ingram*, 947 F.3d 1021, 1026 (7th Cir. 2020) (applying *Hill*); *United States v. Neely*, 763 Fed. Appx. 770, 780 (10th Cir. Feb. 20, 2019); *United States v. Holland*, 749 Fed. Appx. 162, 165 (4th Cir. 2018) (unpublished); *Wallace v. United States*, 2020 WL 2194002, at *5 (M.D. Tenn. May 6, 2020); *United States v. Adulkader*, 2019 WL 6351257, at *4-5 (S.D. Ohio Nov. 27, 2019); *United States v. Jefferys*, 2019 WL 5103822, at *7 (E.D.N.Y. Oct. 11, 2019); *United States v. Doyle*, No. 2:18-CR-177 (E.D. Va. July 17, 2019) (and other E.D. Va. cases cited therein); *Jones v. Warden, FMC Lexington*, 2019 WL 3046101 at *3 (E.D. Ky. July 11, 2019); *United States v. Romero-Lobato*, 2019 WL 2179633 at *4 (D. Nev. May 17, 2019); *United States v. Lopez*, 2019 WL 2077031 at *2 (E.D. Cal. May 10, 2019); *Savage v. United States*, 2019 WL 1573344 at *4 (S.D. Ohio Apr. 11, 2019); *United States v. Johnson*, 2018 WL 3518448 at *4 & n.19 (D. Nev. July 19, 2018). All of these courts have followed *St. Hubert* reflexively, without even noticing that the Seventh Circuit's *Hill* opinion is a deeply flawed foundation.

The Fourth Circuit in *Holland*, notably, broadly cited both *Hill* and *St. Hubert* in a manner that will sweep in every possible attempt offense as ACCA predicate. *See, e.g.*, *Holland*, 749 Fed. Appx. at 166 (citing *Hill* and *St. Hubert*

as confirming that "[s]everal circuits have held that attempting to commit a substantive offense that qualifies as violent felony also constitutes a qualifying violent felony"). The Tenth Circuit did the same in *Neely*.

The denial of rehearing en banc in *St. Hubert* has effectively closed the book on, and precludes meaningful judicial review of, any attempt crime used as a § 924(c), ACCA, or § 3559(c) predicate. The prejudice from the Eleventh Circuit's erroneous rule will increase unless the Court grants certiorari to clarify the law in this regard. As Judge Jill Pryor has rightly noted, district courts within the Eleventh Circuit already "lead the pack in imposing sentences under these enhancement statutes," that is, the ACCA and § 924(c). 918 F.3d at 1212. She noted that the Sentencing Commission's data showed that in 2016 the most ACCA sentences were imposed in the Eleventh Circuit (no less than 26.6 percent), "by far the most of any circuit" and only the Fourth Circuit surpassed the Eleventh Circuit in handing down more sentences under § 924(c). 918 F.3d at 1213 n.2. For that reason, Judge Pryor lamented that "[i]t is critically important that we of all circuits get this right." *Id*.

This observation is even truer for this Court. This case presents an excellent vehicle for the Court to assure that not only the Eleventh Circuit—but the other courts that have reflexively followed the Eleventh Circuit on this issue—"get it right." Mr. Edwards pressed the issue below, the district court and Eleventh Circuit passed judgment on it, and the outcome will resolve the § 924(c) conviction on Count Two here because *Davis* voided the residual clause. Mr. Edwards received a consecutive 84-month (or seven-year) sentence on this phantom crime, a crime built upon

an attempted Hobbs Act robbery. A ruling in his favor on this issue would have a tremendous impact on him, too.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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