No. _____

IN THE

Supreme Court of the United States

VICTOR WALKER,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attempt to commit an offense that has as an element the use of physical, violent force categorically qualifies itself as "a crime of violence" under 18 U.S.C. § 924(c)(3)(A)'s elements clause, even though the attempt offense does not require use or threat of "violent force?"

LIST OF PARTIES

Petitioner, Victor Walker, movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Victor Walker's sentence was enhanced under § 924(c), based on his conviction predicated on attempted Hobbs Act robbery. He respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his 28 U.S.C. § 2255 motion on the issue of whether attempted Hobbs Act robbery qualifies as an Armed Career Criminal Act (ACCA) predicate after this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that imposing an increased sentence under the residual clause of the ACCA violated due process).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Walker's § 2255 motion to vacate in *Walker* v. *United States*, 796 Fed. Appx. 702 (11th Cir. 2020), is provided in Appendix A-1. The district court order dismissing Mr. Walker's § 2255 motion to vacate sentence, *Walker v. United States,* Case No. 5:16-cv-00422-10PRL (M.D. Fla. Aug. 24, 2016), is provided in Appendix A-2.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Walker's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under § 2255. The district court denied Mr. Walker's § 2255 motion on August 24, 2016. *See* Appendix A-2. Mr. Walker subsequently filed a timely notice of appeal and a motion for a certificate of appealability (COA) in the Eleventh Circuit, which was granted on February 16, 2017. The Eleventh Circuit Court of Appeals affirmed the district court's denial of Mr. Walker's § 2255 motion.

See Appendix A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

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

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years
>
> * * *
>
> (c)(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.

* * *

(e)(2)(B)(i) provides in pertinent part:

> **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
>
> > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

28 U.S.C. § 2244(b)(3) provides:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2253(c) provides in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

18. U.S.C. § 1951 provides in pertinent 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) 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 a relative or member of his family or of anyone in his family or anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

In November 2010, Mr. Walker entered a guilty plea to five counts, including conspiracy to commit Hobbs Act robbery (Count One); substantive Hobbs Act robbery (Count Three); attempted Hobbs Act robbery (Count Five); and two counts under 18 U.S.C. § 924(c) predicated on substantive robbery (Count Four), and attempted robbery (Count Six).

On November 1, 2010, Mr. Walker was sentenced to 235 months' imprisonment on Counts One, Three, and Five (to run concurrently with each other); 84 months' imprisonment on Count Four (to run consecutively to all other counts); 300 months' imprisonment on Count Six (to run consecutively to all other counts), followed by 60 months' supervised release.

After this Court's decision in *Johnson v. United States*, 135 S. Ct. 2251 (2015), Mr. Walker moved to vacate his sentence under 28 U.S.C. § 2255, stating that under *Johnson*, his § 924(c) convictions were imposed in violation of the Constitution's guarantee of due process. The district court denied Mr. Walker's motion, holding *Johnson* did not apply to § 924(c). Mr. Walker filed a timely notice of appeal and request for a certificate of appealability. The district court denied the request.

The Eleventh Circuit Court of Appeals granted Mr. Walker a certificate of appealability on the following issue: whether Mr. Walker's conviction for using and carrying a firearm during and in relation to the crime of violence of attempted Hobbs Act robbery was of *Johnson*. The Eleventh Circuit Court of Appeals affirmed the district court's denial of Mr. Walker's § 2255 motion.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE IMPORTANT QUESTION OF WHETHER ATTEMPTED HOBBS ACT ROBBERY QUALIFIES AS A PREDICATE OFFENSE BASED ON 18 U.S.C. § 924(C)'S ELEMENT'S CLAUSE UNDER THE ARMED CAREER CRIMINAL ACT (ACCA)

In denying Mr. Walker's § 2255 motion to vacate, the Eleventh Circuit Court of Appeals erred when it further perpetrated the flawed reasoning it created in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), holding that attempted Hobbs Act robbery requires the use or threat of violent force against person and property. The Eleventh Circuit's *St. Hubert* decision conflicts with *James v. United States*, 550 U.S. 192, 201 (2007), and Seventh Circuit Court of Appeals' decision in U*nited States v. D.D.B.*, 903 F.3d 684 (7th Cir. 2018). This Court should grant certiorari to resolve this conflict and hold that an offense that is categorically a "violent felony" does not necessarily lead to the conclusion that an attempt to commit that offense is also automatically a "violent felony."

A. Section 924(c)'s element clause requires a categorical analysis.

In *Curtis Johnson v. United States*, 559 U.S 133 (2010), 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." *Id*. at 140. The elements clause in § 924(c)(3)(A) is worded identically to § 924(e)(2)(B)(i), except that it may be satisfied by any offense that "has as an element the use of threat of physical force," that is, "violent force," against a "person or property."

Whether attempted Hobbs Act robbery qualifies as a "violent felony" under the elements clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). "A crime cannot categorically be a 'crime of violence' if the statute of conviction punishes any conduct not encompassed by the statutory definition of a 'crime of violence.'" *United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016). As such, attempted Hobbs Act robbery does not categorically require the use or threat of violent force against person and property and Mr. Walker's § 924(c) conviction must be vacated. *See Shepard v. United States*, 544 U.S. 13, 21 (2005).

B. The decision below conflicts with *James v. United States*, 550 U.S. 192 (2007).

The fact that a completed offense is categorically a "violent felony" does not necessarily lead to the conclusion that an attempt to commit that offense is also automatically a "violent felony." This Court rejected that logic in *James v. United States*, 550 U.S. 192, 201 (2007) (overruled on other grounds by *Johnson v. United States*, 135 S. Ct. 2551 (2015)), where the Eleventh Circuit presumed that every attempt to commit a "violent felony" of burglary, as 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), *aff'd*, 550 U.S. 192. The Court, however, rejected such presumptive reasoning and instead delved deeply into Florida law to consider if a conviction for Florida attempted burglary was sufficient to qualify the attempted burglary offense as a "violent felony" under the ACCA.

The Court noted that 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. Specifically, 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[e] an 'overt act directed toward entering or remaining in a structure or conveyance," such that "[m]ere preparation is not enough." *Id*.

The Court did not assume that because burglary was a qualifying ACCA predicate, attempted burglary automatically qualified as well. Rather only after fully analyzing Florida law's requirements to support a conviction for attempted burglary did the Court conclude that the risk created by such conduct was sufficient to qualify Florida attempted burglary as a "violent felony" within the ACCA's residual clause. *James*, 550 U.S. at 201–05. The Court was also clear "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. As such, the Eleventh Circuit erred by adopting the automatic rule rejected in *James*. Attempted Hobbs Act robbery, cannot, and should not, meet the narrower elements clause.

C. The decision below conflicts with the Seventh Circuit's decision in *United States v. D.D.B.*, 903 F.3d 684 (7th Cir. 2018).

The caselaw on attempted Hobbs Act robbery confirms that the "substantial step" needed for conviction need not itself involve the use, attempted use, or threatened use of violent force against any person or property and may involve no more than planning, preparing for, travelling to, and beginning one's travel to an agreed-upon robbery destination *without intending to ever engage in violence*. *See*, *e.g., United States v. Wrobel*, 841 F.3d 450, 455–456 (7th Cir. 2016) (defendants travelled as far as New Jersey in a rented van with plans to travel from Chicago to New York to rob a diamond merchant whom they believed would turn the diamonds over without the need to do anything to him) (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) (defendants simply planned a robbery, and travelled to a location in preparation for it).

The Eleventh Circuit Court of Appeals erred by blindly adopting and continuing to adhere the Seventh Circuit's presumption in *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017), an ACCA case predicated upon an Illinois attempted murder conviction, that the mere "intent" to commit a violent crime alone suffices to qualify an attempt offense as a violent crime.[1] Not only were the issues in *Hill* not

[1] The Eleventh Circuit adopted this reasoning in *United States v. St. Hubert*, 883 F.3d 1319 (Feb. 28, 2018). The case was vacated in light of this Court's decision

"analogous" to whether an attempted Hobbs Act robbery is a crime of violence within § 924(c)(3)(A)—there is no "intent to kill" requirement in a Hobbs Act robbery, as there is in attempted murder or attempted carjacking case—in relying on *Hill*, the Eleventh Circuit neglected to determine whether *Hill* even remained good law in the Seventh Circuit Court of Appeals.

In fact, the Seventh Circuit made clear in *United States v. D.D.B.*, 903 F.3d 684 (7th Cir. 2018), that the rule in *Hill* must be limited to attempt offenses that require specific intent to commit the underlying offense (the "critical" premise of *Hill* was that "the attempt law contains an intent provision because 'one must intend to commit every element of the completed crime in order to be guilty of attempt."). *Id.* at 690. Specifically, the Seventh Circuit held that Indiana attempted robbery does not require the state to show any intent—i.e., that the defendant intended to commit the robbery; rather, the state must simply show that he took a substantial step towards commission of the robbery crime. *Id.* at 691–93.

Similarly, Mr. Walker's attempted Hobbs Act robbery conviction is analogous to Indiana robbery as § 1951(a) of the Hobbs Act statute includes the inchoate offense

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in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and the Eleventh Circuit's en banc decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018). The Eleventh Circuit's new decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), readopted and reinstated the jurisdictional and substantive Hobbs Act robbery rulings from the original case "as previously written." *Id.* at 337, 340-51. The court devoted more attention in its new decision, however, to the question of whether—under the categorical approach—an attempted Hobbs Act robbery meets the elements clause. While stating that it was "readopt[ing] and reinstat[ing]" its first decision on that issue, the Eleventh Circuit also acknowledged that it had also added "some additional analysis along the way." *Id.* at 337. In particular, the court re-adopted and continued to follow the analysis in *Hill.*

of "attempted Hobbs Act robbery," together with the completed crime. 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). Accordingly, there can be no 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 the same reasons the Seventh Circuit in *D.D.B.* held that that attempted Indiana robbery was not a "violent felony" within the ACCA's elements clause, attempted Hobbs Act robbery is not a "crime of violence" within § 924(c)'s elements clause. Had Mr. Walker appealed his conviction to the Seventh Circuit in lieu of the Eleventh Circuit, the former would have been compelled by *D.D.B.*, to find that attempted Hobbs Act robbery is not categorically a "crime of violence."

D. The question presented is important and worthy of this Court's Attention because the important and far-reaching.

The Eleventh Circuit's decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), is extremely prejudicial to defendants identically-situated to Mr. Walker, but also to other defendants sentenced under harsh recidivist enhancements in the Criminal Code. As a result of the Eleventh Circuit's extension of *St. Hubert*'s reasoning to the ACCA and 18 U.S.C. § 3559(c), and its unforgiving "prior panel precedent rule," Eleventh Circuit defendants with a host of state and federal attempt

offenses involving no force or attempted use of force, and/or no specific intent to commit a violent offense, now qualify for the two most draconian enhancements in the Criminal Code.

Moreover, courts throughout the country—both at the circuit court and district court level—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. Neely*, 763 Fed. Appx. 770, 780 (10th Cir. Feb. 20, 2019) (*citing United States v. Rinker*, 746 Fed. Appx. 769, 772 & n. 19 (10th Cir. Aug. 21, 2018) which had also so held, citing *St. Hubert*), *pet. for cert. filed* May 21, 2019 (No. 18-9415); *United States v. Holland*, 749 Fed. Appx. 162, 165 (4th Cir. 2018); *United States v. Doyle*, 2019 WL 3225705 at *4 (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. Calif. 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, as in Mr. Walker's case, have followed *St. Hubert* reflexively, without even noticing that the Seventh Circuit in *D.D.B.* had limited *Hill* in a manner that would be directly applicable to attempted Hobbs Act robbery. There will be no independent analysis of these issues by a reviewing court in the Eleventh Circuit, or in § 924(c) or ACCA cases, unless this Court intervenes.

As Judge Jill Pryor has rightly noted, district courts within the Eleventh Circuit already "lead the pack" in imposing sentences under the ACCA and § 924(c). *See United States v. St. Hubert*, 918 F.3d 1174 (Mem) (11th Cir. 2019) (noting that in 2016, the Sentencing Commission's data indicates that the most ACCA sentences were imposed in the Eleventh Circuit and only the Fourth Circuit surpassed the Eleventh in handing down more sentences under § 924(c)). For that reason, Judge Pryor rightly stated, "It is critically important that we of all circuits get this right." *St. Hubert*, 918 F.3d at 1213 n. 2. 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 on this issue—"get it right." A ruling in Mr. Walker's favor on this issue would have a tremendous impact.

CONCLUSION

Mr. Walker respectfully seeks this Court's review. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX