No. _____

IN THE

Supreme Court of the United States

BAKARI MCCANT,

***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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attempt to commit an offense that has as an element of 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, attempted use, or threatened use of "violent force"?

LIST OF PARTIES

Petitioner, Bakari McCant, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The trial court convicted Bakari McCant under § 924(c) based on his conviction for attempted Hobbs Act robbery. He respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' decision holding that his conviction for an attempted Hobbs Act robbery is a "crime of violence" under § 924(c)'s elements clause.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, *United States v. McCant*, 805 F. App'x 7859 (11th Cir. 2020), is provided in Appendix A-1. The district court order denying Mr. McCant's Motion to Dismiss Count Six of the Indictment, *United States v. McCant,* Case No. 6:17-cr-237-Orl-40KRS (M.D. Fla. Jan. 26, 2018), is provided in Appendix A-2.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. McCant's criminal case under 18 U.S.C. § 3231. The district court denied Mr. McCant's Motion to Dismiss Count Six of the Indictment. *See* Appendix A-2. Mr. McCant later filed a timely notice of appeal. The Eleventh Circuit affirmed the district court's denial of Mr. McCant's motion to dismiss. *See* Appendix A-1. Mr. McCant invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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[.]

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 2017, a federal grand jury charged Mr. McCant with seven counts of a nine-count indictment: two substantive Hobbs Act robberies (Counts One and Two); conspiracy to commit one Hobbs Act robbery (Count Four); attempt to commit one Hobbs Act robbery (Count Five); possession of a firearm as a felon (Count Seven); brandishing a firearm in furtherance of substantive robbery in Count Two (Count Three); and possession of a firearm in furtherance of attempted robbery in Count Five (Count Six), all in violation of 18 U.S.C. §§ 1951(a)(924(c)(1)(A)(i)-(ii), 922(g)(1), and 2.

Mr. McCant moved, under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), to dismiss Count Six, arguing that § 924(c)'s residual count was unconstitutionally vague and an attempt to commit Hobbs Act robbery does not categorically qualify as a "crime of violence" under § 924(c)'s elements clause because a perpetrator may commit the offense without using, attempting to use, or threatening to use of physical force. In its order denying Mr. McCant's motion to dismiss, the district court relied on *United States v. Ovalles*, 861 F.3d 1257, 1263–65 (11th Cir. 2017), the binding precedent at the time.

Mr. McCant went to a bench trial to preserve his right to appeal the denial of his motion to dismiss in which he stipulated:

> With respect to Count Six, which charges the defendant with knowingly possessing a firearm in furtherance of the crime of violence charged in Count Five, the defendant agrees that the stipulated facts prove that he possessed a firearm in furtherance of the crime charged in Count Five. The defendant does not, however, agree that the crime charged in Count Five, attempted Hobbs Act robbery, is a crime of violence.

At the bench trial, the district court recognized that the purpose of the trial was to allow Mr. McCant to preserve the issue regarding his § 924(c) count for the Eleventh Circuit's review. After hearing Mr. McCant's argument for a judgment of acquittal—Mr. McCant maintained that the Eleventh Circuit wrongly decided *Ovalles* and reiterated his argument that attempted Hobbs Act robbery "may be committed without the use, attempted use, or threatened use of force"—the district court denied Mr. McCant's motion for a judgment of acquittal. At sentencing, the district court sentenced Mr. McCant to a 32-year prison sentence (two years above the mandatory-minimum). Mr. McCant filed a timely notice of appeal. The Eleventh Circuit Court affirmed Mr. McCant's § 924(c) conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO ADDRESS WHETHER ATTEMPTED HOBBS ACT ROBBERY IS A "CRIME OF VIOLENCE" UNDER 18 U.S.C. § 924(c)'S ELEMENT'S CLAUSE.

In affirming Mr. McCant's § 924(c) conviction, the Eleventh Circuit 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 attempt offense does not automatically qualify as a "crime of violence" simply because the completed offense qualifies as one.

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 § 924(e)(2)(B)(i)'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. Congress worded § 924(c)(3)(A) and § 924(e)(2)(B)(i)'s elements clauses identically, except that § 924(c)(3)(A) may also be satisfied by any offense that "has as an element the use of threat of physical force," that is, "violent force," against "property."

Courts must answer whether attempted Hobbs Act robbery qualifies as a "violent felony" under the elements clause using the categorical approach—that is,

by referring to the elements of the offense and not the 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). So if attempted Hobbs Act robbery does not categorically require the use, attempted use, or threatened of violent force against another's person or property, Mr. McCant'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).

That a completed offense is categorically a "crime of violence" does not necessarily mean an attempt to commit that offense is also automatically a "crime of violence." This Court rejected that logic in *James v. United States*, 550 U.S. 192, 201 (2007), *overruled on other grounds by Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Eleventh Circuit presumed that every attempt to commit a burglary, as enumerated in 18 U.S.C. § 924(e)(2)(B)(ii), was necessarily a "violent felony" within § 924(e)(2)(B)'s residual clause. *United States v. James*, 430 F.3d 1150, 1156–57 (11th Cir. 2005), *aff'd*, 550 U.S. 192. This Court, however, rejected such presumptive reasoning and instead delved into Florida law to consider whether a conviction for Florida attempted burglary was sufficient to qualify an attempted burglary offense as a "violent felony" under § 924(e)(2)(B).

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. 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. Only after fully analyzing Florida law's requirements to support a conviction for attempted burglary did the Court conclude that the risk created by that conduct was sufficient to qualify Florida attempted burglary as a "violent felony" within § 924(e)(2)(B)'s residual clause. *James*, 550 U.S. at 201–05. The Court was also clear that "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 does not qualify as a "crime of violence" under 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 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 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 based on 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 "analogous" to whether an

[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

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.

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. 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. Instead, the state must simply show that he took a substantial step toward commission of the robbery crime. *Id.* at 691–93.

Similarly, Mr. McCant's attempted Hobbs Act robbery conviction is analogous to Indiana robbery as § 1951(a) of the Hobbs Act statute includes the inchoate offense of "attempted Hobbs Act robbery," together with the completed crime. The Eleventh

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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, as to 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.*

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 attempted Indiana robbery was not a "violent felony" within the § 924(e)(2)(B)(i)'s elements clause, attempted Hobbs Act robbery is not a "crime of violence" under § 924(c)'s elements clause.

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. McCant and 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 924(e). *See, e.g., United States v. Neely*, 763 F. App'x 770, 780 (10th Cir. 2019) (*citing United States v. Rinker*, 746 F. App'x 769, 772 & n.19 (10th Cir. 2018) which had also so held, citing *St. Hubert*), *pet. for cert. denied* October 7, 2019 (No. 18-9415); *United States v. Holland*, 749 F. App'x 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. McCant'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 directly apply to attempted Hobbs Act robbery. There will be no independent analysis of these issues in the Eleventh Circuit 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 (11th Cir. 2019) (en banc) (noting that in 2016, the Sentencing Commission's data shows 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. McCant's favor on this issue would have a tremendous impact.

E. Other judges have also diverged from the Eleventh Circuit's reasoning.

Other courts and judges have similarly diverged from the Eleventh Circuit's reasoning in cases like Mr. McCant's.

As previously noted, Judge Jill Pryor in *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. 2019) (en banc), dissented from the majority's opinion that attempted Hobbs Act robbery qualified as a predicate offense under § 924(c). "To get to that conclusion," Judge Pryor stated "the opinion made two right turns before it took a wrong turn, but the wrong turn led to a logical and legal dead end." *Id.* at 1211. Specifically, the court erred when it concluded that "an attempt to commit a crime should be treated as an attempt to commit every element of that crime." *Id.* at 1211–12.

Judge Pryor explained that the majority was able to get to that conclusion only by "converting *intent* to commit each element of the substantive offense (proof of which is necessary to convict someone of an attempt crime) into *attempt* to commit each element of the substantive offense (which is not necessary to conviction someone of an attempt crime). *Id.* at 1212. Simply put, Judge Pryor has argued that intending

to commit each element of a crime is not the same as attempting to commit each element of that crime. *Id.*

Similarly, in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), Judge Nguyen penned a concurring opinion in which he found that attempted Hobbs Act robbery is substantially different than Hobbs Act robbery because attempted robbery, unlike Hobbs Act robbery, need not involve the use, attempted use, or threatened use of physical force. *Id.* at 1261–63. Using three examples, Judge Nguyen explained:

> Compare three examples:
>
> 1. A man stops an armored vehicle and shoots and injures the driver. But the driver escapes with the money.
>
> 2. A man intercepts an armored vehicle by standing in front of it with his gun pointed at the driver. He pulls the trigger, intending to strike and injure the driver, but the gun jams. The driver escapes with the money.
>
> 3. A man plans a robbery, buys the necessary gear, and drives toward the target, but returns home after seeing police in the vicinity.
>
> Each scenario describes an attempted Hobbs Act robbery. In (1), the man uses physical force. In (2), the man attempts to use physical force. In (3), the man does not use, attempt to use, or threaten to use physical force, even though he intended to commit a robbery and took a substantial step toward committing it. This last scenario—a possible "least serious form" of attempted Hobbs Act robbery—shows that an attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause.

Id. at 1263–64.

Judge Nguyen went on further to state that while the "attempted use . . . of physical force may at first "appear to be synonymous with the *intended* use of physical force," attempt cannot be a stand-in for intent as such an analysis not only "misinterpret[]s the statute but also flout[]s the categorical approach." *Id.* at 1266.

Specifically, a robber "would have *attempted* to commit a violent crime because he *intended* to use force and he took a substantial step toward committing a robbery–*not* because he *attempted to use physical force*." *Id.*

Judge Nguyen also pointed to the Fourth Circuit's holding in *United States v. Simms*, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc). Though that case involved conspiracy to commit Hobbs Act robbery, the court's reasoning applied with "equal force to the crime of attempted Hobbs Act robbery." *Id.* at 1267. In *Simms*, the Fourth Circuit explained that to "convict a defendant of [conspiracy to commit Hobbs Act robbery], the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act." *Simms*, 914 F.3d at 233–34. "Such an agreement" "does not invariably require the actual, attempted, or threatened use of physical force." *Id.* at 234. Similarly, "comparing the act element of an attempt—a substantial step—with the qualifying act elements of a crime of violence leads" to the same conclusion that attempted Hobbs Act robbery does not qualify as a crime of violence. *Dominguez*, 954 F.3d at 1267.

As previously mentioned, this case presents an excellent vehicle for the Court to assure that all courts get this issue "right." A ruling in Mr. McCant's favor on this issue would do that.

CONCLUSION

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

Respectfully submitted,

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APPENDIX