No. 20-_____

IN THE
Supreme Court of the United States

MARTEZ HOWARD,

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

A conviction for a completed offense, say Hobbs Act robbery, 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 an attempt to commit a crime that, if completed, would categorically fit within the elements clause, automatically qualifies, too, as a § 924(c) crime of violence. Yet this "attempts always count" rule is controversial. The circuits are split. The Fourth Circuit expressly rejects the Eleventh Circuit's majority viewpoint and holds instead that an attempt crime categorically is not a § 924(c) crime of violence.

That is not all. This Court rejected an "attempts always count" rule in *James v. United States*, 550 U.S. 192 (2007). That opinion requires a fresh examination into whether *the attempt itself* includes the use, attempted use, or threatened use of physical force.

Mr. Howard asks the Court 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Martez Howard 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The unpublished order of the Eleventh Circuit denying Mr. Howard's application for a certificate of appealability is included in the appendix below. Pet. App. 1. The district court's order denying Mr. Howard's 28 U.S.C. § 2255 motion is also included here. Pet. App. 2.

JURISDICTION

The Eleventh Circuit filed an order denying the application for a certificate of appealability on March 17, 2021. Under Supreme Court Rule 13.1, Mr. Howard has filed this petition on time. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil cases in the courts of appeals.

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

The Eleventh Circuit insists that an *attempt* to commit a crime that, if completed, would categorically fit within the elements clause, automatically qualifies, too, as a § 924(c) crime of violence. As far back as *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), the Eleventh Circuit has applied this shortcut to all attempt predicates. Through its "attempts always count" rule, the Eleventh Circuit ignores the facts that an attempt (a) does not require specific intent and (b) requires proof only that a defendant took a substantial step toward the target crime, although *that step need not be violent or even criminal*. Indeed, the Eleventh Circuit, through this practice, 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 circuit courts. The Second, Third, Seventh, and Ninth Circuits agree with the Eleventh Circuit. *United States v. McCoy*, 995 F.3d 32, 56 (2d Cir. 2021); *United States v. Walker*, 990 F.3d 316, 326–28 (3d Cir. 2021); *United States v. Ingram*, 947 F.3d 1021, 1026 (7th Cir. 2020); *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020). Yet the Fourth Circuit recently parted ways with these circuits and rejected both the holding and reasoning of *St. Hubert* and the majority view. In *United States v. Taylor*, 979 F.3d 203, 210 (4th Cir. 2020), the Fourth Circuit held that an attempted Hobbs Act robbery is categorically *not* a crime of violence. Meanwhile, district courts in other circuits have also sided with the minority view expressed by *Taylor* and the *St. Hubert* dissent. This

fresh conflict will continue, and likely widen, until this Court resolves the question presented.

Second, 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 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. Howard's own crime, categorically is not a § 924(c) crime of violence.

Third, 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) prosecution 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). It is important that such a statute apply uniformly throughout the country. On this question, uniformity has proved elusive.

Finally, 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. Howard's appeal based solely upon *St. Hubert* and the "attempts always count" question presented here.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

In June 2011, Mr. Howard pled guilty to two federal crimes: attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The crime of violence that formed the foundation of the § 924(c) crime was the attempted Hobbs Act robbery. At the original sentencing hearing, the district court imposed consecutive terms of 70 months in prison on the attempted robbery and a consecutive 120 months on the firearm count, for a total sentence of 190 months in prison.

Mr. Howard later filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255. In light of *United States v Davis*, 139 S. Ct. 2319, 2336 (2019), 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. The district court denied Mr. Howard's § 2255 motion. The court relied exclusively upon the Eleventh Circuit's binding precedent in *St. Hubert*, where that court held that attempted Hobbs Act robbery qualifies as a crime of violence under the § 924(c)(3)(A) 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 invokes the "attempted use" of force. The district court denied Mr. Howard a certificate of appealability based upon *St. Hubert*. On March 17, 2021, a judge of the Eleventh Circuit also denied Mr. Howard 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, Mr. Howard's 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 *St. Hubert* obstructs Mr. Howard's path to relief. There 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. This Court has considered, and denied, petitions for writ of certiorari in *St. Hubert* and other similar cases. *See, e.g., St. Hubert v. United States*, No. 19-5267 (certiorari denied June 8, 2020). But circumstances have changed. We now have a circuit split on this question and district courts continue to side with this minority view. It is time for this Court to resolve the "attempts always count" question.

1. The Eleventh Circuit's "attempts always count" rule in *St. Hubert* is deeply flawed, according to the Fourth Circuit and at least three Eleventh Circuit judges, and we now have a fractured circuit split.

How do we apply *Davis* here in Mr. Howard's 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. Yet the *St. Hubert* rule immediately drew criticism. In dissent from a later order denying a petition for rehearing en banc, three Eleventh Circuit judges proclaimed 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, they said, 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.*

That is not all. An attempt requires "the intent to commit the underlying offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 111 (2007) (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, such as 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. For this reason, too, the crime, 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 by, for

example, "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). That's it.

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. In *Taylor*, the Fourth Circuit embraced the *St. Hubert* dissenters' perspective and held that an attempted Hobbs Act robbery categorically is not a crime of violence. That court observed, "[t]he Government may obtain a conviction for attempted Hobbs Act robbery by proving that: (1) the defendant specifically intended to commit robbery by means of a threat to use physical force; and (2) the defendant took a substantial step corroborating that intent. The substantial step need not be violent." 979 F.3d at 208. An attempted Hobbs Act robbery may only be an attempt to threaten to use physical force and not an actual attempt to use physical

force, rendering it not a predicate "crime of violence" under § 924(c). *Id.* The opinion directly challenged the *Dominguez*, *Ingram*, and *St. Hubert* holdings discussed above, and firmly asserted that some crimes of violence, like Hobbs Act robbery, can be accomplished with a mere threat of force, and, for an corresponding inchoate offense, an attempted threat to use force is not sufficient to satisfy § 924(c). *Id.* at 209.

What of the district courts in those regions of the country, say, in the Sixth and Tenth Circuits, where this question remains open? Several district courts in these regions embrace the view of attempted Hobbs Act robbery expressed by the *St. Hubert* dissenters and the Fourth Circuit in *Taylor*. In *Starks v. United States*, 2021 WL 351995, at *8 (M.D. Tenn. Feb. 2, 2021), the court concluded with this riff:

> In the absence of controlling authority in this circuit, the Court has studied the matter and concludes, as did the Fourth Circuit in *Taylor* and various district courts outside that circuit, that attempted Hobbs Act robbery is not categorically a crime of violence. Clearly what Starks and Kimbrough did to Leggs was violent by any definition. But, with the residual clause removed from the equation by *Davis*, the question is whether attempted armed robbery necessarily "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" The answer, the Court believes, is "no."
>
> An "attempt" crime contains two substantive elements: the intent to commit the underlying crime,

> and undertaking an overt act that constitutes a substantial step toward completing the offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007); *Braxton v. United States*, 500 U.S. 344, 349 (1991). Neither the intent (mens rea) nor the act (actus rea) element categorically requires violence, or even the intent to use violence. "A would-be robber may poke his finger under his shirt at an intended victim and tell the victim to give him her money or he will shoot her. If the victim runs away rather than forking over her cash, then the would-be robber could still be convicted for an attempted Hobbs Act robbery, because the Hobbs Act defines a robbery to include "the unlawful taking or obtaining of personal property . . . by means of actual or threatened force," 18 U.S.C. § 1951(b)(1)."

In *United States v. Eccleston*, 2020 WL 6392821, at *46 (D.N.M. Nov. 2, 2020), the court adopted the reasoning of the Fourth Circuit in *Taylor* and concluded in dicta that "attempted Hobbs Act robbery is not a crime of violence under § 924(c), because a person can take a substantial step without 'the attempted use, or threatened use of physical force against the person or property of another.'"

Many district courts in the Second Circuit, too, so long as the question remained open, agreed with *Taylor*. In *United States v. Taylor*, the district court "concur[red] with Judge [Jill] 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 that court:

> As Judge [Jill] 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."). Now, in light of the recent Second Circuit opinion in *McCoy*, these district courts did not carry the day in the end, but the question here continues to confound judges all over the nation.

The ever-widening gap, even in recent months, shows that the question begs resolution by this Court. The circuit

split alone merits review here, of course, but there is more—the majority view also undermines this Court's own precedent.

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

In *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 Eleventh Circuit's *St. Hubert* rule betrays *James*.

The fact that a completed offense is categorically a crime of violence does not inevitably mean that an *attempt* to commit that offense is a crime of violence. In *James*, this Court rejected that very logic by the very same court of appeals. 550 U.S. at 201, *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.

To begin with, 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, this 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 this Court refused to do in *James*. 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. Not only did the Eleventh Circuit adopt an automatic rule just like the one this 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. Howard's 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, as it did so, the panel 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 himself 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); *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). So there can be no specific intent requirement for an attempted Hobbs Act robbery conviction under § 1951(a) either. For this reason, too, an attempted Hobbs Act robbery is not a crime of violence under § 924(c)'s elements clause.

3. This § 924(c)-related question is of national importance and this case is an excellent vehicle for the Court to answer the question.

It is important that any statute, but especially the hyper-punitive § 924(c) statute, applies uniformly across the country. Yet on this "attempts always count" topic, uniformity has proved elusive.

The question of who may gain *Davis* relief (and who may not) is one of high stakes. A § 924(c) conviction is serious business. The crime induces a sharp, mandatory increase in a defendant's term of imprisonment (a consecutive term of five, seven, or ten years in prison for a first such violation). Mr. Howard himself is a good example of the harsh nature of this topic: the outcome here will make the difference between freedom and incarceration. He completed the shorter prison sentence on the conspiracy count (70 months) long ago, and is well into the consecutive 120-month sentence on the firearm count. If the district court had granted him relief in this § 2255 motion, he likely would have been freed by now. Indeed, even with the § 924(c) sentence, Mr. Howard's Bureau of Prisons release date is merely two years away.[1]

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[1] *See Inmate Locator*, BOP, available at https://www.bop.gov/inmateloc/ (last visited June 13, 2021).

This question is much larger than any one person. Section 924(c)-related questions recur in every district and circuit all over the nation. Over the last five years, for example, the federal government convicted 12,007 offenders of at least one count of § 924(c), and acquired an average sentence of 138 months in prison.[2] The § 924(c) prosecutions are distributed all over the map. During the last fiscal year, the top five districts account for only 25 percent of the national total. In short, the harsh crime is prosecuted everywhere, and cries out for uniformity.

As this Court well knows, it has chosen to resolve § 924(c)-related questions in plenty of cases, including *Davis*, of course, but many others, including *Deal v. United States*, 508 U.S. 129 (1993) (mandatory 20-year sentences could be imposed on second or subsequent § 924(c) counts, even though only single judgment was entered on all counts); *Smith v. United States*, 508 U.S. 223 (1993) (holding that exchange of gun for narcotics counts as § 924(c) violation); *Bailey v. United States*, 516 U.S. 137 (1995) (holding § 924(c) conviction based on "use" of firearm during and in relation to drug trafficking offense requires evidence that defendant actively employed firearm); *Muscarello v. United States*, 524 U.S. 125 (1998) (phrase "carries a firearm" in § 924(c) includes conveying firearms in vehicle); *Watson v. United States*, 552 U.S. 74 (2007) (holding that person does not "use" a firearm under § 924(c)

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[2] *Quick Facts — 18 U.S.C. § 924(c) Firearms Offenses (FY 2015-2019)*, U.S. Sentencing Comm'n, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY19.pdf (last visited June 13, 2021).

when he receives it in trade for drugs); *Dean v. United States*, 556 U.S. 568 (2009) (holding that sentencing enhancement for § 924(c) defendant's discharge of firearm required no separate proof of intent); *Abbott v. United States*, 562 U.S. 8 (2010) (holding that consecutive § 924(c) sentence applies despite higher minimum sentences for other counts of conviction); *United States v. O'Brien*, 560 U.S. 218 (2010) (holding fact that firearm was a machinegun was an element of the offense to be proved to the jury beyond a reasonable doubt, rather than a sentencing factor); *Alleyne v. United States*, 570 U.S. 99 (2013) (holding that "brandishing" fact in § 924(c) crime is element of the offense and must be proved to a jury); *Rosemond v. United States*, 572 U.S. 65 (2014) (holding that to aid and abet § 924(c) offense, defendant must know beforehand that one of his confederates will carry a gun); and *Dean v. United States*, 137 S. Ct. 1170 (2017) (holding that a court may consider mandatory minimum for § 924(c) count when sentencing on predicate count). By granting the petition in these cases, and there are more, this Court has already recognized many times that a § 924(c) question is inherently one of national importance.

Back to question here. The harm from the Eleventh Circuit's mistaken *St. Hubert* rule will grow unless the Court grants certiorari to clarify the law. District courts within the Eleventh Circuit already "lead the pack in imposing sentences under these enhancement statutes," including § 924(c). *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (en banc) (Jill Pryor, J., dissenting). The Sentencing Commission's data showed that in 2016, for example, only the Fourth Circuit surpassed the Eleventh Circuit in handing down sentences under § 924(c). *Id.* at 1213 n.2. For that reason, "[i]t is

critically important that [the Eleventh Circuit] 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."

Finally, this case is an excellent vehicle for the Court to answer the questions presented. Mr. Howard pressed the issue below, the district court and Eleventh Circuit passed judgment based exclusively on the *St. Hubert* rule, and the outcome will resolve the lawfulness of Mr. Howard's § 924(c) conviction and consecutive sentence of 120 months in prison on this phantom crime.

CONCLUSION

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

Respectfully Submitted,

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