No. _____

In The

# Supreme Court of the United States

**JOSEPH FENELON COOPER,**

***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 WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented is whether an attempted bank robbery under 18 U.S.C. § 2113, which may be completed even if it is abandoned before anyone knows that it was planned, falls outside the definition of a "crime of violence" under 18 U.S.C. Section 924(c)(3)(A).

## PARTIES TO THE PROCEEDING

Joseph Fenelon Cooper, petitioner on review, was the petitioner-appellant below.

The United States of America, respondent on review, was the respondent-appellee below.

## CORPORATE DISCLOSURE STATEMENT

Premier Bank, at 1461 Capitol Circle, N.W. Tallahassee, Florida, alleged victim

First Union Bank, at 1953 Thomasville, Road, Tallahassee, Florida, alleged victim

Whitney Bank at 5330 North Davis Highway, Pensacola, Florida, alleged victim

Regions Bank, at 4612 Highway 90 West in Pace, Florida, alleged victim

Premier Bank at 1461 Capitol Circle, N.W. Tallahassee, Florida, alleged victim

## RELATED PROCEEDINGS

Counsel is not aware of any directly related proceedings.

This Court, however, has granted certiorari in *United States v. James*, 20-1459, to address almost the identical question raised herein and, therefore, the decision in that case, which is scheduled for oral argument on December 7, 2021, will directly affect the outcome of this case.

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Joseph Fenelon Cooper respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

## INTRODUCTION

The decision below exhibits a significant and acknowledged conflict among the circuit courts concerning whether 18 U.S.C. Section 924(c)(3)(A)'s definition of a crime of violence excludes attempted bank robbery in violation of 18 U.S.C. § 2113. As the Eleventh Circuit noted in this case, it is bound by its decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), which holds that an attempted Hobbs Act robbery is a crime of violence, which reasoning it extended to an attempted bank robbery under 18 U.S.C. § 2113. The Fourth Circuit, however, has held the exact opposite in *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020), *certiorari granted*, 2021 WL 2742792.

If an attempted bank robbery crime qualifies as a crime of violence under 18 U.S.C. Section 924(c)(3)(A) it will generate serious consequences. Each charge carries a five-year mandatory minimum sentence, one that cannot "run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D)(ii). Under the Eleventh Circuit's rule, a person can languish in prison for years after he has served his time for the attempted robbery for an attempted bank robbery that involves a weapon even if he never brandishes this firearm and none of the intended victims were even aware that such a robbery was planned.

For Joseph Cooper, petitioner here, the consequences of this legal rule are anything but theoretical or minor. There is no dispute that Cooper abandoned his

attempted bank robbery before he entered the bank; no one in the bank was threatened or even knew about Cooper's abandoned attempt. Nonetheless, he was sentenced to sixty additional months in prison for possession of a firearm in relation to this abandoned attempt.

This case cleanly presents this pure, important issue of law, and this Court's review is warranted.

## OPINIONS BELOW

The Eleventh Circuit's decision is unpublished but can be found at 2021 WL 2913068. Pet. App. A. The Eleventh Circuit's order denying rehearing en banc is not reported. *Id.* at App. C. The District Court's decision denying the successive 28 U.S.C. § 2255 petition is not reported. *Id.* at App. B.

## JURISDICTION

The Eleventh Circuit entered judgment on July 12, 2021. Petitioner timely sought panel rehearing and rehearing en banc, which the Eleventh Circuit denied on August 26, 2021. Thus, a petition for certiorari is due in this Court by Wednesday, November 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A)(i) of Title 18 of the U.S. Code provides:

> 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—be sentenced to a term of imprisonment of not less than 5 years.

Section 924(c)(3) of Title 18 of the U.S. Code provides:

> 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.

Section 2113 of Title 18 of the U.S. Code provides, in relevant part:

> **(a)** Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

Section 1951 of Title 18 of the U.S. Code 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 company at the time of the taking or obtaining.

## STATEMENT OF THE CASE

1. On June 24, 1997 a federal grand jury in the Northern District of Florida returned a nine-count indictment against Joseph Fenelon Cooper ("Petitioner" or "Cooper") and Joseph Christopher Forgione. For purposes of this Petition, the relevant counts are Count 8 and 9. Count 8 charged Petitioner "did attempt, by force, violence, and intimidation, to take from the person and presence of another, United States currency…" Count 9 charged Petitioner with "during in relation to a crime of violence… as charged in Count VIII, did knowingly use and carry firearms…" (Joint Appendix filed in the Eleventh Circuit Court of Appeals in Case No. 20-11093 (hereafter "C.A. App." at 45-46).

On September 12, 1997, a jury found Petitioner guilty of Counts 8, and 9 and Petitioner was sentenced to 160 on count 8 and 60 months on count 9.[1] (C.A. App. 56-63).

On June 26, 2015, the United States Supreme Court issued its decision in *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015), which was made retroactively applicable by *Welch v. United States*, 136 S. Ct. 1257 (April 18, 2016).

In light of the *Johnson* decision and its retroactive application, the Eleventh Circuit entered an order in Appeal 16-14553-J granting Petitioner leave to file a

[1] Petitioner was also found Guilty on Count 1, 6 and 7. These counts, however, are not relevant to this petition.

successive petition pursuant to 28 U.S.C. § 2255. (C.A. App. 199-207). On March 9, 2017, Petitioner filed a Motion to Vacate under 28 U.S.C. § 2255, the Government responded, and Petitioner replied. (C.A. App. 171-197, 210-235, 237-244). Two notices of supplemental authority were also filed. (C.A. App. 247-251, 253-259).

On July 16, 2019, the magistrate entered a Report and Recommendation dismissing the 28 U.S.C. § 2255 as successive. (C.A. App. 261-270). Petitioner filed objections to this Report and Recommendation on July 24, 2019. (C.A. App. 272-289). The chief magistrate vacated the Report and Recommendation and indicated that it would take the matter under advisement in light of the Eleventh Circuit decision in *In re Hammoud*, No. 19-12458-G, 2019 WL 3296800 (11th Cir. Jul. 23, 2019). (C.A. App. 282).

On January 21, 2020, a senior district court judge entered an order dismissing the 18 U.S.C. § 2255 motion as successive and denied a certificate of appealability. (C.A. App. 284-297). The Eleventh Circuit granted a certificate of appealability but denied relief and denied rehearing *en banc*. Pet. App. C-D.

2 . The attempted robbery in Count 8 was based on the following facts:

- Petitioner and two co-conspirators stole a taxi and drove to Premier Bank in order to rob the bank;
- There was a large pick-up truck in the parking lot, which Petitioner believed may have belonged to a large man;
- Petitioner and his co-conspirators left;
- A police officer spotted the stolen taxi and arrested the men for stealing the taxi.

(Pet. App. C-D). Critically, there was no testimony that Petitioner "by force, violence or intimidation, attempt[ed] to take from the person or presence of another property, money or a thing of value belonging to, or in the care, custody, control, management or possession of a bank." Rather, the facts introduced to establish Count 8 relied on Petitioner's abandoned attempt to enter the bank, not any force, violence or intimidation. Specifically, on Count 8 Petitioner and his co-defendant never even entered the bank parking lot and were stopped by authorities three blocks away from the bank. (*Id.*). Count 9 charged possession of a firearm in relation to this abandoned plan to enter a bank. Petitioner was convicted on both counts and received a 60 month sentence on count 9. (C.A. App. 56-63).

3. After Petitioner's conviction, the Supreme Court issued its opinion in *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015). In *Johnson* the Court recognized that federal law prohibits certain people from possessing firearms. *See e.g.*, 18 U.S.C. § 922(g). Under federal law, "if the violator has <u>three or more</u> earlier convictions for a 'serious drug offense' or a 'violent felony,' the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life." *Id.* at 2555 *citing* 18 U.S.C. § 924(e)(1) (emphasis added). Under this act, a violent felony includes:

> any crime punishable by imprisonment for a term exceeding one year ... that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added).

*Id.* at 2555-56 *citing* 18 U.S.C. § 924(e)(2) (emphasis in opinion). The italicized portion of the foregoing definition is known as the residual clause.

The *Johnson* decision addressed the residual clause as applied to the Armed Career Criminal Act. In finding the residual clause unconstitutionally vague, this Court explained that the "clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements[,]" and "[a]t the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2557.

In reaching its decision, the Court acknowledged that it and numerous Circuit courts have had trouble "making sense of the residual clause." *Id.* at 2559-60. The Court concluded, holding "that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Id.* at 2563.

In *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257 (2016), the United States Supreme Court held that the *Johnson* decision was retroactively applicable. In reaching this decision, the Court explained that in *Johnson* "the residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Id.* at 1262. The Court ultimately concluded that "*Johnson* … struck down part of a criminal statute that regulates

conduct and prescribes punishment. It thereby altered 'the range of conduct or the class of persons that the law punishes.' …. It follows that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." *Id.* at 1268.

On June 24, 2019, the United States Supreme Court issued its opinion in *United States v. Davis*, __U.S. ___, 139 S. Ct. 2319 (2019), abrogating the Eleventh Circuit's decision in *Ovalles v. United States*, 905 F.3d 1231 (2018), and holding that the residual clause in § 924(c) was unconstitutionally vague. This decision was premised on the Court's ruling in *Johnson*, that a key clause of the Armed Career Criminal Act violated "the Constitution's prohibition of vague criminal laws." The Eleventh Circuit recognized that *Davis* applied retroactively in *In re Hammond*, 931 F.3d 1032 (11th Cir. 2019).

4. In light of the *Johnson* decision and its retroactive application, the Eleventh Circuit entered an order in Appeal 16-14553-J granting Petitioner leave to file a successive petition pursuant to 28 U.S.C. § 2255. (C.A. App. 199-207). On March 9, 2017, Petitioner filed a Motion to Vacate under 28 U.S.C. § 2255 alleging that his conviction in Count 9 of the indictment for possession of a firearm in relation to the attempted armed robbery in Count 8 should be vacated in light of the *Johnson* decision as an attempted bank robbery only qualified as an crime of violence under the unconstitutional residual clause. In making this argument, Cooper recognized that the Eleventh Circuit held in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), *abrogated on other grounds by United States v. Davis*, 139 S. Ct. 2319 (2019), that an attempted Hobbs Act robbery was a crime of violence, but Cooper

distinguished this case and also indicated that he would ask the Court to revisit this case *en banc* if necessary.

On January 21, 2021, the district court dismissed the 28 U.S.C. § 2255 as successive and denied a certificate of appealability. The court recognized that a *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319 (2019) claim meets the preliminary requirements of § 2255(h), but the moving party must prove that his claim is premised on the rule. The court went on to state that the movant must show that the residual clause and only the residual clause is the basis for the conviction, and that Petitioner relied on the underlying facts and had not met this burden because the district court relied on the elements clause of § 924(c)(3) to find that the underlying offense was a crime of violence. The district court then summarily concluded that each defendant carried a gun and, therefore, it was a crime of violence and that attempted crimes can be a crime of violence. (C.A. App. 284-297).

The Eleventh Circuit Court of Appeals granted a certificate of appealability directing the parties to address: "Whether the district court erred in finding that Petitioner failed to satisfy his burden under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017) to show that he was unconstitutionally sentenced under the residual clause of 18 U.S.C. § 924(c) when he was convicted of attempted armed bank robbery?" Pet. App. A; App. D.

The Eleventh Circuit ultimately denied Petitioner relief, relying on *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), to hold that if an underlying crime is a crime of violence then an attempt of that crime is also a crime of violence.

Petitioner asked the Eleventh Circuit to revisit the *St Hubert* decision *en banc*, which it declined to do. Pet. App. A; App. B.

## REASONS TO GRANT THE PETITION

There is a conflict among the Circuits regarding whether an attempted bank robbery constitutes a crime of violence even though it may be accomplished by intimidation. This case demonstrates how the Eleventh Circuit's approach that if an underlying crime is a crime of violence then the attempt at that crime is as well can lead to an absurd result. This Court's review of this split is warranted now.

### I. There is a Split Over Whether an Attempted Robbery under 18 U.S.C. § 2113(a) Categorically Qualifies as a Crime of Violence.

#### *A. Application of the Categorical Approach*

To determine whether a crime is a crime of violence courts are to use the categorical approach. *United States v. Martinez*, 845 F.3d 1226, 1129-30 (11th Cir. 2017). In conducting this analysis "a court may look at only the elements of the statute of conviction and not at the underlying facts of the offense." *Id.* An offense does not qualify as a predicate unless "the *least* serious conduct it covers falls within the elements clause." *Borden v. United States*, __ U.S. __, 141 S. Ct. 1817, 1832 (2021) (plurality opinion); *see also Pereida v. Wilkinson*, __ U.S. __, 141 S. Ct. 754, 763 (2021) (categorical approach examines the "minimum conduct" necessary to violate the statute).

The Government may argue that 18 U.S.C. § 2113(a) is divisible in that it can be committed by "force and violence" or "intimidation" or "extortion" and, therefore,

the modified categorical approach should apply.[2] This argument, however, is misplaced as the first paragraph of 18 U.S.C. § 2113(a) defines one attempt crime, though it can be committed by different means. *See St. Hubert*, 909 F.3d at 348 ("We also point out, and St. Hubert agrees, that the definition of 'robbery' in § 1951(b)(1) is indivisible because it sets out alternative means of committing robbery, rather than establishing multiple different robbery crimes.").

Nevertheless, in conducting the modified categorical approach, the court can "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Descamps v. United States*, 570 U.S. 254, 257, 133 S Ct. 2276 (2013). The inquiry "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this

[2] Cooper concedes the second paragraph of 18 U.S.C. § 2113(a) is divisible, but the Eleventh Circuit specifically found that Cooper, despite there being no evidence that he ever actually communicated a threat of any sort, was charged under the first paragraph addressed herein. While Cooper believes that there is insufficient evidence to support the conviction under the first paragraph and, therefore, his conviction must have been under the second paragraph, this Petition will focus on that paragraph based on the holding in the Eleventh Circuit. *See e.g. United States v. Johnson*, 539 F.3d 741, 747 (7th Cir. 2008) ("Accordingly, actual force and violence or intimidation is required for a conviction under the first paragraph of § 2113(a), whether the defendant succeeds (takes) or fails (attempts to take) in his robbery attempt."). The second paragraph of 18 U.S.C. § 2113(a) provides "Whoever enters or attempts to enter any bank, credit union, or any savings and loan association…" Assuming this Court agrees with Cooper's assertion that he must have been convicted under this paragraph as there was insufficient evidence to sustain his conviction under the first paragraph, this second paragraph also is not categorically a crime of violence as you may attempt to enter a bank without doing anything violent.

information." *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254 (2005). If the record does not indicate "which of several crimes in a divisible statute the defendant had been convicted of committing … [then], the government [must] show that *all* of the statute's offenses met the federal definition of a 'violent felony.'" *Pereida*, 141 S. Ct. at 765-66.

"Whether the defendant's conduct is such that he 'hypothetically could have been convicted' of a crime of violence is irrelevant, even when engaging the modified categorical inquiry." *United States v. Estrella*, 758 F.3d 1239, 1247 (11th Cir. 2014). In fact, this is exactly what the categorical approach prohibits. *Id.*

In the instant manner, whether under the categorical approach or the modified categorical approach, an attempted 18 U.S.C. § 2113 bank robbery is not a crime of violence. Here, Cooper was charged with the attempt by "force, violence, and intimidation." (C.A. App. 45-46).[3] The jury was instructed that it had to find the attempt was done by means of "force or violence or by means of intimidation." (C.A. App. 44-50). As intimidation, as is discussed below, is not categorically a crime of violence, the attempted bank robbery charged in this case is not also not a crime of violence.

### *B. Attempted Robbery Under 18 U.S.C. § 2113 Does Not Require that the Government Prove the Use, Attempted Use, or Threatened Use of Force*

18 U.S.C. § 2113(a) makes it a crime to "by force and violence, or by intimidation, take[], or attempt[] to take, from the person or presence of another … any property or money or any other thing of value belonging to, or in the care, custody,

[3] The first paragraph of 18 U.S.C. § 2113(a) also defines a different means by which the robbery can occur – extortion or an attempt to extort. Extortion can also be committed in a non-violent manner and this is another reason why an attempt under 18 U.S.C. § 2113(a) is not categorically a crime of violence.

control, management, or possession of, any bank, credit union, or any savings and loan association." Therefore, the text of this Section makes clear that an attempted robbery under 18 U.S.C. § 2113 can be completed by attempted intimidation; the defendant need not actually communicate anything intimidating, engage in force, or attempt to use force. As the Eleventh Circuit has made clear in this case where Cooper was stopped blocks away from the bank and no one in the bank was aware of the abandoned attempt, the attempted intimidation does not need to be communicated to the intended target of the intimidation in order to qualify as an attempt and, therefore, does not necessarily include the use, attempted use, or threatened use of force.

### *C. The Fourth Circuit Correctly Held that Attempts to Commit a Crime of Violence do not Automatically Qualify as a Crime of Violence*

In this case, the Eleventh Circuit relied on the panel decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), to hold that if an underlying crime is a crime of violence then an attempt of that crime is also a crime of violence. In *St. Hubert*, which involved a guilty plea as opposed to a trial, a panel of the Eleventh Circuit found that the Hobbs Act robbery attempt was a crime of violence where the defendant entered the store with the firearm and held it against the side of an employee. *Id.* at 339.

Since the Eleventh Circuit's decision in *St Hubert*, the Fourth Circuit has taken a close look at attempt crimes and reached the opposite conclusion. In *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020), *certiorari granted* 2021 WL 2742792, the Fourth Circuit explained that a Hobbs Act robbery categorically is a crime of

violence. It found, however, that an attempted Hobbs Act robbery is not. In reaching this conclusion, the Fourth Circuit explained that for an attempt crime, a substantial step must have been taken. It explained that a substantial step is a "direct act in a course of conduct planned to culminate in commission of a crime that is strongly corroborative of the defendant's criminal purpose." *Id.* at 207. It further explained that an attempt, unlike a completed Hobbs Act robbery, "does ***not*** invariably require the use, attempted use, or threatened use of physical force. The 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***." *Id.* at 208 (emphasis supplied). That is, "[w]here a defendant takes a nonviolent substantial step toward threatening to use physical force — conduct that undoubtedly satisfies the elements of attempted Hobbs Act robbery — the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely *attempted to threaten* to use physical force." *Id.* (emphasis original).

In reaching this conclusion, the Fourth Circuit cited an example that is directly on point in this case. The Fourth Circuit explained that a defendant "may case the store that he intends to rob, discuss plans with a coconspirator, and buy weapons to complete the job. But none of this conduct involves an attempt to use physical force, nor does it involve the use of physical force or the threatened use of physical force. In these circumstances, the defendant has merely taken nonviolent substantial steps

toward threatening to use physical force." *Id.* That is precisely what the Government alleged happened here.

While this case involved a bank robbery, not a Hobbs Act robbery, the reasoning is the same, if not stronger, in the instant matter. As it relates to a Hobbs Act robbery under 18 U.S.C. § 1951 and bank robbery under 18 U.S.C. § 2113(a), an attempt can be made if the defendant intended to commit the robbery by threatened or actual force or intimidation and he took a substantial step towards doing so, although no threatened or actual use of force actually occurred. This is not categorically a crime of violence. *See also United States v. Culbert*, 453 F. Supp. 3d 595 (E.D.N.Y. 2020) (attempted Hobbs Act robbery is not a crime of violence).

### *D. The Rule of Lenity Requires a Finding that an Attempted Bank Robbery is Not a Crime of Violence*

While Cooper believes that it is clear that an attempted bank robbery under 18 U.S.C. § 2113(a) can be made by an attempted intimidation, I.A and B, *supra*, which does not involve the use or attempted use of force necessary to sustain a 18 U.S.C. § 924(c) conviction, if this Court finds that there is an ambiguity the rule of lenity requires that this Court adopt the more lenient approach. *Shular v. United States*, 140 S. Ct. 779, 787 (2020). That is, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis,* 139 S. Ct. 2319, 2333 (2019). Therefore, to the extent that there is any ambiguity regarding whether an attempted intimidation categorically qualifies as a crime of violence under 18 U.S.C. § 924(c), that ambiguity must be construed in Cooper's favor.

## II. This Case Offers A Clean Vehicle To Resolve This Important Question.

This case offers the perfect opportunity to resolve this important question because it demonstrates the absurd result that can occur if all attempts to commit a crime of violence automatically qualify as a crime a violence, even when the substantial step was not violent at all.

One can see how the *St Hubert* panel reached the conclusion it did because in that case there was actual violence. In that case, the defendant entered the store with the firearm and held it against the side of an employee. 909 F.3d. at 339. But, extending that reasoning to the instant matter reveals the unintentional absurd result that this decision leads to.

Here, Cooper was stopped by the authorities blocks away from the bank having never entered the bank, much less entered the bank with a weapon. To hold that it is a crime of violence when a defendant abandons his plans before any of the intended victims knows anything, before any gun is brandished, before anyone has been put in any fear in any way at all would extend the reasoning in *St. Hubert* to an absurd result. *See Hylor v. United States*, 896 F.3d 1219, 1226-1227 (11th Cir. 2018) (Judge Jill Pryor, concurring in the result) ("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 the use of force… Yet, under *St. Hubert*, the attempt crime's element of specific intent to commit the murder necessarily means that the offense involved the attempted used of physical force – despite the fact that the offense may be completed without the perpetrator ever actually using, attempting to use, or threatening to use

physical force. This is plainly wrong. But because I am bound to follow precedent, however flawed, reluctantly I concur.").[4]

## CONCLUSION

The petition for a writ of certiorari should be granted.

/s/ Leigh Stevens Schrope
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[4] This Court recently granted certiorari in *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020). *Certiorari granted* 2021 WL 2742792, and that matter is scheduled for hearings on December 7, 2021. As the decision in that case will have a substantial effect on the outcome of this case, Cooper respectfully requests that this Court reserve ruling on this matter until it reaches a decision in *Taylor*.