NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

THAMUD ELDRIDGE, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), is a categorical crime of violence under 18 U.S.C. § 924(c)(1)(A). This Court granted review on this issue in United States v. Taylor, No. 20-1459, certiorari granted July 2, 2021.

2. Whether Mr. Eldridge's Sixth Amendment speedy trial right was violated.

## LIST OF PARTIES

1. Petitioner – Defendant Thamud Eldridge

2. Respondent – Plaintiff United States of America

## LIST OF PROCEEDINGS

1. United States v. Eldridge, et al., No. 1:09-cr-00329 RJA (W.D.N.Y.)(District Court proceedings against Defendants Thamud Eldridge, Kevin Allen, Kashika Speed, Galen Rose)

2. United States v. Eldridge, No. 18-3294-cr(L)(2d Cir.)(Mr. Eldridge's appeal to the United States Court of Appeals for the Second Circuit), judgment of affirmance entered June 22, 2021, petition for rehearing and rehearing en banc denied August 26, 2021.

3. United States v. Allen, 19-92 (con)(co-Defendant Kevin Allen's appeal to the United States Court of Appeals for the Second Circuit), judgment of affirmance entered June 22, 2021, petition for rehearing and rehearing en banc denied August 26, 2021.

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## PETITION FOR WRIT OF CERTIORARI

This case presents the identical issue raised in United States v. Taylor, No. 20-1459, which this Court agreed to review. The United States Court of Appeals for the Second Circuit held that Mr. Eldridge's conviction for attempted Hobbs Act robbery under 18 U.S.C. § 1951(a) was a categorical crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A). The court consequently upheld Mr. Eldridge's 300-month consecutive sentence on his § 924(c) conviction for brandishing a firearm in furtherance of attempted Hobbs Act robbery.

The Circuit Courts of Appeals are divided on the important federal question of whether attempted Hobbs Act robbery is a categorical crime of violence under the elements clause of § 924(c). The Second, Third, Seventh, Ninth and Eleventh Circuits held that it is a crime of violence. The Fourth Circuit in Taylor held that it is not.

The Fourth Circuit is correct. Properly applying the categorical approach, it is clear that attempted Hobbs Act robbery can be committed without the actual "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of § 924(c)(3)(A). Numerous convictions for attempted Hobbs Act robbery have been affirmed where "use, attempted use, or threatened use of physical force" were not present. Consequently, attempted Hobbs Act robbery cannot be considered a categorical crime of violence.

The Circuits ruling to the contrary have effectively abandoned proper application of the categorical approach in favor of the simplistic principle that an attempted categorical crime of violence is itself a categorical crime of violence. This is incorrect. Section 924(c)(3)(A) does not purport to make attempted categorical crimes of violence actual categorical crimes of violence, just like it does not elevate other inchoate crimes – e.g., conspiracy – to this level. These Circuits have twisted the "attempts to use" language of § 924(c)(3)(A), contained within

the grades of qualifying physical force employed by a defendant, beyond its intended purpose. The approach of these Circuits must be rejected.

Because the Court has granted review in Taylor to resolve this question, Mr. Eldridge asks the Court to hold this case until it has decided Taylor, and then to dispose of it in accordance with that decision.

Mr. Eldridge also asks that the Court grant certiorari on the important federal question of whether his Sixth Amendment speedy trial right was violated. More than six years elapsed between Mr. Eldridge's indictment and trial. The Second Circuit held that Mr. Eldridge's speedy trial right was not violated based on its balancing of the factors identified in Barker v. Wingo, 407 U.S. 514, 530 (1972). Mr. Eldridge submits that the Second Circuit misapplied the Barker factors. Because the speedy trial right is "amorphous" and "slippery", id. at 522, it is extremely important for this Court to address application of the Barker factors in a case such as Mr. Eldridge's, so as to fully inform the lower courts on how this difficult analysis is to be conducted. The Second Circuit's approach upheld an impermissible delay, turning a presumptively prejudicial delay into an excused delay without a proper basis for doing so. Mr. Eldridge's speedy trial right was violated.

## OPINIONS BELOW

The Second Circuit's published decision addressing the attempted Hobbs Act robbery issue raised in this Petition is reported at United States v. Eldridge, 2 F.4th 27 (2d Cir. June 22, 2021), petition for rehearing and rehearing en banc denied (August 26, 2021). Pet. App. 1-10. The Second Circuit issued an accompanying Summary Order denying other claims by defendants, reported at United States v. Eldridge, 860 Fed. Appx. 773 (2d Cir. June 22, 2021), petition for rehearing and rehearing en banc denied (August 26, 2021), including Mr. Eldridge's

speedy trial claim. Pet. App. 11-17. The judgment of the United States District Court for the Western District of New York, Pet. App. 18-23, is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on June 22, 2021. A timely petition for rehearing and rehearing en banc was filed on July 7, with a revised petition for rehearing and rehearing en banc filed on August 4 pursuant to permission from the court of appeals. The court denied the petition on August 26, 2021. Pet. App. 24. This Court has jurisdiction under 28 U.S.C. § 1254(1). The courts below had jurisdiction pursuant to 18 U.S.C. § 3231, granting original and exclusive jurisdiction to the federal courts over all offenses against the United States, including Mr. Eldridge's offenses of conviction.

## STATUTORY PROVISIONS INVOLVED

Relevant portions of 18 U.S.C. §§ 924(c) and 1951, and the Sixth Amendment are reproduced in the appendix. Pet. App. 107-110, 111, 112.

## STATEMENT OF THE CASE

Thamud Eldridge was indicted in 2009 and tried in 2016 in the United States District Court for the Western District of New York on multiple counts. He was convicted on several counts: Count One, participating in a RICO enterprise in violation of 18 U.S.C. § 1962(c); Count Two, RICO conspiracy in violation of 18 U.S.C. § 1962(d); Count Three, conspiracy to possess with intent to distribute narcotics in violation of 21 U.S.C. § 846; Count Four, possession of a firearm in furtherance of the drug trafficking conspiracy charged in Count Three, in violation of 18 U.S.C. § 924(c)(1)(A)(i); Count Five, kidnapping in aid of racketeering in violation of 18 U.S.C. § 1959(a); Count Six, attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a); and Count Seven, using and brandishing a firearm in furtherance of the crimes specified in Counts Five and Six, in violation

of 18 U.S.C. § 924(c)(1)(A)(ii), § 2. The jury acquitted Mr. Eldridge on a VCAR murder charge and hung on several other charges.

Counts Five, Six and Seven related to the kidnapping and robbery of a drug dealer, Woodie Johnson, on February 23, 2005. It was alleged that Mr. Eldridge and co-defendants Kevin Allen and Kashika Speed kidnapped Johnson from his home at gunpoint, drove him to recover cocaine he had just delivered to a third-party, and took the cocaine.

The district court sentenced Mr. Eldridge to 600 months' imprisonment. 300 months of the imprisonment were based solely on the Count Seven conviction under § 924(c), Pet. App. 19, as § 924(c)(1)(C) as it existed at the time of Mr. Eldridge's sentencing mandated a consecutive 25-year (300-month) sentence for this second § 924(c) conviction in the same prosecution.[1]

In Mr. Eldridge's appeal to the United States Court of Appeals for the Second Circuit, Mr. Eldridge argued that his § 924(c) conviction on Count Seven was unconstitutional because the predicate crimes charged in Counts Five and Six were only categorical crimes of violence under the "risk of force" definition in § 924(c)(3)(B), and this Court had granted certiorari in United States v. Davis, No. 18-431, to consider the constitutionality of the risk of force clause. By the date the government submitted its brief, this Court had decided Davis, holding that the risk of force definition of a crime of violence contained in § 924(c)(3)(B) is unconstitutionally vague. United States v. Davis, ___ U.S. ___, 139 S. Ct. 2319, 2325-32 (2019). This meant that a crime could only qualify as a crime of violence if it categorically met the "elements clause" definition of crime of violence under § 924(c)(3)(A).

[1] Mr. Eldridge was sentenced on September 10, 2018, and so did not get the benefit of the First Step Act of 2018, Pub L. No.115-391, which became law on December 21, 2018, and which eliminated the stacking of § 924(c) convictions within the same prosecution.

The government in its briefing conceded that Count Five, kidnapping in aid of racketeering in violation of 18 U.S.C. § 1959(b)(2) and New York State Penal Law § 135.20 and 20, was not a categorical crime of violence under the elements clause set forth in § 924(c)(3)(A). Eldridge, 2 F.4th at 35. The government likewise conceded that one of the two alternative grounds for the Count Six conviction – conspiracy to commit Hobbs Act robbery – was not a categorical crime of violence under the elements clause. Gov't Brief, p. 77 (these crimes only qualified as crimes of violence under the residual risk of force clause declared unconstitutional in Davis). Id. The government therefore argued that Mr. Eldridge's Count Seven conviction was validly supported by the remaining alternative ground for the Count Six conviction – attempted Hobbs Act robbery.

The Court of Appeals upheld Mr. Eldridge's Count Seven § 924(c) conviction on the ground that attempted Hobbs Act robbery was a categorical crime of violence under the elements clause in § 924(c)(3)(A). Eldridge, 2 F.4th at 35. In so holding, it followed the recent panel decision of the Second Circuit in United States v. McCoy, 995 F.3d 32, 55 (2d Cir. 2021), petition for cert. filed, which held that attempted Hobbs Act robbery remains a crime of violence after Davis, categorically qualifying as a crime of violence under the elements clause definition. Eldridge, 2 F.4th at 35-36. The court of appeals then addressed the conundrum caused by the fact that the jury did not indicate which of the three charged predicate crimes it was basing its Count Seven § 924(c) conviction on, ultimately holding that Mr. Eldridge had not carried his burden of demonstrating plain error on this issue. Id. at 36-40. However, if attempted Hobbs Act robbery is not a categorical crime of violence, then there would be no way of upholding Mr. Eldridge's Count Seven conviction, because there would be no constitutionally valid predicates, and acquittal would be required.

Mr. Eldridge also argued to the Second Circuit that his Sixth Amendment right to speedy trial had been violated. Mr. Eldridge was arrested and arraigned on the underlying federal indictment on September 29, 2009. Mr. Eldridge's trial did not commence until January 13, 2016, over six years and three months after he was charged. This is an "extraordinary" delay, Barker, 407 U.S. at 533 (delay over 5 years was "extraordinary"), only a few months shy of the six-year, ten-month delay described in United States v. Tigano, 880 F.3d 602 (2d Cir. 2018), as the longest recorded delay in the Sixth Amendment jurisprudence of the Second Circuit. Mr. Eldridge spent this time in local state prisons, at the prosecutor's insistence. The bulk of the delay was attributable to the government, arising from the government's destruction or loss of evidence, the government's action in striking Mr. Eldridge's counsel, and the structural delays caused by assignment of the matter to the magistrate judge. Although Mr. Eldridge did not file a speedy trial motion below, he did directly argue to the district court that the undue delay, during which he was detained in county lockup, was a due process violation warranting immediate release.

The court of appeals rejected Mr. Eldridge's claim. While everyone agreed that the extraordinary length of delay was presumptively prejudicial, the Court found that "a significant portion, if not a substantial majority" of the delay was attributable to the defendants, 860 Fed. Appx. at 779, and that the delay "did not prejudice Mr. Eldridge in any meaningful way." Id. at 780. Both of these findings are clearly wrong. They are not consistent with correct application of the Barker factors, as informed by the animating principle that "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." Barker, 407 U.S. at 529. They discount presumed prejudice in the absence of demonstrated prejudice, in direct contravention of Doggett v. United States, 505 U.S. 647, 655 (1992)(specifically demonstrable

prejudice is not required to prevail on speedy trial claim). The Second Circuit's application of this Court's speedy trial test was incorrect, and reversal is required.

Mr. Eldridge filed a timely petition for rehearing and for rehearing en banc in the court of appeals, which was denied on August 26, 2021. This petition to this Court is timely.

## REASONS FOR GRANTING THE PETITION

### I. Attempted Hobbs Act Robbery is Not a Categorical Crime of Violence Under § 924(c).

In Mr. Eldridge's case, the Second Circuit upheld his Count Seven conviction under § 924(c)(1)(C) because it held that the attempted Hobbs Act robbery conviction in Count Six was a categorical crime of violence under the elements clause in § 924(c)(3)(A). On July 2, 2021, this Court granted the government's petition for a writ of certiorari in United States v. Taylor, No. 20-1459, to address this very issue. The issue is extremely important to Mr. Eldridge, as 300 months of his sentence rides on it. Mr. Eldridge asks the Court to hold this petition pending its decision in Taylor, and then to dispose of the petition as appropriate in light of that decision.

There is a circuit split on this important question of federal law. The currently prevailing view of the majority of jurisdictions to consider the issue is that attempted Hobbs Act robbery is a categorical crime of violence within the meaning of § 924(c). See United States v. McCoy, 995 F.3d 32, 55-57 (2d Cir. 2021), petition for cert. docketed 9/22/21; United States v. Walker, 990 F.3d 316, 325-30 (3d Cir. 2021), petition for cert. docketed 7/26/21; United States v. Ingram, 947 F.3d 1021, 1025-26 (7th Cir. 2020), cert. denied 141 S. Ct. 323; United States v. Dominguez, 954 F.3d 1251, 1261-62 (9th Cir. 2020), petition for cert. docketed 1/26/21; United States v. St. Hubert, 909 F.3d 335, 351-53 (11th Cir. 2018), cert. denied 140 S. Ct. 1727 (2020). Bucking the trend is the Fourth Circuit's decision in United States v. Taylor, 979 F.3d 203, 206-210 (4th Cir. 2020), holding that attempted Hobbs Act robbery is not categorically a crime of violence. This

Court granted review in Taylor to resolve this split. United States v. Taylor, No. 20-1459, ___ U.S. ___, 141 S. Ct. 2882 (July 2, 2021).

The Fourth Circuit's analysis is the only one consistent with this Court's jurisprudence on the categorical approach to defining a crime of violence. The other circuits, although professing to follow it, effectively ignore the categorical approach, instead substituting the holding that an attempted crime of violence was statutorily intended in § 924(c) to be a crime of violence. This, however, is not what the statute provides, and is an impermissible end run around principled application of the categorical approach.

To determine whether a defendant was using, carrying or possessing a firearm during and in relation to a crime of violence under § 924(c), the court must determine whether the predicate crime of violence "categorically" satisfies the definition of a crime of violence. Post-Davis, this means that it must categorically satisfy the elements clause definition of a crime of violence – an offense that is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A).

The categorical approach does not ask or even look at what the defendant in fact did to commit the predicate crime of violence. Rather, it focuses exclusively on the "elements of the statute of conviction." Taylor v. United States, 495 U.S. 575, 600-01 (1990). The operative question is whether the elements of the claimed predicate crime of violence necessarily include "as an element the use, attempted use, or threatened use of physical force against the person or property of another." Borden v. United States, ___ U.S. ___, 141 S. Ct. 1817, 1822 (2021)(plurality op.). Put another way, if the claimed predicate crime can be committed without establishing as an element the use, attempted use, or threatened use of physical force, then it is not categorically a crime of violence. See id.; Mathis v. United States, ___ U.S. ___, 136 S. Ct.

2243, 2248 (2016)(if the crime of conviction is broader than the crime required for enhancement, it cannot be categorically considered to have established the elements of the required crime).

The categorical approach is often applied by determining first what the least culpable conduct is that is criminalized by the crime of conviction, and then assessing whether that satisfies the elements of the crime required for enhancement. See Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013)("we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed" by the required predicate crime)(quoting Johnson v. United States, 559 U.S. 133, 137 (2010)). This exercise in determining the least culpable conduct which could support the conviction does not countenance this conduct being the product of pure "legal imagination." Id. at 191. Rather, the defendant must show a realistic probability that the crime of conviction could be prosecuted based on conduct that is broader than the elements of the required predicate crime. Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

The Fourth Circuit in Taylor correctly applied the categorical approach in concluding that attempted Hobbs Act robbery does not necessarily require as an element "the use, attempted use, or threatened use of physical force." Substantive Hobbs Act robbery requires the jury to find that the defendant "in any way ... obstructs, delays, or affects commerce or the movement of any commodity in commerce, by robbery." 18 U.S.C. § 1951(a). "Robbery" is defined as "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." 18 U.S.C. § 1951(b)(1). Not surprisingly, the federal courts of appeal have consistently held that substantive Hobbs Act robbery is a categorical crime of violence under § 924(c)'s elements clause. See United States v. Walker, 990 F.3d 316, 325 n.11

(3d Cir. 2021)(collecting cases holding that Hobbs Act robbery is a crime of violence for purposes of § 924(c)).

Attempted Hobbs Act robbery, however, is a different crime than substantive Hobbs Act robbery. To obtain a conviction for attempted Hobbs Act robbery, the government "must prove two elements: (1) the defendant had the culpable intent to commit Hobbs Act robbery; and (2) the defendant took a substantial step toward the completion of Hobbs Act robbery that strongly corroborates the intent to commit the offense." Taylor, 979 F.3d at 207. The bottom line is that neither of these elements necessarily requires proof of the "use, attempted use, or threatened use of physical force." The intent requirement clearly does not require the active violence required by the elements clause of § 924(c). It is just a mental state. With regard to the substantial step element, it is also clear that this does not invariably require the "use, attempted use, or threatened use of physical force," because caselaw from multiple circuits repeatedly shows that the substantial step needed for prosecution does not require a defendant to go so far as to actually use, attempt to use, or threaten to use physical force.

As summarized in Taylor:

> Unlike substantive Hobbs Act robbery, attempted 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. See, e.g., United States v. McFadden, 739 F.2d 149, 152 (4th Cir. 1984)( concluding that defendants took a substantial step toward bank robbery where they "discussed their plans," "reconnoitered the banks in question," "assembled [] weapons and disguises," and "proceeded to the area of the bank"). Where a defendant takes a nonviolent substantial step toward threatening to use physical force – conduct that undoubtedly satisfies the elements of 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. The plain text of § 924(c)(3)(A) does not cover such conduct.

979 F.3d at 208 (emphasis added). See also United States v. Jackson, 560 F.2d 112, 120 (2d Cir. 1977)("reconnoiter[ing] the place contemplated for commission of the crime and possess[ing] the paraphernalia to be employed in the commission of the crime" constituted a substantial step towards bank robbery); United States v. Muratovic, 719 F.3d 809, 816 (7th Cir. 2013)("co-conspirators had assembled a team, finalized the robbery plan, conducted surveillance on the truck, procured two handguns and all other supplies called for in the plan," filled up gas cans for the drive, and arrived on location of the would be crime – no violence); United States v. Wrobel, 841 F.3d 450, 453-55 (7th Cir. 2016)(upholding attempted Hobbs Act robbery conviction where evidence showed defendants planned robbery on diamond merchant, secured van, traveled across state lines, but were arrested before robbery with gloves, pry bar and hoods).

Judge Nguyen, dissenting in Dominguez, compellingly illustrates the correct application of the categorical approach to attempted Hobbs Act robbery.

> 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 *1264 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. The 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.

954 F.3d at 1263-64 (Nguyen, J., dissenting).

In contrast to the straightforward and compelling analysis employed by the Fourth Circuit, Judge Nguyen, and multiple other jurists at the federal circuit and district court levels, the majority of circuit panels have resorted to strained and unsupported legal analysis to try to fit attempted Hobbs Act robbery categorically within § 924(c)'s definition of crime of violence. As characterized by the Fourth Circuit, these circuit panels have resorted to "a rule of their own creation." Taylor, 979 F.3d at 208.

Most of these panels simply end up holding that an attempted crime of violence qualifies as a crime of violence. Some panels accomplished this with very little analysis. Ingram, 947 F.3d at 1026 (when a substantive offense would be a violent felony, an attempt to commit that offense is also a violent felony so long as the attempt offense requires proof of an intent to commit all the elements of the completed crime); Smith, 957 F.3d at 595 ("'When a substantive offense would be a crime of violence under 18 U.S.C. § 924(c)(3)(A), an attempt to commit that offense is also a crime of violence.'")(quoting Dominguez, 924 F.3d at 1261). Some panels gave it more in-depth treatment, but still landed in the same place – attempted crimes of violence count as crimes of violence for § 924(c) purposes. See Walker, 990 F3d at 328-330 ("Congress meant for all attempted crimes of violence to be captured by the elements of § 924(c), and courts are not free to disregard that direction and hold otherwise"); Dominguez, 954 F.3d at 1261-62 ("We have generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of violence.")(quotations omitted).

The principal flaw in this analysis is that it writes into the elements clause of § 924(c) language that simply is not there. These courts are reading the statute as if it added, at its end, that qualifying predicate crimes of violence included "attempted crimes of violence." But the

statute does not say this. It would have been simple, if Congress so desired, to define the predicate crimes of violence in § 924(c) to include inchoate crimes, such as attempt or conspiracy. It chose not to do so. In the face of the language actually chosen by Congress, it is an impermissible stretch to graft on an interpretation which universally includes convictions for attempted crimes of violence.

To get around this, the majority of panels have seized on the "attempted use" language in the description, in descending order of seriousness, of the acts required of the defendant for conviction. Section 924(c)(3)(A) requires that crimes of violence have as an element "the use, attempted use, or threatened use" of physical force. This is not, contrary to the conclusion of these panels, language which facially purports to elevate all attempted crimes of violence into crimes of violence. Rather, as persuasively explained by Judge Nguyen, the fairest reading of the "attempted use" language is that it is describing an act of the defendant – not an inchoate crime.

> An 'attempted use ... of physical force' under § 924(c)(3)(A) refers to a defendant's physical act of trying (but failing) to use violent physical force. *Attempted*, Merriam-Webster Dictionary (defining "attempted" as "having been tried without success"). Further, the other two qualifying elements – *using* and *threatening to use* physical force – obviously refer to acts. See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000)(explaining, under the principle of noscitur sociis, that terms must "be interpreted within the context of the accompanying words").

Dominguez, 954 F.3d at 1264 (Nguyen, J., dissenting). Correctly interpreted, the "use, attempted use, or threatened use" language simply follows Judge Nguyen's hierarchy of acts which would satisfy the definition of crime of violence.

The Third Circuit heavily relied on the "attempted use" language in Walker. See also St. Hubert, 909 F.3d at 351-52 (same). It rejected Judge Nguyen's analysis, holding that Congress's

use of "attempted" was a word of art, intended to incorporate the legal definition of attempt and to capture all attempt offenses. 990 F.3d at 329-330.

There are two obvious defects in this approach. First, as observed by Judge Nguyen, the "attempted use" language appears in a list of actions in descending order of the seriousness of those actions. It does not appear as a separate modifier of a crime of violence. Second, also as observed by Judge Nguyen, it is "nonsensical" to hold that § 924(c)(3)(A)'s description of the necessary elements of the crime would be interpreted as adding all inchoate attempts, because an attempt is not an element of a crime. "It would be nonsensical for § 924(c)(3)(A) to refer to the *crime* of attempt as an *element* of the crime of violence." Dominguez, 954 F.3d at 1266 (Nguyen, J., dissenting).

The Second Circuit's analytical gymnastics in McCoy also rely on the "attempted use" of physical force provision in § 924(c)(3)(A). It likewise held that if the substantive crime of violence requires the use of physical force, then a defendant who attempts the commission of that offense also commits a crime of violence because such an attempt necessarily requires an intent to complete the substantive crime and a substantial step towards completing the crime. 995 F.3d at 55. It held that this is an "attempted use" of physical force within the meaning of § 924(c)(3))A), despite the fact that the defendant may in fact be convicted without ever actually attempting to use force. Id. at 56. As described above, this wrongly elevates the "attempted use" description of an act by a defendant into code for inclusion of all attempted crimes of violence – which is not what the statute provides. In so doing, it relies on attempt language in the listing of necessary elements of a crime, which is "nonsensical" because attempt is not an element. Finally, and most basically, the Second Circuit and the other courts similarly ruling do their best

to ignore the basic and controlling outcome of the categorical approach: attempted Hobbs Act robbery can be committed without the "use, attempted use, or threatened use of physical force."

For these reasons, the Court should affirm the holding in Taylor, and reverse the Second Circuit's affirmance of Mr. Eldridge's Count Seven conviction and its 300-month consecutive sentence.

II. Mr. Eldridge's Sixth Amendment Speedy Trial Right Was Violated.

The court of appeals misapplied this Court's speedy trial jurisprudence in denying Mr. Eldridge's Sixth Amendment claim. Although it recited the four factors identified as most relevant in Barker v. Wingo, 407 US. 514 (1972), it did not apply them correctly. Mr. Eldridge waited over six years from the date of indictment to the date of trial. Against this presumptively prejudicial backdrop, the Second Circuit applied the factors in a manner which impermissibly favored the government and which contravened this Court's precedents.

Recognizing the Court's admonition that misapplication of a properly stated rule of law will rarely warrant certiorari, Supreme Ct. Rule 10, this should not bar granting certiorari here because of the unique nature of the speedy trial right. As the Court has repeatedly recognized, the speedy trial right is unique and particularly difficult to apply. "The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused." Barker, 407 U.S. at 519. It is "amorphous" and "slippery", requiring ad hoc analysis. Id. at 522, 530. It is precisely this nature of the speedy trial right that justifies the Court addressing application of the stated formula to specific facts. Only through actual application by the Court can meaningful guidance be provided to the lower courts. Mr. Eldridge's case is the appropriate vehicle for the Court to weigh in on proper application of the speedy trial factors, and correct the unfortunate tendency in the lower courts to look for reasons

to not find a violation where a violation in fact exists. This tendency – presumably driven by the magnitude of the relief required in the form of dismissal – needs to be corrected.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." The speedy trial right is "one of the most basic rights preserved by our Constitution." Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). "[T]his constitutional right has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself." Smith v. Hooey, 393 U.S. 374, 377-78 (1969)(quotation omitted).

In Barker, the Court rejected bright line rules to establish a violation, instead opting for a balancing test in light of the "amorphous" and "slippery" nature of the right. 407 U.S. at 522. The four factors to be balanced are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Id. at 530; Doggett v. United States, 505 U.S. 647, 651 (1992). The length of the delay "is actually a double enquiry." Doggett, 505 U.S. at 651. To trigger a speedy trial claim, the delay must be long enough to "cross [] the threshold dividing ordinary from 'presumptively prejudicial' delay." Id. at 651-52 (quoting Barker, 407 U.S. at 530-31). "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time." Id. at 652.

As conceded by the government and acknowledged by the Second Circuit, the length of the six-year, three-month delay between indictment and trial of Mr. Eldridge was presumptively prejudicial. Eldridge, 880 Fed. Appx. at 779. It is a truly extraordinary delay. See Barker, 407 U.S. at 533 (describing a delay of over five years as extraordinary). It is just a few months shy

of the six-year, ten-month delay described in United States v. Tigano, 880 F.3d 602, 612 (2d Cir. 2018), as the longest recorded delay in the Sixth Amendment caselaw of the Second Circuit. Under the Second Circuit's interpretation of the speedy trial analysis, "[w]here a defendant establishes a particularly substantial delay, 'the burden is on the government to prove that the delay was justified and that [the defendant's] speedy trial rights were not violated.'" United States v. Black, 918 F.3d 243, 254 (2d Cir. 2019)(quoting United States v. New Buffalo Amusement Corp., 600 F.2d 368, 377 (2d Cir. 1979)).

Turning to the reason for the delay, it is Mr. Eldridge's position that the bulk of the delay was attributable to the government. In assessing the reasons for the government's delay, the court must consider whether the delays were a deliberate attempt to delay trial in order to hamper the defense, were for neutral reasons, or were for valid reasons. Barker, 407 U.S. at 531; Doggett, 505 U.S. at 657. While deliberate delays count most heavily against the government, most neutral delays will also count against the government because it bears the affirmative duty to bring the case to trial. Courts routinely weigh "neutral delays 'such as negligence or overcrowded courts' against the government because 'the ultimate responsibility for such circumstances must rest with the government rather than the defendant.'" Black, 913 F.3d at 260 (quoting Barker, 407 U.S. at 531). While a neutral reason for the delay, such as negligence, is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, "it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." Doggett, 505 U.S. at 657. Delays caused by the defense weigh against the defendant. Vermont v. Brillon, 556 U.S. 81, 90 (2009).

In Mr. Eldridge's case, the primary reasons for delay were the government's destruction or loss of evidence which necessitated substantial motion work, the government's affirmative

actions in moving to strike defendant's counsel, and the structural delays caused by assignment of the matter to the magistrate judge. These all must be weighed against the government.

The government's spoliation of evidence resulted in two lengthy evidentiary hearings and over three years of delay. The first arose out of the government's destruction of the gun involved in the September 21, 2005 shooting, which was the subject of Counts 16 and 17. The government notified defendants of its destruction on December 15, 2010. Mr. Eldridge filed a motion to dismiss those counts based on the destruction on March 17, 2011. Doc. #100, Pet. App. 39. Evidentiary hearing on this (and other issues, including identification issues) were held on June 21, 2012, November 19, 2012, and March 28, 2013. Pet. App. 45, 47. The magistrate judge issued his decision on June 12, 2013, two years and three months after the motion was filed. Doc. #216, Pet. App. 49. This decision was appealed to the district court judge, who did not issue his decision until November 20, 2013 – two years and eight months after the motion was filed. Pet. App. 51.

The second delay arose when the government informed defendants for the first time through a December 22, 2014 filing that all of the remaining evidence from the September 21, 2005 shooting had been destroyed, along with other physical evidence related to a home invasion which was the subject of other indictment counts. Doc. #373, Pet. App. 58. This was on the eve of trial, scheduled for January 13, 2015. This late disclosure led directly to the adjournment of trial, Pet. App. 60-61, which was ultimately held on January 13, 2016, one year later. Evidentiary hearings were held on July 13, July 29 and August 14, 2015, and a decision was not rendered until December 16, 2015, a year after the issue was raised. Pet. App. 64-68.

The government's spoilation of evidence led to almost four years of delay as the remedy for the spoilation was litigated. This delay must be counted against the government. At best it

was negligent for the government to have destroyed this evidence, and this negligence directly caused the litigation delays. If the government had not lost or destroyed the evidence, the ensuing necessary litigation over the remedy would not have occurred. As noted in Black, litigation arising from missing photo arrays counts solely against the government. 918 F.3d at 261.

The Second Circuit refused to hold the spoilation delay against the government, noting that other defense motions were pending during this same period. 860 Fed. Appx. at 780. This ignores the fact that substantial hearing time was devoted solely to the spoilation issue. It clearly extended the time it took to take evidence and issue the ruling. While the existence of other motions may make the analysis more murky, this fact cannot be used to dismiss wholesale the delay caused by the government's destruction of evidence.

The next delay attributable to the government arose from its affirmative quest to strike defendant's counsel. Normally, delays regarding the changing of defense counsel are weighed against the defendant because the responsibility is attributable to defendant. However, on the unique facts of this case, the responsibility lies with the government because the government filed the motions to strike counsel, and these motions led to substantial delay. Because the initial indictment carried the possibility of the death penalty, two attorneys – Easton and Musitano – were appointed to represent Mr. Eldridge. After the government chose not to pursue the death penalty, it filed its first motion to remove second counsel on February 16, 2010. Pet. App. 35. This was denied by Magistrate Scott on March 15, 2010, which then led to the government's motion to extend deadlines, Doc. #34, which bumped the scheduled argument on pending issues almost three months to June 23, 2010. Pet. App. 36.

Four years later, the government again tried to remove the second appointed counsel, Doc. #304, Pet. App. 54, and again the Magistrate denied the motion. See Doc. #315 ("because this case presents complex legal and factual issues, removing learned counsel from the defendants at this late stage would cause significant disruption in the defendants' representation and place an atypical burden on remaining counsel"). Undeterred, the government filed a third motion in front of the district court judge, who granted the motion on September 16, 2014. Doc. #337, Pet. App. 56-57. As a result, Easton was terminated and Musitano was Eldridge's sole attorney. However, Musitano himself encountered some unexpected immigration issues, which left Mr. Eldridge without either of his original counsel. Attorney Addelman was appointed on February 20, 2015, Doc. #458, and the court denied repeated requests to have Easton reappointed. Pet. App. 63, 68.

Mr. Eldridge's loss of his counsel led directly to substantial delay. As Addelman represented to the court on March 6, 2015, March 27, 2015, and May 22, 2015, Pet. App. 62-64, he was not able to adequately prepare for trial within the timeframes contemplated. Trial ultimately was postponed until January 2016. But for the government's motions to strike counsel, this delay would not have been needed, and the government should be held responsible for it. Moving to strike counsel after four years of representation was an unjustifiable and unfair tactical decision, for which the government should bear the consequences.

The Second Circuit chose to not even address this reason for delay in its decision. 860 Fed. Appx. at 779-80. The government's deliberate decision to get rid of one of Mr. Eldridge's attorneys – filing no less than three motions to accomplish this, including one as the matter approached its original January 2015 trial date – was the but for cause of Mr. Eldridge losing

counsel who had been with him since indictment, and having newly-appointed counsel understandably needing a delay. This cannot be ignored, as it was by the Second Circuit.

The third substantial cause of delay arose from assignment of the case to a magistrate judge. This resulted in the systemic delays caused by appeals to the district court judge of the magistrate's rulings. For example, the magistrate judge issued a decision disqualifying government counsel on October 7, 2011. Doc. #123, Pet. App. 41. The government appealed on October 21, oral argument before the district court judge was held on January 19, 2012, a decision reversing the magistrate was issued on January 31, 2012, Doc. #138, Pet. App. 43 and the matter was not back before the magistrate until March 14, 2012. Pet. App. 43. This was a five-month delay. Likewise, the magistrate's omnibus decision regarding motions, including the destruction of the gun, was issued on June 12, 2013, Doc. #216, Pet. App. 49, appeal was taken, argument held, and decision not rendered by Judge Arcara until November 20, 2013. Doc. #249. Pet. App. 51. This was again a five-month delay. The government's appeal of the magistrate's denial of its motion to strike counsel took two-and-a-half months. Doc. #315, 337. Pet. App. 55.

As to this reason for delay, the court of appeals wrote: "we see nothing problematic in the 'neutral' reason for delay, namely the use of a magistrate judge for certain proceedings." 860 Fed. Appx. at 780. This is a clear misapplication of the Court's precedents. A "neutral" reason – in contrast to a "valid" reason – is held against the government "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531. The systemic delays caused by referral to a magistrate, which arise because the case is put on hold during appeals to the district court judge, is the responsibility of the government, just as overcrowded courts are. Id.; Boyer v. Louisiana, 569 U.S. 238, 246 (Sotomayor, J.)(dissenting from dismissal of writ as improvidently granted on issue of whether

state's failure to fund counsel for indigent defendant should be held against state in speedy trial balancing). Over one year of delay in this case was directly attributable to deadtime while the magistrate judge's decisions were appealed. This system-caused delay, while certainly neutral, cannot be dismissed as "nonproblematic." It needed to be weighed against the government.

Ultimately the Second Circuit justified the delay by stating that "a significant portion, if not a substantial majority, of the delay was attributable to the defendants." 860 Fed. Appx. at 779. This simply is not true, and was flatly contradicted by the district court's own findings. In ruling on co-defendant Speed's motion for release from custody, the district court found that as of 50 months into the proceeding, 14 months would be excludable as attributable to the defendants. Doc. #252. The remaining 36 months were neutral as to both parties. Id. This decision was made on December 12, 2013, one year prior to the government informing defendants on December 22, 2014 of its second spoilation of evidence, which as discussed above led directly to a one-year adjournment of trial.

With regard to the third Barker factor, the defendant's assertion of his right, it is undisputed that Mr. Eldridge never filed a motion to dismiss in district court based on his speedy trial right. Yet, as the Court recognized in Barker, this does not result in waiver of Mr. Eldridge's constitutional rights. 407 U.S. at 526-29 (rejecting caselaw finding waiver of Sixth Amendment's speedy trial protection if fail to demand trial). A defendant ultimately "has no duty to bring himself to trial." Id. at 527.

More importantly, this is not a case where the defendant simply sat on his hands, not complaining of the delay. Mr. Eldridge filed a pro se motion for bail release on February 13, 2015, complaining of his excessive pretrial detention in county lockup, arguing that the delay violated his due process rights, and requesting immediate release. Doc. #455, Pet. App. 62.

Counsel filed a similar motion. Doc. #469, Pet. App. 64. These motions, along with co-defendant Speed's prior pretrial detention motion, squarely brought to the court's attention the lack of a speedy trial, even if not designated as such. This should put Mr. Eldridge in a better position, under the balancing test, than the defendant who says nothing. The Second Circuit did not acknowledge this, holding simply that Mr. Eldridge "did not expressly invoke his speedy trial rights." 860 Fed. Appx. at 779. Ignoring what Mr. Eldridge did in fact do with regard to complaining of delay constitutes a misapplication of this factor.

The fourth and final Barker factor is prejudice to the defendant. "Prejudice ... should be assessed in light of the interests of defendants which the speedy trial right was designed to protect." Barker, 407 U.S. at 532. These are threefold: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id.; Doggett, 505 U.S. at 654 (same). Affirmative demonstrable proof of impairment of one's defense is not required in order to find a Sixth Amendment violation. Doggett, 505 U.S. at 655.

Mr. Eldridge suffered exactly the type of severe harms the speedy trial right is intended to protect against. His was the definition of "oppressive pretrial incarceration." As set forth in his detention motion, Doc. #455, Mr. Eldridge spent all of his six years and three months in New York county jails awaiting trial. As the Second Circuit noted in Tigano, "confinement in local jails makes those years particularly oppressive." 880 F.3d at 618. There are "little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." Barker, 407 U.S. at 532-33.

Mr. Eldridge's confinement in county jails is particularly problematic because of his contention that the prosecutor actively and intentionally sought to have him confined there. As

Mr. Eldridge explained at sentencing, he asked the magistrate judge to allow him to go into BOP custody while defending against the instant charge. The prosecutor objected, telling the judge that the government would lose its case if Mr. Eldridge was transferred out of county jail. Mr. Eldridge has now come to understand, given the testimony introduced against him at trial from multiple informants within the local county jails, that this was a tactical move by the government to continue to obtain evidence against him.

Mr. Eldridge also suffered the anxiety and concern associated with having untried crimes hanging over his head for over six years. The charged crimes were incredibly serious. They included two VCAR murder charges in violation of 18 U.S.C. § 1959(a)(1)(which he was not convicted of), shooting at a police officer (which was severed), and the counts of conviction resulting in 600 months' imprisonment. This is precisely the situation which correctly is understood to cause intense anxiety to the defendant, his family and his friends. United States v. Marion, 404 U.S. 307, 320 (1971).

In spite of all this, the court of appeals concluded that Mr. Eldridge was not prejudiced by the delay "in any meaningful way," 860 Fed. Appx. at 780, in part because Mr. Eldridge was already serving the remainder of another federal sentence for the first three years and three months following his indictment, and he did not argue that he suffered any particular anxiety. Id. In so holding, the court misapplied Barker's prejudice prong.

With regard to the fact of a concurrent sentence, the Court has expressly recognized that it does not cure or justify the delay. Prejudice still exists. In Smith v. Hooey, 393 U.S. 374 (1969), the Court addressed the Texas Supreme Court's holding that a federal prisoner did not have a speedy trial right in connection with having his state indictment moved to trial. In reversing, it observed that:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge.

Id. at 378. The Court also observed that the defendant's incarceration on another conviction does not reduce their anxiety about the pending charges. "[T]here is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large." Id. at 379.

Mr. Eldridge's sentence on his existing federal charge was made worse by the trial delay because he was not able to be classified to BOP and participate in its programming. Instead he was stuck in the deadtime of county jail. Further, because the instant charges were substantially more severe than his existing federal convictions, it is understandable and presumed that delay in resolving the instant charges would cause extreme anxiety and distress for Mr. Eldridge and his family. This anxiety is not somehow lessened because the defendant is imprisoned on another conviction.

Finally, the express perception of the Second Circuit that Mr. Eldridge needed to argue "particular anxiety" is incorrect, unfair, and inconsistent with the Court's precedents. "[C]onsideration of prejudice is not limited to the specifically demonstrable." Doggett, 505 U.S. at 655. The anxiety caused by waiting for trial on very serious charges for over six years should be presumed. It should not require counseling records or some other showing of particularized distress. As recognized in Barker, the personal prejudice that a defendant experiences "is not always readily identifiable." 407 U.S. at 531. To require a showing of particularized anxiety violates the Court's articulation of the prejudice component.

As to whether the delay impaired the defense, the Second Circuit pointed to the benefit to the defense of lost evidence. It did not, however, assess the presumptive impairment side of the equation. Because impairment of one's defense "can rarely be shown," Doggett, 505 U.S. at 655, this Court has concluded that "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Id. at 656. This presumptive prejudice "is part of the mix of relevant facts, and its importance increases with the length of delay." Id. In ignoring this entirely, the court of appeals erred. This error is magnified in the context of a delay of over six years, as this extraordinary length of delay presumptively increases the prejudice to the trial and the defendant. Also, the delay was a but-for cause of Mr. Eldridge losing his initial counsel, with whom he had built a positive relationship. Instead, Mr. Eldridge had new counsel imposed on him, over his own objection. This impaired Mr. Eldridge's ability to defend himself, which constitutes real prejudice.

Certiorari should be granted to reverse the court of appeals' decision that Mr. Eldridge's Sixth Amendment speedy trial right was not violated.

## CONCLUSION

Mr. Eldridge asks that this petition for writ of certiorari be held pending the Court's decision in United States v. Taylor, No. 20-1459, and then disposed of as appropriate in light of that decision. Mr. Eldridge also asks that the Court consider and grant this petition for writ of certiorari on the Sixth Amendment violation.

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