No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WISSAM HAMMOUD,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of this Court's recent decision in *United States v. Taylor*, 145 S. Ct. 2015 (2022), 18 U.S.C. § 924(c)(3)(A)'s "crime of violence" definition excludes attempted murder.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Hammoud, Case No. 8:04-cr-2-JDW-TGW-1

Hammoud v. United States, Case No. 8:19-cv-2541-JDW-TGW.

United States Court of Appeals (11th Cir.)

United States v. Hammoud, No. 20-13138.

TABLE OF CONTENTS

TABLE OF CONTENTS — *CONTINUED*

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Wissam Hammoud respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The district court's order denying Mr. Hammoud's motion to vacate his sentence under 28 U.S.C. § 2255 is provided in Appendix A. The Eleventh Circuit's unpublished opinion affirming the district court's order is provided in Appendix B.

JURISDICTION

The Eleventh Circuit entered its judgment on November 23, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

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

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime

that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentence to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentence to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of not less than 10 years.

* * * * *

(3) For purposes of this subsection[,] the term "crime of violence" means an offense that is a felony and—

(A) has as an element that 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 court of committing the offense.

* * * * *

18 U.S.C. § 1513 provides in pertinent part:

(a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,

shall be punished as provided in paragraph (2)

(2) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 30 years.

STATEMENT OF THE CASE

1. In a prior case, Mr. Hammoud was convicted of federal firearms offenses stemming from his sale of a firearm to an undercover agent introduced to him by a confidential informant. After the district court sentenced Mr. Hammoud, he used computer programs and met with two cooperating witnesses in an attempt to find and kill the agent and informant. He instructed the witnesses on the means to silence a firearm and said that he would pay $5,000 to anyone who killed the informant. Mr. Hammoud met with the witnesses to discuss 'the window of opportunity' to kill the informant. He also said he would provide the witnesses with a handgun and silencer to kill the informant, which he did.

2. A grand jury returned a 13-count superseding indictment against Mr. Hammoud, which included charges for: (1) retaliation against a witness, in violation of 18 U.S.C. § 1513(a)(1) (count one); (2)

solicitation to commit murder, in violation of 18 U.S.C. § 373(a) (count three); (3) use of a firearm during a "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(A) (count five); and (4) possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1) (count thirteen). As to count five—the § 924(c) count—the superseding indictment specified that four predicate "crime[s] of violence" supported the count—counts one, two, three, and four. *Id.* at 4.[1]

Mr. Hammoud later entered into a written plea agreement in which he agreed pled guilty to counts one, three, five, and thirteen in exchange for the government's dismissal of the remaining counts. The plea agreement, however, limited count five. Now, only one "crime of violence" supported the § 924(c) charge—soliciting murder, as alleged in count three.

Although the plea agreement expressly stated that the solicitation offense in count three supported the § 924(c) charge, during the change of plea hearing, after an exchange between the magistrate judge and

[1] Like count one, count two charged Mr. Hammoud with witness retaliation, and like count three, count four charged him with solicitation to commit murder. Neither count two nor count four are relevant here.

counsel, Mr. Hammoud pled guilty to carrying a firearm during the witness retaliation offense charged in count one.

The district court accepted Mr. Hammoud's guilty plea and sentenced him to 240 months' imprisonment.[2]

3. The Eleventh Circuit affirmed in part and dismissed in part Mr. Hammoud's direct appeal, which raised challenges to his guilty plea and sentence that are not relevant here, and the district court later denied on the merits his first motion to vacate his sentence under § 2255, which raised a single claim of ineffective assistance of counsel.

4. In 2019, the Eleventh Circuit gave Mr. Hammoud permission to file a second or successive § 2255 motion to challenge his § 924(c) conviction in light of this Court's then-recent decision *United States v. Davis*, 139 S. Ct. 2319 (2019). *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019).[3]

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[2] The district court sentenced Mr. Hammoud to 180 months on counts one and three, a concurrent 120-month sentence on count thirteen, and a consecutive 60-month sentence on count five.

[3] In *Davis*, this Court held that the residual clause in § 924(c)'s "crime of violence" definition is unconstitutionally vague. 139 S. Ct. at 2336. After *Davis*, the only way an offense can qualify as a § 924(c) "crime of violence" is under § 924(c)'s elements clause, which provides that an offense is a "crime of violence" if it is a felony and "has as an

5. With the Eleventh Circuit's permission, Mr. Hammoud another § 2255 motion in the district court, arguing, among other things, that in light of *Davis*, his retaliation offense was no longer a "crime of violence" and the district court therefore had to vacate his conviction on count five.

The district court denied Mr. Hammoud's motion, determining that Mr. Hammoud had procedurally defaulted on his *Davis* claim. Specifically, the court determined that although Mr. Hammoud could show cause for not raising the *Davis* objection earlier, he could not show prejudice because the retaliation offense qualified as a "crime of violence" under the elements clause. The district court, however, granted Mr. Hammoud a certificate of appealability (COA) on his *Davis* claim.

6. On appeal, Mr. Hammoud again argued, among other things, that his retaliation offense was not a "crime of violence" because attempting to kill someone does not require the attempted use of violent force. After the briefing was complete, this Court issued its opinion in

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element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

Taylor, holding that attempted Hobbs Act robbery was not a "crime of violence" under § 924(c)'s elements clause.

The Eleventh Circuit ordered the parties to submit letters addressing the effect of *Taylor*. But shortly after the Eleventh Circuit entered its order, it decided *Alvarado-Linares v. United States*, 44 F.4th 1334 (11th Cir. 2022), in which it held that under *Taylor*, attempted murder is a "crime of violence" under § 924(c)'s elements clause.

The Eleventh Circuit later issued a two-page unpublished opinion affirming the denial of Mr. Hammoud's § 2255 motion:

> Petitioner-Appellant Wissam Hammoud appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his 18 U.S.C. § 924(c) conviction on Count Five in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). The district court denied Hammoud's motion, finding his claim was procedurally defaulted. Alternatively, the district court concluded that his *Davis* claim failed on the merits.
>
> After careful review and with the benefit of oral argument, we find no reversible error in the district court's denial of Hammoud's motion to vacate his sentence.

Hammoud v. United States, No 20-13138, 2022 WL 17176310, at *1 (11th Cir. Nov. 23, 2022).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit erred when it held that attempted murder is a "crime of violence" under § 924(c)'s elements clause. As this Court recognized in *Taylor*, most attempt offenses require that a defendant intend to commit an offense and take a substantial step toward its commission. Neither element, however, requires proof that a defendant attempted to use violent force. Despite this Court's clear holding in *Taylor*, the Circuits remain confused—and in conflict—about what it means for an offense to require the "attempted use . . . of physical force" under the elements clause. Because the Eleventh Circuit's precedent creates an unambiguous circuit conflict on an issue that affects many federal prosecutions, this Court should grant certiorari and reverse.

I. In *Taylor*, this Court held attempted Hobbs Act robbery is not a "crime of violence" under § 924(c)'s elements clause.

In *Taylor*, this Court held that attempted Hobbs Act robbery is not a "crime of violence." 142 S. Ct. at 2020–21. To prove an attempt, *Taylor* explained, a defendant must have the intent to commit an offense and take a substantial step toward its commission. *Id.* Neither element requires proof the defendant used, attempted to use, or threatened to use violent force. *Id.*

To illustrate the point, *Taylor* provided an example of a defendant who plans to rob a store using a note demanding money but is apprehended at the entrance. *Id.* That individual is guilty of attempted Hobbs Act robbery, but he did not use, attempt to use, or threaten to use force. *Id.*

This same reasoning applies to attempted murder. A defendant stopped at the entrance of a store with a balled-up fist has no more used, attempted, or threatened to use force than the defendant stopped with a note. *See Hylor v. United States*, 896 F.3d 1219, 1226–27 (11th Cir. 2018) (Jill Pryor, J., concurring in result) (explaining that an individual can be convicted of attempted murder despite never using, attempting to use, or threatening to use physical force).[4]

[4] Judge Jill Pryor nevertheless concurred in the result because she was bound by the Eleventh Circuit's decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), which held that an attempt to commit a "crime of violence" is necessarily a "crime of violence." *Taylor* has abrogated *St. Hubert* and expressly rejected that reasoning. 142 S. Ct. at 2021–22; *see Alvarado-Linares*, 44 F.4th at 1346 n.2.

II. Post-*Taylor*, the circuits are split on the meaning of the phrase "attempted use . . . of physical force" and whether it captures attempted murder-for-hire offenses.

Although the circuits agree that after *Taylor*, attempted Hobbs Act robbery is not a "crime of violence," they disagree on the meaning of "attempted use . . . of physical force" and whether attempted murder-for-hire offenses require the attempted use of physical force. This Court should use this case, which squarely presents this important legal issue, to resolve the conflict.

A. In the Eleventh Circuit, the phrase "attempted use . . . of physical force" requires that a crime has as an element a substantial step plus intent to use force against another person, and it captures attempted murder-for-hire offenses.

After this Court issued *Taylor*, the Eleventh Circuit decided *Alvarado-Linares*, holding that attempted murder is a "crime of violence." 44 F.4th at 1345–48. The court held that *Taylor* was distinguishable because an individual can commit Hobbs Act robbery by threatening someone and can thus commit attempted Hobbs Act robbery by attempting to threaten someone, which, the court explained, does not require the attempted use of force. *Id.* at 1346–47. But an individual cannot commit murder, the court reasoned, by threatening someone. *Id.*

Instead, it always requires force, so an attempt to commit murder always requires the attempted use of force. *Id.* Notably, in reaching this conclusion, the Eleventh Circuit relied on the Fourth Circuit's decision in *Taylor*. *Id.* (citing *United States v. Taylor*, 979 F.3d 203, 209 (4th Cir. 2020)).

The Eleventh Circuit also rejected the defendant's argument that acts, like contacting a hitman, do not require the actual, attempted, or threatened use of force. *Id.* at 1347–48. The court held that the word "attempt" in the elements clause carries its "hornbook criminal-law definition"—an intent to commit the underlying offense and a substantial step toward its commission. *Id.* So attempted murder-for-hire offenses, the court held, are "crime[s] of violence" because they require a substantial step plus the intent to use force against another person—even if the offense merely requires contacting a hitman. *Id.*

B. In the Ninth Circuit, the phrase "attempted use . . . of physical force" requires that a crime has as an element that an offender engage in a substantial step toward the use of physical force, regardless of the offender's intent to use force, and it does not capture attempted murder-for-hire offenses.

The Ninth Circuit has also addressed the phrase "attempted use . . . of physical force" post-*Taylor*. In *United States v. Linehan*, the

defendant was charged with soliciting the transportation of an explosive device, in violation of 18 U.S.C. §§ 373(a) and 844(d), and soliciting the use of facilities of commerce with the intent that a murder be committed, in violation of 18 U.S.C. §§ 373(a) and 1958(a). 56 F.4th 693, 697–98 (9th Cir. 2022). Similar to § 924(c), the federal solicitation statute, § 373(a), punishes the solicitation of offenses that have "as an element the use attempted use, or threatened use of physical force against property or against the person of another."

In *Linehan*, the defendant argued that neither transporting an explosive device nor using an interstate commerce facility with the intent that murder be committed are "crime[s] of violence" under § 373(a)'s elements clause. *See id.* at 697. Because § 373(a)'s elements clause is largely the same as other elements clauses found in the federal criminal code, like § 924(c)'s, the *Linehan* court used "the same basic framework" used for those clauses. *Id.* at 699.

The Ninth Circuit ultimately held that transporting an explosive device requires the "attempted use" of physical force, while using an interstate commerce facility with the intent that murder be committed does not. *Id.* at 706–07. In coming to its conclusion, the Ninth Circuit

had to determine what it means for an offense to have as an element the "attempted use . . . of physical force," a component of the elements clause on which case law had provided "little independent consideration." *Id.* at 701.

Like the Eleventh Circuit, the Ninth Circuit held that in construing the phrase "attempted use . . . of physical force," it should employ "the traditional meaning of 'attempt' as requiring an individual to engage in conduct that reflects a 'substantial step' toward the wrongful end." *Id.* at 702. But unlike the Eleventh Circuit, the Ninth Circuit rejected the notion that the phrase the "attempted use . . . of physical force" "import[s] a specific intent mens rea that is associated with attempt offenses." *Id.* at 705. According to the Ninth Circuit, in *Borden v. United States*, 141 S. Ct. 1817 (2021), this Court held that crimes with a mens rea of purpose or knowledge can qualify as predicate offenses, and there is no support for the position that the "attempted use . . . of physical force" requires that predicate offenses have an additional and higher mens rea of specific intent. *Id.*

The Ninth Circuit therefore held, on the one hand, that transporting an explosive device requires the "attempted use . . . of

physical force" because it "requires the defendant to have undertaken a substantial step toward the use of violent force." *Id.* at 704. And, on the other hand, it held that using an interstate commerce facility with the intent that a murder be committed did not require the "attempted use . . . of physical force." *Id.* at 706–07. The court explained that "[a]lthough it is natural to assume that when 'murder' is referenced in a criminal statute the offense qualifies as a crime of violence," § 1958(a) is not a "crime of violence" because it requires only that a defendant travel in, or use a facility of, interstate commerce with the requisite criminal intent, conduct that does not require an offender to engage in a substantial step toward the use of violent force. *Id.*

The Ninth Circuit therefore differs from the Eleventh Circuit in two important respects. First, it construed the phrase the "attempted use . . . of physical force" to exclude any independent mens rea component. Second, it held that conduct that qualifies as attempted murder does not require the "attempted use . . . of physical force."

III. The Eleventh Circuit's ruling is wrong.

The Eleventh Circuit made two wrong turns in *Alvarado-Linares*. First, it incorrectly reasoned—relying on the Fourth Circuit's decision in

Taylor—that attempted Hobbs Act robbery is materially different because a defendant need only attempt to threaten force, while attempted murder will always require the attempted use of force. 44 F.4th at 1346–47. To be sure, the Fourth Circuit's decision turned on that distinction. But this Court did not adopt that reasoning, nor did it distinguish between offenses that a defendant can commit by threat. In fact, this Court rejected the Fourth Circuit's reasoning that if an offense requires the use of force, an attempt to commit the offense also qualifies as a "crime of violence." *See* 142 S. Ct. at 2022. Rather, *Taylor* reasoned that (1) "an intention is just that, no more," and (2) a substantial step does not require the use, attempted use, or threatened use of physical force. 142 S. Ct. at 2020. The same is true for the offense of attempted murder. *See Linehan*, 56 F.4th at 706–07.

Second, *Alvarado-Linares* reasoned, with no support, that the word "attempt[ ]" in the elements clause carries its legal meaning. 44 F.4th at 1347–48.[5] In *Taylor*, however, this Court gave "the word[s]" of the

[5] The Ninth Circuit made this same error to a lesser extent, assuming the word "attempt" in the elements clause requires a substantial step towards the commission of an offense, but not the specific intent to commit the underlying offense. *See supra* II.B.

elements clause their plain and ordinary meaning. 142 S. Ct. at 2022 & 2022 n.2. (defining "the word 'threat'" using various dictionaries); *id.* at 2023 ("The statute speaks of the 'use' or 'attempted use' of 'physical force against the person or property of another.' Plainly, this language requires the government to prove that the defendant took specific actions against specific persons or their property."). The word "attempt" means to try to accomplish something. *Attempt*, Black's Law Dictionary (11th ed. 2019). Applying that plain and ordinary meaning, acts like entering a store with a balled-up fist do not require the attempted use of force. *See Hylor*, 896 F.3d at 1226–27 (Jill Pryor, J., concurring in the result).

Applying *Taylor*'s reasoning and the correct understanding of the word "attempt" in § 924(c)'s elements clause, retaliation by attempted murder is not a "crime of violence."

IV. The question presented is extremely important.

In light of this Court's decisions in *Johnson v. United States,* 576 U.S. 591 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Davis*, courts now need to rely on elements clauses, like the one here, more and

more.[6] And post-*Taylor*, courts are still confused about how to evaluate whether an offense has as an element the "attempted use" of physical force. Waiting for more percolation will just increase the confusion; the circuits are unlikely to reach uniformity on their own. Moreover, the conflict here concerns an important and recurring issue. Indeed, the government often uses attempt crimes to support not only § 924(c) prosecutions, but also sentencing enhancement 18 U.S.C. § 16(b), the Armed Career Criminal Act, and the Federal Sentencing Guidelines. This Court should therefore expeditiously review the question presented and address the meaning of the "attempted use . . . of physical force" in § 924(c)'s elements clause.

V. This case is an excellent vehicle to resolve the conflict.

This case is an ideal vehicle for further review. The question was squarely presented in the district and circuit courts, was thoroughly considered, and provided the sole basis for the Eleventh Circuit's decision. Given the number of cases affected and the entrenched nature of the conflict, this Court's review is needed.

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[6] In *Johnson*, *Dimaya*, and *Davis*, this Court struck down the residual clauses in the Armed Career Criminal Act, 18 U.S.C. § 16(b), and § 924(c), respectively. *See supra* n.3.

CONCLUSION

For the above reasons, Mr. Hammoud respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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