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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether a Petitioner in a properly filed successive petition pursuant to 28 U.S.C. § 2255 challenging his conviction for possession of a firearm during a crime of violence in violation of 18 U.S.C. Section 924(c)(3)(A) in relation to an attempted bank robbery pursuant to 18 U.S.C. § 2113, is precluded from relief because the district court claimed it relied on the elements clause in light of *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015), *Welch v. United States*, 136 S. Ct. 1257 (April 18, 2016) and *United States v. Taylor*, 596 U.S. ___, 142 S. Ct. 2015 (2022)?

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

The case of *Cooper v. United States*, 21-6278, in which this Court vacated the judgment of the Eleventh Circuit and remanded the matter for further proceedings in light of *United States v. Taylor*, 596 U.S. __ (2022), is related to the instant matter as it was Petitioner's prior petition for a writ of certiorari to this Court.

TABLE OF CONTENTS

Page:

APPENDIX

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

PETITION FOR A WRIT OF CERTIORARI

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 conflict among the circuit courts concerning whether a petitioner in a properly filed successive petition pursuant to 28 U.S.C. § 2255 challenging his conviction for possession of a firearm during a crime of violence in violation of 18 U.S.C. Section 924(c)(3)(A) in relation to an attempted bank robbery pursuant to 18 U.S.C. § 2113, is precluded from relief because the district court claimed it relied on the elements clause in light of *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015), *Welch v. United States*, 136 S. Ct. 1257 (April 18, 2016) and *United States v. Taylor*, 596 U.S. ___, 142 S. Ct. 2015 (2022). In *Taylor,* itself a case stemming from a successive 28 U.S.C. § 2255 petition, this Court granted relief; in *Francies v. United States*, 2022 U.S. App. LEXIS 19610, at *2-4 (7th Cir. Jul. 15, 2022), an appeal from the denial of a successive 28 U.S.C. § 2255 petition, the Government conceded and the Seventh Circuit granted relief pursuant to *Taylor*, *Johnson,* and *Welch*; In Petitioner's case, under virtually identical facts and at the same juncture, the Eleventh Circuit denied relief.

If the Eleventh Circuit's decision is permitted to stand, a person's right to successive 28 U.S.C. § 2255 relief pursuant to *Taylor*, *Johnson,* and *Welch* will depend on what Circuit they were convicted in and seemingly what Assistant United States Attorney is assigned to the case. For Joseph Cooper, petitioner here, the consequences

of this arbitrary application of this Court's precedent are anything but theoretical or minor. Under *Taylor*, Petitioner's abandoned attempted bank robbery is not categorically a crime of violence. Nonetheless, the courts are denying him any relief from his additional sixty-month sentence.

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 2023 U.S. App. LEXIS 6030. Pet. App. A. The Eleventh Circuit's order denying rehearing en banc is not reported. Pet. App. D. This Court's decision granting Petitioner's Petition for a Writ of Certiorari is unpublished. Pet. App. F. The Eleventh Circuit's prior opinion relating to the successive 28 U.S.C. § 2255 petition is not reported and can be found at 2021 U.S. App. LEXIS 20555. Pet. App. B. The Eleventh Circuit's decision denying rehearing en banc is not reported. Pet. App. E. The District Court's decision denying the successive 28 U.S.C. § 2255 petition is not reported. Pet. App. C.

JURISDICTION

The Eleventh Circuit entered judgment on March 14, 2023. Petitioner timely sought panel rehearing and rehearing en banc, which the Eleventh Circuit denied on May 3, 2023. Thus, a petition for certiorari is due in this Court by Tuesday, August 1, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(a) and(b) provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [28 USCS § 2255].

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

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.

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 VIII and IX. Count VIII charged that Petitioner "did attempt, by force, violence, and intimidation, to take from the person and presence of another, United States currency…" Count IX charged that 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 JA, 45-46).

On September 12, 1997, a jury found Petitioner guilty of Counts VIII and IX and Petitioner was sentenced to 160 on count VIII and 60 months on count IX.[1] (JA 56-63).

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

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

On July 16, 2019, the magistrate entered a Report and Recommendation dismissing the 28 U.S.C. § 2255 as successive. (JA 261-270). Petitioner filed objections to this Report and Recommendation on July 24, 2019. (JA 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). (JA 282).

On January 21, 2020, a senior district court judge entered an order dismissing the 28 U.S.C. § 2255 motion as successive and denied a certificate of appealability. Pet. App. C. The Eleventh Circuit granted a certificate of appealability but denied relief and denied rehearing *en banc*. Pet. App. B, E, G.

On June 27, 2022, Petitioner file a Petition for a Writ of Certiorari in this Court, which was granted based on the decision in *United States v. Taylor*, 596 U.S. ___, 142 S. Ct. 2015 (2022) and the Court vacated the Eleventh Circuit's decision and

remanded the matter to the Eleventh Circuit for further consideration in light of that decision. Pet. App. F. On July 25, 2022, the Government filed an unopposed motion for an extension of time to file letter briefs. Supplemental letter briefs were filed and the Eleventh Circuit again denied relief and rehearing *en banc*. Pet. App. A.

2. The attempted robbery in Count VIII 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.

(JA 65-71, 73). 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 VIII relied on Petitioner's abandoned attempt to enter the bank, not any force, violence or intimidation. Specifically, on Count VIII 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 IX 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 IX. (JA 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* this 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 three or more 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 Hammoud*, 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. (JA 199-207). On March 9, 2017, Petitioner filed a Motion to Vacate under 28 U.S.C. § 2255 alleging that his conviction in Count IX of the indictment for possession of a firearm in relation to the attempted armed robbery in Count VIII 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, Petitioner 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 Petitioner 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 Stats 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. Pet. App. C.

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. G

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. B, E.

5. Petitioner filed a Petition for a Writ of Certiorari in this Court. This Court issued its opinion in *United States v. Taylor*, 596 U.S. ___, 142 S. Ct. 2015 (2022), expressly disapproving of *St. Hubert* and finding that an attempted crime of violence is not automatically categorically a crime of violence. Petitioner's petition for a writ of certiorari was granted based on *Taylor*, the matter was remanded to the Eleventh Circuit for further consideration in light of that decision. Pet. App. F. On July 25, 2022, the Government filed an unopposed motion for an extension of time to

file letter briefs, indicating that it wanted to seek guidance on how to proceed from the Justice Department in light of the significant legal issue and impact of *Taylor*. Supplemental letter briefs were filed and the Eleventh Circuit again denied relief and rehearing *en banc*, finding that because the district court said it relied on the elements clause Petitioner was not entitled to relief. Pet. App. A, D.

REASONS TO GRANT THE PETITION

There is a conflict among the Circuits regarding whether a Petitioner in a properly filed successive petition pursuant to 28 U.S.C. § 2255 challenging his conviction for possession of a firearm during a crime of violence in violation of 18 U.S.C. Section 924(c)(3)(A) in relation to an attempted bank robbery pursuant to 18 U.S.C. § 2113 is precluded from relief because the district court claimed it relied on the elements clause in light of *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015), *Welch v. United States*, 136 S. Ct. 1257 (April 18, 2016) and *United States v. Taylor*, 596 U.S. ___, 142 S. Ct. 2015 (2022).

I. A PETITIONER IN A PROPERLY FILED SUCCESSIVE PETITION PURSUANT TO 28 U.S.C. § 2255 IS ENTITLED TO RELIEF PURSUANT TO *UNITED STATES V. TAYLOR*, 596 U.S. ___, 142 S. CT. 2015 (2022) EVEN IF THE DISTRICT COURT CLAIMED TO RELY ON THE ELEMENTS CLAUSE IN LIGHT OF *JOHNSON V. UNITED STATES*, 576 U.S. 591, 135 S. CT. 2551 (2015), *WELCH V. UNITED STATES*, 136 S. CT. 1257 (APRIL 18, 2016) AND *UNITED STATES V. TAYLOR*, 596 U.S. ___, 142 S. CT. 2015 (2022).

1. The District Court's Claimed Reliance on the Elements Clause

The Eleventh Circuit held that because the district court indicated that it relied upon the elements clause, and because it believed that the jury instruction and indictment supported that claim, that Petitioner is not entitled to relief despite the

fact that this Court has now explained that attempted robbery is *not* a crime of violence under the elements clause.

In *United States v. Taylor*, 596 U.S. ___, 142 S. Ct. 2015 (2022), this Court expressly rejected the reasoning used by the Eleventh Circuit in *United States v. St. Hubert*, 909 F. 3d 335, 352-353 (11th Cir. 2018) that if a completed crime is a crime of violence then an attempt at that crime is also a crime of violence. *Id.* as 2021-22. In *Taylor*, the defendant was convicted of an attempted Hobbs Act robbery and possession of a firearm in connection with a crime of violence under 18 U.S.C. § 924(c). In Mr. Taylor's case, the robbery went "awry," and someone was shot. In his successive habeas petition, Taylor argued that the conspiracy to commit a Hobbs Act robbery and an attempted Hobbs Act robbery were not crimes of violence. The government argued that it was a crime of violence under the elements clause. The Fourth Circuit agreed with Taylor (*United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020)) and this Court agreed to resolve the conflict amongst the Circuits and ultimately sided with *Taylor* and the Fourth Circuit.

In reaching its conclusion, this Court noted that the parties agreed that the categorical approach should be applied. *Id.* at 2020. The Court explained that in order to prove an attempted Hobbs Act robbery, the "government must prove two things: (1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a 'substantial step' toward that end." *Id.* In finding that this was not categorically a crime of violence, this Court noted that "whatever one might say about *completed* Hobbs Act robbery, *attempted*

Hobbs Act robbery does not satisfy the elements clause. Yes, to secure a conviction the government must show an intention to take property by force or threat, along with a substantial step toward achieving that object. But an intention is just that, no more. And whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property." *Id.*

This Court rejected the reasoning in *St. Hubert*, that the elements clause encompasses crimes of violence and *attempts* at crimes of violence, noting that the clause does not ask "whether the defendant committed a crime of violence *or* attempted to commit one. It asks whether the defendant *did* commit a crime of violence." *Id.* at 2022.

This Court rejected the government's argument that the substantial step element makes an attempt a crime of violence because while some attempts may be violent, not all are. *Id.* This Court also rejected the argument that "threatened" use of force can be satisfied by planning to use force even it is never actually communicated. This Court noted that when Congress uses the word "threat" in a non-communicative way as argued by the government, it makes this clear. It further recognized that the government, in essence, was trying to resurrect the residual clause, which has already been found unconstitutional. *Id.* at 2023.

This Court explained that "[t]o determine whether a federal felony qualifies as a crime of violence, § 924(c)(3)(A) doesn't ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or, for that matter, with

the actual or attempted use of force). It asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force." It found that an attempted Hobbs Act robbery does not; nor does an attempted bank robbery.

Despite this clear holding that attempted robbery is *not* a crime of violence under the elements clause, the Eleventh Circuit in this case held that Petitioner is not entitled to relief because (1) the district court said it relied on the elements clause; (2) the indictment supported this claim; and (3) the jury instructions supported this claim. Pet. App. A.

First, the indictment charges the possession of a firearm in relation to a crime of violence, but does *not* specify whether it is a crime of violence under the residual clause or elements clause. (JA 45-46). Second, the instructions also did *not* indicate that in order for the crime to be considered a crime of violence the jury must find that it is a crime under the elements clause. (JA 48-54).

The district court's own explanation reveals that it used the residual clause. At the time of trial, there was no law in the Eleventh Circuit that an attempted bank robbery was a crime of violence under the elements clause. Twenty-two years after sentencing the district court indicated that it relied on the elements clause because "the trial evidence established that Cooper and a co-defendant each intended to carry a weapon during the robbery. Two weapons were found: a .357 revolver and a .32 pistol. Therefore, there was no need to rely, either in whole or in part, on the now-unconstitutional residual clause." Pet. App. C. While the district court claimed it relied on the elements clause to determine that the crime was categorically a crime

of violence, the categorical approach requires a Court look "not to the facts of the particular . . . case,' but to the statutory definition of the crime of conviction." *United States v. Chappelle*, 2022 U.S. App. LEXIS 20115, at * 10 (2d Cir. 2022) *citing Moncrieffe v. Holder*, 569 U.S. 184, 190, 133 S. Ct. 1678 (2013).

Here, the district court did the exact opposite – it looked at the facts of the case, not the statutory definition, to justify its finding that it was a crime of violence. As this Court noted in *Johnson, this is the sort of reasoning that is so problematic with the residual clause.* 135 S. Ct. 2551 at 2557.

As this Court in *Taylor* established, the district court's conclusion that it used the elements clause is misplaced when it focused on whether Petitioner intended to carry a weapon rather than the elements of the offense. This is doing exactly what was found unconstitutional in *Johnson* and *Davis*- it is creating a judge imagined abstraction – imagining that they were going to go through with the crime; imagining who was going to enter the bank; imagining who was going to carry the gun; imagining what they intended to do with the gun. That is quintessential residual clause reasoning.

The only clause the court could have used, and the clause that its reasoning showed it did actually use, was the residual clause. Just like an attempted Hobbs Act robbery, an attempted bank robbery is not a crime of violence. As Petitioner has maintained since filing his successive 28 U.S.C. § 2255 petition, he is entitled to relief because he was sentenced under the unconstitutional residual clause.

Since the Fourth Circuit issued its decision in *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020), a district court applied the same reasoning employed in that case to determine an attempted Hobbs Act robbery was not a crime of violence to determine that neither was an attempted bank robbery. *Hines v. United States*, 2021 U.S. Dist. LEXIS 118100, at *3 (D. Md. 2021) ("for the same reasons attempted Hobbs Act robbery could not serve a predicate offense for a § 924(c) conviction, neither could attempted armed bank robbery."). Many courts have recognized that a bank robbery and a Hobbs Act robbery are analogous. *See United States v. Parks*, 237 F. Supp. 3d 229, 239 (M.D. Pa. 2017) (citing to *United States v. Robinson*, 844 F.3d 137, 141 (3d Cir. 2016), which concluded that Hobbs Act robbery was a crime of violence, to reach conclusion that § 2113 bank robbery was a crime of violence); *United States v. Pena*, 161 F. Supp. 3d 268, 274-75 (S.D.N.Y. 2016) ("federal bank robbery under 18 U.S.C. § 2113(a), which is defined similarly to Hobbs Act Robbery[.]"); *Dedeaux v. United States*, 2021 U.S. Dist. LEXIS 47789, at *4 (D.N.J. 2021) ("the Third Circuit determined that Hobbs Act robbery is always a crime of violence sufficient to support a conviction under § 924(c) as, like the federal bank robbery statute, it requires the taking of property by force, violence, fear of injury, or intimidation, an element which could only be accomplished through actual, attempted, or threatened use of physical force."); *United States v. Kincade*, 2017 U.S. Dist. LEXIS, at *7 (D. Nv. 2017) ("Hobbs Act robbery and federal bank robbery are the same for our purposes."); *Jones v. United States*, 2019 U.S. Dist. LEXIS 210090, at *28 n.17 (N.D.W. Va. 2019) ("Hobbs Act Robbery—which has similar elements to federal bank robbery—is a crime of

violence under § 924(c)'s force clause."), *Cf. also United States v. Hurtado*, 2017 U.S. Dist. LEXIS 53131, at *21 (D.N.M. 2017) ("The elements of a § 2113(a) offense are nearly identical to the elements of generic robbery).[2]

The very example used by this Court in *Taylor* is almost identical to Petitioner's case. In the example, this Court posed a hypothetical where a person plans on robbing a store on a particular date, researches the business, writes the threatening note, buys the material, but is arrested upon walking in the store. This Court noted that in this scenario defendant "did not 'use' physical force. He did not 'attempt' to use such force—his note was a bluff and never delivered. And he never even got to the point of threatening the use of force against anyone or anything. He may have intended and attempted to do just that, but he failed." *Taylor*, 142 S. Ct. at 2021.

Here, Petitioner may have planned to rob the bank, he may have intended to rob the bank, and he may have taken a substantial step towards robbing the bank, but he "never even got to the point of threatening the use of force against anyone or anything[;]" "he failed." He was arrested before anyone knew what he was going to do. That is, he had the intention – "no more." *Id.* at 2020. This does not and cannot amount to a crime of violence.

[2] By affirming Petitioner's conviction in this case and rejecting Petitioner's argument on appeal that a substantial step had not been taken, the Eleventh Circuit rejected the line of reasoning that Paragraph 1 of § 2113(a) requires actual force or intimidation in an attempt to rob.

2. It is Immaterial on which Clause the District Court Claimed to Rely

The Eleventh Circuit placed great emphasis on the district court's claim that it relied on the elements clause, but the question is whether there is an element, not what the district court claimed and to the extent that *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), holds otherwise, it should be overruled. To deny Petitioner relief in this case creates a circuit conflict and it leads to an absurd and manifestly unjust result violating Petitioner's right to due process of the law.

Since the decision in *Taylor*, the Seventh Circuit in *Francies v. United States*, 2022 U.S. App. LEXIS 19610, at *2-4 (7th Cir. Jul. 15, 2022), recognized that a properly permitted successive 28 U.S.C. § 2255 petition in light of *Johnson* and *Davis* was the proper time to raise a challenge under *Taylor* and granted the petitioner successive § 2255 relief based on these Supreme Court decisions.[3] In that case, the district court also found that the attempted Hobbs Act robbery was a crime of violence under the elements clause but the Seventh Circuit reversed the § 924(c) conviction in light of *Johnson*, *Davis*, and *Taylor*.

Likewise, *Taylor* itself was the result of a successive habeas petition. In that case, the defendant pleaded guilty to the § 924(c) charge, after "a robbery went awry and his accomplice shot a man." 142 S. Ct. at 2018, 2027 (recognizing the petition was a successive § 2255 petition). As this Court concisely noted in *Taylor*, when evaluating whether a person is lawfully convicted under § 924(c) in relation to a crime of violence,

[3] The Government in this case asked for an extension so that it could receive guidance from the Department of Justice and the Solicitor General regarding how to proceed in light of *Taylor*. Now, it is taking the exact opposite position that it took in *Francies*. *Id.* at * 4.

a court's only job is to "[l]ook at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force." *Id.* at 2025. This Court concluded, that while the defendant may face prison time for violating the Hobbs Act, "he may not be lawfully convicted and sentenced under § 924(c) to still another decade in federal prison." *Id.* at 2026.

In *Taylor*, this Court did not take the strained approached advocated by the Eleventh Circuit and try to justify in retrospect the conviction by finding evidence that the court relied on the elements clause. Attempting this backward reasoning is especially strained in a case such as this one because how can the district court have actually relied on the elements clause when this Court said that the required element is simply not present. Not once has one court said what element the district court relied on to justify its statement that it relied on the elements clause. This has not happened because, as recognized by this Court, there is no element of violence under the categorical approach.[4]

Therefore, as in *Taylor*, Petitioner's conviction still cannot stand because what he was charged with in Count IX is not a crime at all. Count IX charged that Petitioner with "during in relation to a crime of violence… as charged in Count VIII, did knowingly use and carry firearms." (JA 45-46). Count VIII however, is not a crime of violence. Therefore, Count IX does not charge a crime and the conviction is in

[4] As this was a jury trial and the jury determined guilt based on the instructions given by the Court, it is unclear why it is even relevant what the trial court thought as the jury made the determination of guilt and the Court imposed the mandated sentence based on that finding.

violation of Petitioner's right to due process. Therefore, to allow it to stand violates Petitioner's right to due process of the law and it is proper for this Court to address at this stage. *Cf. e.g.*, *United States v. Brown*, 752 F.3d 1344, 1352053 (11th Cir. 2014) (if an indictment alleges something that is not a federal offenses, it does "not invoke the district court's jurisdiction to enter judgment or accept a guilty plea."); *Ex parte Royall*, 117 U.S. 241, 248, 6 S. Ct. 734 (1886) ("'An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.'"); *Johnson v. United States,* 805 F.2d 1284, 1288 (7th Cir. 1986) ("To punish a person criminally for an act that is not a crime would seem the quintessence of denying due process of law.").

Therefore, to the extent that *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017) controls, Petitioner respectfully requests this Court to overrule it.

CONCLUSION

For over seven years the Government has tried to prevent Petitioner from being awarded any relief from his conviction for possessing a firearm in relation to alleged attempted armed robbery where no one in the bank ever even knew of the alleged intention to rob the bank, much less the alleged possession of a gun. In those years, Petitioner's case has been dismissed or relief denied four separate times. Each time, however, he has appealed and in the end his position has been vindicated. Attempted armed robbery is not a crime of violence. Regardless of what the district court claimed, there is no element of violence in attempted armed robbery and,

therefore, any reference or determination of violence had to be under the residual clause. Even if this were not true, the Government, in an attempt to once again thwart Petitioner any relief from a portion of his sentence, has taken a position opposite to the one taken by the this Court when it affirmed the granting of successive 28 U.S.C. § 2255 relief and of the one that the Government took itself in the Seventh Circuit. This is unjust and violates Petitioner's right to due process. Therefore, Petitioner respectfully requests that this Court GRANT this Petition for a Writ of Certiorari.

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