No. 14-282

In the Supreme Court of the United States

TAVARES CHANDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Nevada law for conspiracy to commit robbery is a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 743 F.3d 648.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2014. A petition for rehearing was denied on June 9, 2014 (Pet. App. 54a-55a). The petition for a writ of certiorari was filed on September 8, 2014 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Nevada, petitioner was convicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 235 months of

imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-33a, 37a-39a.

1. On February 12, 2010, police officers responded to a domestic violence complaint against petitioner. Petitioner's wife, who had visible bruises, reported that petitioner had beaten her with his fists and a stick over the course of three days and had forcibly prevented her from leaving their residence to get help. She also reported that petitioner had pointed a handgun at her and threatened to kill her if she were ever unfaithful to him. Petitioner's 15-year-old daughter corroborated her mother's story and also reported that her father had beaten her regularly with extension cords since he returned from prison in March 2009. Gov't C.A. Br. 4-5.

Officers searched the apartment and found a stolen, loaded .40 caliber semi-automatic handgun, narcotics, and a wooden stick. Gov't C.A. Br. 5. A subsequent investigation revealed that petitioner had previously been convicted of a felony. Petitioner was charged in the United States District Court for the District of Nevada with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Petitioner pleaded guilty to that offense. Gov't C.A. Br. 3.

2. Based on his firearm conviction, petitioner was eligible for a prison sentence of 15 years to life under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), if he had "three previous convictions * * * for a violent felony or a serious drug of-

fense." 18 U.S.C. 924(e)(1).[1] The ACCA defines a "violent felony" as:

> 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.

18 U.S.C. 924(e)(2)(B).

Petitioner had three prior Nevada convictions for felony offenses: (1) a 1998 conviction for second-degree kidnapping; (2) a 2001 conviction for coercion; and (3) a 2005 conviction for conspiracy to commit robbery. Petitioner argued that neither his conviction for conspiracy to commit robbery nor his kidnapping conviction was a violent felony under the ACCA. Sent. Tr. 14-17.

Under Nevada law, robbery is "the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury." Nev. Rev. Stat. Ann. § 200.380(1) (LexisNexis 2012). A defendant is guilty of conspiracy in Nevada for participating in "an agreement between two or more persons for an unlawful purpose." *Nunnery* v. *Eighth Judicial Dist. Court*, 186 P.3d 886, 888 (Nev. 2008)

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[1] For defendants who do not qualify as armed career criminals, a conviction under Section 922(g)(1) carries a maximum sentence of ten years of imprisonment. 18 U.S.C. 924(a)(2).

(per curiam) (citation omitted); see Nev. Rev. Stat. Ann. § 199.480 (LexisNexis 2012). "[A]n overt act in furtherance of the conspiracy is not required to support a conviction for conspiracy" under Nevada law. *Nunnery*, 186 P.3d at 888; see Nev. Rev. Stat. Ann. § 199.490 (LexisNexis 2012). Over petitioner's objection, the district court determined that petitioner's three Nevada convictions were all violent felonies under the ACCA. Sent. Tr. 25.

As detailed in the Presentence Investigation Report (PSR) prepared by the Probation Department, petitioner had an extensive and violent criminal history, including five felony convictions in addition to the three ACCA predicates. PSR ¶ 90. In total, petitioner had 21 criminal history points, placing him in Criminal History Category VI. Petitioner's criminal history category, when combined with a total offense level of 31, resulted in an imprisonment range of 188 to 235 months under the advisory Sentencing Guidelines. Sent. Tr. 13; PSR ¶ 30. The Probation Office recommended a 235-month prison term, the high end of the Guidelines range. PSR ¶ 92; see PSR ¶ 90 ("No amount of incarceration has been sufficient to slow the defendant's crime spree and violence."). The district court agreed with the PSR's findings and recommendations, characterized petitioner as "dangerous," and imposed a 235-month prison sentence, to be followed by five years of supervised release. Sent. Tr. 39-40.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-23a. The court concluded that the Nevada offense of conspiracy to commit robbery is a "violent felony" under the ACCA because it "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii);

see Pet. App. 6a-18a.[2] Applying this Court's decisions in *James* v. *United States*, 550 U.S. 192 (2007), *Begay* v. *United States*, 553 U.S. 137 (2008), and *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), as well as its own precedent interpreting those decisions, Pet. App. 7a-10a, the court of appeals framed the inquiry as (1) "whether the conduct encompassed by the elements of conspiracy to commit robbery under Nevada law ordinarily present[s] a serious potential risk of physical injury to another," *id.* at 12a (internal quotation marks, citation and brackets omitted); and (2) "whether conspiracy to commit robbery in Nevada is roughly similar, in kind as well in degree of risk posed to those offenses enumerated at the beginning of the residual clause,'" *id.* at 15a (internal quotation marks and citation omitted).

The court of appeals ruled that petitioner's Nevada conviction for conspiracy to commit robbery satisfied both parts of the test. In addressing the risk of injury, the court relied on *United States* v. *Mendez*, 992 F.2d 1488, 1492 (9th Cir.), cert. denied, 510 U.S. 896 (1993), which had held that conspiracy to interfere with interstate commerce by robbery in violation of the Hobbs Act, 18 U.S.C. 1951, is a "crime of violence" for purposes of the firearm sentencing enhancement in 18 U.S.C. 924(c)(1). Pet. App. 12a-15a. The court found *Mendez* controlling here because (1) both Hobbs Act conspiracy and conspiracy to commit robbery under Nevada law "effectively define conspiracy to commit robbery as an agreement between two or

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[2] The court of appeals also held that petitioner's prior Nevada offense of second degree kidnapping likewise qualified as a "violent felony" under the ACCA's residual clause. Pet. App. 18a-23a. Petitioner does not challenge that conclusion in this Court.

more persons to unlawfully take property from another person against his or her will," *id.* at 13a; and (2) both the ACCA and the firearm enhancement in 18 U.S.C. 924(c)(1) "apply to crimes that involve a serious or substantial risk that physical force will occur during the course of the offense." Pet. App. 14a. The court also relied on its previous conclusion in *Mendez* that "'a conspiracy increases the chan[c]es that the planned crime will be committed' because a conspiracy 'provides a focal point for collective criminal action.'" *Id.* at 11a (quoting *Mendez*, 992 F.2d at 1491).

The court of appeals also concluded that a Nevada conviction for conspiracy to commit robbery is roughly similar, in kind and in degree of risk posed, to the enumerated offenses in the ACCA's residual clause. Pet. App. 15a-17a. It explained that, "[u]nder *Mendez*, a conspiracy to commit a violent crime creates the same risk of harm as the violent crime itself." *Id.* at 15a. Because a Nevada conviction for robbery "poses risks similar to extortion and burglary," *id.* at 17a, the court concluded that "conspiracy to commit robbery in Nevada is also similar, in kind and degree of risk posed, to extortion and burglary," *ibid.*

Judge Bybee authored a concurring opinion, joined by Circuit Judge Tashima and Senior District Judge Wood, to "question the reasoning and continued validity of *Mendez*" in light of subsequent Supreme Court decisions. Pet. App. 23a. Judge Bybee expressed the view that *Mendez* "does not satisfy" the categorical analysis set forth in *James*, under which "the relevant inquiry is whether the statutory elements of the offense 'are of the type that would justify its inclusion within the residual provision.'" *Id.* at 24a (quoting *James*, 550 U.S. at 202). He reasoned that "*Mendez*

treats the elements of conspiracy to commit a crime as identical to the elements of the underlying crime" and, "proceeding from that faulty premise, *Mendez* holds that conspiracy to commit robbery is a crime of violence even though," in Judge Bybee's view, "conspiracy rarely, if ever, presents a serious potential risk of injury to another." *Ibid.* Judge Bybee concluded that "[i]t is only when overt acts directed toward the commission of the crime are committed that a crime begins to pose a 'serious potential risk of physical injury to another.'" *Id.* at 30a (quoting 18 U.S.C. 924(e)(2)(B)(ii)). Because conspiracy to commit robbery under Nevada law does not require an overt act, Judge Bybee believed that it should not qualify as a violent felony under the ACCA's residual clause. *Id.* at 30a-31a.

Nonetheless, after noting that several circuits "have held that conspiracy may qualify as a violent felony" under the ACCA's residual clause, Judge Bybee conceded that "the Supreme Court's ACCA cases did not 'clearly' overrule *Mendez*'s holding that conspiracy to commit robbery categorically is a crime of violence (and thus a violent felony)." Pet. App. 31a, 33a. Judge Bybee urged en banc review, *ibid.*, but the court of appeals declined to consider the case en banc, *id.* at 54a-55a.

ARGUMENT

Petitioner contends (Pet. 4-22) that his prior Nevada conviction for conspiracy to commit robbery is not a "violent felony" under the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The court of appeals correctly rejected that contention, and its decision is consistent with recent decisions of this Court and other courts of appeals interpreting the ACCA. The

conflict of authority he identifies does not merit this Court's intervention: the Tenth and Eleventh Circuit decisions relied on by petitioner predate this Court's recent ACCA jurisprudence, which—as both Circuits have recognized—has undermined the basis for those decisions.

This Court has denied review in several cases raising the issue whether conspiracy to commit various forms of robbery under various state statutes constitutes a violent felony under the ACCA. See *Gore* v. *United States*, 132 S. Ct. 1633 (2012) (No. 11-6606) (Texas offense of conspiracy to commit aggravated robbery); *Gooden* v. *United States*, 559 U.S. 975 (2010) (No. 09-7568) (federal conspiracy to commit armed banked robbery); *White* v. *United States*, 558 U.S. 1151 (2010) (No. 09-6846) (North Carolina offense of conspiracy to commit robbery with a dangerous weapon, with no overt act requirement); see also *Raupp* v. *United States*, 133 S. Ct. 610 (2012) (No. 12-5234) (whether Indiana offense of conspiracy to commit robbery constitutes a "crime of violence" under Sentencing Guidelines § 4B1.2). The same outcome is warranted here.

1. a. The court of appeals correctly held that the Nevada offense of conspiracy to commit robbery is an ACCA violent felony. Under Nevada law, the underlying offense of robbery consists of "the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury." Nev. Rev. Stat. Ann. § 200.380(1). Conspiracy under Nevada law requires "an agreement between two or more persons for an unlawful purpose." *Nunnery* v. *Eighth Judicial Dist. Court*, 186 P.3d 886, 888 (Nev. 2008)

(per curiam) (citation omitted); see Nev. Rev. Stat. Ann. § 199.480. Although "an overt act in furtherance of the conspiracy is not required to support a conviction for conspiracy" under Nevada law, *Nunnery*, 186 P.3d at 888; see Nev. Rev. Stat. Ann. § 199.490, a conspiracy conviction requires proof "that the defendant had a specific intent to either commit or to aid in the commission of the specific crime agreed to," *Mayorga-Vargas* v. *State*, No. 53708, 2010 WL 3394734, at *1 (Nev. July 19, 2010) (unpublished); see *Rankin* v. *State*, 281 P.3d 1211 (Nev. 2009) (Table), 2009 WL 1470443, at *4.

Contrary to petitioner's primary contention (Pet. 14-19), the lack of an overt act requirement does not prevent conspiracy to commit robbery under Nevada law from constituting a "violent felony" under the ACCA. Such a conspiracy has as its goal the commission of an inherently violent act—the taking of property from another by means of force, violence, or fear of injury. This Court has long recognized that formation of a conspiracy necessarily threatens the accomplishment of the conspiracy's object. See, *e.g.*, *United States* v. *Jimenez Recio*, 537 U.S. 270, 275 (2003) ("The conspiracy poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime—both because the '[c]ombination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'") (brackets in original) (quoting *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961)). Conspiracy is also a continuing offense that does not terminate until it has succeeded or the conspiracy has been abandoned, *United States* v. *Kissel*,

218 U.S. 601, 608 (1910); see *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946); or, as to a particular conspirator, until the defendant has withdrawn, *Smith* v. *United States*, 133 S. Ct. 714, 721 (2013).

As the courts of appeals have recognized, these features make robbery conspiracies dangerous in the typical case. The Fourth Circuit has noted, for instance, that "[w]hen conspirators have formed a partnership in crime to achieve a violent objective, and when they intend to achieve that object, they have substantially increased the risk that their actions will result in serious physical harm to others." *United States* v. *White*, 571 F.3d 365, 371 (2009), cert. denied, 558 U.S. 1151 (2010). Other courts of appeals agree. See *United States* v. *Gore*, 636 F.3d 728, 738 (5th Cir. 2011) ("The existence of the agreement itself presents a serious potential risk that the agreement will be carried forward."), cert. denied, 132 S. Ct. 1633 (2012); *United States* v. *Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985) ("Because the conspiracy itself provides a focal point for collective criminal action, attainment of the conspirators' objectives becomes * * * a significant probability.") (emphasis omitted); see also Pet. App. 11a (citing *United States* v. *Mendez*, 992 F.2d 1488, 1491 (9th Cir.), cert. denied, 510 U.S. 896 (1993)). Thus, the formation of a conspiracy to commit robbery creates the requisite "serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

Moreover, petitioner's conspiracy offense involved at least the same degree of risk as the attempted burglary offense that this Court found to be a violent felony in *James* v. *United States*, 550 U.S. 192, 203 (2007). In *James*, the Court recognized that risk of injury was not present in all instances in which the

crime's elements had been satisfied. *Id.* at 207. The ACCA's residual clause, however, "speaks in terms of a 'potential risk.'" *Ibid.*; see *ibid.* ("These are inherently probabilistic concepts."). The Court noted that "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property," but rather from "the possibility that an innocent person might appear while the crime is in progress." *Id.* at 203. Attempted burglary, the Court held, involves the same type of risk. *Id.* at 203-204. Indeed, the risk of confrontation "may be even greater" in the context of attempted burglary: "ACCA only concerns that subset of attempted burglaries where the offender has been apprehended, prosecuted, and convicted," which "will typically occur when the attempt is thwarted by some outside intervenor." *Id.* at 204.

The logic of *James* applies with even greater force to petitioner's conviction for conspiracy to commit robbery. Unlike burglary, robbery under Nevada law *always* involves the use or threatened use of force or violence. And not only does the formation of a robbery conspiracy in itself create a "potential risk" that this violent crime will be completed, see pp. 8-10, *supra*, but the "subset" of robbery conspiracies that are discovered, thwarted, and prosecuted are far more likely to involve dangerous confrontations—either with the target of the robbery or with "some outside intervenor." *James*, 550 U.S. at 204. Therefore, although the crime's elements may in theory be satisfied "as soon as two people agree to commit a robbery in the future" (Pet. 17), the relevant subset of convictions poses a much greater level of risk. See *James*, 550 U.S. at 207 ("One could, of course, imagine a situa-

tion in which attempted burglary might not pose a realistic risk of confrontation or injury to anyone—for example, a break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors. But ACCA does not require metaphysical certainty.").

Petitioner emphasizes that the attempted burglary statute at issue in *James* "require[ed] an 'overt act'" above and beyond "mere preparation." Pet. 17 (quoting *James*, 550 U.S. at 202 (some brackets omitted)). Petitioner draws a contrast with conspiracy under Nevada law, which has no such requirement. Yet *James* did not say that *only* attempted burglaries involving an overt act pose the requisite risk of injury; the Court reserved the question. 550 U.S. at 205-206. Nor, even if *James* had adopted such a requirement for attempted burglaries, would it necessarily follow that an overt act would be required here: whereas confrontation during burglary is "a situation which the burglar ordinarily seeks to avoid," *id.* at 225 (Scalia, J., dissenting), a robbery conspirator specifically desires a dangerous confrontation and forms a partnership to achieve that end. Moreover, a robber takes a significant step towards successful realization of his crime by locating others with the same goal and agreeing to work in concert with them. Indeed, forming a conspiracy is arguably a far more significant step than the "conduct directed toward unlawfully entering or remaining in a dwelling" that qualified as an overt act in *James*. *Id.* at 203.[3]

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[3] Notably the Sentencing Commission includes conspiracy offenses—including robbery conspiracies—in its definition of "Crime of violence" for purposes of the career offender sentencing enhancement. See Sentencing Guidelines § 4B1.2, comment. (n.1).

Petitioner is also wrong to argue (Pet. 14-16) that *Chambers* v. *United States*, 555 U.S. 122 (2009), supports his claim. In *Chambers*, this Court held that the Illinois offense of failure to report for penal confinement was not a "violent felony" under the ACCA because "[c]onceptually speaking, the crime amounts to a form of inaction, a far cry from the purposeful, violent, and aggressive conduct" associated with the enumerated offenses. *Id.* at 128, 130 (internal quotation marks omitted). Attempting to analogize his robbery conspiracy offense to the failure-to-report offense in *Chambers*, petitioner and his amicus contend that his conspiracy conviction involves "no conduct * * * at all" (Pet. 16; see Sent. Project Amicus Br. 7), represents "all talk and no action" (Pet. 18), and therefore does not show "an increased likelihood that [he] is the kind of person who might deliberately point the gun and pull the trigger," *Begay* v. *United States*, 553 U.S. 137, 146 (2008). That argument, however, overlooks that the act of conspiring *is* conduct, see *United States* v. *Shabani*, 513 U.S. 10, 16 (1994) ("[T]he criminal agreement itself is the *actus reus*."), and that the agreement is generally manifested through actions, not just words. See *United States* v. *Damra*, 621 F.3d 474, 496 (6th Cir. 2010) ("[A] de-

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In *James*, this Court treated the Commission's application of the career offender enhancement as relevant "evidence that a crime * * * poses a risk of violence." 550 U.S. at 207; see *id.* at 206 ("[T]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between a particular offense and the likelihood of accompanying violence." (citation omitted)). The Commission's considered judgment that conspiracy to commit robbery is a "crime of violence" further supports the decision below.

fendant's agreement to participate in a conspiracy can be inferred from his actions."), cert. denied, 131 S. Ct. 2930 (2011); *Galatas* v. *United States*, 80 F.2d 15, 22 (8th Cir. 1935) ("[T]he agreement is generally a matter of inference, deduced from the acts of the persons accused.") (citation omitted), cert. denied, 297 U.S. 711 (1936). And when the specific goal of a conspiracy is to obtain another's property by the use or threat of force or violence, "form[ing] a partnership in crime to achieve [that] violent objective * * * substantially increase[s] the risk that [the conspirators'] actions will result in serious physical harm to others." *White*, 571 F.3d at 371; see *Gore*, 636 F.3d at 740-741 ("Even if an offender * * * agreed that another co-conspirator would commit the crime, his participation in a conspiracy to commit aggravated robbery—in which he must intend that the crime be carried out—serves as a self-identification as the type of person who, if later armed, is more likely to pull the trigger.").

Petitioner also contends (Pet. 12-14) that the court of appeals erred by "conflating" conspiracy to commit robbery with robbery itself. In support of that argument, he notes that "[t]he elements do not overlap at all." Pet. 13. But petitioner's prior conviction was not for conspiracy to commit some undefined unlawful purpose; it was for conspiracy to commit robbery. Because petitioner's goal was inherently violent, and because the act of conspiring created a "criminal grouping" that increased the chance that such violent felony would be committed, *Chimurenga*, 760 F.2d at 404, the act of conspiring to commit that violent felony constitutes "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Petitioner mischaracterizes the court

of appeals' reasoning in *Mendez* as "conspiracy to do x = x." Pet. 13 (emphasis omitted) (quoting Pet. App. 28a (Bybee, J., concurring)). That is not what *Mendez* said. Rather, after first concluding that robbery was a violent crime, the court of appeals then considered the level and seriousness of the risk created by "a criminal grouping" of likeminded conspirators, correctly concluding that a conspiracy to commit robbery creates a "significant probability" that physical force will be used. 992 F.2d at 1491-1492 (emphasis omitted; citation omitted). That analysis is precisely what the ACCA requires.

b. This Court's most recent ACCA decision further supports the court of appeals' holding. In *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), the Court held that a prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is a "violent felony" under the ACCA's residual clause, because vehicular flight categorically "presents a serious potential risk of physical injury to another." *Id.* at 2273. The Court rejected the defendant's argument that *Begay* and *Chambers* "require ACCA predicates to be purposeful, violent, and aggressive in ways that vehicle flight is not." *Id.* at 2275. The Court held that, "[i]n general, levels of risk divide crimes that qualify from those that do not." *Ibid.* The Court distinguished *Begay* as "involv[ing] a crime akin to strict liability, negligence, and recklessness crimes." *Id.* at 2276. Outside of that context, "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk." *Id.* at 2275; see *id.* at 2275-2276 (inquiry into "risk levels provide[s] a categorical and manageable stand-

ard that suffices to resolve the case before [the Court]").

As in *Sykes*, the crime of conspiracy to commit robbery under Nevada law involves knowing or intentional conduct, and thus an inquiry into "risk levels provide[s] a categorical and manageable standard that suffices to resolve the case." *Sykes*, 131 S. Ct. at 2275-2276. For the reasons set forth above, the offense of conspiracy to commit robbery satisfies the risk-of-injury requirement of *Sykes*. See pp. 8-15, *supra*. The offense of conspiracy to commit aggravated robbery is therefore a "violent felony" under the ACCA's residual clause, without any need to conduct a redundant inquiry into whether the offense is also purposeful, violent, and aggressive.

In any event, conspiracy to commit robbery necessarily involves action aimed toward a violent end—conduct that is by definition purposeful, violent, and aggressive. See *White*, 571 F.3d at 372-373 (noting that the offense of conspiracy to commit robbery with a dangerous weapon is "marked by combative readiness or bold determination against the person of another") (internal quotation marks omitted); see also *Gore*, 636 F.3d at 740 ("An agreement that another will commit aggravated robbery is purposeful because it is made with intent that the crime be committed. It is violent because it contemplates a physical assault or threatened assault against another person. * * * For the same reasons, an agreement to commit aggravated robbery is an aggressive act.").

2. Contrary to petitioner's contention (Pet. 8-11), further review is not warranted to address any division in authority among the courts of appeals. Numerous courts of appeals have held that conspiracy to

commit robbery is a violent felony under the ACCA. See Pet. App. 10a-18a; *Gore*, 636 F.3d at 738; *White*, 571 F.3d at 373; *United States* v. *Wilkerson*, 286 F.3d 1324, 1326 (11th Cir.), cert. denied, 537 U.S. 892 (2002); *United States* v. *Hawkins*, 139 F.3d 29, 34 (1st Cir.), cert. denied, 525 U.S. 1029 (1998); *United States* v. *Preston*, 910 F.2d 81, 86-87 (3d Cir. 1990), cert. denied, 498 U.S. 1103 (1991); see also *United States* v. *Griffith*, 301 F.3d 880, 884-885 (8th Cir. 2002), cert. denied, 537 U.S. 1225 (2003) (conspiracy to commit theft). Moreover, as petitioner concedes, at least four courts of appeals have concluded that a conspiracy to commit robbery or theft is a violent felony under the ACCA without regard to the existence of an overt-act requirement. See *White*, 571 F.3d at 370 (rejecting defendant's argument that, "absent an overt-act element, the Conspiracy Offense categorically fails to present a degree of risk of physical harm that is similar to the risks posed by the enumerated offenses"); see also Pet. App. 10a-18a; *Griffith*, 301 F.3d at 885; *Hawkins*, 139 F.3d at 34.

Petitioner points to two circuits that have supposedly reached a different conclusion. Pet. 9-11 (discussing *United States* v. *King*, 979 F.2d 801 (10th Cir. 1992), and *United States* v. *Whitson*, 597 F.3d 1218 (11th Cir. 2010)). Yet both of those cases have been substantially undermined by this Court's recent ACCA jurisprudence—as the Circuits themselves have acknowledged.

a. Before *King*, the Tenth Circuit held in *United States* v. *Strahl*, 958 F.2d 980 (1992), that attempted burglary under Utah law was not a violent felony under the ACCA. *Strahl* relied on precisely the sort of "metaphysical" speculation that this Court repudi-

ated in *James*, 550 U.S. at 207, hypothesizing that the elements of attempted burglary might be satisfied even by "conduct such as making a duplicate key, 'casing' the targeted building, obtaining floor plans of a structure, or possessing burglary tools." *Strahl*, 958 F.2d at 986. Therefore, because the *Strahl* court could conceive of activities that satisfied the statute's elements but "do not *necessarily* present circumstances which create the high risk of violent confrontation inherent in a completed burglary," the court ruled that attempted burglary was not an ACCA predicate. *Ibid.* (emphasis added); see *ibid.* ("Attempted burglary convictions under Utah law, thus, may include conduct well outside § 924(e)'s target of 'violent' felonies. * * * Where a category is overly broad or inclusive, subsection (ii) is not applicable.") (citation and some internal quotation marks omitted).

In *King*, the Tenth Circuit addressed whether a defendant's prior New Mexico conviction for conspiracy to commit armed robbery was a violent felony under the ACCA. See 979 F.2d at 804. The court recognized that "[a] strong argument can be made that a conspiracy to commit a violent felony presents a serious potential risk of physical injury to another, and is therefore itself a 'violent felony' for purposes of [the ACCA]." *Id.* at 803 (emphasis omitted). The court also acknowledged that other courts of appeals had taken that position, holding that conspiracies to commit violent felonies are themselves qualifying ACCA predicates. *Id.* at 803-804 (citing cases). The *King* court observed, however, that it was "not writ[ing] on a clean slate." *Id.* at 804. Rather, the court was bound to follow *Strahl*, and, since the elements of conspiracy to commit robbery "do not neces-

sarily present circumstances which create the high risk of violent confrontation inherent in a completed [armed robbery]," such conspiracies could not qualify as violent felonies. *Ibid.* (quoting *Strahl*, 958 F.2d at 986).

This Court's recent ACCA rulings have seriously eroded the basis on which *King* and *Strahl* rested. *James* undercut *Strahl*'s precise holding by finding attempted burglary under Florida law to be a violent felony. 550 U.S. at 195. But even more fundamentally, *James* rejected *Strahl*'s method of looking for "unusual cases in which even a prototypically violent crime might not present a genuine risk of injury." *Id.* at 208. *James* instead made clear that "the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *Ibid.* (emphasis added); see also *Sykes*, 131 S. Ct. at 2281 ("The fact that Sykes can imagine a nonrisky way to violate [the statute] does not disprove that intentional vehicular flight is dangerous 'in the ordinary case.'" (quoting *James*, 550 U.S. at 208)).

The Tenth Circuit has itself recognized that *James* undermined the basis for *Strahl* and *King*. In *United States* v. *Fell*, 511 F.3d 1035 (10th Cir. 2007), the court explained that *James* had "[r]eject[ed] the method * * * this court adopted in *Strahl*," which had improperly "require[d] that every conceivable factual offense covered by a statute must *necessarily* present a serious potential risk of injury before the offense can be deemed a violent felony." *Id.* at 1039-1040 (citation omitted). Therefore, the court undertook in *Fell* to apply the "new framework" outlined in *James* to determine whether conspiracy to commit second

degree burglary under Colorado law was a violent felony. *Id.* at 1039.[4]

Fell makes clear that the Tenth Circuit has abandoned the approach of *Strahl* and *King* in favor of the *James* framework. See 511 F.3d at 1039-1040.[5] Other Tenth Circuit cases have accordingly found state offenses to come within the ACCA's residual clause without requiring "that every conceivable factual offense covered by a statute fall within the ACCA." *United States* v. *West*, 550 F.3d 952, 957 (10th Cir. 2008), overruled on other grounds by *Chambers* v. *United States*, 555 U.S. 122 (2009) (internal quotation marks and citation omitted). It is therefore unlikely that the Tenth Circuit would stand behind *King* if

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[4] In *Fell*, the court concluded that such a conspiracy did not qualify as a violent felony. The court found that, even though the conspiracy "increase[d] * * * the theoretical probability [that] the substantive crime of burglary will be completed," a burglary itself creates the requisite risk only through the possibility of confrontation with an innocent person during the crime, and a burglary conspiracy does not require that a burglar be present at the targeted building. 511 F.3d at 1043-1044. In this case, by contrast, the substantive offense of robbery is *inherently* dangerous, requiring the employment of "force or violence or fear of injury." Nev. Rev. Stat. Ann. § 200.380(1). An increased risk of completing the substantive crime, therefore, means an increased risk of physical injury.

[5] In *United States* v. *Martinez*, 602 F.3d 1166 (10th Cir. 2010), the Tenth Circuit indicated that *Strahl*'s holding as to attempted burglary under Utah law had "survived *James*," because the Utah statute was broader than the Florida statute at issue in *James*. *Id.* at 1172-1173. The court also recognized, however, that "the analysis in *Strahl* * * * may be questioned" in light of *James*, *id.* at 1173, and the court confirmed that "the *James* framework" was the correct approach to evaluating the ACCA's residual clause, *id.* at 1169.

given an appropriate opportunity to reconsider the issue. See also *United States* v. *Turner*, 501 F.3d 59, 68 n.8 (1st Cir. 2007) (recognizing that "the Tenth Circuit has more recently moved toward the majority position" with regard to conspiracy offenses), cert. denied, 552 U.S. 1243 (2008).

b. Review is also not warranted to resolve any tension between the decision below and the Eleventh Circuit's interpretation of the Sentencing Guidelines in *United States* v. *Whitson*, 597 F.3d 1218 (11th Cir. 2010). A Guidelines case cannot justify this Court's intervention, because the Commission is free to adopt definitions in the Guidelines that differ from definitions under the ACCA. And, like the Tenth Circuit's decision in *King*, the basis for *Whitson* has been substantially eroded by this Court's recent ACCA jurisprudence.

Before *Begay*, the Eleventh Circuit held in *United States* v. *Wilkerson*, 286 F.3d 1324 (2002), that conspiracy to commit robbery under Florida law was a violent felony under the ACCA. The court explicitly rejected the defendant's claim that the offense did not qualify "because Florida does not require an overt act in furtherance of the conspiracy." *Id.* at 1325. The court found "no merit in this argument," concluding that "[w]hen one reaches an agreement with a co-conspirator to commit a robbery, and formulates the intent to commit the robbery, his conduct presents at least a potential risk of physical injury within the meaning of § 924(e)(2)(B)(ii)." *Id.* at 1325-1326.

In *Whitson*, the question was whether the defendant's prior conviction for a non-overt-act robbery conspiracy was a "crime of violence" under Section 4B1.1 of the Sentencing Guidelines. The court

acknowledged and reaffirmed *Wilkerson*'s holding that robbery conspiracies pose a sufficiently high level of risk. *Whitson*, 597 F.3d at 1221-1222; see *id.* at 1222 ("We stand by *Wilkerson* as far as it concerns serious risk of physical injury."). In light of *Begay*, however, the court concluded that its "analysis must go further," requiring the court also to "consider whether the prior crime is 'roughly similar, in kind as well as in degree of risk posed' to an enumerated crime." *Id.* at 1221 (quoting *Begay*, 553 U.S. at 143). The court therefore inspected the defendant's robbery conspiracy for what it called "*Begay* Similarity in Kind." *Id.* at 1222. And, looking at the conspiracy separate and apart from its objective, the court did not find it: because "[n]o violence or aggression is associated with forming an agreement," the court concluded that such conspiracies "lack[] the requisite violence and aggression to be roughly similar in kind to burglary, arson, and the other enumerated crimes." *Ibid.* (internal quotation marks omitted).

As noted above, see pp. 15-16, *supra*, *Sykes* has now put to rest the misconception that *Begay*'s "purposeful, violent, and aggressive" language was intended to impose a new prerequisite for all ACCA predicates. The Eleventh Circuit agrees, and has therefore resumed evaluating knowledge-based and intent-based crimes with regard only to the degree of risk they pose:

> Because *Sykes* makes clear that *Begay*'s "purposeful, violent, and aggressive" analysis does not apply to offenses that are not strict liability, negligence, or recklessness crimes, we join the general consensus of the circuits recognizing as much. Offenses that are not strict liability, negligence, or reckless-

> ness crimes qualify as crimes of violence under [Guidelines] § 4B1.2(a)(2)'s residual clause if they categorically pose a serious potential risk of physical injury that is similar to the risk posed by one of the enumerated crimes.

United States v. *Chitwood*, 676 F.3d 971, 979 (11th Cir.), cert. denied, 133 S. Ct. 288 (2012). In light of that change, it appears that *Wilkerson*'s holding—that non-overt-act robbery conspiracies pose a sufficiently high degree of risk—is again dispositive as to whether such robbery conspiracies qualify under the ACCA's residual clause. At a minimum, it would be premature for this Court to take up the issue before the Eleventh Circuit has had an opportunity to reconsider *Whitson* in light of *Sykes* and *Chitwood*.[6]

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[6] In *Johnson* v. *United States*, No. 13-7120 (argued Nov. 5, 2014), this Court has granted certiorari to address whether possession of a short-barreled shotgun is a violent felony under the ACCA's residual clause. Cf. Sent. Project Amicus Br. 10 (noting disagreement over firearm-possession offenses, including the offense involved in *Johnson*). Although the Court's analysis of the residual clause in *Johnson* could have relevance for the analysis here, the natures of the offenses involved in the two cases are sufficiently distinct that it is unnecessary to hold the petition in this case for *Johnson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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