No. 14-_____

IN THE
Supreme Court of the United States

TAVARES CHANDLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

James A. Oronoz
Lucas J. Gaffney
ORONOZ & ERICSSON LLC
700 South 3rd Street
Las Vegas, NV 89101
(702) 878-2889

E. Joshua Rosenkranz
Counsel of Record
Robert Loeb
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

QUESTION PRESENTED

Tavares Chandler was subject to a 15-year mandatory minimum sentence as a "career criminal" because he had a conversation in which he agreed he would commit a robbery.

Is conspiracy to commit a robbery, absent any overt act in furtherance of the crime, itself a violent felony presenting a serious potential risk of physical injury justifying an enhanced sentence under the Armed Career Criminal Act?

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OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 743 F.3d 648 (9th Cir. 2014). The judgment of the district court (Pet. App. 34a-53a) is unreported. The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. 54a-55a) is unreported.

JURISDICTION

The court of appeals entered the judgment sought to be reviewed on February 20, 2014, and denied rehearing and rehearing en banc on June 9, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), provides a mandatory minimum sentence of 15 years for defendants who have "three previous convictions by any court for … a violent felony." "Violent felony" is defined by § 924(e)(2)(B) 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* ….

(emphasis added). The emphasized phrase is known as the ACCA's "residual clause." *Chambers v. United States*, 555 U.S. 122, 124 (2009).

STATEMENT OF THE CASE

Tavares Chandler pleaded guilty, without a plea agreement, to a charge of being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). Pet. App. 4a. Ordinarily, the maximum sentence for this offense is 10 years. *See* § 924(a)(2). Under the ACCA, however, the sentence jumps to a mandatory minimum of 15 years if the defendant "has three previous convictions by any court … for a violent felony," § 924(e)(1). The term "violent felony" is defined by Section 924(e)(2)(B), which includes a broad residual clause encompassing any crime that is punishable by more than one year of imprisonment and "involves conduct that presents a serious potential risk of physical injury to another."

The district court determined that Chandler had previously been convicted of three "violent felonies," and sentenced him to 235 months' imprisonment. Pet. App. 2a. Chandler did not dispute that one of his predicate offenses, a Nevada conviction for coercion, qualified as a violent felony. Chandler did, however, dispute the other offenses the government offered as predicate "violent felonies": a Nevada conviction for conspiracy to commit robbery, Nev. Rev. Stat. §§ 199.480, 200.380, as well as a prior kidnapping conviction. The district court rejected Chandler's arguments, finding that the residual clause covered both the kidnapping conviction and the conspiracy conviction. Pet. App. 23a.

On appeal, a Ninth Circuit panel affirmed. The court determined that under *United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993), it was compelled to conclude that conspiracy to commit robbery is a violent felony. Pet. App. 10a-17a. According to the panel, *Mendez* established that "a conspiracy to commit a violent crime creates the same risk of harm as the violent crime itself." Pet. App. 15a. Because robbery "creates a serious risk of harm that is comparable to the risk posed by burglary," the panel concluded, conspiracy to commit robbery must be treated as a violent felony as well. Pet. App. 17a.

Judge Bybee concurred in the judgment, joined by the other two members of the panel. On behalf of all three judges on the panel, Judge Bybee "wr[o]te separately to question the reasoning and continued validity of *Mendez*." Pet. App. 23a. Not only is *Mendez's* "holding that *conspiracy to do x = x*" "illogical," he explained, but also its "conclusion is questionable in light of recent Supreme Court precedent." Pet. App. 28a.

Turning to Chandler's conviction in particular, Judge Bybee observed that, "[u]nlike some states, Nevada does not require an overt act in pursuance of the crime." Pet. App. 27a (citing *Lane v. Torvinen*, 624 P.2d 1385, 1386 (Nev. 1981)). Because the crime entails only an unlawful agreement, the Supreme Court of Nevada has held that "'although conspiracy to commit robbery involves conspiring to commit a violent act, it is not itself a felony involving the use or threat of violence'" for purposes of a state sentencing scheme. Pet. App. 28a (quoting *Nunnery v. Eighth Judicial Dist. Ct. ex rel. Cnty. of Clark*, 186 P.3d 886, 888 (Nev. 2008) (per curiam)). Judge

Bybee "s[aw] no reason why this court should diverge from the Supreme Court of Nevada's sound reasoning and the well-established law that conspiracy to commit a crime is not the same as committing a crime." Pet. App. 28a.

Judge Bybee further explained that *Mendez* failed to "recognize that although a person conspiring to commit robbery is 'doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury.'" Pet. App. 29a (quoting *Chambers,* 555 U.S. at 128). Rather, "only when overt acts directed toward the commission of the crime are committed" does "a crime begin[] to pose a 'serious potential risk of physical injury to another.'" Pet. App. 30a.

Judge Bybee also noted that "the circuits are split over whether conspiracy is a violent felony" and collected cases from the last twenty years indicative of this entrenched dispute. Pet. App. 31a. In light of "the questionable reasoning in *Mendez* and intervening Supreme Court precedent," the entire panel took the extraordinary step of recommending further review of this "difficult issue." Pet. App. 33a.

The Ninth Circuit denied rehearing en banc without an opinion. Pet. App. 55a.

REASONS FOR GRANTING THE WRIT

There is an established and entrenched circuit conflict regarding whether a defendant convicted of conspiracy to commit a robbery, absent any steps in furtherance of that crime, will for the purposes of sentencing enhancements be treated as having been

convicted of a violent felony. Here, petitioner was convicted of such a conspiracy under Nevada law, which makes the agreement a crime, even with no physical or overt act taken to commit the robbery. Neither the plain language of the Armed Career Criminal Act (ACCA), this Court's precedents, nor common sense support treating a mere agreement as itself being a violent crime. The relevant statutory language speaks to offenses that "*involve*[] *conduct* that *presents* a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii) (emphasis added). A conspiracy, without any overt act, requires no physical "conduct" at all and certainly no conduct that by itself could be deemed a violent crime.

Unfortunately, petitioner was in the Ninth Circuit where a mere agreement to commit a robbery, without more, is itself a violent crime. Had this case arisen in the Tenth or Eleventh Circuits instead, the prior conspiracy conviction, without any overt act, would not be treated as a "violent felony" for purposes of the 15-year minimum sentence under the ACCA. Fifteen years in prison turns on a single conversation and a fluke of jurisdiction.

This result cannot stand. Indeed, all three members of the panel in the court of appeals in this case took the unusual step of filing a concurring opinion doubting whether the Ninth Circuit precedent comports with the statute and this Court's rulings and calling for further review on the issue. Pet. App. 33a. Judge Bybee, writing for all three panel members, criticized the Ninth Circuit's approach as an "illogical holding that *conspiracy to*

do x = x" that necessarily bypasses the ACCA's statutory requirement that the crime itself "involve[] conduct that presents a serious potential risk of physical injury to another." Pet. App. 28a. As Judge Bybee explained, this gloss was particularly troublesome when a state conspiracy statute lacked any overt act requirement because "[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.'" Pet. App. 28a.

The problems generated by the Ninth Circuit approach in this case are echoed throughout the courts of appeals. The First, Fourth, and Eighth Circuits treat a conspiracy as synonymous with the planned crime, even in the absence of any overt act. They hold, in Judge Bybee's words, that a "*conspiracy to do x = x*." The Tenth and Eleventh Circuits, on the other hand, have followed this Court's mandate to evaluate the elements of the conspiracy crime itself to determine whether it is "similar, in kind as well as degree of risk posed to the enumerated offenses" in the ACCA. *Begay v. United States*, 553 U.S. 137, 144 (2008). These circuits agree that, under this approach, a no-overt act conspiracy cannot be a violent felony. The Ninth Circuit's denial of rehearing en banc leaves the courts of appeals irreconcilably split on this critical question and binds the Ninth Circuit to its flawed precedent.

This Court's review is plainly warranted for three reasons: (1) there is a clear and entrenched split among the courts of appeals on the question

presented that will persist absent this Court's intervention; (2) as the unanimous concurrence below reflects, the outcome in this case is both incorrect and contrary to the rulings of this Court; and (3) this case is an ideal vehicle in which to resolve a frequently reoccurring issue and a matter of clear importance to the proper administration of the criminal justice system under both the ACCA and the United States Sentencing Guidelines, as well as a host of other federal statutes.

I. THE COURTS OF APPEALS ARE INTRACTABLY DIVIDED ON THE QUESTION PRESENTED.

Despite decades of debate and acknowledgement of inconsistent outcomes, the courts of appeals remain deeply and intractably divided over whether inchoate crimes of conspiracy, in the absence of any overt act, are themselves violent crimes under the ACCA residual clause. On one hand, the Tenth, and Eleventh Circuits have held that no-overt act conspiracy crimes are not sufficiently "purposeful, violent, [or] aggressive" to qualify as a violent felony. *Begay*, 553 U.S. at 144. On the other hand, the Ninth Circuit, along with the First, Fourth, and Eighth Circuits have held that "conspiracy to commit a crime of violence is itself a violent crime." *United States v. Griffith*, 301 F.3d 880, 885 (8th Cir. 2002) (quotation omitted). These squarely conflicting holdings on this important and reoccurring issue will not reconcile absent this Court's review.

A. Four Circuits Look To Whether The Planned Crime Is Potentially Violent In Holding That A Separate Conspiracy Conviction Itself Should Be Deemed A Violent Crime.

Four circuits firmly, but erroneously, hold that conspiracy to commit a robbery, with no overt act at all, should be deemed a "crime of violence" under §924(c)(3). For example, even where, as here, the crime of conspiracy itself requires no violence or any overt act at all, the Ninth Circuit believes that it is a violent crime because the crime that was being discussed or planned "involves a substantial risk that physical force … may be used in the course of committing the offense." *Mendez*, 992 F.2d at 1491.

The First, Fourth and Eighth Circuits, too, focus on the danger of violence from the crime being planned, as opposed to any violence from the conspiracy itself, even when under the relevant state laws a conspiracy requires no overt act. *See United States v. Fiore*, 983 F.2d 1, 1, 4 n.4. (1st Cir. 1992); *United States v. White*, 571 F.3d 365, 373 (4th Cir. 2009); *United States v. Griffith*, 301 F.3d 880, 885 (8th Cir. 2002). These courts of appeals have consistently and repeatedly held that conspiracy can be a violent felony under § 924(e)(2)(B)(ii) because the conspiracy subsumes the planned crime. With little analysis, these courts hold that a "conspiracy to commit a crime of violence is itself a violent crime." *Griffith*, 301 F.3d at 885 (quoting *United States v. Johnson*, 962 F.2d 1308, 1311 (8th Cir. 1992)); *see also United States v. Boaz*, 558 F.3d 800, 807–08 (8th Cir. 2009) (the "analysis of a prior conspiracy

conviction is governed by the substantive offense that was the object of the conspiracy"); *United States v. Hawkins*, 139 F.3d 29 (1st Cir. 1998). As the Fourth Circuit has explained, a conspiracy to commit a violent crime is "categorically aggressive" and "cannot be divorced from its violent objective" and is therefore a violent felony under the ACCA. *See White*, 571 F.3d at 372–73; *see also United States v. Mason*, 392 F. App'x 171, 174 (4th Cir. 2010) (extending *White* and holding non-overt act conspiracy is a "crime of violence" under the sentencing guidelines).

B. The Tenth And Eleventh Circuits Properly Hold That A Conspiracy, With No Overt Act, Is Not An Inherently Violent Crime.

In conflict with the Ninth Circuit ruling here, the Tenth Circuit correctly holds that non-overt act conspiracies are not violent felonies. In *United States v. King*, 979 F.2d 801 (10th Cir. 1992), the court of appeals held that conviction for conspiracy to commit armed robbery does not fall within the residual clause. The court reasoned that non-overt act conspiracies "do not necessarily present . . . the high risk of violent confrontation inherent in the completed [underlying crime]." *Id.* at 804 (citation omitted). Without this "high risk" of violence, the conspiracy did not fall within the ACCA residual clause. *Id.*; *see also United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007) (Colorado conviction for conspiracy to commit burglary did not qualify as violent felony under residual clause).

Likewise, the Eleventh Circuit holds that conspiracy crimes without overt act requirements are not themselves violent crimes. *See United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010). At issue in *Whitson* was whether conspiracy to commit robbery, absent any overt act element, was a crime of violence.[1] *Id.* at 1222. The court framed the relevant question as "whether criminal conspiracy is similar, in kind as well as degree of risk posed to the enumerated offenses." *Id.* (quoting *Begay*, 553 U.S. at 144. The court of appeals held that this inquiry turned on whether "the conspiracy, in itself, involves conduct that is purposeful, violent, and aggressive." *Id.* Applying that standard, the court held that "[w]ithout more, [non-overt act conspiracy] lacks the

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[1] In *Whitson*, the issue was presented under U.S.S.G. § 4B1.2. Because the U.S.S.G. § 4B1.2 definition of "violent crime" is nearly identical to the ACCA's residual clause, the courts routinely rely on cases interpreting one provision when considering the other. *See, e.g., United States v. Chitwood*, 676 F.3d 971, 975 n.2 (11th Cir. 2012) (using cases concerning residual clause violent felonies to interpret § 4B1.2 violent crimes because the two are "substantially the same."); *United States v. Sprouse*, 394 F.3d 578, 580 (8th Cir. 2005) ("Because the definitions of crime of violence and violent felony are identical, the same analysis applies in determining whether [the defendant's] convictions fall within the conduct defined."); *United States v. Wilfong*, 528 F. App'x 814, 821 (10th Cir. 2013) ("[T]he residual clause in § 4B1.2(a)(2) is identical to language in the ACCA [and therefore w]e apply the same analysis to both."); *accord United States v. Winter*, 22 F.3d 15, 18 n.3 (1st Cir. 1994); *United States v. Raupp*, 677 F.3d 756, 758 (7th Cir. 2012); *United States v. Moore*, 635 F.3d 774, 775 (5th Cir. 2011); *United States v. Vann*, 660 F.3d 771, 773 n.2 (4th Cir. 2011); *United States v. Stinson*, 592 F.3d 460, 463 (3d Cir. 2009); *United States v. Ladwig*, 432 F.3d 1001, 1005 (9th Cir. 2005).

requisite violence and aggression to be roughly similar in kind to … the enumerated crimes." *Id.* (internal quotation marks omitted).

Like the Ninth Circuit panel below, the Eleventh Circuit acknowledged and rejected out-of-circuit precedent reaching the opposite conclusion. Of the Fourth Circuit holding in *White* addressing an identical conspiracy offense, the *Whitson* court observed that while "[i]t may be true that a conspiracy and its target offense are linked … the *Begay* analysis requires us to separate them and to examine *the conspiracy alone*." 597 F.3d at 1223. Because there is "no violence or aggression in the act of agreement," *id.*, the court concluded it "cannot agree" with the Fourth Circuit in *White*. *Id.*

These cases stand in clear conflict with the Ninth Circuit ruling here, as well as the holdings of four other circuits that have expressly and repeatedly held that non-overt act inchoate crimes can be violent felonies under the ACCA residual clause and like federal statutes. This conflict is long-standing and incapable of resolution without this Court's intervention.

II. THE NINTH CIRCUIT'S DECISION IS WRONG AND CONFLICTS WITH THE DECISIONS OF THIS COURT.

This Court should grant certiorari because the Ninth Circuit's decision in this case is wrong and conflicts with this Court's rulings on the scope and application of the ACCA residual clause. Indeed, as all three members of the panel suggested, the ruling

below leads to outcomes fundamentally at odds with this Court's guidance in *Begay v. United States*, 553 U.S. 137 (2008), and *Sykes v. United States*, 131 S. Ct. 2267 (2011), among others.

Hundreds of offenders receive mandatory minimum 15-year sentences under the ACCA each year.[2] In light of the importance of this statute, this Court has endeavored to provide meaning to the residual clause. *Sykes*, 131 S. Ct. at 2270. The task has not always been easy. Because "Congress chose to frame ACCA in general and qualitative, rather than encyclopedic, terms," the statute "'requires judges to make sometimes difficult evaluations of the risks posed by different offenses.'" *Id.* at 2277 (quoting *James v. United States*, 550 U.S. 192, 210 n.6 (2007)); *see also id.* at 2284 (Scalia, J., dissenting) (suggesting that the residual clause be declared "a drafting failure" that is unconstitutionally "void for vagueness").

Against this backdrop, this Court's decisions set forth three clear principles for evaluating whether a predicate offense falls within the residual clause and triggers the 15-year mandatory minimum. None of these principles support the approach embraced by the Ninth Circuit.

First, "separate crime[s]" must be analyzed separately. *Chambers*, 555 U.S. at 126. Thus, whether a conviction supports a sentencing enhancement under

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[2] U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 283 (Oct. 2011).

the ACCA, requires precise definition of the elements of a particular predicate offense to determine whether an offense necessarily "involves conduct that presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii); *Begay*, 553 U.S. at 141 (considering whether the elements of a New Mexico DUI statute involved conduct that posed a risk of physical injury).

Accordingly, the Ninth Circuit and the other circuits that follow its approach err in conflating conspiracy to commit robbery with robbery itself: It is rather "well established" that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). If the government alleges that a conspiracy offense is an ACCA predicate, that offense must be examined on its own terms.

The elements of the Nevada offenses at issue underscore this point. To convict a defendant of robbery, the State must prove: (1) "the unlawful taking," (2) "of personal property," (3) "from the person of another, or in the person's presence," (4) "against his or her will," (5) "by means of force or violence or fear of injury." Nev. Rev. Stat. § 200.380(1). By contrast, "Nevada law defines a conspiracy as [1] an agreement [2] between two or more persons [3] for an unlawful purpose." *Nunnery v. Eighth Judicial Dist. Ct. ex rel. Cnty. of Clark,* 186 P.3d 886, 888 (Nev. 2008) (internal quotation marks omitted); *see also* Nev. Rev. Stat. § 199.480. The elements do not overlap at all. So, as the panel below explained, the reasoning that "*conspiracy to do x = x*," is both "illog-

ical" and wrong. Pet. App. 28a (Bybee, J., concurring). Under this Court's interpretation of the ACCA, whether *robbery* is a violent felony cannot answer whether *conspiracy to commit robbery* is.

Second, the ACCA residual clause is intended to redress the most egregious of "career criminals." *Taylor v. United States*, 495 U.S. 575, 581 (1990). Accordingly, a "violent felony" under the residual clause requires a combination of bad "intent[]" or bad "conduct" such that the crime demonstrates "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146; *see also Sykes*, 131 S. Ct. at 2275–76. Section 924(e), after all, imposes a mandatory minimum 15-year sentence on firearm possession. Both intent and conduct are required for an offense to be "similar … in kind" to § 924(e)'s "listed examples—burglary, arson, extortion, or crimes involving the use of explosives." *Begay*, 553 U.S. at 142–43; *see also Sykes*, 131 S. Ct. at 2275–76.

Accordingly, where an intent requirement is missing, as with "a strict liability crime" like driving under the influence, the offense will not qualify, notwithstanding that it "reveal[s] a degree of callousness toward risk." *Begay*, 553 U.S. at 146. And similarly, where a conduct requirement is missing, as with a "crime [that] amounts to a form of inaction" like failing to report to a prison, the offense will not qualify either, because whatever the offender is "doing … at the relevant time, there is no reason to believe that [it] poses a serious potential risk of physical injury." *Chambers*, 555 U.S. at 128.

The Nevada conspiracy offense fails to qualify at this threshold step. To obtain a conspiracy conviction, it is "not … necessary to prove that any overt act was done in pursuance of such unlawful conspiracy." Nev. Rev. Stat. § 199.490.[3] Indeed, "Nevada conspiracy law … considers the crime of conspiracy a completed act upon the making of an unlawful agreement regardless of whether the object of the conspiracy is effectuated." *Nunnery*, 186 P.3d at 888–89. So, as in *Chambers*, the offense requires no physical action at all, let alone action that poses a serious risk of physical injury. "To the contrary, an individual who" conspires to commit a crime in the future "would seem unlikely, not likely, to call attention to [his plans] by simultaneously engaging in additional violent and unlawful conduct." *Chambers*, 555 U.S. at 128.

The approach of the Ninth Circuit is, however, that there is no difference at all between discussing a crime and committing the crime. The Court has stated that "where conspirators agree to use actual or threatened force, or violence to obtain personal property from another, the risk that physical force may be used *in the course of* the conspiracy is substantial." *Mendez*, 992 F.2d at 1492 (internal quota-

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[3] The same is true of some federal conspiracy offenses, like conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 1951, and drug conspiracy, 21 U.S.C. § 846, *see United States v. Shabani*, 513 U.S. 10 (1994), as well as the generic conspiracy offenses of two other states of this Circuit, *see* Ariz. Rev. Stat. § 13-1003(A) (no overt act required for conspiracy to commit crimes against the person, burglary, or arson); Or. Rev. Stat. § 161.450, and at least 12 other states nationwide, *see United States v. Garcia-Santana*, 743 F.3d 666, 673 n.4 (9th Cir. 2014).

tion marks omitted) (emphasis added). But a conspiracy offense in Nevada is fully completed when the parties have a conversation in which they agree to commit a future crime—well before the conduct constituting its potentially violent object takes place, and indeed before any conduct takes place at all.

Under *Chambers*, this temporal distinction matters. The proper question is whether the conduct at the "time" of the offense itself (or undertaken "simultaneously" with it) "poses a serious potential risk of physical injury"—not whether *future* conduct, constituting a separate crime, would pose such a risk. 555 U.S. at 128; *see also id.* (indicating skepticism that "violence that may occur long after an offender fails to report" has any "relevance"). Where no conduct is required at all to be guilty of conspiracy, it cannot fit within a category of offenses "involv[ing] *conduct*" of any sort. § 924(e)(2)(B)(ii) (emphasis added).

Third, to qualify as a violent felony, "the risk posed by" the offense must be "comparable to that posed by its closest analog among the enumerated offenses" in the statute—burglary, arson, extortion, and crimes involving explosives. *James*, 550 U.S. at 203. Applying this assessment of relative risk, the Court has held that intentional vehicular flight from law enforcement (*Sykes*) and attempted burglary (*James*) do pose comparable risks of physical injury, whereas failing to report to a penal institution (*Chambers*) and driving under the influence (*Begay*) do not.

Most on point is *James*, which also concerned an inchoate offense. The Court held that a Florida at-

tempted burglary offense was sufficiently comparable to completed burglary because "the risk arises not from the completion of the burglary, but from the possibility that an innocent person might appear while the crime is in progress." 550 U.S. at 203. Indeed, "[i]nterrupting an intruder at the doorstep while the would-be burglar is attempting a break-in creates a risk of violent confrontation" with whomever interrupts the crime-in-progress—a risk the Court thought "may be even greater than that posed by a typical completed burglary," which may not involve any confrontation at all. *Id.* at 203–04.

This risk posed by a would-be burglar caught red-handed, on the verge of entering, was central to the Court's holding. The Court emphasized that attempted burglary in Florida "requir[es] an 'overt act *directed toward entering* or remaining in a structure or conveyance,'" and conversely that "[m]ere preparation is not enough." *Id.* at 202 (citation omitted) (emphasis added). And the Court reiterated the point by distinguishing other states' "attempt laws that could be satisfied by preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure illegally." *Id.* at 205; *see also id.* at 206 ("[W]e need not consider whether the more attenuated conduct encompassed by such laws presents a potential risk of serious injury under ACCA.").

Conspiracy to commit robbery, in contrast, is distinct from the commission of the crime of robbery. In Nevada, it need not even involve "mere preparation"; the crime is committed as soon as two people agree to commit a robbery in the future, *Nunnery*, 186 P.3d

at 888–89, even months later and miles away. And an agreement, in itself, poses no serious risk of physical injury to anyone. As the Eleventh Circuit put it, "No violence or aggression is associated with forming an agreement." *Whitson*, 597 F.3d at 1222 (per curiam).

So it will not do to contend, as the government did below, that "'by entering into a criminal partnership to commit such a violent crime, conspirators render acts of violence … much more likely'" down the road. Answering Br. 27 (quoting *United States v. White*, 571 F.3d 365, 372 (4th Cir. 2009)). The statute does not speak in the future tense, or describe offenses setting in motion events that may one day lead to physical injury. Rather, the residual clause speaks in present terms only, of offenses that "*involve*[] *conduct* that *presents* a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii) (emphasis added.) Under the statute's plain text, the risk of injury must be presented directly by the conduct constituting the offense. That is why *James* crafted its holding carefully: "We conclude that nothing in the plain language of clause (ii), when read together with the rest of the statute, prohibits attempt offenses from qualifying as ACCA predicates *when they involve conduct that presents* a serious potential risk of physical injury to another." 550 U.S. at 198 (emphasis added).

A conspiracy to commit a robbery, without any overt act, is all talk and no action. That talk and the agreement reached is criminal, but it poses no risk of injury itself. Thus, the Ninth Circuit's ruling here

cannot be sustained under this Court's decisions and it should be overruled.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING A REOCCURRING ISSUE OF NATIONAL IMPORTANCE.

This case cleanly presents an issue that is ripe for and in need of this Court's adjudication. The three judge panel here noted the conflict among the circuits, questioned the validity of the Ninth Circuit's approach and called for further review of this "difficult issue." Pet. App. 33a. That rehearing en banc was denied only amplifies the need for this Court's review—the courts of appeals have dug in their heels on opposite sides of this recurring question, awaiting guidance from this Court. Indeed, recent decisions addressing this issue have been issued as unpublished opinions, further insulating them from meaningful review. *See United States v. Mason*, 392 F. App'x 171 (4th Cir. 2010) (reversing district court determination that North Carolina conspiracy conviction did not fall within ACCA residual clause without oral argument)

This case presents the ideal vehicle for resolving the circuit conflict. There is no dispute that the target offense—robbery under Nevada law—is a "violent felony" under ACCA's residual clause. Nor is there any dispute that Mr. Chandler's conspiracy conviction did not require an overt act; the crime of conspiracy may be accomplished under Nevada law on the basis of an agreement alone. Nor does Mr. Chandler challenge the district court's conclusion that he has two other predicate convictions for a

"violent felony." Thus, determining whether his conspiracy conviction was for a "violent felony" is dispositive to the application of the ACCA's 15-year mandatory minimum penalty.

Additionally, the conflict over ACCA's application to inchoate offenses is of great significance. As this Court has acknowledged, "'in terms of fundamental fairness, the Act should ensure . . . that the same type of conduct is punishable on the Federal level in all cases.'" *Taylor,* 495 U.S. at 582 (quoting S. Rep. No. 98-190, p. 20 (1983)). The entrenched circuit split on this issue, however, produces vastly different sentences determined not by the defendant's eligibility, but by the happenstance of geography. Offenders convicted of the same offense, with the same criminal history, will receive dramatically different sentences if they are convicted in circuits that agree with the Ninth Circuit's interpretation of ACCA's residual clause, than if they are convicted in circuits that do not. And the geographical disparity at issue here is especially apparent because the two circuits with the largest number of offenders subject to ACCA's mandatory minimum penalty—the Fourth Circuit and the Eleventh Circuit—are on opposite sides of the split. *See* U.S. Sentencing Comm'n*, Mandatory Minimum Penalties*, *supra*, at 284.

The severity of § 924(e)'s mandatory minimum magnifies the extent of the disparate and disproportionate sentences that the split creates. On average, defendants who qualify for ACCA's mandatory minimum receive sentences that are more than seven years longer than if no mandatory

minimum penalty applies.[4] In this case, for instance, treating Mr. Chandler's prior conspiracy conviction as a "violent felony" transformed the 10-year *maximum* sentence into a 15-year *minimum* sentence, and enabled the nearly 20-year sentence the district court imposed. Because the decision to apply ACCA increases a defendant's sentence by many years, the gulfs between sentences received by similarly situated defendants—and the disproportionate sentences—that this conflict produces are significant.

Finally, this issue has effects beyond ACCA's 15-year mandatory minimum penalty. Other statutes and sentencing guideline provisions are analogous to ACCA's residual clause. Because courts usually interpret these "virtually identical" definitions the same, *see United States v. Harris*, 586 F.3d 1283, 1285 (11th Cir. 2009), the issue of whether conspiracy carries the same risk as the target offense is not limited to ACCA. It applies to U.S. Sentencing Guidelines enhancements for immigration offenses, *see* U.S.S.G. § 2L1.2(b)(1)(A)(ii), as well as criminal history and career-offender determinations, *id* §§ 4A1.1(e), 4B1.1 &. 4B1.2(a).[5] It affects bail and release eligibility under the Bail Reform Act, 18 U.S.C. § 3156(a)(4) (defining a "crime of violence" as a felony that "involves a substantial risk [of] physical force"). It also delineates the scope of criminal liability under 18 U.S.C. § 924(c) and its mandatory

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[4] *See* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties*, *supra*, at 286.

[5] *See* p. 10 n.1, *supra*.

minimum penalties, which are already widely criticized as overly punitive and inconsistently applied. *See* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties*, *supra*, at 359-61.

For over two decades the circuit courts of appeals have grappled with this question, reaching diametrically opposed conclusions and, in the process, subjecting thousands of defendants to inconsistent terms of incarceration. Faced with an entrenched conflict, judges must resort to calling upon their own circuit colleagues for reconsideration, Pet. App. 33a, and respectfully disagreeing with their sister circuits, *see Whitson*, 597 F.3d at 1223. All the while, a majority of circuits are applying a rule that plainly contradicts this Court's precedent and results in dramatically enhanced sentences that were never intended by Congress.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

James A. Oronoz
Lucas J. Gaffney
ORONOZ & ERICSSON LLC
700 South 3rd Street
Las Vegas, NV 89101
(702) 878-2889

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Date: September 8, 2014

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. TAVARES CHANDLER, *Defendant-Appellant.*	No. 12-10331 D.C. No. 2:10-cr-00482-GMN-PAL-1 OPINION

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted
June 13, 2013 – San Francisco, California

Filed February 20, 2014
Before: A. Wallace Tashima and Jay S. Bybee, Circuit Judges, and Kimba M. Wood, Senior District Judge.*

Per Curiam Opinion;
Concurrence by Judge Bybee

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* The Honorable Kimba M. Wood, Senior Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed the district court's conclusion that the defendant had previously been convicted of three "violent felonies," which subjected him to an increased penalty under the Armed Career Criminal Act, 18 U.S.C. § 924 (e)(1).

The panel held that a Nevada conviction for robbery is a violent felony because it creates a serious risk of harm that is comparable to the risk posed by burglary; and that because after *United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1992). "the § 924(e) analysis of a prior conspiracy conviction is governed by the substantive offense that was the object of the conspiracy," conspiracy to commit robbery, pursuant to Nev. Rev. Stat. §§ 199.480, 200. 380, is also a "violent felony" under the ACCA's residual clause.

The panel also held that second degree kidnapping in Nevada, Nev. Rev. Stat. §§ 200.310, 200.330, categorically involves a serious risk that physical force may be used in the course of committing the offense; that this risk is roughly similar to the risk involved in burglary; and that second degree kidnapping under Nevada law is,

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

accordingly, categorically a "violent felony" under the residual clause of the ACCA.

Concurring, Judge Bybee, joined by Judges Tashima and District Judge Wood, agreed that *Mendez* requires the per curiam holding that conspiracy to commit robbery is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii), but wrote separately to question the reasoning and continued validity of *Mendez*.

COUNSEL

James A. Oronz (argued) and Lucas J. Gaffney, Oronoz & Ericcson, L.L.C., Las Vegas, Nevada, for Defendant-Appellant.

Phillip N. Smith, Jr. (argued), Assistant United States Attorney, Daniel G. Bogden, United States Attorney, Robert L. Ellman, Appellate Chief, United States Attorney's Office of the District of Nevada, Las Vegas, Nevada, for Plaintiff-Appellee.

OPINION

PER CURIAM:

Tavares Chandler pleaded guilty to being a felon in possession of firearm in violation of 18 U.S.C. § 922(g))(1). At sentencing, the district court concluded that Chandler had been convicted of three "violent felonies," as defined by the Armed Career Criminal Act (ACCA), and sentenced Chandler to a term of 235 months' imprisonment. Chandler does not contest his extensive criminal history, but he contends that the district court erred in concluding that he had been convicted of three violent felonies.

Because we conclude that all three prior convictions are violent felonies under the ACCA, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Chandler was indicted in 2010 for being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). Chandler pleaded guilty to the indictment without the benefit of a plea agreement. Chandler had previously been convicted in Nevada state court of the offenses of (1) second degree kidnapping, Nev. Rev. Stat. §§ 200.310, 200.330; (2) coercion, Nev. Rev. Stat. § 207.190; and (3) conspiracy to commit robbery, Nev. Rev. Stat. §§ 199.480, 200.380. The government sought an increased penalty under the ACCA, arguing that Chandler's Nevada state convictions qualified as violent felonies. *See* 18 U.S.C. § 924(e)(1). Chandler objected, arguing that neither his conspiracy conviction nor his kidnapping conviction was a violent felony as defined by the ACCA. He did not dispute that his conviction for coercion qualified as a violent felony. Over Chandler's objection, the district court determined that Chandler's three Nevada state convictions were all violent felonies under the ACCA and sentenced Chandler to 235 months' imprisonment. Chandler timely appealed.

"We review de novo whether a prior conviction is a predicate felony under the ACCA." *United States v. Grisel*, 488 F.3d 844, 846 (9th Cir. 2007) (en banc).

II. DISCUSSION

Under 18 U.S.C. § 924(e)(1), any "person who violates section 922(g) of this title and has three previous convictions … for a violent felony or a serious drug offense, or both, … shall be … imprisoned not less than fifteen years." For purposes of this subsection of the ACCA, a violent felony is "any crime punishable by imprisonment for a term exceeding one year … [that] 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)(B)(ii).

Notably, a violent felony as defined in the ACCA is nearly identical to a "crime of violence" as defined in the Sentencing Guidelines' Career Offender enhancement.[1] *Compare* 18 U.S.C. § 924(e)(B)(ii) *with* U.S. Sentencing Guidelines Manual § 4B1.2(a) (providing that a crime of violence is (1) "any offense … punishable by imprisonment for a term exceeding one year, that … is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"). Because there is no meaningful

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[1] Similarly, we have observed that the definition of "crime of violence" in 18 U.S.C. § 924(c) "is very similar to that of 'violent felony' in section 924(e)(2)(B)." *United States v. Sherbondy*, 865 F.2d 996, 1008 n.15 (9th Cir. 1988). Although the definitions are not always interchangeable, similar statutory language suggests that the definitions may be similarly interpreted. *United States v. Coronado*, 603 F.3d 706, 709 (9th Cir. 2010).

distinction between the definitions, we have used our analysis of the definition of crime of violence in the Sentencing Guidelines to guide our interpretation of violent felony in the ACCA. *See United States v. Spencer*, 724 F.3d 1133, 1138 (9th Cir. 2013); *United States v. Crews*, 621 F.3d 849, 852 n.4 (9th Cir. 2010); *United States v. Melton*, 344 F.3d 1021, 1027 (9th Cir. 2003).

In *United States v. Park*, 649 F.3d 1175 (9th Cir. 2011), we established a framework for analyzing whether a conviction under state law is a conviction for a crime of violence. "First, the 'conduct encompassed by the elements of the offense, in the ordinary case,' must 'present[] a serious potential risk of physical injury to another.'" *Id.* at 1177-78 (alteration in original) (quoting *James v. United States*, 550 U.S. 192, 208 (2007)). "Second, the state offense must be 'roughly similar, in kind as well as in degree of risk posed' to those offenses enumerated at the beginning of the residual clause—burglary of a dwelling, arson, extortion, and crimes involving explosives." *Id.* at 1178 (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)). As we recently observed:

> The inquiry under *Park*'s first prong is straightforward. But the second requirement—whether the state offense is "'roughly similar, in kind as well as in degree of risk posed' to those offenses enumerated at the beginning of the residual clause"—is more complicated, and must be addressed in

> light of the Supreme Court's quartet of ACCA cases.

Spencer, 724 F.3d at 1138 (internal citation omitted) (quoting *Park*, 649 F.3d at 1178).

In *James*, the Supreme Court held that the second requirements should focus on whether the risk posed by the state offense "is comparable to that posed by its closest analog among the enumerated offenses." *James*, 550 U.S. at 203. In *Begay*, however, the Court concluded that a state conviction for driving under the influence was not categorically a violent felony under the ACCA because it did not "involve purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 144–45. (internal quotation marks omitted); *see also Chambers v. United States*, 555 U.S. 122, 128 (2009) (applying *Begay's* "purposeful, violent, and aggressive conduct" formula). In its most recent ACCA opinion, the Court once again focused on the level of risk posed by the state offense at issue compared with the level of risk posed by the enumerated offenses. *See Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011) ("In general, levels of risk divide crimes that qualify from those that do not.").

We concluded in *Spencer* that *Sykes* meant that *Begay's* "purposeful, violent, and aggressive formulation' is only dispositive in cases involving a strict liability, negligence, or recklessness offense"—such as driving under the influence—and does not apply to intentional crimes. *Spencer*, 724 F.3d at 1139; *see also* Sykes, 131 S. Ct. at 2276 ("*Begay*

involved a crime akin to strict liability, negligence, and recklessness crimes; and the purposeful, violent, and aggressive formulation was used in that case to explain the result. The felony at issue here is not a strict liability, negligence, or recklessness crime."). Many of our sister circuits have interpreted *Sykes* similarly. *See, e.g.*, *Harrington v. United States*, 689 F.3d 124, 135 (2d Cir. 2012) ("In *Sykes*, the Court clarified that in cases involving intentional criminal conduct, the focus of judicial inquiry should remain on the risk assessment specified in the ACCA's text, i.e., whether the proscribed conduct present a serious potential risk of physical injury to another' comparable to that posed by the enumerated offenses." (quoting 18 U.S.C. § 924(e)(2)(B)(ii))); *United States v. Chitwood*, 676 F.3d 971, 979 (11th Cir. 2012) ("*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."); *United States v. Bartel*, 698 F.3d 658, 662 (8th Cir. 2012); *United States v. Meeks*, 664 F.3d 1067, 1070 (6th Cir. 2012); *United States v. Smith*, 652 F.3d 1244, 1248 (10th Cir. 2011); *United States v. Rodriguez*, 659 F.3d 117, 119 (1st Cir. 2011).

Here, neither conspiracy to commit robbery nor second degree kidnapping is a strict liability crime or offense that punishes reckless or negligent behavior. *See Doyle v. State,* 921 P.2d 901, 911 (Nev. 1996) (overruled on other grounds by *Kaczmarek v. State,* 91 P.3d 16 (Nev. 2004)) ("A person who *knowingly* does any act to further the object of a conspiracy, or otherwise participates

therein, is criminally liable as a conspirator; however, '[m]ere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not name one a party to conspiracy.'" (alteration in original) (emphasis added) (quoting *State v. Arredondo,* 746 P.2d 484, 487 (Ariz. 1987))); Nev. Rev. Stat. § 200.310(2) ("A person who *willfully* and without authority of law seizes, inveigles, takes, carries away, or kidnaps another person with the intent to keep the person secretly imprisoned … is guilty of kidnapping in the second degree." (emphasis added)). As a result, we apply the "closest analog test" set for in *James*. *See Spencer*, 724 F.3d at 1140.

With this framework in mind, we turn to Chandler's prior convictions.

A. *Conspiracy to Commit Robbery*

We have not previously considered whether conspiracy to commit robbery is a violent felony.[2]

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[2] We recently held that a Nevada conviction for conspiracy to commit burglary is not an aggravated felony under the immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(U). *United States v. Garcia-Santana,* ___F.3d___, No. 12-10471 (9th Cir. Feb. 20, 2014); *Garcia-Santana* does not govern this case because the INA's aggravated felony definition substantially differs from the ACCA's definition of a "violent felony." *See Nijhawan v. Holder,* 129 S. Ct. 2294, 2300-01 (2009). Unlike the ACCA, the INA defines "aggravated felony" to specifically include a "conspiracy to commit" one of its listed offenses, among which is "burglary." 8 U.S.C. § 1101(a)(43)(U). In *Garcia-Santana*, therefore, the question presented was

We have, however, determined that conspiracy to interfere with interstate commerce by robbery is a crime of violence for purposes of the firearm sentencing enhancement in 18 U.S.C. § 924(c)(1).[3] *See United States v. Mendez,* 992 F.2d 1488, 1489 (9th Cir. 1993). In *Mendez,* we explained that a conspiracy "'increases the changes that the planned crime will be committed'" because a conspiracy "'provides a focal point for collective criminal action.'" *Id.* at 1491 (quoting *United States v. Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985)). Due to his heightened risk of harm, a "conspiracy to commit a crime of violence is a 'crime of violence' under the substantial risk definition of § 924(c)(3)(B) or its equivalent."[4] *Id.* at 1492. In other words,

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whether "conspiracy"—as used in the INA—requires proof of an overt act; we held that it does. *See* Garcia-Santansa, slip op. at 3. Here by contrast, we must decide whether a Nevada conviction for conspiracy to commit robbery, even though it does not require an overt act, nonetheless "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(B)(iii).

[3] The firearm sentencing enhancement provision provides that "any person who, during and in relation to any crime of violence … uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence…be sentenced to a term of imprisonment of not less than 5 years." 18 U.S.C. § 924(c)(1).

[4] The provision reference in *Mendez*—18 U.S.C. § 924(c)(3)(B)—defines crime of violence for the purposes of the firearm sentencing enhancement provision that was at issue in that case. It states that "the term 'crime of violence' means an offense that is a felony and…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." 18 U.S.C. § 924(c)(3)(B).

"conspiracy to rob in violation of [the Hobbs Act] 'by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense,'" and is thus a crime of violence. *Mendez*, 992 F.2d at 1491 (quoting 18 U.S.C. § 924(c)(3)(B)). Cognizant of this binding precedent,[5] we consider whether conspiracy to commit robbery under Nevada law is a "violent felony" as that term is defined in § 924(e)(2)(B)(ii).

1. Serious potential risk of injury

The first question under *Park* is whether the conduct encompassed by the elements of conspiracy to commit robbery under Nevada law ordinarily "present[] a serious potential risk of physical injury to another." *Park*, 649 F.3d at 1177–78 (quoting *James*, 550 U.S. at 208) (brackets in the original). Because *Mendez* established that conspiracy to commit robbery "categorically creates a substantial risk that physical force may be used," *Mendez*, 992 F.2d at 1492, we must answer in the affirmative.

Admittedly, *Mendez* differs from this case in two respects. First, *Mendez* involved conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. § 1951, whereas here, Chandler was

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[5] As Judge Bybee points out, the circuits are split over whether *conspiracy* to commit a violent felony is itself a violent felony. *See* Concurrence at 28–29 (Bybee, J., concurring). Given that split, we recognize that *Mendez* may not survive the Supreme Court's quartet of ACCA cases. But, at the least, *Mendez* is not "clearly irreconcilable" with the Supreme Court's precedent, so we are bound to apply *Mendez* until it is expressly overruled by an en banc panel of this court. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

convicted of conspiracy to commit robbery in violation of Nev. Rev. Stat. §§ 199.480, 200.380. The Hobbs Act penalizes "[w]hoever in any way or degree obstructs, delays or affects commerce . . . by robbery . . . or conspires so to do." 18 U.S.C. § 1951(a). The Act then defines robbery as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence." 18 U.S.C. § 1951(b)(1). And conspiracy under federal law occurs "[i]f two or more persons conspire [ ] to commit any offense against the United States." 18 U.S.C. § 371; *see also United States v. Feola*, 420 U.S. 671, 692 (1975) ("[T]he essence of conspiracy is agreement.").

Nevada also defines conspiracy as "an agreement between two or more persons for an unlawful purpose." *Nunnery v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 186 P.3d 886, 888 (Nev. 2008) (per curiam) (internal quotation marks omitted); *see also* Nev. Rev. Stat. § 199.480(1). And, 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. § 200.380(1).

Thus, federal law and Nevada law both effectively define conspiracy to commit robbery as an agreement between two or more persons to unlawfully take property from another person against his or her will. Because federal law is substantially similar to Nevada law, the first distinction between *Mendez* and this case is insignificant.

Second, *Mendez* differs from this case because it involved 18 U.S.C. § 924(c)(1), which subjects individuals who use a firearm in the course of a "crime of violence" to an additional five years' imprisonment. The statute defines a crime of violence as any offense "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." 18 U.S.C. § 924(c)(3)(B). By contrast, Chandler appeals a sentencing enhancement under 18 U.S.C. § 924(e)(2)(B)(ii), which subjects individuals who have three previous convictions for "violent felonies" to a minimum of fifteen-years imprisonment. A violent felony is an offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.*

Both statutes are similar because they apply to crimes that involve a serious or substantial risk that physical force will occur during the course of the offense. The major difference between these two statutes is that the ACCA only applies to seriously dangerous crimes that are similar to the enumerated offenses, whereas 18 U.S.C. § 924(c)(1) applies to all substantially dangerous offenses. In light of this difference, *Mendez* is not helpful when analyzing the second prong of the *Park* framework. Nevertheless, because *Mendez* uses the substantial risk of injury test, which is similar to the serious risk of injury test

that we consider here, it still applies to our analysis of the first prong.[6]

Accordingly, despite the differences between *Mendez* and this case, we are bound by *Mendez* to conclude that "conspiracy to rob . . . 'by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense.'" *Mendez*, 992 F.2d at 1491 (quoting 18 U.S.C. § 924(c)(3)(B)); *see also United States v. Gore*, 636 F.3d 728, 738 (5th Cir. 2011) ("An agreement to commit aggravated robbery presents a serious potential risk of injury."); *United States v. Turner*, 501 F.3d 59, 67 (1st Cir. 2007).

2. Risk of injury roughly similar to the enumerated offenses in the ACCA

Because we previously determined that robbery in Nevada involves a serious risk of physical force, we must now answer the more difficult question: whether conspiracy to commit robbery in Nevada is "'roughly similar, in kind as well as in degree of risk posed' to those offenses enumerated at the beginning of the residual clause." *Spencer*, 724 F.3d at 1140 (quoting *Park*, 649 F.3d at 1178). Under *Mendez*, a conspiracy to commit a violent crime creates the same risk of harm as the violent crime itself. 992 F.2d at 1492. So, if robbery in Nevada is "roughly similar, in kind as well as in

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[6] Indeed, "substantial" is defined as important, essential, "not seeming or imaginary." *Webster's Third New International Dictionary of the English Language Unabridged* (2002). Similarly, "serious" is defined as "[g]rave in disposition, appearance, or manner: not light." *Id.*

degree of risk posed" to burglary, arson, or extortion, 18 U.S.C. § 924(e)(2)(B)(ii), then conspiracy to commit robbery is also comparable to the enumerated offenses. Here, robbery as defined by Nevada is most similar to extortion and burglary.

The Supreme Court has defined extortion as "obtaining something of value from another with his consent[7] induced by the wrongful use of force, fear, or threats." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (internal quotation marks omitted). We previously determined that a Nevada state conviction for robbery is a crime of violence under the U.S. Sentencing Guidelines because "Nev. Rev. Stat. § 200.380 . . . satisf[ies] the generic definition of extortion." *See United States v. Harris*, 572 F.3d 1065, 1065–66 (9th Cir. 2009) (per curiam).

Burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). The real danger of burglary, like robbery, is "the possibility of a face-to-face confrontation" with the victim or an intervener. *James*, 550 U.S. at 203. Indeed, robbery, like burglary, "is dangerous because it can end in confrontation leading to violence." *Sykes*, 131 S. Ct. at 2273. In fact, the risk posed by robbery may

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[7] Nevada's definition of robbery differs from extortion because the taking of property there must be "against the will" of the victim. But as Professor LaFave has explained, this difference is not significant because "both crimes equally require that the defendant's threats induce the victim to give up his property, something which he would not otherwise have done." 3 W. LaFave, *Substantive Criminal Law* § 20.4(b) (2d ed. 2003).

actually be greater than the risk posed by burglary because robbery requires a taking from a person, against his or her will, by means of force or violence or fear of injury, whereas burglary may be completed without any human interaction. *See United States v. Davis*, 487 F.3d 282, 286 (5th Cir. 2007) ("To commit robbery, an individual must interact with the victim in order to cause bodily injury or place the victim in fear of it.").

Accordingly, we conclude that robbery poses risks similar to extortion and burglary. As such, conspiracy to commit robbery in Nevada is also similar, in kind and degree of risk posed, to extortion and burglary. *See Gore*, 636 F.3d at 741 ("We are satisfied that conspiracy to commit aggravated robbery, in the ordinary case, presents a serious risk of injury similar in kind and degree to the enumerated offenses.").

3. Conclusion

A Nevada conviction for robbery is a violent felony because it creates a serious risk of harm that is comparable to the risk posed by burglary. And because after *Mendez*, "the § 924(e) analysis of a prior conspiracy conviction is governed by the substantive offense that was the object of the conspiracy," *United States v. Boaz*, 558 F.3d 800 (8th Cir. 2009), conspiracy to commit robbery, pursuant to Nev. Rev. Stat. §§ 199.480, 200.380, is also a "violent felony" under the ACCA's residual clause. *See also United States v. White*, 571 F.3d 365, 370, 372 (4th Cir. 2009) ("[T]he essential conduct underlying the Conspiracy Offense is categorically violent . . . [and] [t]he Conspiracy Offense cannot be

divorced from its violent objective—robbery with a deadly weapon.").

B. *Second degree kidnapping*

Under Nevada law:

> A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree.

Nev. Rev. Stat. § 200.310(2).

We have not previously had the opportunity to consider whether second degree kidnapping under Nevada law is a violent felony. But, in *United States v. Williams*, 110 F.3d 50 (9th Cir. 1997), we determined that second degree kidnapping under Oregon law, Ore. Rev. Stat. § 163.225(1)(a), is a crime of violence as the term is defined in § 4B1.2(a)(2) of the Sentencing Guidelines. *Id.* at 51–53. And in *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988), we observed that kidnapping as defined by the Model Penal Code "entails a 'serious potential risk of physical injury' to the victim, making the offense a 'violent felony' under subsection (ii)." *Id.* at 1009 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). Although neither of these cases involved statutes exactly like Nevada's, we keep

these persuasive authorities in mind as we review Chandler's second degree kidnapping conviction. Once again, we apply the framework that we established in *Park*, 649 F.3d 1175.

1. Serious risk of harm

Chandler argues that second degree kidnapping as defined by Nevada law can occur in ways that are both violent and nonviolent, particularly because "inveigling" does not require force or restraint. *See Bridges v. State*, 6 P.3d 1000, 1009 (Nev. 2000); *Black's Law Dictionary* 843 (8th Ed. 2004) (inveigle means "to lure or entice through deceit or insincerity"). Accordingly, he contends that we must use the modified categorical approach to determine whether his conviction involved violent conduct. We disagree.

We have determined that kidnapping presents a risk of serious force, even where the kidnapping statute at issue has no force requirement. *See Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1133 (9th Cir. 2012) (considering whether attempted kidnapping is an aggravated felony). In *Delgado-Hernandez*, we referenced the federal kidnapping statute, 18 U.S.C. § 1201(a), which punishes anyone who "'unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person.'" *Id.* at 1130 (quoting 18 U.S.C. § 1201(a)). We adopted the Sixth Circuit's reasoning in explaining that:

> [T]he essence of kidnapping is requiring another to do something against his or her will; and because

> physical force or restraint is usually the best way to overbear the will of another, physical force or threat of force is a latent, but more often actual, companion of the coercive element. That deception may be used to effect the kidnapping does not erase the ever-present possibility that the victim may figure out what's really going on and decide to resist, in turn requiring the perpetrator to resort to actual physical restraint if he is to carry out the criminal plan.

Id. at 1130–31 (quoting *United States v. Kaplansky*, 42 F.3d 320, 324 (6th Cir. 1994)). Additionally, we observed in *Delgado-Hernandez* that "the Supreme Court has seen fit to assume, admittedly without deciding, that [kidnapping] constitutes a crime that presents a substantial risk of force." *Delgado-Hernandez*, 697 F.3d at 1130 (citing *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999)). And while the Supreme Court's statement in this regard was dictum, it is nevertheless highly persuasive. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) ("Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what the Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.").[8]

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[8] In *Delgado-Hernandez* we also noted that "legislative bodies, including Congress, have consistently treated kidnapping as a crime of violence." *Delgado-Hernandez*, 697 F.3d at 1131–33. After surveying the evidence, we concluded: "In sum, numerous

Of particular importance here, Nevada's second degree kidnapping statute is very similar to the federal kidnapping statute that we reviewed in *Delgado-Hernandez*. *Compare* Nev. Rev. Stat. § 200.310(2) (a person is guilty of kidnapping if he unlawfully "seizes, inveigles, takes, carries away, or kidnaps" another person), *with* 18 U.S.C. § 1201(a) (a person commits kidnapping if he unlawfully "seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away" another person). Kidnapping could potentially be committed in both jurisdictions without the use of force. Because of the similarities between the Nevada second degree kidnapping statute and the federal kidnapping statute, our reasoning in *Delgado-Hernandez* is highly persuasive here.

Thus, even though force is not required, second degree kidnapping as defined by Nevada law still presents a serious potential risk of physical injury to another.[9] *See also United States v. Sherbondy*, 865 F.2d at 1009 ("kidnapping entails a

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courts have held that kidnapping generally presents a risk of substantial force. Congress, the Sentencing Commission, and forty jurisdictions have concluded, consistent with historical practice, that kidnapping is a violent crime." *Id.* at 1133.

[9] If anything, it would seem that Nevada second degree kidnapping categorically presents a greater risk of force than the federal kidnapping statute. *Compare* Nev. Rev. Stat. § 200.310(2) (requiring that the action be done "with the intent to keep the person secretly imprisoned within the State," "for the purpose of conveying the person out of the State without authority of law," or "in any manner held to service or detained against the person's will"), *with* 18 U.S.C. § 1201(a) (lacking the heightened *mens rea* requirements of the Nevada statute).

'serious potential risk of physical injury' to the victim"); *Kaplansky*, 42 F.3d at 324 ("kidnapping is the 'type' of offense where the risk of physical injury to the victim is invariably present").

2. Risk of injury roughly similar to the enumerated offenses in the ACCA

The only question remaining, then, is whether second degree kidnapping under Nevada law is a crime that is "roughly similar, in kind as well as in degree of risk posed" to burglary, arson, extortion, or crimes involving the use of explosives. *Begay*, 553 U.S. at 143. Like conspiracy to commit robbery, second degree kidnapping is similar to the enumerated crime of burglary.

As we discussed above, "[b]urglary is dangerous because it can end in confrontation leading to violence." *Sykes*, 131 S. Ct. at 2273. By comparison, kidnapping is riskier than burglary because "a face-to-face confrontation," *James*, 550 U.S. at 203, with the victim is very likely when a kidnapping occurs. Accordingly, the second prong of the *Park* framework is satisfied. *See, e.g.*, *Delgado-Hernandez*, 697 F.3d at 1128–30 (describing the substantial risks kidnapping poses); *Sherbondy*, 865 F.2d at 1009 (reasoning that kidnapping, as defined in the Model Penal Code, is a violent felony).

3. Conclusion

We conclude that second degree kidnapping in Nevada categorically involves a serious risk that physical force may be used in the course of committing the offense and that this risk is roughly similar to the risk involved in burglary. Accordingly,

we hold that second degree kidnapping under Nevada law is categorically a "violent felony" under the residual clause of the ACCA.

III. CONCLUSION

For the foregoing reasons, conspiracy to commit robbery and second degree kidnapping are "violent felonies" under 18 U.S.C. § 924(e)(2)(B)(ii). Accordingly, Chandler is subject to the fifteen-year sentencing enhancement under § 924(e)(1) for having previously been convicted of three violent felonies.

The judgment of the district court is **AFFIRMED**.

BYBEE, Circuit Judge, with whom TASHIMA, Circuit Judge, and WOOD, Senior District Judge, join, concurring:

I agree that *United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993), requires our per curiam holding that conspiracy to commit robbery is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). I write separately to question the reasoning and continued validity of *Mendez*.

I

Not all felonies are "violent felonies." As indicated by its title, the Armed Career Criminal Act's ("ACCA") fifteen-year mandatory prison term is intended for career criminals, those offenders whose prior crimes "reveal a degree of callousness toward risk" and "show an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger." *Begay v. United*

States, 553 U.S. 137, 146 (2008); *see also Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011). By contrast, the ACCA's fifteen-year mandatory minimum sentence was not intended for "reckless polluters" or those who "recklessly tamper with consumer products." *Begay*, 553 U.S. at 146–47.

When determining whether a felony is a "violent felony" courts must "employ the 'categorical approach'" to determine whether an offense "'involves conduct that presents a serious potential risk of physical injury to another.'" *James v. United States*, 550 U.S. 192, 201–02 (2007) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). Under the categorical approach, 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 202.

Mendez does not satisfy this standard for two reasons. First, *Mendez* treats the elements of conspiracy to commit a crime as identical to the elements of the underlying crime. Second, proceeding from that faulty premise, *Mendez* holds that conspiracy to commit robbery is a crime of violence even though conspiracy rarely, if ever, presents a serious potential risk of injury to another.

II

In *Mendez*, we used the categorical approach—as we understood it in 1993—to determine "whether conspiracy to rob is … by definition [ ] a 'crime of violence'" under 18 U.S.C. § 924(c)(1). 992 F.2d at 1490–91. This was a good start, but we then broadly declared, intuitively, but

without any analysis of the elements of robbery as defined in the Hobbs Act, that "[r]obbery indisputably qualifies as a crime of violence." *Id.* at 1491. Then, without any analysis of the elements of conspiracy, we decided that conspiracy to commit robbery presents the same serious potential risk of physical injury as completed robbery because the existence of a criminal conspiracy increases the chances the planned crime will be committed. *Id.* at 1492.

In addition to being illogical, *Mendez*'s conclusion is questionable in light of recent Supreme Court precedent. In *James*, the Court considered whether attempted burglary was a violent felony under the ACCA's residual clause, even though burglary is one of the violent felonies enumerated in the ACCA's residual clause. 550 U.S. at 195. A prolonged analysis would have been wholly unnecessary if the inchoate offense, attempted burglary, was the same as the actual felony, burglary. But, as the Court determined, inchoate offenses may pose different risks than the underlying offense. *Id.* at 204. For example, "the risk posed by an attempted burglary … may be even greater than that posed by a typical completed burglary" because attempted burglaries are often thwarted by an intervenor. *Id.* Thus, *James* demonstrates that *every* inchoate offense must be considered individually, regardless of whether the underlying offense is categorically a violent felony, because different offenses pose different risks.

James is consistent with the well-established rule that inchoate offenses are separate from completed offenses. *Iannelli v. United States*,

420 U.S. 770, 778 (1975) ("This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense."); *Braverman v. United States*, 317 U.S. 49, 54 (1942) ("A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object."); *see also United States v. Iribe*, 564 F.3d 1155, 1160 (9th Cir. 2009) (quoting *United States v. Macias-Valencia*, 510 F.3d 1012, 1014 (9th Cir. 2007) ("'Conspiracy and attempt are inchoate crimes that do not require completion of the criminal objective.'")).

This case presents a prime example of the significant differences between an inchoate offense (conspiracy to commit robbery) and a completed offense (robbery). In Nevada, robbery is defined as:

> 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, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery.

Nev. Rev. Stat. § 200.380(1). "More briefly stated, robbery has as its elements the taking of the property of another from his person or presence through the application of force or fear." *State v. Feinzilber*, 350 P.2d 399, 401 (Nev. 1960) (discussing Nev. Rev. Stat. § 200.380(1)).

By comparison, Nevada's conspiracy statute, Nev. Rev. Stat.§ 199.480, simply states that conspiracy occurs "whenever two or more persons conspire to commit murder, robbery, sexual assault, [or other enumerated offenses]." Unlike some states, Nevada does not require an overt act in pursuance of the crime, Nev. Rev. Stat. § 199.490, so "[t]he gist of the crime of conspiracy is the unlawful agreement or confederation." *Lane v. Torvinen*, 624 P.2d 1385, 1386 (Nev. 1981).

The Supreme Court of Nevada addressed the difference between conspiracy to commit robbery and robbery in *Nunnery v. Eighth Judicial Dist. Court ex rel. County of Clark*, 186 P.3d 886 (Nev. 2008) (per curiam), in order to decide whether "conspiracy to commit robbery is [ ] a felony involving the use or threat of violence." *Id.* at 887. The court began by analyzing an earlier case where it decided that solicitation to commit murder is not a violent crime because "in the crime of solicitation, the harm is the asking—nothing more need be proven." *Hidalgo v. Eighth Judicial Dist. Court*, 184 P.3d 369, 373 (Nev. 2008) (en banc) (per curiam) (citations and internal quotation marks omitted).[10] The Supreme Court of

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[10] *Hidalgo* also included observations that are equally applicable to conspiracy. For example, conspiracy, much like "[s]olicitation is criminalized . . . because it carries the risk or possibility that it could lead to a consummated crime," but under Nevada law "a risk or potential of harm to others 'does not constitute a "threat."'" *Id.* (quoting *Redeker v. Eighth Judicial Dist. Court ex rel. County of Clark*, 127 P.3d. 520, 527 (Nev. 2006)). "Obviously, the nature of the crime Hidalgo allegedly solicited is itself violent. But this does not transform *soliciting* murder into *threatening* murder." *Id.* at 374.

Nevada then explained that *Hidalgo* "applie[d] with equal force here" because "conspiracy is committed upon reaching the unlawful agreement." *Nunnery*, 186 P.3d at 888. And because conspiracy does not require an overt act—let alone a violent one—the Supreme Court of Nevada concluded, "although conspiracy to commit robbery involves conspiring to commit a violent act, it is not itself a felony involving the use or threat of violence." *Id.* at 889.

I see no reason why this court should diverge from the Supreme Court of Nevada's sound reasoning and the well-established law that conspiracy to commit a crime is not the same as committing a crime. But until we are willing to reevaluate *Mendez*, offenders like Chandler will be categorized as "career offenders" based on robberies which they discussed but did not actually commit.

III

Furthermore, because of its illogical holding that *conspiracy to do x = x*, *Mendez* did not evaluate whether the elements of conspiracy to commit robbery "involve [ ] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). I submit that this omission significantly undermines *Mendez*'s continued validity because conspiracy to commit robbery does not "show an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger." *Begay*, 553 U.S. at 146.

There is little doubt that robbery poses a "serious potential risk of physical injury to another"

at the time it is committed. *See United States v. Harris*, 572 F.3d 1065, 1066 (9th Cir. 2009) (per curiam) (determining that "a conviction under Nev. Rev. Stat. § 200.380 [for robbery] categorically qualifies as a crime of violence for purposes of the career offender sentencing enhancement" under the Sentencing Guidelines).

Conspiracy to commit robbery, however, poses a risk that a robbery will be committed only *in the future*. *See Chambers v. United States*, 555 U.S. 122, 128 (2009) (rejecting the government's argument that an offense is a violent felony because it posed a risk of violence in the future); *Lane*, 624 P.2d at 1386 ("The gist of the crime of conspiracy is the unlawful agreement or confederation."). And as the Supreme Court of Nevada has aptly explained, "a risk or potential of harm to others does not constitute a threat." *Hidalgo*, 184 P.3d at 373 (citations and internal quotation marks omitted); *see also Nunnery*, 186 P.3d at 888–89 (holding that conspiracy to commit robbery is not a violent crime because "the elements of conspiracy to commit robbery do not include the use or threat of violence to the person of another").

Mendez incidentally acknowledges the difference between imminent and future harm. 992 F.2d at 1491–92 ("[W]here conspirators agree to use 'actual or threatened force, or violence' to obtain personal property from another . . . *the risk* that physical force *may be used* . . . is substantial." (emphasis added) (citations and internal quotation marks omitted))). But *Mendez* does not recognize that although a person conspiring to commit robbery is "doing *something* at the relevant time, there is no

reason to believe that the *something* poses a serious potential risk of physical injury." *Chambers*, 555 U.S. at 128. "To the contrary, an individual who [conspires to commit robbery] would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." *Id.* at 127; *see also Grunewald v. United States*, 353 U.S. 391, 402 (1957) ("For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world.").

It 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." 18 U.S.C. § 924(3)(2)(B)(ii). But, in Nevada, once there has been an overt act, the offense is no longer a mere conspiracy.[11] *Nunnery*, 186 P.3d at 888–89. Instead, the offense becomes either attempted or completed robbery—offenses which ordinarily pose a more serious potential risk of harm to others.

In other words, conspiracy is at least one "step away from any physical dimension." *United States v. Raupp*, 677 F.3d 756, 763 (7th Cir. 2012) (Wood, J., dissenting). And because the "step" between discussing or even agreeing on possibilities and

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[11] The Supreme Court of Nevada aptly explained this difference: "Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." *State v. Verganadis*, 248 P. 900, 901 (Nev. 1926) (citation and internal quotation marks omitted).

physical action is a significant one, I maintain that conspiracy to commit robbery is simply not an offense "of the type that would justify its inclusion within the residual provision." *James*, 550 U.S. at 202. At the very least, the risk of serious physical harm posed by conspiracy to commit robbery—*Mendez* notwithstanding—is substantially different from the risk of serious harm posed by robbery.

IV

Despite these concerns, I, like the majority, cannot say that the Supreme Court's ACCA decisions "undercut the theory or reasoning" of *Mendez* "in such a way that the cases are *clearly* irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (emphasis added). Indeed, interpretation of the ACCA is challenging, and the circuits are split over whether conspiracy is a violent felony.

At least five circuits have held that conspiracy may qualify as a violent felony. *See United States v. Gore*, 636 F.3d 728, 738 (5th Cir. 2011) ("An agreement to commit aggravated robbery presents a serious potential risk of injury . . . . This is particularly true when an overt act in furtherance of the agreement is performed. We need not consider whether an agreement without such an overt act would suffice for purposes of the ACCA."); *United States v. White*, 571 F.3d 365, 372 (4th Cir. 2009) ("[T]he essential conduct underlying the Conspiracy Offense is categorically violent. The Conspiracy Offense cannot be divorced from its violent objective—robbery with a deadly weapon."); *United States v. Boaz*, 558 F.3d 800, 807 (8th Cir. 2009)

("The § 924(e) analysis of a prior conspiracy conviction is governed by the substantive offense that was the object of the conspiracy . . . ."); *United States v. Hawkins*, 139 F.3d 29, 34 (1st Cir. 1998) (holding that conspiracy to commit armed robbery is a violent felony under the ACCA because "[w]e have also unequivocally held that *conspiracy* to commit a crime of violence . . . it itself a crime of violence"); *United States v. Preston*, 910 F.2d 81, 87 (3d Cir. 1990) ("Since [the defendant] was convicted of conspiracy to commit a violent felony, the use or threat of physical force was a part of his prior conviction for this crime.").

By contrast, at least two circuits have held that conspiracy does not qualify as a violent felony. *See United States v. Whitson*, 597 F.3d 1218, 1222 (11th Cir. 2010) (per curiam) ("Conspiring to commit a crime is a purposeful act . . . . But in South Carolina, the 'gravamen of conspiracy is an agreement or combination. An overt act in furtherance of the conspiracy is not necessary to prove the crime.'" (internal citation omitted) (reaffirmed and applied in *United States v. Lee*, 631 F.3d 1343, 1349 (11th Cir. 2011)); *United States v. Fell*, 511 F.3d 1035, 1039–41 (10th Cir. 2007) (holding that a Colorado conviction for conspiracy to commit second-degree burglary was not a violent felony because "[a]lthough there is an overt act element, the act need not be directed toward the entry of a building or structure . . . . [M]any overt acts sufficient to sustain a Colorado conspiracy conviction create no risk of a violent confrontation between the defendant and an individual interacting with the conspirator while the overt act is being

committed."); *United States v. King*, 979 F.2d 801, 804 (10th Cir. 1992) (explaining that the Tenth Circuit "look[s] only to the elements of the conspiracy crime" and holding that conspiracy to commit robbery does "not necessarily present circumstances which created the high risk of violent confrontation inherent in a completed [armed robbery]" (alteration in original) (quotation marks and citation omitted)).

The circuit split shows that there are valid reasons to believe 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). But in light of the questionable reasoning in *Mendez* and intervening Supreme Court precedent, I submit that whether conspiracy can qualify as a violent felony is a difficult issue that warrants our en banc consideration.

APPENDIX B

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
v.	)	
TAVARES CHANDLER	)	Case Number: **2:10-cr-00482-GMN-PAL-1**
	)	USM Number: **45463-048**
	)	**James Oronoz, CJA**
	)	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)	**1 of indictment**
☐ pleaded nolo contendere to count(s) which was accepted by the court.	
☐ was found guilty on count(s) after a plea of not guilty.	

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC§§922(G)(1) & 924(A)(2)	Felon in Possession of a Firearm	2/12/2010	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/31/2012
Date of Imposition of Judgment

/s/ Gloria M. Navarro

Signature of Judge

Gloria M. Navarro
U.S. District Judge
Name and Title of Judge

June 25, 2012
Date

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: **TAVARES CHANDLER**
CASE NUMBER: **2:10-cr-00482-GMN-PAL-1**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Two hundred thirty-five (235) months

☑ The court makes the following recommendations to the Bureau of Prisons:

Defendant to be designated to serve his term of incarceration within Southeastern United States.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: **TAVARES CHANDLER**
CASE NUMBER: **2:10-cr-00482-GMN-PAL-1**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Five (5) years

You shall not commit another Federal, State or local crime during the term of supervision.

You shall not possess illegal controlled substances. Revocation of supervision is mandatory for possession of illegal controlled substances.

The defendant shall refrain from any unlawful use of a controlled substance and shall submit to one drug test within 15 days of the commencement of supervision and at least two periodic drug tests thereafter, not to exceed 104 drug tests annually. Revocation is mandatory for refusal to comply.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable.*)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable.*)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (*Check, if applicable.*)

☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 3C — Supervised Release

DEFENDANT: **TAVARES CHANDLER**
CASE NUMBER: **2:10-cr-00482-GMN-PAL-1**

SPECIAL CONDITIONS OF SUPERVISION

1. Possession of Weapons – You shall not possess, have under your control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state, or local law.

2. Warrantless Search – You shall submit to search of your person, property, residence or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release.

3. Substance Abuse Treatment – You shall participate in and successfully complete a substance abuse treatment and/or cognitive based life skills program, which will include drug/alcohol testing and/or outpatient counseling, as approved and directed by the probation office. You shall refrain from the use and possession of beer, wine, liquor, and other forms of intoxicants while participating in substance abuse treatment. Further, you shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation office based upon your ability to pay.

4. Mental Health Treatment – You shall participate in and successfully complete a mental health

treatment program, which may include testing, evaluation, and/or outpatient counseling, as approved and directed by the probation office. You shall refrain from the use and possession of beer, wine, liquor, and other forms of intoxicants while participating in mental health treatment. Further, you shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation office based upon your ability to pay.

5. True Name – You shall use your true name at all times and will be prohibited from the use of any aliases, false dates of birth, social security numbers, places of birth, and any other pertinent demographic information.

6. Victim-Witness Prohibition – You shall not have contact, directly or indirectly, with any victim or witness in this instant offense, unless under the supervision of the probation officer.

7. Report to Probation Officer After Releases from Custody – You shall report, in person, to the probation office in the district to which you are releases within 72 hours of discharge from custody.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: **TAVARES CHANDLER**
CASE NUMBER: **2:10-cr-00482-GMN-PAL-1**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments of Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$100.00**	**$**	**$**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below:

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

Judgment — Page 6 of 6

DEFENDANT: **TAVARES CHANDLER**
CASE NUMBER: **2:10-cr-00482-GMN-PAL-1**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

*****See attached Final Order of Forfeiture**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) final principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
v.	)	
TAVARES CHANDLER	)	2:10-CR-00482-GMN (PAL)
Defendant.	)	

FINAL ORDER OF FORFEITURE

On May 12, 2011, the United Stated District Court for the District of Nevada entered a Preliminary Order of Forfeiture pursuant to Fed. R. Crim. P. 32.2(b)(1) and (2); Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c), based upon the plea of guilty by defendant TAVARES CHANDLER to a criminal offense, forfeiting specific property alleged in the Indictment and shown by the United States to have a requisite nexus to the offense to which defendant TAVARES CHANDLER pled guilty. Docket #1, #40, #41, #44, #47.

This Court finds the United States of America published the notice of the forfeiture in accordance with the law on May 28, 2011, June 4, 2011, and June 11, 2011, in the *Las Vegas Review-Journal/Sun*, notifying all third parties of their right to petition the Court. #51.

On July 20, 2011, JAYSON WALTERS was personally served with copies of the Preliminary Order of Forfeiture and the Notice. #55.

On August 3, 2011, the Petition, Stipulation for Return of Property and Order was filed. #56. On August 4, 2011, the Court entered and Order granting the Petition, Stipulation for Return of Property. #57.

This Court finds no additional petitions were filed herein by or on behalf of any person or entity and the time for filing such petitions and claims has expired.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that all right, title, and interest in the property hereinafter described is condemned, forfeited, and vested in the United States of America pursuant to Fed. R. Crim. P. 32.2(b)(4)(A) and (B); Fed. R. Crim. P. 32.2(c)(2); Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c); and Title 21, United States Code, Section 853(n)(7) and shall be disposed of according to law:

1) an HS Products XD40, .40 caliber semi-automatic handgun bearing serial number US258337; and

2) any and all ammunition.

The Clerk is hereby directed to send copies of this Order to all counsel of record and three certified copies of the United States Attorney's Office.

DATED this 31 day of May, 2012.

/s/ Gloria M. Navarro
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. TAVARES CHANDLER, *Defendant-Appellant.*	No. 12-10331 D.C. No. 2:10-cr-00482-GMN-PAL-1 District of Nevada, Las Vegas ORDER

Filed June 9, 2014

Before: TASHIMA and BYBEE, Circuit Judges, and WOOD, Senior District Judge.*

The panel judges have voted to deny Appellant's petition for rehearing. Judge Bybee voted to grant the petition for rehearing en banc, and Judges Tashima and Wood recommended granting the petition for rehearing enbanc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable Kimba M. Wood, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

Appellant's petition for rehearing and petition for rehearing en banc, filed March 13, 2014, is DENIED.