No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ROBERT A. ESPINOZA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS W. PATTON
Federal Public Defender
Office of the Federal Public Defender
401 Main Street, Suite 1500
Peoria, Illinois 61602
Phone: (309) 671-7891
Email: thomas_patton@fd.org
COUNSEL OF RECORD

QUESTION PRESENTED

Illinois attempt offenses have two elements: an intent to commit an offense and a substantial step towards commission of the offense. The substantial step need not involve the use, attempted use, or threatened use of physical force against the person or property of another. The question presented is:

Can an attempt offense be a predicate crime of violence for an 18 U.S.C. § 924(c) offense?

TABLE OF CONTENTS

PAGE

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ROBERT A. ESPINOZA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, ROBERT A. ESPINOZA, respectfully prays that a writ of certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Seventh Circuit, issued on February 1, 2018, affirming the denial of Mr. Espinoza's motion to vacate his sentence filed pursuant to 28 U.S.C. § 2255, and the order denying Mr. Espinoza's Petition for Rehearing and Petition for Rehearing en banc issued April 9, 2018.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is unpublished at 845 F.3d 816. The opinion of the United States District Court for the Central District of Illinois (Pet. App. 3a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2018. Pet. App. 1a. A timely petition for rehearing and petition for rehearing *en banc* was denied on April 9, 2018. Pet. App. 2a. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code § 2255(a):

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Title 18 United States Code § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18 United States Code § 924:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . .
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection-- . . . (ii) is a . . . destructive device, . . . the person shall be sentenced to a term of imprisonment of not less than 30 years.
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE

Illinois attempt offenses have two elements: the intent to commit a specific offense and a substantial step towards committing the offense. Neither element requires the defendant to use, attempt to use, or threaten to use force.

Accordingly, Illinois offenses do not have as an element the use, attempted use, or threatened use of physical force against the person or property of another.

The Seventh Circuit acknowledged all this but went on to hold that an Illinois attempt offense, where the offense attempted has as an element the use of force, does have as an element the use of force because "[w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, . . ., it makes sense to say that the attempt crime itself includes violence as an element . . . ." *Hill v. United States*, 877 F.3d 717, 718 (7th Cir. 2017). That is statutory drafting, not statutory interpretation. This issue has become incredibly important in light of this Court's holding that 18 U.S.C. § 16(b) is unconstitutionally vague. *Sessions v. Dimaya*, -- U.S. --, 138 S.Ct. 1204 (2018).

As relevant to this petition, Mr. Espinoza was charged with engaging in a pattern of racketeering activity (RICO) in violation of 18 U.S.C. § 1962(c), and using and carrying a firearm, specifically an incendiary device, during and in relation the RICO charge, in violation of 18 U.S.C. § 924(c). The charges were based on Mr. Espinoza's alleged membership in the Quad Cities Bishops, a street gang in the Quad Cities (Rock Island, Moline, and East Moline, Illinois and Davenport, Iowa).

The RICO count alleged that the Quad Cities Bishops was a RICO enterprise, that Mr. Espinoza was associated with the enterprise, and that the

enterprise engaged in a pattern of racketeering activity through nine racketeering acts, only six of which applied to Mr. Espinoza. One of the six racketeering acts applicable to Mr. Espinoza was drug distribution and the remaining five were attempted Illinois arsons. The § 924(c) count charged Mr. Espinoza with using and carrying a firearm, specifically an incendiary device as defined in 18 U.S.C. § 921(a)(4), during and in relation to the RICO charge.

The case proceeded to trial. As to the § 924(c) count, the Court determined as a matter of law that the RICO count was a crime of violence as defined in § 924(c)(3). Accordingly, the Court instructed the jury that to find Mr. Espinoza guilty of the § 924(c) offense it had to find he "committed the racketeering crime alleged in Count One," that he used or carried a firearm during and in relation to that crime, and that the firearm was a destructive device. The government never argued at trial or during any stage of the appeal or habeas proceedings that the categorical approach does not apply to determining if an offense is a crime of violence for § 924(c) purposes.

The jury convicted Mr. Espinoza of all counts. The Court sentenced Mr. Espinoza to 240 months of imprisonment on the RICO count and a consecutive 360 months of imprisonment on the § 924(c) count.[1]

[1] Mr. Espinoza was also convicted of RICO conspiracy, being a felon in possession of a firearm and conspiracy to distribute marijuana. The sentences on those counts all ran concurrently with the 240 month RICO sentence.

Following this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the United States Court of Appeals for the Seventh Circuit granted Mr. Espinoza permission to file a successive motion pursuant to 28 U.S.C. § 2255 to challenge his § 924(c) conviction. Mr. Espinoza's motion to vacate argued that under the rule announced in *Johnson*, 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. Mr. Espinoza then argued that because his RICO conviction did not have as an element the use, attempted use or threatened use of physical force against the person or property of another it was not a crime of violence as defined in § 924(c)(3)(A) it could not support his § 924(c) conviction. Mr. Espinoza argued that even if a court is allowed to look at the specific racketeering acts supporting the RICO conviction under the modified categorical approach, the attempted arson racketeering acts did not involve the use, attempted use or threatened use of force because Illinois' attempt statute only requires an intent to commit an offense and a substantial step towards the commission of the offense and the substantial step requirement, as interpreted by the Illinois Supreme Court, did not require even the attempted use of force.

The district court found the RICO statute divisible, allowing it to use the modified categorically approach to examine the racketeering acts supporting the RICO conviction to determine whether those acts had as an element the use of

force. The district court then concluded that an Illinois attempted arson conviction had such an element.

Mr. Espinoza appealed the district court's order and the day after he filed his reply brief the Seventh Circuit issued its opinion in *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017). (Pet. App. 25a) *Hill* holds "[w]hen a substantive offense would be a violent felony under [18 U.S.C.] § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony." *Hill*, which also dealt with an Illinois attempt conviction, concedes that Illinois attempt offenses have only two elements, intent to commit an offense and a substantial step towards commission of the offense. (Pet. App. 26a). *Hill* also concedes that neither of those elements necessarily requires even the attempted use of force. *Id*. Despite these admissions, *Hill* found attempts to commit crimes of violence are crimes of violence because "[w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, . . ., it makes sense to say that the attempt crime itself includes violence as an element. . . . ." *Id*. The Seventh Circuit applied *Hill* to Mr. Espinoza's case, stating *in toto* "[t]he judgement is affirmed on the authority of *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017)." (Pet. App. 1a).

REASONS FOR GRANTING THE WRIT

With this Courts invalidation of 18 U.S.C. § 924(e)(2)(B)(ii) and 18 U.S.C. § 16(b), the question of whether attempt offense still qualify as violent felonies and crimes of violence is critically important. Prior to *Johnson* and *Dimaya*, this issue was not critical as attempt offenses could qualify as violent felonies or crimes of violence under either statutes' residual clause. *See James v. United States*, 550 U.S. 192 (2007) (attempted burglary violent felony under ACCA's residual clause), *overruled by Johnson v. United States*, 135 S.Ct. 2551 (2015); *United States v. Keelan*, 786 F.3d 865, 871 n.7 (11th Cir. 2015) (attempt conviction was crime of violence under § 16(b). *Johnson* and *Dimaya* wrought a sea change. Now attempt convictions can only be violent felonies or crimes of violence if they have as an element the use, attempted use, or threatened use of physical force. The language of 18 U.S.C. § 924(c)(3)(B) is identical to § 16(b), so the issue is also vitally important in § 924(c) cases. *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016) (holding 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague in light of *Johnson*).

Attempt offenses do not have as an element, the use, attempted use, or threatened use of physical force. The Seventh Circuit's contrary holding was a willful act of statutory drafting to obtain a desired result rather than an exercise in statutory interpretation. This Court recently rejected the Ninth Circuit's

similar attempts at legislating, *Jennings v. Rodriguez*, --U.S.--, 138 S.Ct. 830 (2018), and should do the same here.

Hill did not engage in statutory interpretation, it engaged in statutory drafting. Once *Hill* acknowledged that Illinois attempt offenses do not have as an element even the attempted use of force that should have been the end of the analysis. Rather than accept this straightforward conclusion *Hill*, in effect, amended the language of § 924(c)(3)(A) to read "has as an element the use, attempted use, threatened use, *or intended* use of physical force against the person of another." That is statutory drafting, not interpreting.

A. *Hill* Admits That Attempt Offenses Do Not Have as an Element the Use, Attempted Use, or Threatened Use of Force.

Hill concedes, as it must, that Illinois attempt offenses have only two elements, intent to commit an offense and a substantial step towards commission of the offense. Pet. App. 26a. *Hill* then concedes, as it must, that neither element necessarily requires even the attempted use of force. *Id*. For example, *Hill* noted that "one could be convicted of attempted murder for planning the assassination of a public official and buying a rifle to be used in that endeavor. Buying a weapon does not itself use, attempt, or threaten physical force; neither does drawing up assassination plans." *Id*. That should have been the end of the opinion. Following *Johnson* and *Dimaya*, an offense can only be a violent felony, or for 18 U.S.C. § 924(c) purposes a crime of violence, if it is an enumerated

offense (attempted arson is not) or has as an element the use, attempted use, or threatened use of physical force against the person or property of another. Since *Hill* admits Illinois attempt offenses have no such element, by the plain language of the statutes Illinois attempt offenses are not crimes of violence. End of analysis.

Rather than relying on the actual language of § 924(e) (which for our purposes is identical to § 924(c)(3)(A)), *Hill* purports to discern what Congress *really* intended § 924(e) to cover and then holds that attempts to commit offenses that have as an element the use of force fall within Congress' unstated intent. As *Hill* put it, [w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, . . ., it makes sense to say that the attempt crime itself includes violence as an element. . . . ." *Id*. But what does or does not "make sense" to a particular tribunal is irrelevant when interpreting plain, unambiguous statutory language. Section 924(e)(2)(B)(i) and § 924(c)(3)(A) state an offense is a violent felony or crime of violence if it has *as an element* the actual use of force, the attempted use of force, or the threatened use of force. The statute *does not* include offenses that have as an element the *intent* to use force.

This Court has time and again told inferior courts to apply the plain language of statutes. "The preeminent canon of statutory interpretation requires [this Court] to 'presume that [the] legislature says in a statute what it means and

means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 1593 (2004). A court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id*.

B. Hill fails on its own Terms.

Hill rests its holding on Judge Hamilton's concurrence in *Morris v. United States*, 827 F.3d 696, 698-99 (7th Cir. 2016). Pet. App. 26a-27a. There, Judge Hamilton contended:

> As a matter of statutory interpretation, an attempt to commit a crime should be treated as an attempt to carry out acts that satisfy *each element of the completed crime*. That's what is required, after all, to prove an attempt offense. If the completed crime has as an element the actual use, attempted use, or threatened use of physical force against the person or property of another, then attempt to commit the crime *necessarily* includes an attempt to use or to threaten use of physical force against the person of property of another.

Morris, 827 F.3d at 698-699. (emphasis in original). This argument is based upon an incorrect legal premise. There is no requirement in Illinois law, or federal for that matter, that the defendant attempt to carry out acts that satisfy each element of the completed offense. All that must be proven is an intent to commit an offense and a substantial step towards commission of the offense. *United States v. Villegas*, 655 F.3d 662, 668-69 (7th Cir. 2011); *United States v. Bailey*, 227 F.3d 792, 797 (7th Cir.2000); *United States v. Dennis*, 115 F.3d 524, 534 (7th Cir.1997).

In fact, jurors in Illinois are not even instructed on the elements of the offense a defendant is charged with attempting to commit. Illinois Pattern Jury

Instruction-Criminal, No. 6.05 (available at http://www.illinoiscourts.gov/CircuitCourt/CriminalJuryInstructions/CRIM_06.00.pdf.) (last visited July 6, 2018). A jury cannot possibly find an intent to commit elements it has no idea exist.

"Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction. At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) (internal quotations and citations omitted). An intent to commit each element of the offense attempted *is not* an element of attempt offenses. *Hill's* holding rests on the false premise that "conviction of attempt requires proof of intent to commit all elements of the completed crime." Pet. App. At 26a.

C. *Hill's* Claim That Other Circuits Have Held Attempts To Commit Violent Felonies Are Themselves Violent Felonies Under The *Elements* Clause Is Wrong.

Hill cites three cases for the proposition that three other circuits have held attempt offenses are violent felonies "under the elements clauses of § 924(e) and similar federal recidivist laws, such as 18 U.S.C. § 16 and 18 U.S.C. § 924(c)." *Hill*, 877 F.3d at 718. None of the cited cases support that claim. *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016), does not even involve an attempt offense. *United*

States v. Mansur, 375 Fed.Appx. 458 (6th Cir. 2010), states in dicta that that an attempted Ohio robbery conviction could be a violent felony under § 924(e) but goes on to hold the conviction was a violent felony under the residual clause. Additionally, the Sixth Circuit, in a subsequent published opinion rejected *Mansur's* interpretation of the Ohio robbery statute. Finally, *United States v. Wade*, 458 F.3d 1273 (11th Cir. 2006), which predates *Johnson*, holds that attempted residential burglary is a violent felony *under the residual clause*, not under the elements clause.

United States v. Fogg, 836 F.3d 951 (8th Cir. 2016), did not address the attempt issue. The prior conviction at issue in *Fogg* was a Minnesota conviction for drive by shooting in violation of Minn. Stat. § 609.66 subd. 1e. *Id*. at 953. That section, titled "Felony; drive-by shooting," states "(a) whoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building is guilty of a felony and may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than $6,000, or both." If a person violates section 1e(a) by "firing at or toward a person, or an occupied building or motor vehicle," the maximum penalty jumps to ten years of imprisonment and a fine of not more than $20,000. 609.661e(b). *Id*. at 954.

The defendant in *Fogg* had been convicted of violating 609.66 subd.1e(b), and the Eighth Circuit found that offense had as an element the attempted use of force as it required the jury to find the defendant fired a gun "at or toward a person, or an occupied building or motor vehicle." *Fogg*, 836 F.3d at 955. While the parties and the Eighth Circuit colloquially referred to the offense as attempted drive by shooting (presumably because no one was actually shot), the opinion has nothing to do with attempt offenses.

United States v. Mansur, 375 Fed.Appx. 458 (6th Cir. 2010), was decided before the Supreme Court invalidated ACCA's residual clause in *Johnson*. *Mansur's* discussion of attempted robbery having as an element the attempted use of force is *dicta* as the Sixth Circuit ultimately held attempted robbery presented a serious potential risk of physical injury to another and therefore qualified as a violent felony under the residual clause. *Id*. at 464-65 n.9. And, in *United States v. Yates*, 866 F.3d 723, 727-29 (6th Cir. 2017), the Sixth Circuit rejected *Mansur's* reading of Ohio's robbery statute. An unpublished opinion issued before *Johnson* which ultimately rests its holding on the unconstitutionally vague residual clause and which has been rejected by the Sixth Circuit itself is hardly persuasive authority.

Hill's citation to *United States v. Wade*, 458 F.3d 1273 (11th Cir. 2006), is misleading. *Hill* cites to Wade in support of the proposition that the Eleventh

Circuit "appears to agree" that attempt offenses can qualify as violent felonies under "the elements clauses of § 924(e) and similar federal recidivist laws, such as 18 U.S.C. § 16 and 18 U.S.C. § 924(c)." What *Wade* actually held was that Georgia attempted residential burglary was a violent felony *under the residual clause*. *Wade*, 458 F.3d at 1278. *Wade* based its holding on *James v. United States*, 430 F.3d 1150 (11th Cir. 2005), and *United States v. Rainey*, 362 F.3d 733 (11th Cir. 2004) which held, respectively, that Florida attempted burglary and Florida attempted arson were violent felonies *under the residual clause*. *Wade*, 458 F.3d at 1277-78. To put it mildly, relying on a case holding attempt convictions are violent felonies under the unconstitutional residual clause to support a holding that attempt offenses have as an element the use, attempted use, or threatened use of physical force against the person of another is not persuasive.

Since *Hill* was decided the Eleventh Circuit has adopted its reasoning. *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018). This Court needs to intervene and stop this erroneous line of cases before it grows longer.

D. Many offenses have as an element the "attempted use" of force.

The conclusion that an attempt offense does not itself have as an element the use, attempted use, or threatened use of physical force against the person or property of another is straightforward. Nevertheless, that straightforward conclusion can lead to puzzlement due to §§ 924(e)(2)(B)(i)'s, 16(a)'s and

924(c)(3)(A)'s use of the term "attempted use" of force. If the statutes cover attempted uses of force how do they not apply to attempts to commit crimes that have as an element the use of force? The answer is the statutory language is focused on offenses, like assault or aggravated assault, that have as an element the attempted use of force but not the actual use of force.

The classic definition of assault is an unlawful attempt, or threat, coupled with a present ability, to commit a violent injury on the person of another. *United States v. Vallery*, 437 F.3d 626, 631 (2006). For example, the federal assault statute, 18 U.S.C. § 111(b), makes it a felony punishable by up to 20 years in prison to commit a simple assault using a deadly or dangerous weapon. Simple assault is the willful *attempt to inflict injury* upon the person of another or threatening to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm. *United States v. Vallery*, 437 F.3d 626, 631 (2006). Accordingly, a violation of § 111(b) has as an element the attempted use of force, or the threatened use of force, making it a crime of violence under § 924(c)(3)(A) even though the statute does not have as an element the actual use of force.

In the ACCA and § 16 context, where the definition of violent felony and crime of violence are used to classify prior convictions, the "attempted use of force" element covers a wide range of state assault offenses which have as an

element the attempted use of force but not the actual use of force. Some examples include: Alaska, AS § 11.41.220 (assault in third degree if defendant recklessly places person in fear of imminent serious physical injury by means of dangerous instrument); Arizona A.R.S. § 13-1204 (aggravated assault to commit simple assault with dangerous weapon and simple assault includes placing another in reasonable apprehension of imminent physical injury); Arkansas A.C.A. § 5-13-204 (aggravated assault if defendant displays a firearm in manner creating substantial danger of death or serious physical injury to another); California Pen. Code § 245 (felony to assault another person with a deadly weapon, firearm, machine gun, semiautomatic firearm, etc., where assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another).

Another example is 18 U.S.C. § 249 which makes it an offense to "cause bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person. " Again, that offense has as an element the attempted use of force against the person of another, satisfying § 924(c)(B)(A). It is these types of statutes—which include the attempted use of force as an element of a substantive offense—that fall under §§ 924(e)(2)(B)(i), 16(a), and 924(c)(3)(A), not general

attempt convictions which do not have as an element the use, attempted use, or threatened use of force. Accordingly, holding that attempt offenses are do not have as an element the attempted use of force does not strip the words "attempted use" of force of their meaning. They still do substantial work.

E. Congress can amend the statutes to include attempt convictions.

There are strong policy arguments for including attempts to commit offenses that have as an element the use of force in the definitions of violent felonies and crimes of violence. Those policy arguments may pursued Congress to amend §§ 924(e), 16, and 924(c) to include within their definitions of violent felony and crime of violence attempt convictions. But that is work for Congress, not courts. Courts interpret statutes, they do not write them. In the end that is what the Seventh Circuit did here. Given the critical importance of this issue this Court should step in and prevent this error from spreading even further than it already has.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

ROBERT A. ESPINOZA, Petitioner

/s/ Thomas W. Patton
THOMAS W. PATTON
Federal Public Defender
Office of the Federal Public Defender
401 Main Street, Suite 1500
Peoria, Illinois 61602
Phone: (309) 671-7891
Email: thomas_patton@fd.org
COUNSEL OF RECORD

Dated: July 5, 2018