IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2017

No.

MICHAEL HILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

---

JOHN F. MURPHY
WILLIAM H. THEIS*
FEDERAL DEFENDER PROGRAM
55 East Monroe St., Suite 2800
Chicago, IL 60603
(312) 621-8300
*Counsel of Record

August 28, 2018

QUESTION PRESENTED FOR REVIEW

The Armed Career Criminal Act treats as a violent felony felonies that require the use of force. In Illinois, as in many states and as for many federal offenses, the elements of attempt are (1) intent to commit the target offense and (2) a substantial step toward the target offense. The decision below correctly accepted that neither of these two elements categorically requires the use of force, but nonetheless ruled that, when the target offense is a violent felony, attempt is itself a violent felony, because that conclusion "makes sense." Is attempt to commit a violent felony itself a violent felony, even though the elements of attempt do not categorically require the use of force?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Hill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying relief is reported at *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017), and is reprinted in the appendix to this petition. A. 1.[1]

JURISDICTION

Hill sought post-conviction relief under 28 U.S.C. § 2255. The district court denied relief. R. 11. Hill entered a timely appeal. The Court of Appeals affirmed on December 13, 2017. *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017). Hill filed a

[1] "A. ___" indicates a reference to the Appendix to this petition. "R. __" indicates a reference to the district court record. "Cr. R. __" indicates a reference to the record in the underlying criminal case.

timely petition for rehearing and rehearing en banc, which was denied on April 9, 2018. He timely moved for an extension to file a certiorari petition. He was given leave to file on or before September 6, 2018. *Hill v. United States*, No. 18A17. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(e)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

720 ILCS 5/8-4(a)

A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

INTRODUCTION

The substantial penalty available under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), comes into play when a defendant has three prior convictions for a violent felony. Congress has defined a violent felony as an offense that has force as an element of the offense. In many jurisdictions, including Illinois, an attempt to commit a crime does not categorically require force as an element of the offense. Instead, attempt

requires an intent to commit the target offense, and a substantial step to that end, which corroborates the intent. Since intent is a state of mind, and since the substantial step need not involve force, attempt is not a violent felony as measured under this Court's decisions.

Yet the decision below concluded that even though an attempt offense in Illinois does not require force as an element of the offense, attempt would be treated as a violent felony so long as the object of the attempt is itself a violent felony. To quote the decision below, the result just "makes sense." *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017). The decision below is more than fundamentally flawed; it is a decision that will have a wide-ranging impact in hundreds of cases, where defendants will be subjected to substantial penalties contrary to the intent of Congress.

STATEMENT OF THE CASE

LEGAL BACKGROUND

Under 18 U.S.C. § 924(a)(2), the range of imprisonment for the offense of unlawful possession of a firearm after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions . . . for a violent felony or a serious drug offense." ACCA defines a "violent felony" to include any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). Besides these enumerated offenses, ACCA also includes alternative definitions of violent felony under its "force" clause and under its "residual" clause. This Court has already declared that the residual clause is unconstitutional. *Johnson v. United States,* 135 S. Ct. 2551 (2015). This petition raises an important question about the interpretation of ACCA's force clause.

If it is to count under the force clause, a prior conviction must categorically require force as an element of the offense. This Court has defined force to mean physical force "capable of causing physical pain or injury to another person." *Johnson v. United States,* 559 U.S. 133, 140 (2010). In making this inquiry, a court looks to the elements of the proposed predicate offense, not the underlying facts of the specific conviction. *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). A conviction counts under the force clause only if the offense always, that is, categorically, requires the use of force as defined in federal law. *Descamps v. United States,* 570 U.S. 254, 257 (2013).

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Hill entered a plea of guilty to possession with intent to distribute cocaine base (Count 5), 21 U.S.C. § 841(a)(1); use of a firearm during and in relation to a drug trafficking crime (Count 6), 18 U.S.C. § 924(c); and possession of a firearm by a convicted felon (Count 7), 18 U.S.C. § 922(g)(1). Cr. R. 16, 17. A presentence investigation report ("PSR") was prepared,

classifying Hill as an armed career criminal under ACCA, and as a career offender under the sentencing guidelines. U.S.S.G. § 4B1.1. The PSR's conclusion rested on Hill's three prior convictions—one for Illinois attempted murder and two for Illinois aggravated battery.

Applying the career offender enhancement to Count 5 (the drug charge) and the armed career criminal enhancement to Count 7 (the felon-in-possession charge), the PSR assigned Hill an adjusted offense level of 31 and a criminal history category of VI; the resulting guidelines range was 188 to 235 months' imprisonment for these two counts. Cr. R. 20. The Court sentenced Hill to 216 concurrent months' imprisonment on Counts 5 and 7, and a consecutive 60-month term of imprisonment on Count 6. *Id.*

After this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Hill applied to the Seventh Circuit for permission to file a second motion under 28 U.S.C. § 2255. He challenged his attempt conviction and one of the aggravated battery convictions as improper ACCA predicates. The Seventh

Circuit granted permission, and his motion was sent to the district court for further proceedings.

The district court then considered Hill's motion, finding that the two challenged Illinois convictions—the 1983 attempt conviction and the 1993 aggravated battery conviction—remain valid ACCA and career offender predicates. R. 11.

Hill took a timely appeal. The Seventh Circuit granted a certificate of appealability, but limited the certificate to the attempt conviction.

In resolving Hill's appeal, the Seventh Circuit correctly accepted that the Illinois attempt statute does not require force as an element of the offense. "The crime of attempt in Illinois consists in setting out to commit a crime and taking a substantial step toward accomplishing that end. 720 ILCS 5/8-4(a)." 877 F.3d at 718. As a consequence, "[O]ne 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*.

Yet the Seventh Circuit rejected the necessary consequence that attempt murder does not fit within ACCA's definition of force. In its view, "it makes sense to say" that a defendant's intent to commit a crime requiring force satisfied ACCA's force requirement even though no force was used.

> [T]he crime of attempt requires only a substantial step toward completion, but . . . it [is] sufficient that one must *intend* to commit every element of the completed crime in order to be guilty of attempt. When 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. at 719 (Court's emphasis). Restating its position, the Seventh Circuit declared, "When a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony." *Id*.

The Seventh Circuit also ruled that Illinois murder is a crime of violence. Thus, it concluded that attempt to murder is itself a crime of violence.

REASONS FOR GRANTING THE PETITION

I. The decision below rejects the basic analytical framework ordained by this Court for analyzing the Armed Career Criminal Act.

If a prior conviction is to count under the force clause of ACCA, the offense must categorically require force as an element. In making this inquiry, a court looks to the elements of the offense, not the underlying facts of the specific conviction. This Court originated this categorical approach in *Taylor v. United States*, 495 U.S. 575, 600 (1990). Although *Taylor* considered a burglary conviction, which involves an enumerated offense, the Court has extended the categorical approach to cases arising under the force clause. *Johnson v. United States*, 559 U.S. 133 (2010). Thus, a conviction counts under the force clause only if the offense always, that is, categorically, requires the use of force as defined in federal law.

As measured under this doctrine, Illinois attempt is not a violent felony, because Illinois attempt does not require force as an element of the offense. The Illinois crime of attempt is defined

as follows: "A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a). The Illinois attempt statute says nothing about the use of force, and it covers any and all criminal offenses, including many that, even when completed, involve no force or violence whatsoever. Instead, the Illinois attempt statute requires an intent to commit the object of the attempt and requires a substantial step toward that end. The substantial step need not require force at all. These are the only two elements of the offense.

The non-forceful nature of Illinois attempt is illustrated by *People v. Boyce*, 27 N.E.3d 77 (Ill. 2015). The defendant wrote a letter from prison to ask the recipient to murder a person. Prison authorities confiscated the letter before it left the prison, and the intended recipient never received the letter. Boyce was convicted of an attempt to solicit murder. Although Boyce had murder in his heart, the prospective killer never knew what Boyce was asking him to do. Moreover, the prospective victim had no idea of

what Boyce had in mind for him. Boyce's conviction rested on his intent and his substantial step, the mailing of the letter. Boyce did not exert physical force on anyone.

The decision below fully accepted that Illinois attempt does not have force as an element of the offense. "[O]ne could be convicted of attempted murder for planning the assassination of a public official and buying a rifle to be used in that endeavor." 877 F.3d at 719. However, the Seventh Circuit could not believe that Congress would have intended to exclude attempts. Instead, "it makes sense to say that the attempt crime itself includes violence as an element." *Id*. The decision below made a conscious and deliberate choice to rewrite ACCA because it could not believe Congress intended the result that would have followed from the faithful application of this Court's precedents.

This rationale ignores examples in which Congress has demonstrated that if it intends to include attempts in a definition of violent felony, it knows how to do so. In 18 U.S.C. § 3559(c), Congress has provided mandatory life imprisonment for a designated class of defendants who have convictions for "serious

violent felonies." As part of that sentencing regime, Congress defined the term "serious violent felony" to include specifically identified offenses, like murder, and then rounded off the definition with convictions for "attempt, conspiracy, or solicitation to commit any of the above offenses." 18 U.S.C. § 3559(c)(2)(F)(i). This simple addition fully expresses Congress' intent to include attempt offenses.

Likewise, 8 U.S.C. § 1101(a)(43) lists numerous offenses in subsections (A) through (T) as aggravated felonies. Subsection (U) caps the provision by including within "aggravated felony" "an attempt or conspiracy to commit an offense described in this paragraph." Once again, Congress, when it is so minded, knows how to deploy language that includes attempts to commit a crime.

Congress can also take a more indirect route to include attempts, as illustrated by ACCA. In *James v. United States*, 550 U.S. 192 (2007), this Court agreed that attempted burglary cannot be equated with burglary, one of the offenses singled out in the enumerated offenses clause. *Id.* at 197. But this Court

allowed that the residual clause included attempted burglary. *Id.* at 201-07.

James' holding regarding the residual clause was short-lived, however. This Court later determined that the residual clause was too broad to pass constitutional scrutiny, and in *Johnson v. United States*, 135 S. Ct. 2551 (2015), it invalidated the residual clause. After *Johnson*, attempted burglary no longer has a home in the residual clause, and *James* has already rejected the notion that an attempted burglary is the same as a completed burglary. If attempted burglary is ever again to be a violent felony under ACCA, Congress must amend the statute.

Johnson's holding has a similar impact on the force clause. Attempted violent offenses can no longer find a home in the residual clause. If this is a loophole, only Congress can close it, and the legislative fix requires only the straightforward language employed in the statutes examined above. The lower courts should not rewrite the statute because they think the rewrite "makes sense."

II. The erroneous analytical framework of the decision below will have wide application.

The decision below will have a wide-ranging application. It will affect hundreds of defendants who have Illinois attempt convictions, but the impact will go well beyond those who have Illinois attempt convictions. Many states have attempt statutes like the Illinois statute. These statutes have adopted the traditional common law view that the defendant need only have the intent to commit the target offense and take a substantial step to that end, even though the substantial step need not involve force. *E.g.*, A.R.S. § 13-1001 (Ariz.); C.R.S.A. § 18-2-101 (Col.); Ga. Code Ann., § 16-4-1; V.A.M.S. 562.012 (Mo.); N.Y. Penal Law § 110.00; 18 Pa.C.S.A. § 901; V.T.C.A., Penal Code § 15.01 (Tex.); West's RCWA 9A.28.020 (Wash.).

The decision below will also have an impact in cases where the defendant is convicted under 18 U.S.C. § 924(c) of possessing, carrying, or using a firearm in the commission of a federal crime of violence. Relying on the decision below, the Eleventh Circuit has already held that an attempt to commit a Hobbs Act robbery,

18 U.S.C. § 1951, is a crime of violence. *United States v. St. Hubert*, 883 F.3d 1319, 1333-34 (11th Cir. 2018).

The Eleventh Circuit's decision in *St. Hubert* has been subjected to powerful criticism by one member of that Court. Judge Jill Pryor noted that the intent component of attempt does not require the use of force. "But having the intent to commit a crime involving the use of force simply is not the same thing as using, attempting to use, or threatening the use of force." *Hylor v. United States*, 896 F.3d 1219, 1226 (11th Cir. 2018) (Jill Pryor, J.) (concurring). Judge Pryor also emphasized that the substantial step component does not fill the gap, since a substantial step need not involve force.

> It is readily conceivable that a person may engage in an overt act—in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block from the bank, and approaching the bank door before being thwarted—without having used, attempted to use, or threatened to use force. Would this would-be robber have intended to use, attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? Definitely not. So an individual's conduct may satisfy all the elements of an attempt to commit an elements-clause offense without anything more than intent to use elements-clause force and some act

> in furtherance of the intended offense that does not involve the use, attempted use, or threatened use of such force.
>
> *Id*.

This Court should take the opportunity to remind the lower Courts that its decisions on the definition of force and the application of the categorical standard mean what they say. They are not to be discarded in an effort to promote what the lower courts may think to be good policy.

CONCLUSION

Wherefore, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Dated August 28, 2018, at Chicago, Illinois.

Respectfully submitted,

s/*William H. Theis*
William H. Theis
Counsel of Record

John F. Murphy
William H. Theis
Federal Defender Program
55 East Monroe St., Suite 2800
Chicago, IL 60603
(312) 621-8300