IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2018

No.

TONY LIPSCOMB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

1. Does Illinois robbery categorically require the use of force and thereby qualify as a violent felony under the Armed Career Criminal Act?

(This Court has granted certiorari to consider essentially the same question, although the question arose in the context of Florida's robbery statute. *Stokeling v. United States*, No. 17-5554, *cert. granted* April 2, 2018. The Court also has pending petitions raising this issue under the Illinois robbery statute. *Klikno v. United States*, No. 17-5018, *cert. filed* June 22, 2017; *Van Sach v. United States*, No. 17-8740, *cert. filed* May 31, 2018; and *Shields v. United States*, No. 17-9399, *cert. file*d June 12, 2018.)

2. The Seventh Circuit agrees that the Illinois offense of attempt does not require the use of force. Nonetheless, it has ruled that, when the attempted 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? (The Court has a pending petition raising this same issue. *Hill v. United States*, No. 18-5915, *cert. filed* August 28, 2018.)

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Petitioner Tony Lipscomb 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 *Lipscomb v. United States*, 721 Fed. Appx. 518 (7th Cir. 2018), and is reprinted in the appendix to this petition. A. 1.[1]

JURISDICTION

Lipscomb sought post-conviction relief under 28 U.S.C. § 2255. The district court denied relief. R. 27. Lipscomb filed a timely appeal. The Court of Appeals affirmed on May 3, 2018. *Lipscomb v. United States*, 721 Fed. Appx. 518 (7th Cir. 2018).

[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.

Lipscomb timely moved for an extension to file a certiorari petition. He was given leave to file on or before October 1, 2018. *Lipscomb v. United States*, No. 18A92. 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.

Ill. Rev. Stat. ch 38, §18–1(a) (1997)

(a) Robbery. A person commits robbery when he or she knowingly takes property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force

Ill. Rev. Stat. ch 38, §18–2(a) (1997)

(a) A person commits armed robbery when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon.

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.

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). ACCA includes alternative definitions of violent felony under its "force" clause and under its "residual" clause. This petition raises a 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. 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).

In *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*), a case involving a battery conviction, the Court interpreted the force clause as requiring not any physical force, but "***violent*** force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original). Thus, "physical force," as used in ACCA, means "a degree of power that would not be satisfied by the merest touching." *Id.* at 139. However, a "slap in the face" could cause enough pain to satisfy the definition of force. *Id.* at 143.

FACTUAL AND PROCEDURAL BACKGROUND

Lipscomb was charged in 1992 in a three-count indictment with possession of a firearm by a felon, in violation of 18 U.S.C.

§ 922(g) (Count 1); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Count 2); and possession of a controlled substance with intent to distribute, in violation of 18 U.S.C. § 841(a)(1) (Count 3). He was convicted on all counts after a jury trial.

His PSR recounted several Illinois convictions that, the report concluded, made him an armed career criminal and a career offender.

- Attempted robbery on December 23, 1975.
- Attempted murder and attempted armed robbery on June 16, 1976.
- Attempted murder, armed robbery, and armed violence on May 17, 1979.[2]

Relying on these convictions, R. 27, at 2, the court sentenced him to a total 355 months' imprisonment: 295 months on Count 1, a concurrent sentence of 240 months on Count 3, and a consecutive sentence of 60 months on Count 2. The Seventh Circuit affirmed

[2] The dates for these offenses are the dates of commission, not the dates of sentencing.

his conviction and the sentence. *United States v. Lipscomb*, 14 F.3d 1236 (7th Cir. 1994).

After this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), Lipscomb moved the district court for relief pursuant to 18 U.S.C. § 2255. R. 1. He questioned both his designation as an armed career criminal and as a career offender.

Lipscomb requested and received a stay in the proceedings to await this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), since that case would be relevant to the career offender designation. After *Beckles* was decided, the district court lifted the stay and resolved Lipscomb's case.

The district court noted the question left unresolved in *Beckles*: whether *Samuel Johnson* would aid career offenders who, like Lipscomb, were sentenced as career offenders when the guidelines were still mandatory. In the district court's judgment, the answer to that question was unnecessary because the predicate offenses satisfied ACCA's force clause. R. 27, at 6.

The district court held, as the government conceded, that Lipscomb's armed violence convictions could not serve as predicates for enhanced sentencing. R. 27, at 7. But it also held that Lipscomb's remaining convictions properly counted towards his designation as an armed career criminal. Specifically, the district court held that since the Seventh Circuit had ruled that Illinois robbery is a violent felony, it was bound by Circuit precedent with respect to Lipscomb's armed robbery conviction. The district court also considered itself bound by Circuit precedent with respect to the attempt convictions.

Acknowledging the continually evolving law in the wake of *Samuel Johnson*, the district court granted a certificate of appealability as to the armed robbery, attempt robbery, attempt armed robbery, and attempt murder convictions. R. 27, at 12–13.

The Seventh Circuit affirmed in a brief memorandum opinion. Invoking its recent decision in *Hill v. United States*, 877 F.3d 1020 (7th Cir. 2017) (cert. pending in No. 18-5915), it held that attempt convictions for murder and robbery were violent felonies under ACCA. As for Illinois robbery, it relied on its

recent opinion confirming that Illinois robbery is a violent felony under ACCA. *Shields v. United States*, 885 F.3d 1020, 1024 (7th Cir. 2018) (cert pending in No. 17-9399).

REASONS FOR GRANTING THE PETITION

The decision below misapplies this Court's definition of force as that term is used in the Armed Career Criminal Act. *Curtis Johnson* has defined "force" as "***violent*** force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140 (emphasis in original). Although the Illinois robbery statute makes force an element of the offense, the Illinois definition of force is by no means equivalent to the federal definition of force. Illinois sets the bar much lower and, by doing so, disqualifies Illinois robbery as an ACCA predicate. Many other states have taken the same approach to robbery, and a major Circuit split has resulted, leading to this Court's grant of certiorari in *Stokeling*. Lipscomb's case presents another example of this persistent problem.

The decision below also misapplies this Court's basic principles for defining violent felonies. The Seventh Circuit has already acknowledged that the Illinois offense of attempt does not categorically require force. One would think, then, that the Seventh Circuit would easily deny violent felony status to Illinois attempt. But instead the Circuit has concluded that it just "makes sense" to treat an attempt as a violent felony if the object of the attempt is itself a violent felony.

I. The decision below exacerbates a Circuit split on robbery as a violent felony, an issue now scheduled for oral argument before this Court.

The decision below relies on a line of Seventh Circuit cases that has assumed an equivalence between the level of force required for Illinois robbery and the level of force required by ACCA. That assumed equivalence is unsupportable.

The Illinois robbery statute makes force an element of the offense. Although the statute itself provides no definition of force, the Illinois Supreme Court has declared that force "however slight" counts. *People v. Campbell*, 84 N.E. 1035, 1036 (Ill. 1908). *Campbell* elaborated on this principle, "Where a diamond pin,

with a corkscrew stalk twisted in a lady's hair, was snatched out and a part of the hair was drawn away at the same time, it was held that this constituted robbery; and where a watch was fastened by a steel chain, which was broken in snatching the watch, it was held robbery." *Id*. The Illinois Supreme Court has continued to adhere to the "however slight" doctrine." *People v. Taylor*, 541 N.E.2d 677, 679 (Ill. 1989). Illinois is by no means alone in declaring that even slight force will suffice for a robbery conviction. 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(d)(1) (3d ed. 2018).

The task for a federal court, then, is to measure the standard established by the Illinois cases against *Curtis Johnson's* definition of force. The Seventh Circuit has not faithfully performed that task. The leading Seventh Circuit case, *United States v. Dickerson*, 901 F.2d 579 (7th Cir. 1990), has held that "force" in the Illinois robbery statute had the same meaning as "force" in ACCA. In reaching this conclusion, *Dickerson* merely quoted the Illinois statute and quoted the ACCA statutory

language. *Dickerson* then assumed that the word had the same meaning in both statutes.

> Ill.Rev.Stat. ch. 38, § 18–1(a), in effect at the time of Dickerson's arrest and conviction, provided that: "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." The Illinois robbery statute very clearly, then, contains "an element [of] use, attempted use, or threatened use of physical force against the person of another," necessary to qualify as a "violent felony" under 18 U.S.C. § 924(e)(2)(B). . . .
>
> We agree with the district court that the Illinois robbery statute in its own terms includes the elements of either "use of force or ... threatening the imminent use of force," that clearly come within the scope of 18 U.S.C. § 924(e)(2)(B).

901 F.2d at 584. For *Dickerson*, it was sufficient that both statutes contained the word "force"; it did not seem to cross the Court's mind that a word appearing in two different statutes might have two different meanings.

Moreover, *Dickerson* considered the alleged facts underlying the defendant's robbery conviction; it did not confine itself to an appraisal of statutory elements of Illinois robbery.

> Not only are the elements of the Illinois robbery statute within the scope of 18 U.S.C. § 924(e)(2)(B), the circumstances of Dickerson's own crime reflect elements of use or threatened use of physical force. During his guilty plea hearing Dickerson admitted that he struck the victim, knocked him to the ground, and took $13.00 from the victim's pocket. These activities clearly involved the use of physical force against the victim.

901 F.2d at 584. But under *Taylor v. United States*, 495 U.S. 575, 600-01 (1990), the sentencing court must look at the statutory elements of the offense, not the actual conduct underlying the conviction. *Dickerson* approached the problem from a vantage point explicitly forbidden by this Court's precedents.

Dickerson has been specifically rejected in *Amos v. United States*, 2017 WL 2335671 (D. Ariz. May 30, 2017), where the defendant had a prior conviction under the Illinois armed robbery statute. The government appealed the *Amos* ruling, but later dismissed its appeal, *Amos v. United States*, 2017 WL 8236051 (9th Cir. Dec. 21, 2017), avoiding a Circuit split regarding the Illinois statute. *Dickerson's* approach has been rejected in a number of Circuits regarding statutes similar to the Illinois statute. *E.g., United States v. Walton*, 881 F.3d 768 (9th Cir.

2018) (Alabama armed robbery); *United States v. Jones*, 877 F.3d 884 (9th Cir. 2017) (Arizona armed robbery); *United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017) (Maine robbery); *United States v. Winston*, 850 F.3d 677, 685 (4th Cir. 2017) (Virginia robbery); *United States v. Eason*, 829 F.3d 633, 640-42 (8th Cir.2016) (Arkansas robbery); *United States v. Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016) (North Carolina robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery).

In rejecting Lipscomb's request for relief, the Seventh Circuit provided scant discussion, but cited to *Shields v. United States*, 885 F.3d 1020 (7th Cir. 2018), its most recent reaffirmation of *Dickerson*. *Shields* also invoked a more recent precedent. *United States v. Chagoya-Morales*, 859 F.3d 411 (7th Cir. 2017). *Chagoya* represents a separate line of analysis, and it is equally defective.

Illinois, like many other states, recognizes that if the defendant takes property without using force, then the offense is theft. *People v. Taylor*, 541 N.E.2d 677, 679 (Ill. 1989). The

factual line between robbery and theft can sometimes seem thin. Thus, as stated in *Taylor*, if the defendant snatches a hat from the victim's head, the crime is theft, whereas yanking a watch attached by a chain is robbery. *Id.* In *Chagoya*, the Seventh Circuit concluded that if *Johnson*-level force is not used, then the Illinois offense is theft, not robbery. The Seventh Circuit has gone astray in assuming that Illinois robbery always requires *Johnson* force. That conclusion flies in the face of *Campbell*, which requires force, however slight.

Illinois robbery is not a violent felony, nor is Illinois armed robbery a violent felony. The Illinois armed robbery statute merely requires that the defendant carry a weapon while committing a robbery. Ill. Rev. Stat. ch 38, §18–2(a) (1997). There is no requirement that the defendant threaten the use of a weapon, nor a requirement that the defendant indicate in any way to the victim that a weapon is present. *People v. Gray*, 806 N.E.2d 753, 757-58 (Ill. App. 2004). *Cf. People v. Alejos,* 455 N.E.2d 48, 50 (Ill. 1983) (armed violence requires no more than possession of a weapon). If the robber makes threats to use a

weapon, even when he does not actually have one, then a different offense comes into play, aggravated robbery under Ill. Rev. Stat. ch 38, §18–1(b)(1) (1997). *People v. Thomas*, 545 N.E.2d 289, 293 (Ill. App. 1989). Lipscomb was convicted of armed robbery, not aggravated robbery.

Other Circuits considering statutes similar to the Illinois armed robbery statute have confirmed that the offense is not a violent felony. *United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (Alabama armed robbery); *United States v. Jones*, 877 F.3d 884 (9th Cir. 2017) (Arizona armed robbery); *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) (Florida armed robbery); *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017) (Massachusetts armed robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery).

This Court has recently granted certiorari in *Stokeling v. United States,* No. 17-5554, *cert. granted* April 2, 2018, to decide whether Florida's robbery statute categorically requires force as defined by this Court in *Curtis Johnson*. Lipscomb's sentence, which rests on a conviction under an Illinois robbery statute,

raises essentially the same issue raised in *Stokeling*. The robbery statute of each state requires "force," and the question in each case is whether "force" as required in each statute equates with "force" as required in ACCA. Lipscomb requests that the Court hold his petition until it decides *Stokeling*.

II. The decision below also takes a wrong turn in its treatment of attempt as a violent felony.

As measured under ACCA's force clause, 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 invoked with little discussion the Circuit's recent decision in *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017). *Hill* 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*. *Hill* could not believe Congress intended the result that would have followed from the faithful application of this Court's precedents. The decision below in Lipscomb's case confirms the path marked out in *Hill*.

This Court has already rejected the notion that if a crime is a violent felony, then an attempt to commit that crime is a violent felony. 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 *James* 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. Nor does Illinois attempt, as the Circuit recognized, satisfy the elements of the force clause. If this is a problem, Congress, not the courts, has the power to fix the problem.

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. The lower courts should not rewrite the statute because they think the rewrite "makes sense."

CONCLUSION

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

Dated September 26, 2018, at Chicago, Illinois.

Respectfully submitted,

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