No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

DEMONE RULE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTIONS PRESENTED FOR REVIEW

Illinois attempt offense contain only two elements: the intent to commit an offense and a substantial step towards commission of the offense. The substantial step towards the commission of the offense does not require the use, attempted use, or threatened use of physical force against the person or property of another. If a completed offense categorically has "as an element the use,… or threatened use of physical force against the person of another," does the attempted commission of that offense automatically categorically qualify under the Armed Career Criminal Act as a "violent felony" under the elements clause as well?

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Petitioner, DEMONE RULE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, issued December 13, 2018, affirming the judgment of the district court.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying relief, *United States v. Rule*, is unpublished, and is reprinted in the appendix to this petition. A. 1.[1]

JURISDICTION

The Court of Appeals entered final judgment on December 13, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). This case involves the interpretation of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

STATUTES INVOLVED

18 U.S.C. § 924(e)

(e)(2) As used in this subsection-…
(B) the term "violent felony' means any crime punishable by imprisonment for a term exceeding one year…, that-
(i) has 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 the use of explosives, or otherwise involves conduct that present a serious risk of physical injury to another…

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 towards the commission of that offense.

[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.

STATEMENT OF THE CASE

Illinois attempt offense only have two elements: the intent to commit a specific offense and a taking a substantial step towards committing that offense. Illinois attempt offense do not require a defendant to use, attempt to use, or threaten to use force. As such, Illinois attempt offenses do not have as an element, the use, attempted use, or threatened use of pf physical force against the property of another.

The Seventh Circuit acknowledged that attempt offenses do not have as an element the use, attempted use, or threatened use of force, but still held that where the underlying offense attempted has as an element the use of force, so too does the attempt to commit the underlying offense 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). In so holding, the Seventh Circuit did not preform any statutory interpretation. In light of this Court's holding under *Johnson v. United States,* 135 S. Ct 2551 (2015), the "force clause" has become the *sine qua non* of the definition of a violent felony, because the "residual clause" of the Armed Career Criminal Act is unconstitutionally vague.

To count under the "force clause," a prior conviction must categorically require "force" as an element of the offense. To determine whether the offense qualifies, the court must at the elements of offense, not the underlying facts of the

convictions. *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). A conviction qualifies under the force clause only if the elements of the offense always, or categorically, require the use of force. *Descamps v. United States,* 570 U.S. 254, 257 (2013).

Furthermore, the Court interpreted the amount of force necessary to satisfy the force clause as not just any physical force, but "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson).* Physical force as required by the ACCA means "a degree of power that would not be satisfied by the merest touching." *Id.* at 139

With respect to this petition, Mr. Rule was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) and being an armed career criminal, in violation of 18 U.S.C. § 924(e). The case proceeded to trial and a jury found Mr. Rule guilty of being a felon in possession of a firearm. At sentencing, Mr. Rule argued that his previous conviction for Illinois attempted murder did not qualify as a violent felony under the force clause. Relying on *Hill*, the Court found that Mr. Rule's attempted murder conviction qualified as a violent felony, that Mr. Rule was an armed career criminal, and sentenced him to 235 months.

Mr. Rule filed a timely notice of appeal on January 22, 2018, arguing that his Illinois attempt murder conviction should not qualify as a predicate offense for the Armed Career Criminal Act because the elements of Illinois attempt do not contain as an element the use of force. The Seventh Circuit declined to overrule *Hill*,

reiterating that Illinois attempt murder offenses are violent felonies because murder offenses in Illinois are also violent felonies. A. 1.

REASONS FOR GRANTING THE WRIT

The decision below misapplies this Court's definition of force as the term is applied in the Armed Career Criminal Act. Prior to the finding that 18 U.S.C § 924(e)(2)(B)(ii) and 18 U.S.C. § 16(b) were unconstitutional, attempt offenses were routinely categorized as violent felonies or crimes of violence under the residual clause. *See James v. United States* 550 U.S. 192 (2007)(attempted burglary a violent felony under the 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 *Sessions v. Dimaya*, -- U.S. --, 138 S. Ct. 1204 (2018) eliminated the residual clause, and as such, attempt convictions only qualify as violent felonies or crimes of violence if they have as an element the use, attempted use, or threatened use of physical force.

Attempt offenses in Illinois never have as an element, the use, attempted use or threatened use of physical force. However, the Seventh Circuit held otherwise because "it just makes sense," without engaging in any further analysis. Even though *Hill* acknowledges that Illinois attempt statutes do not contain the use, attempted use, or threatened use of force, the Court found it sufficient that attempt

offenses require the *intended* use of force. That is creating a new requirement for the force clause out of thin air and is not supported by the case law.

A. Hill Concedes that Illinois Attempt Offenses Do Not Have as an Element The Use, Attempted Use, or Threatened Use of Force.

Hill unequivocally states that Illinois attempts do 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. Buying a weapon does not itself use, attempt, or threaten physical force; neither does drawing up assassination plans." *Hill*, 877 F.3d at 719. Under *Johnson*, an offense can only be a violent felony, if it is one of the enumerated offenses or has as an element the use, attempted use, or threatened use of physical force against the person or property of another. *Hill* concedes that the Illinois attempt statutes do not contain that important use of force language and as such, by the plain language of the statute, Illinois attempts are not violent felonies under the ACCA.

Seventh Circuit's previous handling of attempts under the ACCA prior to *Johnson* always analyzed attempts under the residual clause. Indeed, that attempts fall under the purview of the residual clause was already addressed in *United States v. Davis,* 16 F.3d 212 (7th Cir. 1994), and *United States v. Sandles*, 80 F.3d 1145 (7th Cir. 1996). After engaging in a detailed analysis of how its sister circuits treated attempts under the ACCA, the Court in *Davis* noted that each circuit to have addressed the issue analyzed whether attempts are "crimes which involve conduct that presents a serious potential risk of physical injury to another;"

the very language of the residual clause under 18 U.S.C. 924(e)(2)(B)(ii). *Davis*, 16 F.3d at 214-5. That analysis, and the conclusion that attempts do not fit within the force clause was reiterated again in *Sandles,* "because the ACCA does not include attempts in its definition of 'violent felony' court must determine whether an attempt 'otherwise involves conduct that presents a serious potential risk of physical injury to another." *United States v. Sandles* 80 F.3d 1145, 1150 n.5 (7th Cir. 1996). Thus the correct analysis as to whether an attempt is a predicate offense for purposes of the ACCA is by resort to analysis under the residual clause, which is now void for vagueness under *United States v. Johnson.*

Instead of accepting the outcome that attempts are only violent felonies under the residual clause, the Court in *Hill* assumed Congress could not have actually intended this result and instead inserted a new requirement for the use of force: "[w]hen the intent element of the attempt offense includes intent to commit violence against the person another…it makes sense to say that the attempt crime itself includes violence as an element…" *Id.* at 719. However, this Court has admonished that, "we cannot replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson,* 561 U.S. 320, 334 (2010). *See also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593 (2004) ("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.")

The issue of how attempts were *intended* to be treated under the ACCA was addressed in *James v. United States,* 550 U.S. 192 (2007), overruled in *Johnson v. United States* 135 S. Ct. 2551 (2015). In *United States v. James*, the Eleventh Circuit assumed that an attempt offense is a violent felony under the residual clause if the completed underlying offense is also a violent felony, relying on previous case law holding such. *United States v. James*, 430 F.3d 1150, 1156-57 (11th Cir. 2005). However, this Court instead examined Florida law to determine what conduct was required for a conviction under the Florida attempted burglary statute, then turned to whether that conduct satisfied the residual clause of the ACCA.

Only after a detailed analysis of what specifically Florida law required for a conviction for attempted burglary did the Court find that the risk created by that conduct was sufficient to qualify a Florida attempted burglary as a violent felony under the ACCA's residual clause. *James* 550 U.S. 201-205. This Court did not assume that because a completed burglary qualified as a violent felony under the ACCA, that an attempted burglary automatically qualified as well. Rather, the Court carefully analyze the scope of conduct that fell under Florida's attempt statute, then determined whether that specific conduct qualified an offense as a violent felony under the ACCA's residual clause.

The idea that an attempt crime is a violent felony if the completed crime is also a violent felony was squarely rejected by *James.* Further, that holding with respect to the residual clause was subsequently overruled by *Johnson.* As such,

attempt offenses can no longer be swept into the violent felony bin under the residual clause. A court cannot create new elements to satisfy the force clause simply because it does not like the result from applying the force clause as it stands now. Congress, not the courts are tasked with finding a solution to that problem.

B. Congress Can Amend The Statute To Include Attempt Convictions.

Congress has demonstrated that if it wants to include attempts in the definition of violent felony under the Armed Career Criminal Act, it knows the mechanism under which to do so. In fact, H.R. 6697 seeks to broaden the scope of the Armed Career Criminal Act by expanding the types of offenses that qualify for enhanced sentencing. Under the "Restoring the Armed Career Criminal Act," the ACCA would be amended to eliminate the distinction between "serious drug offenses" and "violent felonies," and would instead subject defendants to enhanced sentencing for having three or more "serious felony conviction." Under this bill, a "serious felony conviction" is any felony for which the maximum term of imprisonment is at least 10 years. The act would presumably include all manner of attempt offenses, whether they satisfied the force clause or not.

Congress has already specifically included attempt offenses in the definitions of certain offense. Under 8 U.S.C. § 1101(a)(43) a number of offenses are included under the definition of "aggravated felony" including "an attempt or conspiracy to commit an offense described in this paragraph." Congress already knows how to include attempts to commit a crime in the definition of offenses when it wishes to

include them. Lower courts should not do Congress's work for it because it does not like the result.

CONCLUSION

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

Dated March 12, 2019, at Chicago, Illinois.

Respectfully submitted,

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