No.

In the

Supreme Court of the United States

KOUWANII BRUNSTORFF,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is an attempt to commit a categorically violent felony, in this case, assault in the second degree in New York, categorically violent under the force clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), where an attempt conviction does not require the use, attempted use or threatened use of physical force?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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OPINION OF THE COURT BELOW

The summary order of the United States Court of Appeals for the Second Circuit is reported at Brunstorff v. United States, 754 Fed. Appx. 48 (2d Cir. 2019), 2019 WL 193527 and is printed in the Appendix to this petition at A-1 to A-3. The Second Circuit's Order denying the motion for panel rehearing, or, in the alternative, for rehearing *en banc*, is in the Appendix at A4. The opinion of the United States District Court for the District of Connecticut is unreported, but can be found at 2017 WL 5906611 (D. Conn. Nov. 30, 2017) and is printed in the Appendix at A-5 to A-24.

BASIS FOR JURISDICTION

Brunstorff invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The Second Circuit Court of Appeals issued the ruling sought to be reviewed on January 15, 2019. Brunstorff thereafter filed a timely petition for panel rehearing, or, in the alternative, rehearing *en banc*, which the court denied on April 9, 2019. The petition for a writ of certiorari is filed within ninety days of the April 9 order. See Supreme Court Rules 13.1, 13.3 and 29.2.

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 and entered judgment on November 30, 2017. The Court of Appeals for the Second Circuit had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 922(g), provides in relevant part:

> it shall be unlawful for any person (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting interstate commerce, any firearm or ammunition; or to receive any firearm or ammunition

> which has been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 924(e) provides in relevant part:

> (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 . . . committed on occasions different from one another, such person shall be . . . 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. . .
>
> > (B) the term "violent felony" means 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; . . . .

New York Penal Law § 110.00 provides: "[a] person is guilty of an attempt to commit a crime when, with intent to commit such crime, he engages in conduct which tends to effect the commission of such crime."

New York Penal Law § 120.05(2) provides in relevant part: "[a] person is guilty of assault in the second degree when: . . . 2. [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument."

28 U.S.C. § 2255(a) provides:

> 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.

STATEMENT OF THE CASE

In 2012, Kouwanii Brunstorff pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) and 924(e). The district court (Burns, J.) determined that Brunstorff had previously been convicted of three or more violent felonies and therefore imposed the mandatory minimum sentence of 180 months' imprisonment under the ACCA, 18 U.S.C. § 924(e), instead of a sentence within the otherwise applicable statutory limit of ten years. (Appendix ("A-") 26).

Following this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*2015 Johnson*"), Brunstorff filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, claiming that his ACCA-enhanced sentence was no longer valid. With the invalidation of the ACCA's residual clause in *2015 Johnson*, Brunstorff argued that his underlying convictions did not qualify as ACCA predicates under the so-called force clause of 18 U.S.C. § 924(e)(2)(B)(i) in light of *Johnson v. United States*, 559 U.S. 133 (2010) ("*2010 Johnson*").

The district court denied Brunstorff's § 2255 motion. The court concluded that *2010 Johnson* did not entitle Brunstorff to relief because, *inter alia*, his New York convictions for robbery in the first degree, assault in the second degree and attempted assault in the second degree were violent felonies under the ACCA's force clause. (A-19-22). The district court issued a certificate of appealability concerning, *inter alia*, "whether his prior convictions are violent felonies under the force clause of the ACCA." (A-24 & A-25).

The Court of Appeals for the Second Circuit affirmed. Regarding the attempted assault conviction, which is the only ACCA predicate for which Brunstorff seeks review in this Court, the court relied on a pre-*2010 Johnson* case to hold that "[t]o (attempt to) cause physical injury by means of a deadly weapon or dangerous instrument is necessarily to (attempt to) use 'physical force," *on any reasonable interpretation of that term*." *Brunstorff*, 754 Fed. Appx. at 50 (quoting *United States v. Walker*, 442 F.3d 787, 788 (2d Cir. 2006) (per curiam) (emphasis in original)). (A-3). Had the Court of Appeals concluded that attempted assault was not categorically violent, Brunstorff would not have faced the ACCA-enhanced sentence due to the absence of a third violent felony conviction. See 18 U.S.C. § 924(e)(1).

REASONS FOR GRANTING THE WRIT

This petition should be granted because the Court of Appeals decided an important federal question in a way that conflicts with a relevant decision of this Court, specifically, *2010 Johnson*. Review is also warranted because the Second Circuit decided an important federal question that has caused disagreement in the lower courts and which will continue to arise frequently if not resolved, that is, whether an attempt to commit a violent felony, here attempted second degree assault under New York law, is categorically violent where the state's attempt statute applies to nonviolent conduct. See Supreme Court Rule 10(c).

I. Certiorari Should Be Granted Because The Second Circuit Decided An Important Federal Question In A Way That Conflicts With A Relevant Decision Of This Court

In *2010 Johnson*, 559 U.S. 133, this Court held that the force element in 18 U.S.C. § 924(e)(2)(B)(i) requires "violent" force, which is a greater degree of force than "physical" force. *2010 Johnson* at 140. At issue was whether the petitioner's conviction for simple battery under Florida law was a violent felony under § 924(e)(2)(B)(i). The Florida statute provided that a battery occurs when, *inter alia*, a person "[a]ctually and intentionally touches or strikes another person against the will of the other." *2010 Johnson* at 136. Recognizing that it was bound by Florida's interpretation of state law, the Court noted that the Florida Supreme Court had held that the element of "actually and intentionally touching" can be based on "*any* physical contact, 'no matter how slight.'" *Id.*, 138 (citing *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007)). This included "[t]he most 'nominal contact,' such as a 'ta[p] . . . on the shoulder without consent.'" *2010 Johnson* at 138 (citing Hearns, 961 So.2d at 219).

This Court next sought to determine whether the level of force required to violate Florida's simple battery statute satisfied the ACCA's requirement that a predicate conviction "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). After examining the meaning of "physical force" in the ACCA, the Court concluded that the ACCA required "a degree of force that would not be satisfied by the merest touching." *2010 Johnson* at 139. Given the ACCA's focus on *violent* felonies, the Court reasoned that the "physical force" element of the ACCA is tantamount to "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.*, 140 (citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003)) (emphasis in original). The Court also described the level of force necessary for a state crime to constitute an ACCA violent

felony as a "substantial degree of force." *2010 Johnson* at 140. Force that is not "capable of causing physical pain or injury to another," *id.*, that is, less-than-"violent" force, is not an ACCA violent felony. The Florida aggravated battery statute was not a violent felony under the ACCA because the Florida statute could be violated based on something less than the "violent" force needed to constitute an ACCA predicate. *2010 Johnson* at 140.

Application of *2010 Johnson* to the attempted assault conviction in this case demonstrates that it is not categorically violent because liability for an attempt can occur in the absence of *any* use, attempted use or threatened use of physical force, let alone the "violent" force required by *2010 Johnson*. An attempt under New York law occurs when, "with intent to commit [a] crime, [the defendant] engages in conduct which tends to effect the commission of such crime." N.Y. Penal Law § 110.00. The "tends to effect" clause in § 110.00 has been construed broadly to include conduct that involves *no* violence even when the defendant attempts to commit a crime that, if completed, is violent. In *People v. Naradzay*, 11 N.Y.3d 460 (2008), for example, the evidence was sufficient to convict the defendant of attempted murder and attempted burglary where he obtained a shotgun and ammunition, borrowed a vehicle and drove several miles to the immediate vicinity of the intended victim's house, where he was arrested in possession of the loaded shotgun only twenty feet from the house, along with a "to-do" list in his pocket). The court in *People v. Sabo*, 179 Misc.2d 396, 687 N.Y.S.2d 513 (1998) applied the same reasoning to deny the defendant's motion to dismiss an indictment for attempted murder. The defendant had hired someone to procure a hit man even though the middleman informed the police and never planned to perform his role. The defendant gave the victim's picture and pertinent information to the informant, including the victim's home and business addresses, business telephone and business name. The defendant also gave the informant $10,000 for the hit man

with a promise of $15,000 more on confirmation of the victim's death. *Id.*, 403. The court in *People v. Cano*, 12 N.Y.3d 876, 877 (2009) affirmed a conviction for attempt to engage in illegal sexual activity with a minor where the defendant engaged in "extensive preparation," which included traveling to meet with the victim). Given the early stage of attempt liability, myriad other nonviolent acts could conceivably result in attempt convictions. Granting certiorari in this case will allow the Court to address the conflict between *2010 Johnson* and the decision below.

II. Certiorari Should Also Be Granted Because The Second Circuit Decided An Important Federal Question That Has Caused Disagreement In The Lower Courts; The Disagreement Is Likely To Continue If The Issue Is Not Resolved

Federal courts are grappling with the question of whether an attempt to commit a categorically violent felony is itself categorically violent. Several Circuit Courts of Appeals agree with the Second Circuit that such attempts are categorically violent. See, e.g., *United States v. Holland*, 749 Fed. Appx. 162, 166 (4th Cir. 2018) (attempted assault with a deadly weapon with intent to kill); *United States v. Mansur*, 375 Fed. Appx. 458, 463-64 (6th Cir. 2010) (attempted armed robbery);[1] *United States v. Armour*, 840 F.3d 904, 908 (7th Cir. 2016) (attempted bank robbery under 21 U.S.C. § 2113(a) is categorically a crime of violence under the force clause of 18 U.S.C. § 924(c)). *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017) (attempt to commit a violent felony is a violent felony because "an attempt to commit a crime should be treated as an attempt to commit every element of that crime. . . ."); *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016) (attempted drive-by shooting); *Ovalles v. United States*, 905 F.3d 1300, 1305 (11th Cir. 2018) (attempted carjacking under 18 U.S.C. § 2119 qualifies

[1] *Mansur* was overruled in *United States v. Yates*, 866 F.3d 723, 727-28 (6th Cir. 2017), but on the different issue of whether a completed robbery, not an attempted robbery, is categorically violent.

because "the defendant [must] have the specific intent to commit each element of the completed offense.")

Other federal judges disagree that attempts are categorically violent even if the completed crime would have been categorically violent. See, e.g., *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (Jill Pryor, J., dissenting). The dissent in *St. Hubert* noted that "*[i]ntending* to commit each element of a crime involving the use of force is not the same as *attempting* to commit each element of that crime." *Id.* (emphasis in original). An attempted bank robbery, for example, can occur in the absence of the use, attempted use or threatened use of physical force by renting a getaway van, parking the van near the bank and approaching the bank's door before being thwarted. *Id.* The court agreed in *United States v. Alfonso*, 3:17CR128(JBA), 2019 WL 1916199 at *3 (D. Conn. Apr. 30, 2019), holding that attempt to commit robbery is not a crime of violence because the "substantial step" needed to violate Connecticut's attempt statute, Conn. Gen. Stat. 53a-49, "need not include the use, attempted use, or threatened use of physical force," but can be violated by, among other non-violent actions, "lying in wait, . . . reconnoitering the place contemplated for the commission of the crime[,] . . . [or] possession of materials to be employed in the commission of the crime.").[2]

[2] The court in *Alfonso* relied on another district court decision, *Johnson v. United States*, 3:16CV215(MPS), 2016 WL 7362764, *7 (D. Conn. Dec. 19, 2016). *Johnson* held, in a post-*2015 Johnson* § 2255 challenge to an ACCA-enhanced sentence, that conspiracy to commit a violent felony, in that case, robbery, is not categorically violent. The court reasoned that Connecticut's conspiracy statute, Conn. Gen. Stat. § 53a-48(a), which requires an intent to commit a crime, agreement to engage in the conduct constituting the crime, and an overt act in furtherance of the agreement, does not have as an element the use, attempted use or threatened use of physical force "regardless of the offense that is the object of the conspiracy." *Johnson*, 2016 WL 7362764, *6-7. The rationale to exclude conspiracies and attempts from the scope of categorically violent felonies is the same: both can occur without the use of any actual, attempted or threatened use of violent force.

Attempt predicate convictions are present in many cases arising under the ACCA (and other statutes and sentencing guidelines, such as 18 U.S.C. § 16(a), and U.S.S.G. § 4B1.2(a)(1), which examine whether prior convictions are categorically violent). In fact, Brunstorff is aware of two pending petitions for writs of certiorari that raise the same issue: *Brown v. United States*, 18-9327 and *Thrower v. United States*, 19-5024.[3] In her *St. Hubert* dissent, moreover, Judge Jill Pryor wrote that the issue of whether Hobbs Act robbery and attempted Hobbs Act robbery are violent felonies is a "now-hot topic, unresolved by the Supreme Court." *St. Hubert*, 918 F.3d at 1201 (Jill Pryor, J., dissenting). The relative ubiquity of attempt convictions and the disagreement among the lower courts warrants review to resolve this important federal question. This is particularly true because the escalation in punishment is "notoriously harsh." *St. Hubert*, 918 F.3d at 1201 (referring to the five to ten year sentence for a first conviction under § 924(c) and the mandatory minimum twenty-five years for a second or subsequent conviction) (Jill Pryor, J., dissenting).

Coincidentally, the underlying criminal case in *Johnson*, 3:16CV215(MPS)—*United States v. Johnson*, 616 F.3d 85 (2d Cir. 2010)—was cited in *2015 Johnson*, 135 S. Ct. at 2560, in support of this Court's decision to invalidate the ACCA's residual clause.

[3] *Brown* and *Thrower* also arise out of the Second Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to determine whether an attempt to commit a violent felony is itself categorically violent.

Respectfully Submitted

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