IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2018

No.

HUGO PLIEGO-HERNANDEZ,
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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September 19, 2018

QUESTION PRESENTED FOR REVIEW

The district court enhanced Pliego-Hernandez' sentencing guideline range on the strength of a prior conviction for attempted robbery. Nothing in the text of the relevant guideline supported that result, but the Seventh Circuit concluded that the guideline commentary could supply the missing content. Did the Seventh Circuit contravene *Stinson v. United States*, 508 U.S. 36 (1993) when it relied on guideline commentary inconsistent with 18 U.S.C. § 16?

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Petitioner Hugo Pliego-Hernandez 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 *United States v. Pliego-Hernandez*, 720 Fed.Appx. 790 (7th Cir. 2018), and is reprinted in the appendix to this petition. A. 1.[1]

JURISDICTION

Pliego-Hernandez appealed his sentence in a criminal case. The Court of Appeals affirmed on April 25, 2018. *United States v. Pliego-Hernandez*, 720 Fed.Appx. 790 (7th Cir. 2018). Pliego-Hernandez made a timely motion for an extension to file a certiorari petition. He was given leave to file on or before

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

September 21, 2018. *Pliego-Hernandez v. United States*, No. 18A66. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 16

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and 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.

U.S.S.G. §2L1.2 (2015). Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under

Chapter Four or by **12** levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Application Note 1(B)(iii)

(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Application Note 5

Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

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

Pliego-Hernandez was charged in a one-count indictment under 8 U.S.C. § 1326(a) and 6 U.S.C. § 202(4) with illegal reentry into the United States. R. 1. He entered a blind plea of guilty to the indictment.

His presentence report calculated his sentencing guideline to include a 16-level enhancement because he had an Illinois conviction for attempted robbery. Under U.S.S.G. § 2L1.2 (b)(1)(A) (2015), the version in effect at the time of sentencing, a conviction for a crime of violence added 16 levels to the offense level. The application notes to that provision listed robbery as a crime of violence and further provided that an attempt to commit one of the listed offenses was itself a crime of violence.

The PSR calculated his offense level as 21 and his criminal history category as V. These scores gave him a range of 70 to 87 months in prison. PSR ¶ 75.

Counsel objected to the 16-level enhancement. R. 21, at 1-2. He argued that attempts were not properly included within the guideline enhancement. At sentencing, counsel pressed this objection to the 16-level enhancement, but the district court rejected the argument. See R. 36 at 5–6.

The court sentenced Pliego-Hernandez to 70 months in prison. Final judgment was entered on the docket on December 11, 2015. R. 23.

On April 4, 2016, Pliego-Hernandez filed a motion to appoint counsel to pursue relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). R. 26. On April 7, 2016, the court denied the motion for appointment of counsel, since Pliego-Hernandez had no motion for relief pending before the court. R. 27.

On May 10, 2016, Pliego-Hernandez filed a motion for re-sentencing. R. 28. The court ordered the government to respond. After the government's response, the court appointed counsel for

Pliego-Hernandez. R. 40. Appointed counsel filed an amended motion. R. 46.

The amended motion included the claim that Pliego-Hernandez' initial counsel did not file a notice of appeal even though the client had asked him to file. This motion was supported by a declaration from prior counsel. R. 54 at 11. The government's response reiterated its argument that the sentence was proper, but did nothing to counter the claim that counsel had failed to file an appeal when requested to do so. The district court ruled that Pliego-Hernandez had received ineffective assistance of counsel since the client had requested an appeal and the attorney had failed to honor that request. The district court adhered to its ruling that the enhancement was correct. R. 55.

The district court granted relief in part and denied relief in part. It ordered that any notice of appeal be filed within 14 days of its order. R. 55. Appointed counsel filed a notice of appeal the next day. R. 56.

On appeal, Pliego-Hernandez objected to the enhancement under U.S.S.G. § 2L1.2 (b)(1)(A) (2015). He argued that Illinois

attempted robbery is not a crime of violence, since Illinois attempt does not include use of force as an element of the offense. The commentary, by including an offense that does not require force, exceeded the Commission's authority.

The Seventh Circuit affirmed on the theory that, since the guideline itself does not define crime of violence and only the commentary defines crime of violence, the commentary's inclusion of attempts did not exceed the Commission's authority. "But the guideline text does not define 'crime of violence.' Because this task is entirely left to the commentary, the commentary cannot be broader than, or inconsistent with, the guideline." 720 Fed. Appx. at 791-92. Thus, if a guideline has no meaning, the commentary can fill the void. The Seventh Circuit specifically declared that it was relying solely on the commentary's inclusion of robbery as an enumerated offense and its further inclusion of attempts to commit enumerated offenses. *Id*. at 791 n.1. For that reason, it did not rely on its recent decision in *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017), which interpreted 18 U.S.C. § 924(e).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with a basic principle laid down by this Court in *Stinson v. United States*, 508 U.S. 36 (1993). *Stinson* affirmed that the commentary to the sentencing guidelines is authoritative, but cautioned that commentary does not have authority if "it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id*. at 38. In this case, the application note that extends U.S.S.G. § 2L1.2 (b)(1)(A) (2015) to attempted offenses is inconsistent with 18 U.S.C. § 16, the governing statute.

Section 16 defines "crime of violence" as follows:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and 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.

Under Guideline Section 2L1.2 (b)(1)(A), a defendant with a conviction for a "crime of violence" receives a 16-level enhancement. The text of that guideline does not define "crime of

violence," nor, unlike the career offender guideline, U.S.S.G. § 4B1.1, is it linked to another guideline that provides a definition. U.S.S.G. § 4B1.2. Nonetheless, section 16's definition fully applies, and the Commission was not required to repeat that definition in the text of the guideline.

The Commission did, however, provide commentary to the guideline. Application Note 1(B)(iii) to section 2L1.2 lists several enumerated crimes, including robbery, as "crimes of violence," and generally includes offenses that have force as an element of the offense. Application Note 1, like section 16, says nothing about attempt. A separate note, Application Note 5, then includes as crimes of violence all attempts to commit any offense included under Application Note 1.

The decision below concluded that Application Note 5 was not inconsistent with the guideline. In its view, the guideline provision does not define "crime of violence," and crime of violence is defined only in the commentary. At worst, then, Application Note 5 is inconsistent only with Application Note 1, but *Stinson* does not prohibit one piece of commentary from being

inconsistent with another piece of commentary.

The decision below erred in declaring that the definition of crime of violence comes solely from the commentary. It overlooked section 16, the obvious source of the applicable definition. The Court should have asked whether Application Note 5 is consistent with section 16.

When the inquiry is properly framed, the result below is incorrect. After *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), section 16's residual clause cannot support Note 5. With section 16's residual clause off the table, the inquiry must focus on section 16's force clause. The question, then, is whether attempt categorically requires force as an element of the offense. If not, Application Note 5 cannot supply the missing ingredient.

If a prior conviction is to count under the force clause of section 16, 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. Attempt in Illinois, as in many other jurisdictions, including the federal courts, *United States v. Resendiz-Ponce*, 549 U.S. 102, 106 (2007); *Braxton v. United States*, 500 U.S. 344, 349 (1991), does not have force as an element of the offense. Intent to commit a crime does not amount to the use of force. Intent is a state of mind, nothing more. A substantial step, the other element, may sometimes involve force, but it does not categorically involve the use of force.

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.

These general principles, recognized in Illinois and elsewhere, are 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, but he was guilty of attempt.

Illinois attempt does not require force as an element of the offense and therefore does not fit within section 16's force clause. Under *Stinson*, Application Note 5 cannot drag attempts within the guideline. Pliego-Hernandez' enhanced sentence rests on a conviction that under *Stinson* cannot be properly counted.

CONCLUSION

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

Dated September 19, 2018, at Chicago, Illinois.

Respectfully submitted,

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