

Docket No.
20-5202

In The
Supreme Court of The United States

ORIGINAL

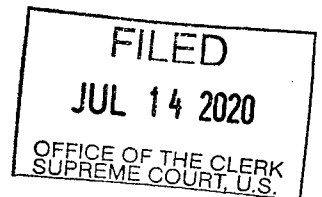
Jerome Collins
petitioner

v

United States of America
Respondent

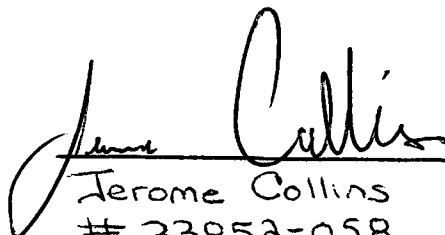
On Petition For a Writ of Certiorari
From The United States Court of Appeals
For The Fourth Circuit

Docket No.
18-4525



Originating In The
United States District Court
For the Western District of North Carolina
AT Charlotte
Docket No.

Pro-Se
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Question(s) Presented

1. Whether the New York offense of Attempt to commit, categorically qualifies as a crime of violence and whether varying conclusions from different circuits create a diversity of sentences among Federal prisoners with like instant offenses as well as similar prior convictions
2. Whether the New York offense of Attempt, whereby a defendant pleads guilty, by definition, lacks the intent to commit the underlying crime renders the statute overbroad.

List of Parties

All parties to this matter appear in the Caption of the case on the Cover page.

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Table of Authorities

Cases

Gill v I.N.S.

420 F.3d 82 (2nd cir 2005)

Kapik v Aschroft

384 F.3d 84 (3rd cir 2004)

North Carolina v Alford

400 us 25 (1970)

People v Foster

19 N.Y.2d 150 (1967)

People v Johnson

89 N.Y.2d 905 (1996)

United States v Dinkins

928 F.3d 34 (4th cir 2019)

United States v Dozier

848 F.3d 180 (4th cir 2017)

Statutes and Rules

18 U.S.C. § 922(g)(1)

N.Y. Penal Law § 110.00

N.Y. Penal Law § 120.10(4)

Guideline

U.S.S.G. § 4B1.2

Jurisdiction

The date on which The United States Court of Appeals for the Fourth Circuit decided my case was on March 31, 2020

A Timely petition for a rehearing or hearing En Banc was denied by the United States Court of Appeals for the Fourth Circuit on April 14, 2020

A copy of the request for a rehearing or hearing En Banc as well as a copy of the order denying said request appears at Appendix 'A'

Jurisdiction of this court is therefore invoked under 28 U.S.C. § 1254 (1).

Statement of The Case

The petitioner pleaded guilty the possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1).

The PSR identified two prior Convictions for a crime of violence under USSC § 4B1.2,

- (1) a North Carolina Common Law Robbery, and
- (2) a New York conviction for attempted assault in the first degree in violation of N.Y. penal Law section 110.00 and section 120.10(1).

Two prior crimes of violence with respect to an instant violation of 18 U.S.C. § 922(g)(1) assigns a base offense level of 24, otherwise, one prior crime of violence assigns an offense level of 20.

The petitioner is contesting the District Courts declaration that the petitioners conviction, in the State of New York for attempted assault in the first degree does not "categorically" qualify as a crime of violence,

The District Court overruled the petitioners objection to the PSR qualifying the, "attempted," assault as a crime of violence.

On Appeal to the fourth circuit court of Appeals the majority concluded that New York's attempt statute states that the defendant must have the, "intent to commit a crime," and that therefore the defendant pleads guilty to the specific intent.

Chief Judge Gregory dissented noting, "this should be a straight forward case. Fourth circuit precedent, United States v Dozier, 848 F.3d 180 (4th cir 2017) requires a defendant to act with the specific intent to commit the underlying crime and New York permits defendants to plead guilty to offenses when they do not — indeed cannot — possess the specific intent to commit the underlying crime.

Because New York Attempt is overbroad, CJ Gregory would have reversed The District Courts decision classifying the petitioners New York attempted first degree assault conviction as a crime of violence.

Reasons For Granting The Writ

There exists a circuit split on whether a New York attempt categorically qualifies as a crime of violence.

A unique feature of this New York law is that it permits a defendant to plead guilty to attempting a crime which by definition cannot be committed intentionally, such as attempted reckless endangerment, please see People v Foster, 225 N.E.2d 200 (N.Y. 1967)

In any event, The majority of the panel of The fourth Circuit Court of Appeals (C.J. Gregory dissenting) answered this question in the affirmative finding that a defendant entering a plea of guilty, "necessarily admits," to possessing the requisite specific intent.

The United States Courts of Appeals for the third Circuit, and perhaps more compelling, The Second circuit have reached different conclusions, (see Knapik v Ashcroft 384 F.3d 84 (3rd Cir 2004) holding that a New York Conviction for attempted reckless assault could not satisfy the categorical approach) also; Gill v I.N.S. 420 F3d 82 (2nd Cir 2005) holding that no mental state could be clearly discerned from a New York conviction for attempted Reckless endangerment.

It is imperative Therefore that this Honorable Court grant Certiorari To answer this question of exceptional importance and resolve the circuit split now existing

Question(s) Presented

1. Whether the New York offense of Attempt to Commit, categorically qualifies as a crime of violence and whether varying conclusions from different circuits create a diversity of sentences among federal prisoners with like instant offenses as well as similar prior convictions.
2. Whether the New York offense of Attempt, whereby a defendant pleads guilty by definition, lacks the intent to commit the underlying crime renders the statute overly broad.

Discussion

1. Whether The New York offense of Attempt to commit categorically qualifies as a crime of violence and whether varying conclusions from different Circuits create a diversity of sentences among Federal prisoners with like instant offenses as well as similar prior convictions

The decision of the majority panel of the Fourth Circuit Court of Appeals, concluding that a New York state "Attempt" is a categorical match to the Federal Generic Attempt, simply because a defendant necessarily admits to possessing "specific intent" is contrary and in direct conflict with decisions rendered by the third, and perhaps more compelling, the second Circuits.

Even the dissenting opinion of Chief Justice Gregory opined that the New York Jurisprudence makes it, "undeniably clear," that attempt liability extends to defendants, "who lack the specific intent to commit the underlying crime." "By permitting plea bargains in attempt cases where a defendant does not have the specific intent to commit the underlying crime, New York is, in essence, interpreting its attempt statute to not require specific intent in the context of plea bargaining."

The Fourth Circuits interpretation of Foster relies on the lone New York authority for its assertion that a defendant necessarily admits to possessing specific intent, direct contradicting subsequent New York case law that interprets Foster as permitting pleas to impossible attempt offenses when specific intent is lacking.

However, the fourth circuits conclusion that a defendant necessarily admits to possessing specific intent when pleading guilty to an impossible attempt crime is, to say the least, troubling.

An admission during a plea colloquy, as the Court is undoubtedly aware, is an acknowledgement that the facts as stated by the government are true.

However, it is axiomatic that one cannot admit to the truth of a legally impossible offense. Even the New York courts recognize that there can be no such admissions, People v Johnson, 89 N.Y.2d 905 (1996) (holding that where a defendant pleaded guilty to an attempted aggravated assault which, the court held, is committed without intent) but rather relied on contract principles to hold the defendant to his bargain, Foster, 19 N.Y.2d at 154, (holding that such a plea should be sustained on the ground that it was sought by the defendant and freely taken as part of a bargain which was struck for the defendant's benefit.)

Such an approach is tantamount to an Alford plea (North Carolina v Alford 400 US 25 (1970) whereby a defendant's guilty plea, "contains only a waiver of trial but no admission of guilt." (see also United States v Alston 611 F.3d 219 (4th Cir 2010) And, as such, because an Alford plea's factual basis is "not" confirmed by the defendant, it cannot later be used by a sentencing court to identify the resulting conviction as a predicate.

Nor should a court be allowed to do so on a plea with respect to an "attempted" crime.

The Second and the Third Circuit on the other hand concluded that this feature in the New York law does not satisfy the categorical approach.

The Second circuit concluded that, "no" mental state can be clearly discerned from a New York conviction for attempted reckless assault, let alone the requisite intent necessary to be classified as a crime involving moral turpitude, Gill 420 F3d at 91.

The Third Circuit similarly held that a New York conviction for attempted reckless endangerment could not determine if the conviction necessarily involves moral turpitude without also abandoning the categorical approach, Knapik, 384 F.3d at 92.

Categorically speaking, the concept of, "attempted reckless endangerment," makes no sense as an attempt necessarily requires intent to commit a crime, while recklessness requires no such intent.

As a result of these conflicting precedents among the circuits, the interpretation or reading of the qualifying character of an "attempt" prior conviction, serving as a crime of violence for enhancement purposes, and, in other ways, categorically excluded for a crime of violence predicate, The creation of an injustice and inequity of sentences has been created among defendants in our federal system.

2. Whether the New York offense of Attempt, whereby a defendant pleads guilty, by definition lacks the intent to commit the underlying crime, renders the statute overbroad

New York's acceptance of guilty pleas to attempt crimes, where a defendant, by definition, lacked the intent to commit the underlying crime renders the statute overbroad, Dozier 848 F.3d at 185 (holding that sentencing courts must compare the state and generic elements of [general attempt] statutes as well as the elements of the underlying substantive statutory offense when determining whether a prior attempt conviction qualifies as a controlled substance offense), also, United States v Dinkins 928 F.3d 349 (4th cir 2019) to determine whether an inchoate offense qualifies as a violent felony under the ACCA's force clause, two sets of elements are at issue, the elements of the inchoate crime and the elements of the instant or underlying offense.

This petitioner's plea to attempted first degree assault under New York should therefore not have qualified as a crime of violence.

The fact that the majority panel classified The New York assault, or otherwise, "attempted" assault as a crime of violence, with the Chief Justice [Gregory] dissenting, in conjunction with the Second and the Third circuits rendering conflicting opinions bears on the fact that the statute is overly broad inviting a multitude of interpretations.

Conclusion.

Wherefore, this petitioner respectfully requests
That this Honorable court grant This petitioner
a writ of certiorari.

The petitioner submits that the issue presented
in This motion establishes that there is a split
amongst the circuits and as a result, this Court
needs to resolve the circuit conflict.

Furthermore, the New York attempt statute
is overly broad and far to vague to categorically
constitute an "Attempt" as a crime of violence.

Respectfully Submitted

Jerome Collins

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