No. 20-5202

IN THE SUPREME COURT OF THE UNITED STATES

JEROME COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim that attempted first-degree assault, in violation of N.Y. Penal Law §§ 110.00 and 120.10(1) (McKinney 2009), is not a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(2) and 4B1.2(a)(1) (2016).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.C.):

United States v. Collins, No. 17-cr-239 (July 11, 2018)

United States Court of Appeals (4th Cir.):

United States v. Collins, No. 18-4525 (Mar. 31, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4-33)* is not published in the Federal Reporter but is reprinted at 808 Fed. Appx. 131.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2020. A petition for rehearing was denied on April 29, 2020 (Pet. App. 1). The petition for a writ of certiorari was filed on July

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* The pages of the appendix to the petition are unnumbered. This brief cites to the appendix as if the document were continuously paginated.

14, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of North Carolina, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g). Judgment 1. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 4-33.

1. In 2017, Charlotte-Mecklenburg police apprehended petitioner pursuant to an arrest warrant issued for a probation violation. Presentence Investigation Report (PSR) ¶ 6. He was carrying a nine-millimeter pistol at the time of his arrest. Ibid. A federal grand jury indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. He pleaded guilty to the charge. Judgment 1.

The Probation Office's presentence report determined that petitioner qualified for a base offense level of 24 under Sentencing Guidelines § 2K2.1(a), which applies if a defendant possessed a firearm after "sustaining at least two felony convictions of * * * a crime of violence." Sentencing Guidelines § 2K2.1(a)(2) (2016); see PSR ¶ 12. Sentencing Guidelines § 4B1.2(a) defines a "crime of violence" as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year," that either (1) "has as an element the use,

attempted use, or threatened use of physical force against the person of another" (the elements clause); or (2) is one of several listed offenses, including "aggravated assault." An application note specifies that crimes of violence "include the offense[] of * * * attempting to commit" a crime of violence. Id. § 2K2.1(a), comment. (n.1). The crimes of violence identified in the presentence report were petitioner's prior felony convictions for North Carolina common-law robbery and attempted first-degree assault, in violation of N.Y. Penal Law §§ 110.00 and 120.10(1) (McKinney 2009). PSR ¶¶ 12, 26, 31. After applying other adjustments, the presentence report calculated an offense level of 21 and a criminal history category of VI, resulting in an advisory Sentencing Guidelines range of 77 to 96 months of imprisonment. PSR ¶¶ 42, 68.

Petitioner objected to the classification of his attempted first-degree assault conviction as a crime of violence on the ground that first-degree assault can include reckless conduct under New York law. Sent. Tr. 3-4; D. Ct. Doc. 19, at 1 (Feb. 1, 2018). The district court overruled his objection, explaining that petitioner was convicted of attempting a variant of first-degree assault that required "intent to cause physical injury." Sent. Tr. 5. The court then determined that this offense qualified as a crime of violence under both the elements clause and the enumerated offense of "aggravated assault." Id. at 12; see id. at

12-13. It sentenced petitioner to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

2. The court of appeals affirmed. Pet. App. 4-33. The court observed that although petitioner had argued in the district court that "New York assault" was not a crime of violence, he had abandoned that contention on appeal and argued, for the first time, that "New York attempt is broader than generic attempt." Id. at 8. The court declined to resolve whether plain-error review applied, however, because petitioner could "not prevail even under the preserved error standard." Ibid. The court explained that attempted first-degree assault, in violation of N.Y. Penal Law §§ 110.00 and 120.10(1) (McKinney 2009), requires that the "defendant act 'with intent to cause serious physical injury to another person.'" Pet. App. 17 (quoting N.Y. Penal Law § 120.10(1) (McKinney 2009)). Accordingly, petitioner's conviction was for an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. at 19 (citation omitted).

Chief Judge Gregory dissented. Pet. App. 21-33. In his view, attempted first-degree assault under New York law could not qualify as a crime of violence because even though "New York law recognizes attempt liability only for crimes that involve a mens rea of specific intent," "New York courts permit convictions by plea to hypothetical or legally impossible offenses such as attempted recklessness." Id. at 23 (citation omitted).

ARGUMENT

Petitioner contends (Pet. 1-10) that attempted first-degree assault, in violation of N.Y. Penal Law §§ 110.00 and 120.10(1) (McKinney 2009), does not qualify as a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(2) and 4B1.2(a)(1) (2016). That contention lacks merit. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. And, in any event, this case presents a poor vehicle for addressing the question presented. No further review is warranted.

1. The court of appeals correctly determined that petitioner's conviction for attempted first-degree assault was a conviction for a "crime of violence" under Sentencing Guidelines § 4B1.2(a)'s elements clause. To determine whether a prior conviction constitutes a crime of violence under the elements clause, courts apply a "categorical approach," which requires analysis of "the elements of the crime of conviction" rather than the offense conduct. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); see Taylor v. United States, 495 U.S. 575, 602 (1990). If the statute of conviction lists multiple alternative elements establishing multiple distinct crimes, it is "'divisible,'" and a court may apply a "'modified categorical approach'" that "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of."

Mathis, 136 S. Ct. at 2249 (citation omitted); see Shepard v. United States, 544 U.S. 13, 26 (2005).

New York Penal Law § 120.10 (McKinney 2009), which defines first-degree assault, contains four subsections. Id. § 120.10(1)-(4). Petitioner does not dispute that those subsections define separate offenses with different elements, and that the statute is therefore divisible. See Pet. App. 12 n.3. Nor does he dispute that he was convicted of attempting the offense in subsection (1), which provides that someone has committed first-degree assault when "[w]ith intent to cause serious 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." N.Y. Penal Law § 120.10(1) (McKinney 2009); see Pet. App. 12 n.3. And he did not dispute below (Pet. App. 13), and does not dispute in this Court, that completed New York first-degree assault with a deadly weapon or dangerous instrument qualifies as a crime of violence under the elements clause.

Instead, petitioner contends (Pet. 3-9) that attempted New York first-degree assault with a deadly weapon or dangerous instrument does not qualify as a crime of violence under the elements clause. That contention lacks merit. New York's attempt statute provides that a defendant "is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." N.Y. Penal Law § 110.00 (McKinney 2009). Accordingly, the elements of

attempted first-degree assault with a deadly weapon or dangerous instrument are that the defendant "inten[ded] to cause serious physical injury to another person * * * by means of a deadly weapon or a dangerous instrument," id. § 120.10(1); see id. § 110.00, and that he "engage[d] in conduct which tends to effect the commission of [that] crime," id. § 110.00. That offense "has as an element the * * * attempted use * * * of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2016).

Petitioner observes (Pet. 5-8) that New York courts have permitted defendants to plead guilty to attempt offenses, which require intent, even when the substantive offense itself can be committed with a mens rea other than intent. He also identifies (Pet. 7) decisions from other courts of appeals concluding that New York attempt offenses different from his -- attempted reckless endangerment and attempted reckless assault -- do not qualify as crimes of moral turpitude under 8 U.S.C. 1227(a)(2)(A)(i), on the theory that it is legally impossible to intend reckless conduct. See Gill v. INS, 420 F.3d 82, 90-91 (2d Cir. 2005); Knapik v. Ashcroft, 384 F.3d 84, 90-92 (3d Cir. 2004). But that observation, and those decisions, are inapposite here. Unlike a substantive offense with a mens rea of recklessness, first-degree assault with a deadly weapon or dangerous instrument requires "intent to cause serious physical injury to another person." N.Y. Penal Law § 120.10(1) (McKinney 2009); see Pet. App. 17. Accordingly, this

case does not involve any potential incongruity between a mens rea of intent for attempt and a mens rea of recklessness for the substantive offense.

2. Even if the question presented would otherwise warrant this Court's review, this case would be a poor vehicle to consider it for at least two reasons.

First, because petitioner did not raise this issue before the district court, his claim is reviewable only for plain error, see Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner must demonstrate (1) error; (2) that is plain or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736; see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009). He cannot do so.

For the reasons above, petitioner cannot demonstrate that the court of appeals' determination that attempted first-degree assault with a deadly weapon or dangerous instrument is a crime of violence was error, much less a "clear or obvious" error. Puckett, 556 U.S. at 135. To satisfy the second element of plain-error review, a defendant must show that an error was so obvious under the law as it existed at the time of the relevant district court or appellate proceedings that the courts "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." United States v. Frady, 456 U.S. 152, 163 (1982).

Second, petitioner's challenge to his sentence rests on a claimed error in the application of an advisory Sentencing Guidelines provision that the Sentencing Commission has proposed amending. Typically, this Court leaves issues of Sentencing Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Sentencing Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

Here, the Commission has already taken steps to exercise its oversight authority with respect to other portions of the Sentencing Guidelines' "crime of violence" definition. Effective August 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision's "residual clause" and to expand the Sentencing Guidelines' list of offenses that automatically qualify as crimes of violence. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). In addition, the Commission has

proposed potentially amending the elements clause to "allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense." 83 Fed. Reg. 65,400, 65,407 (Dec. 20, 2018). Such an amendment, if adopted, would greatly diminish the importance of the question whether petitioner's prior conviction was for an offense that has, as an element, the attempted use of force against the person of another within the meaning of the Sentencing Guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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