

No. _____

**In The
Supreme Court of the United States**

—◆—
ANTONIO MINNIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

When a criminal defendant's prior conviction is for an offense listed as a crime of violence in U.S.S.G. § 4B1.2(a)(2) – such as attempted aggravated assault – and the elements and range of conduct that can result in conviction are broader under state law than under the generic version of the offense, the conviction is not for a crime of violence and cannot serve as a predicate for enhanced federal sentencing. *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 133 S.Ct. 2276 (2013). The elements of the generic crime of attempted aggravated assault are the formation of an intent to commit a crime and the taking of a substantial step in furtherance of the intention. Although the elements of attempted first degree assault under Missouri law are the same, the Missouri Supreme Court recently affirmed a conviction despite the absence of evidence that the defendant's formation of intent *preceded* his taking of a substantial step toward commission of the crime. *State v. Lammers*, 479 S.W.3d 624 (Mo. 2016).

The question presented is:

Whether under U.S.S.G. § 4B1.1, when the elements of a generic offense and a state's codification and interpretation of that offense are the same but the scope of punishable conduct is greater under state law for another reason – *e.g.*, the state supreme court's relaxed interpretation of the sequencing of elements sufficient to support conviction – prior conviction of that state crime can serve as a predicate for enhanced federal sentencing.

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PETITION FOR A WRIT OF CERTIORARI

Antonio Minnis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

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OPINION BELOW

On October 6, 2017, a panel of the Court of Appeals filed its opinion affirming the judgment of the United States District Court for the Eastern District of

Missouri. The opinion of the Court of Appeals is reported at 872 F.3d 889 (8th Cir. 2017).



JURISDICTION

The Court of Appeals entered its judgment on October 6, 2017. The Court of Appeals denied the petitioner's request for rehearing on November 16, 2017. On February 6, 2018, in response to the petitioner's application, Justice Gorsuch entered an order extending the time to file this petition through March 16, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 4B1.1 Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

* * *

U.S.S.G. § 4B1.2 Definitions of Terms Used in Section 4B1.1

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is . . . aggravated assault. . . .¹

Mo. Rev. Stat. § 565.050 Assault, first degree, penalty

1. A person commits the offense of assault in the first degree if he or she attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

* * *

Mo. Rev. Stat. § 564.011

1. A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A “substantial step” is conduct which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.



¹ A “crime of violence” includes “attempting to commit such offenses.” U.S.S.G. § 4B1.2 cmt. n.1.

STATEMENT

The petitioner pled guilty to a charge of possessing heroin with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B)(i). The District Court found the petitioner to be a career offender under U.S.S.G. § 4B1.1 and imposed an enhanced sentence of imprisonment for 188 months. App.7-App.10. One of the prior convictions relied upon for enhancement was for attempted first degree assault under Mo. Rev. Stat. §§ 565.050 and 564.011. App.12-App.16.

The petitioner appealed, invoking the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. § 1291. He challenged the District Court's determination that attempted first degree assault under §§ 565.050 and 564.011 satisfies the definition of a violent crime under U.S.S.G. § 4B1.2 and can serve as a predicate for enhanced career offender sentencing pursuant to U.S.S.G. § 4B1.1.

The petitioner based his challenge on the Missouri Supreme Court's opinion in an unrelated prosecution for attempted first degree assault. *State v. Lammers*, 479 S.W.3d 624 (Mo. 2016). The petitioner contended that the evidence in *Lammers* was incapable of proving that the defendant had formed an intent to assault or harm anyone prior to purchasing the assault rifles that led to his arrest, and thus that the scope of conduct subject to punishment under Missouri law is broader than that under the generic version of attempted aggravated assault. The Court of Appeals affirmed, concluding that "*Lammers* . . . does not modify the

substantial step analysis, and thus does not construe attempt in an overinclusive manner,” and that “[t]he elements of attempted first-degree assault under Missouri law are not broader than the generic crime.” App.4-App.5.

The petitioner sought rehearing by the Court of Appeals panel. He pointed out that the police officer who testified about the defendant’s state of mind in *Lammers* – and furnished the only evidence regarding the intent element of attempted first degree assault – recalled the defendant’s acknowledgment of having watching a movie about a school shooting and then “envisioning” himself committing a mass shooting, also recalled the defendant’s discussion of a “plan” to shoot people at a Walmart store or a movie theater, and ultimately admitted that he had no knowledge of or insight into whether the defendant first had the latter thoughts before or after he purchased the assault rifles. App.19-App.20. The panel denied the petition for rehearing. App.10.



ARGUMENT FOR ALLOWANCE OF THE WRIT

In a series of decisions beginning with *Taylor v. United States*, 495 U.S. 575 (1990), and including *Descamps v. United States*, 133 S.Ct. 2276 (2013), *Johnson v. United States*, 135 S.Ct. 2551 (2015), and *Mathis v. United States*, 136 S.Ct. 2243 (2016), this Court has established that a sentencing court should determine whether a defendant’s prior conviction

counts as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(3)(1), by means of “a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” *Taylor*, 495 U.S. at 600.²

Under the categorical approach established in *Taylor*, sentencing courts are directed to “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime” and recognize the prior conviction as a viable predicate for enhancement “only if the statute’s elements are the same as, or narrower than, those of the generic offense.” *Descamps*, 133 S.Ct. at 2281; *see also Taylor*, 495 U.S. at 599 (recognizing that “if the state statute is narrower than the generic view . . . there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary”).

When the crime under the particular state’s law is broader than the generic offense – if conviction can be obtained without proof or admission of every element as the element is recognized in the generic offense – then the conviction does not categorically qualify as a predicate for sentence enhancement, “even if the defendant actually committed the offense in its generic

² This case did not arise under or involve the ACCA. But the lower courts have applied the categorical approach as well to determining whether a prior conviction qualifies as a crime of violence under the Sentencing Guidelines. *See, e.g., United States v. Boose*, 739 F.3d 1185, 1186 (8th Cir. 2014).

form.” *Descamps*, 133 S.Ct. at 2283; *see also Mathis*, 136 S.Ct. at 2251 (recognizing that the Court has “often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense”); *id.* at 2257 (stating that sentencing courts “must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense . . . [and] may not ask whether the defendant’s conduct . . . falls within the generic definition”).

The categorical approach is premised on the Court’s determination that in specifying particular offenses as crimes of violence that authorize enhanced punishment, “Congress referred only to their usual or . . . generic versions – not to all variants of the offenses.” *Mathis*, 136 S.Ct. at 2248 (citing *Taylor*, 495 U.S. at 598). The facts underlying a defendant’s prior conviction – “the means by which the defendant, in real life, committed his crimes” – are irrelevant to the categorical evaluation of whether the conviction can serve as a predicate for enhanced sentencing as a career criminal. *Id.* (citing *Taylor*, 495 U.S. at 600). “Accordingly, a sentencing judge may look only to ‘the elements of the [offense], not to the facts of [the] defendant’s conduct.’” *Ibid.* (alteration in original).

The Court has relied upon state supreme court statutory interpretations to make the comparison of elements required by the categorical approach. *See, e.g., James v. United States*, 550 U.S. 192 (2007) (relying on the Florida Supreme Court’s “considerabl[e] narrowing” of broad language in the state’s burglary statute,

and that court’s consistent application of “this heightened standard,” in finding that attempted burglary under that statute is a crime of violence), *overruled on other grounds by Johnson v. United States*, 135 S.Ct. 2551, 2563 (2015).

In codifying the crime of aggravated assault and criminal liability for inchoate offenses, the Missouri legislature retained the elements of the generic crime of attempted aggravated assault: the defendant must have (1) intended to commit first degree assault and (2) taken a substantial step toward the completion of that offense. *Lammers*, 479 S.W.3d at 632. But *Lammers* serves as authority for conviction of attempted first degree assault without regard to whether the defendant’s intent to offend was formed before or after he took a “substantial step” toward commission of the offense. Thus the scope of conduct punishable as attempted first degree assault in Missouri is broader than that punishable under the generic version of the crime.

The petitioner does not challenge Missouri’s authority to punish the taking of what might be the first step toward commission of an offense combined with the *subsequent* formation of an intent to complete the crime. But the sequencing of elements – *i.e.*, intent-formation followed by a step demonstrating the actor’s determination to fulfill that intention – is integral to the generic definition of attempt. *See, e.g., United States v. Dworken*, 855 F.2d 12, 17 (1st Cir. 2011) (identifying the elements of attempt as “an intent to engage in criminal conduct” and the taking of a substantial

step “that strongly corroborates the criminal intent”); *United States v. Mowad*, 641 F.2d 1067, 1073 (2d Cir. 1981) (noting the Circuit’s two-tiered test for the review of attempt convictions, looking first for proof of criminal intent and next for “whether the accused’s conduct may be viewed as sufficiently corroborative of his established criminal intent”); *United States v. Hsu*, 155 F.3d 189, 198 n.14 (3d Cir. 1998) (noting that the conduct element of criminal attempt consists of “an act or omission constituting a substantial step in a course of conduct planned to culminate in . . . commission of the crime”) (quoting MODEL PENAL CODE § 5.01(1)(c)); *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996) (recognizing that the elements of attempt are “culpable intent to commit the crime charged” and “a substantial step towards the completion of the crime that strongly corroborates the intent”); *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974) (recognizing that the elements of attempt are intent to commit the crime and a substantial step “strongly corroborative of the firmness of the defendant’s criminal intent”); *United States v. Pennyman*, 889 F.2d 104, 106 (6th Cir. 1989) (recognizing that the elements of attempt are “the intent to engage in the proscribed criminal activity” and conduct that “unequivocally corroborate[s]” that intent); *United States v. Roventus*, 768 F.2d 809, 821 (7th Cir. 1985) (approving the recitation of elements in *Mandujano*, *supra*); *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982) (identifying the elements of attempt as “an intent to engage in criminal conduct” and “conduct constituting a ‘substantial step’ towards the commission of the substantive offense which strongly

corroborates the actor’s criminal intent”); *United States v. Morales-Perez*, 467 F.3d 1219, 1222 (9th Cir. 2006) (recognizing that the substantial step must be “strongly corroborative of the firmness of a defendant’s criminal intent”); *United States v. Monholland*, 607 F.2d 1311, 1318 (10th Cir. 1979) (finding it “essential” for conviction of attempt that the defendant take a substantial step toward completion “with the intent of committing the particular crime”); *United States v. Rothenberg*, 610 F.3d 621, 626 (11th Cir. 2010) (identifying the elements of attempt as an intent to commit the crime and a “substantial step . . . which strongly corroborates the defendant’s criminal intent”); *United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014) (defining attempt as “an action constituting a ‘substantial step’ towards commission of a crime . . . performed with the requisite criminal intent”); *see also* MODEL PENAL CODE § 5.01(1)(c) (requiring proof of “an act or omission constituting a substantial step in a course of conduct planned to culminate in . . . commission of the crime”).

After *Lammers*, with its relaxation of the sequencing of crime elements, more conduct is punishable as attempted first degree assault in Missouri than could be punished under the generic version of that offense. The Court of Appeals summarized its rejection of the petitioner’s contentions:

In *Lammers* the court found sufficient evidence for attempted first-degree assault where the defendant purchased two assault rifles, took target practice, and admitted to

planning “to carry out a mass shooting, with Walmart in mind as a specific target.”

App.3. The sequence of those events – that it is just as likely that the purported plan was formulated *after* the defendant purchased weapons and took target practice as before – did not figure into the Court of Appeals’ analysis. But it is inevitable that the Missouri Supreme Court’s interpretation of the first degree assault and attempt statutes makes the range of punishable conduct broader under Missouri law than under the generic versions of those offenses: acts executed prior to the formation of an intent cannot have been committed in furtherance of that non-existent purpose, nor is it clear that they can be corroborative of such a purpose.

This case affords the Court the opportunity to clarify the application of the categorical approach when the elements of an offense under state law are the same as the elements of the generic offense, but the state’s interpretation or application of its law expands the scope of conduct that can subject an individual to criminal punishment.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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