
No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

KERRY BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

I. With respect to a conviction from a state that deems preparatory conduct sufficient to satisfy the inchoate offense of attempt, can attempt qualify as a violent felony under the force clause of the Armed Career Criminal Act simply because the attempted offense has the use, attempted use, or threatened use of force as an element?

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Petitioner, Kerry Brooks, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 18, 2017, denying Mr. Brooks a certificate of appealability.

OPINION BELOW

A copy of the judgment in *Kerry Brooks v. United States*, No. 17-1957 is included in Appendix A. A copy of the order denying rehearing is included in Appendix B.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit denied rehearing on December 1, 2017. In accordance with Rule 13.3 of the Rules of the Supreme Court of the United States, this petition for writ of certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order affirming the district court's judgment in this case. Mr. Brooks

invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION INVOKED

“No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .” U.S. Const., Amend. V.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed” U.S. Const., Amend. VI.

I. STATEMENT OF THE CASE

A. Original Jurisdiction

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 18 U.S.C. § 3231, because Mr. Brooks was charged and convicted of an offense against the laws of the United States, violating 18 U.S.C. §§ 922(g)(1). Mr. Brooks appealed the conviction and sentence to the United States Court of Appeals for the Eighth Circuit. *United States v. Brooks*, 417 F.3d 982 (8th Cir. 2005). Jurisdiction in that court was established by 28 U.S.C. § 1291. Mr. Brooks sought post-conviction relief pursuant to 28 U.S.C. § 2255, which was denied by the district court. *Brooks v. United States*, 2007 WL 927755 (W.D.Mo. 2007) (unpublished).

After the Supreme Court’s decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Brooks sought leave to file a successive motion to vacate, pursuant to 28 U.S.C. § 2255. On August 26, 2016, the United States Court of Appeals for the Eighth Circuit granted his request. *Brooks v. United States*, Case No. 16-2602 (8th Cir. August 26, 2016). The district court had jurisdiction over Mr. Brooks’ § 2255 motion pursuant to § 2255(a). The district court denied Mr. Brooks’ § 2255 motion and denied a certificate of appealability. Mr. Brooks appealed to the

United States Court of Appeals for the Eighth Circuit, which had jurisdiction pursuant to § 2255(d).

B. Procedural History

On April 8, 2004, Mr. Brooks pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1). *United States v. Brooks*, 417 F.3d 982, 983 (8th Cir. 2005). In his plea agreement, he acknowledged that he had prior convictions for second-degree attempted robbery, first-degree attempted robbery, and two felony counts of sale of a controlled substance. *Id.* at 983.¹

On September 14, 2004, the district court sentenced Mr. Brooks to 210 months' imprisonment to be followed by 5 years of supervised release. *Id.* Mr. Brooks appealed, and a panel of the Eighth Circuit affirmed his sentence. *Id.* at 985. Mr. Brooks sought post-conviction relief pursuant to 28 U.S.C. § 2255, which was denied by the district court. *Brooks v. United States*, 2007 WL 927755 (W.D.Mo. 2007) (unpublished).

After the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Brooks sought leave to file a successive § 2255 motion. On August 26, 2016, the Eighth Circuit granted his request. *Brooks v. United States*, Case No. 16-2602 (8th Cir. August 26, 2016).

In his successive § 2255 motion, Mr. Brooks argued that he did not qualify as an armed

¹ Paragraph 29 of Mr. Brooks' Presentence Investigation Report (PSR) mistakenly indicated that Mr. Brooks had a prior conviction for first-degree robbery. Mr. Brooks attached a Sentence and Judgment to his § 2255 motion establishing that he was actually convicted of second-degree robbery (DCD 8-1, Exhibit 1). The government did not contest that the conviction was for second-degree robbery (DCD 9. Government's Response to § 2255 Motion). Mr. Brooks' PSR is part of the record in *Kerry Brooks v. United States*, No. 16-2602 (8th Cir. June 17, 2016).

career criminal under 18 U.S.C. § 924(e) (DCD 8, § 2255 Motion at 1).² Mr. Brooks admitted that he had two prior convictions for serious drug offenses, but he claimed that his prior convictions for second-degree robbery and attempted first-degree robbery did not qualify as predicate offenses under § 924(e)(2)(B) (DCD 8, § 2255 Motion at 2-3). The government agreed that Mr. Brooks' conviction for Missouri second-degree robbery could not be treated as a predicate offense under *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016) (DCD 9, Gov't. Response at 1).

The question before the district court was whether Mr. Brooks' Missouri conviction for attempted first-degree robbery was a qualifying conviction under the Armed Career Criminal Act (ACCA) (DCD 11, Order at 2). The district court concluded that attempted first-degree robbery was a violent felony under the force clause of § 924(e)(2)(B)(i) (DCD 11, Order at 4). The court said, "An attempt to commit robbery in the first degree constitutes a violent felony under section 924(e)(2)(B)(i) because attempted robbery in the first degree involves the "attempted use...of physical force against the person of another" (DCD 11, Order at 4). The district court relied on *United States v. Alexander*, 809 F.3d 1029 (8th Cir. 2016), in which a panel of the Eighth Circuit concluded that a Missouri conviction for second-degree assault by knowingly attempting to cause physical injury to another by means of a dangerous instrument was a violent felony. The court, therefore, denied Mr. Brooks' § 2255 motion (DCD 11, Order at 4). The motion was denied on February 27, 2017 (DCD 11, Order at 5).

On April 28, 2017, Mr. Brooks timely filed a notice of appeal (DCD 13). On May 3,

² Citations to the district court docket refer to *Kerry Brooks v. United States*, 16-CV-03466-ODS and are abbreviated as "DCD." The underlying criminal case is *United States v. Kerry Brooks*, 02-03113-01-CR-W-ODS.

2017, the Eighth Circuit remanded the case to the district court for a determination of whether to grant a certificate of appealability. On May 11, 2017, the district court entered an order denying a certificate of appealability. On May 22, 2017, Mr. Brooks filed a motion for a certificate of appealability with the Eighth Circuit. On September 18, 2017, the Eighth Circuit denied the motion. On November 2, 2017, Mr. Brooks filed a petition for rehearing. The Eighth Circuit denied the petition for rehearing on December 1, 2017.

II. REASONS FOR GRANTING REVIEW

This Court should grant certiorari, because there is confusion among the lower courts in how to analyze attempt offenses for purposes of the ACCA. Some courts look strictly to the elements of attempt, *United States v. Rucker*, 2017 WL 1246465 at *3 (D. Colo. 2017); *Montoya v. United States*, 2016 WL 6810727 at *7 (D. Utah 2016), while other courts look to the elements of the object offense, *Eaton v. United States*, 2017 WL 3037435 at *8 (D.N.Dak. 2017); *United States v. Sylva*, 2016 WL 7320917 at *3 (W.D.Ark. 2016) (Report and Recommendation adopted in 2016 WL 7257085). The latter form of analysis is incorrect. Attempting a forcible offense is not the same as attempting to use force because the attempt crime can be committed by preparatory acts that do not involve the use, attempted use, or threatened use of force.

III. ARGUMENT

A. Standard for Obtaining a Certificate of Appealability

A certificate of appealability should be issued if a movant has made a substantial showing of the denial of a constitutional right. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A movant must show that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Id.* A movant must show more than the

“absence of frivolity” or “the existence of mere good faith,” but he need not prove that some jurists would grant the petition for habeas corpus. *Id.* at 338. Obtaining a certificate of appealability does not require a showing that the appeal will succeed and it should not be denied merely because the court believes the applicant will not demonstrate an entitlement to relief. *Welch v. United States*, 136 S.Ct. 1257, 1263-64 (2016).

Attempted robbery is not one of the enumerated offenses under 18 U.S.C. § 924(e)(2)(B)(ii). If Mr. Brooks is correct that attempted robbery does not qualify as a predicate offense under the elements clause, § 924(e)(2)(B)(i), then his sentence can only be based on the unconstitutionally vague residual clause in violation of his right to due process. Furthermore, treating Mr. Brooks as an armed career criminal violates his Sixth Amendment right to a jury trial if the purported predicate did not have as an element the use, threatened use, or attempted use of force. Thus, Mr. Brooks makes a substantial showing of the denial of a constitutional right.

B. Relevant Federal and State Statutory Provisions

Section 924(e)(2)(B) provides that a prior offense qualifies as a “violent felony” if it: 1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or 2) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. Since attempted robbery is not one of the offenses listed in § 924(e)(2)(B)(ii) and the residual clause is unconstitutionally vague, attempted first-degree robbery can only qualify as a violent felony if it satisfies the force clause in § 924(e)(2)(B)(i).

Mr. Brooks was charged with attempted robbery under Mo. Rev. Stat. § 564.011 (DCD 8-2, Attachment to § 2255 Motion). The offense occurred in 1982. *Id.* The statute in effect at

that time provided that a person commits first-degree robbery when he forcibly steals property and: 1) causes serious physical injury; 2) is armed with a deadly weapon; 3) uses or threatens the immediate use of a dangerous instrument against any person; or 4) displays or threatens the use of what appears to be a deadly weapon or dangerous instrument. Mo. Rev. Stat. § 569.020 (1979).³

The term “forcibly steals” was defined as when, in the course of stealing, a person “uses or threatens the immediate use of physical force upon another person for the purpose of: (a) [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (b) [c]ompelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.” Mo. Rev. Stat. § 569.010(1) (1979).⁴

The Missouri attempt statute in effect at the time of the offense provided:

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.
2. It is no defense to a prosecution under this section that the offense attempted was, under the actual attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the actor believed them to be.

Mo. Rev. Stat. § 564.011 (1979).⁵

Attempt under § 564.011 has only two elements: 1) the defendant has the purpose to

³ The first-degree robbery statute is now Mo. Rev. Stat. § 570.023 (2017).

⁴ The “forcibly steals” definition is now Mo. Rev. Stat. § 570.010(13) (2017).

⁵ The attempt statute is now Mo. Rev. Stat. § 562.012 (2017).

commit the underlying offense, and 2) the doing of an act that is a substantial step toward the commission of that offense. *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. banc 1999). To sustain an attempt conviction under Missouri law, the defendant need not commit an act beyond mere preparation to commit the object offense. *State v. Young*, 139 S.W.3d 194, 198 (Mo. App. 2004); *United States v. Reid*, 769 F.3d 990, 995 (8th Cir. 2016).

In 1982, the pattern jury instruction for attempts was MAI-Cr 2d 18.02,⁶ which provided:

(If you do not find the defendant guilty (under Count ____) of [name of offense], you must consider whether he is guilty of an attempt to commit [name of offense].)

(As to Count ____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [date], in the (City) (County) of ____, State of Missouri, the defendant [briefly describe the conduct which would constitute the attempt], and

Second, that such conduct was a substantial step toward the commission of the crime of [name of offense with sufficient details to identify person or property involved, e.g., rape upon Susan Doe or burglary of a specific building] and was done for the purpose of committing such [name of offense], and

(Third, that the defendant is not entitled to an acquittal by reason of Instruction No. ____,)

then you will find the defendant guilty (under Count __) of an attempt to commit [name of offense].

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

If you do find the defendant guilty (under Count ____) of (an attempt to commit) (attempted) [name of offense], you will assess and declare the punishment [insert range of punishment as directed in MAI-Cr 2d 2.04. See Section 564.011].

⁶ The current jury instruction for attempts is found at MAI-Cr 4th 404.06.

When an attempt offense was submitted to a jury, but the object offense was not, a separate instruction defining the object offense was required. MAI-Cr 2d 18.02, note 3. If the definition of the object offense contained words and phrases that required definition according to the notes on use for the object offense, then those words and phrases were defined as well. *Id.*

The jury instruction shows that even though a jury was to be instructed on the definitions of “robbery” and “forcibly steals,” the jury was not required to find beyond a reasonable doubt the use or threatened use of force as an element. Thus, the use, threatened use, or attempted use of force was not an element of attempted robbery. See, *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) (An element of a crime is something ‘the prosecution must prove to sustain a conviction,’ meaning either something the jury must find beyond a reasonable doubt or something the defendant must admit during a guilty plea.)

A conviction for attempted robbery can be sustained with no requirement that the substantial step relate in any way to the use of force. A substantial step could be a non-violent preparatory activity, such as casing a bank or recruiting others to participate in the robbery. See MAI-Cr 2d 18.02, note 4 and MAI-Cr 4th 404.06, note 5. In taking a substantial step, the would-be robber must act with the purpose to commit a robbery, but the *intended* use of physical force against another person is not the same thing as the *actual* use, attempted use, or threatened use of physical force. The plain language of § 924(e)(2)(B)(i) does not define a violent felony as one that has as an element the intended use of force, and a court cannot expand the definition. When a “statute’s language is plain, the sole function of the courts is to enforce it according to its terms.” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989).

The purpose of categorical analysis is to focus strictly on the elements of a prior

conviction to avoid Sixth Amendment concerns that would arise from sentencing courts making factual findings that should be made by juries. *Descamps v. United States*, 133 S.Ct. 2276, 2288 (2013). Mistakenly treating Missouri attempted robbery as if it incorporates the elements of robbery causes Sixth Amendment violations when applying the ACCA.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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APPENDIX

Appendix A - Judgment of the Eighth Circuit Court of Appeals

Appendix B – Order denying rehearing by the Eighth Circuit Court of Appeals