

No. 18-5008

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IN THE SUPREME COURT OF THE UNITED STATES

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AUTREY CANADATE, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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NOEL J. FRANCISCO  
Solicitor General  
Counsel of Record

BRIAN A. BENCZKOWSKI  
Assistant Attorney General

JOSHUA K. HANDELL  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

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#### QUESTION PRESENTED

Whether petitioner was entitled to a certificate of appealability on his claim that his prior Florida conviction for attempted armed robbery is not a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), where he has three other prior convictions whose classification as ACCA predicates he does not challenge in this Court.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1, at 1) is unreported. The order of the district court (Pet. App. A2, at 1-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2018. The petition for a writ of certiorari was filed on June 26, 2018. 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 Southern District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A4, at 1. He was sentenced to 180 months of imprisonment, to be followed by two years of supervised release. Id. at 2-3. Petitioner did not appeal his conviction or sentence. Pet. 6. He later filed a motion under 28 U.S.C. 2255 to vacate his sentence. 16-cv-22476 D. Ct. Doc. 1, at 1-19 (June 24, 2016) (Motion). The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. A2, at 1-4. The court of appeals similarly denied a COA. Pet. App. A1, at 1.

1. In 2012, police officers in Miami-Dade County observed petitioner engage in what appeared to be a series of drug deals from his parked car. 12-cr-20760 Factual Proffer 1-2. When petitioner noticed that an officer had spotted him, he began to run. Id. at 2. The officer apprehended petitioner and recovered a loaded handgun from his waistband. Ibid. The officers later found five baggies of crack cocaine in petitioner's car. Ibid.

A federal grand jury in the Southern District of Florida returned a three-count indictment charging petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1); one count of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1); and one count of possession of a firearm in

furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (1) (A) (i). 12-cr-20760 Indictment 1-2. Petitioner pleaded guilty to the felon-in-possession count pursuant to a plea agreement. Pet. App. A4, at 1; 12-cr-20760 Plea Agreement ¶ 1.

2. A conviction for possession of a firearm by a felon, in violation of Section 922(g) (1), has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a) (2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment, 18 U.S.C. 924(e) (1). The ACCA defines a "violent felony" as:

any crime punishable by imprisonment for a term exceeding one year \* \* \* that --

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e) (2) (B). The first clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016) (citation omitted).

Petitioner and the government stipulated in the plea agreement that petitioner had two prior Florida convictions for possession with intent to distribute or sell cocaine, one prior Florida conviction for aggravated assault with a firearm, and one prior Florida conviction for attempted armed robbery. 12-cr-20760 Plea Agreement ¶ 2. The Probation Office classified petitioner as an armed career criminal under the ACCA. Presentence Investigation Report (PSR) ¶ 22; see PSR ¶¶ 27, 37, 39, 42. Petitioner did not object to that classification, 12-cr-20760 Sent. Tr. 2-3, and the district court sentenced him to 180 months of imprisonment, *id.* at 11. Petitioner did not appeal his conviction or sentence. Pet. 6.

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. *Id.* at 2557. The Court emphasized, however, that its holding "d[id] not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." *Id.* at 2563. The Court has subsequently made clear that the holding of Johnson is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

In June 2016, petitioner moved to vacate his sentence under 28 U.S.C. 2255. Motion 1. Petitioner did not dispute that his two prior convictions for possession with intent to distribute or sell cocaine qualified as serious drug offenses under the ACCA. Pet. App. A2, at 2 n.1; Pet. App. A3, at 3. Petitioner contended,

however, that Johnson's invalidation of the ACCA's residual clause meant that neither of his other prior convictions -- for aggravated assault with a firearm and for attempted armed robbery -- could now qualify as a violent felony that would provide a third ACCA predicate. Motion 12-18.

Adopting the recommendation of a magistrate judge, Pet. App. A3, at 1-7, the district court denied petitioner's motion, Pet. App. A2, at 1-4. The court observed that petitioner had "concede[d] that his two drug convictions are predicate offenses under the ACCA." Id. at 2 n.1. The court determined that, under circuit precedent, petitioner's prior convictions for attempted armed robbery and aggravated assault also qualified as ACCA predicates, because each satisfied the ACCA's elements clause. Id. at 2-3 (citing, inter alia, United States v. Fritts, 841 F.3d 937 (11th Cir. 2016) (armed robbery), cert. denied, 137 S. Ct. 2264 (2017), and Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328 (11th Cir.) (aggravated assault), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, supra). The court therefore found that, notwithstanding Johnson's invalidation of the residual clause, petitioner still had "the necessary three predicate offenses" to be sentenced under the ACCA. Id. at 2. The court denied a COA. Id. at 3-4.

4. The court of appeals likewise denied a COA. Pet. App. A1, at 1. The court determined that "[b]ecause Circuit precedent forecloses [petitioner's] claim," petitioner had not demonstrated

that “‘reasonable jurists’” would find that “the issues ‘deserve encouragement to proceed further.’” Ibid. (citation omitted).

#### ARGUMENT

Petitioner contends (Pet. 10) that the court of appeals erred in denying a COA on his claim that his sentence was not “properly enhanced by the ACCA” because “it is at least debatable” whether his prior Florida conviction for attempted armed robbery is a violent felony under the ACCA’s elements clause. The court correctly declined to issue a COA. Petitioner does not dispute that his two prior Florida drug convictions qualify as ACCA predicates. And circuit precedent foreclosed his contention that neither of his other prior Florida convictions -- for aggravated assault with a firearm and for attempted armed robbery -- qualified as a third ACCA predicate.

The Court is currently considering the question whether a Florida conviction for robbery is a conviction for a violent felony under the ACCA’s elements clause in Stokeling v. United States, No. 17-5554 (argued Oct. 9, 2018). But because petitioner would still have three ACCA predicate convictions regardless of whether his prior Florida conviction for attempted armed robbery qualifies as a violent felony, the petition for a writ of certiorari need not be held pending the decision in Stokeling. The Court has recently denied petitions for writs of certiorari in cases that were in a similar posture, see Makonnen v. United States, cert. denied, No. 18-5105 (Nov. 5, 2018); Gubanic v. United States, cert.



denied, No. 17-8764 (Oct. 1, 2018); Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667), and it should do the same here.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

Contrary to petitioner's contention (Pet. 8-10), the court of appeals did not err in denying a COA on his claim that he lacks three prior convictions for violent felonies or serious drug offenses under the ACCA. Although "[t]he COA inquiry \* \* \* is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), the Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). Petitioner does not dispute that both of his prior Florida convictions for possession with intent to distribute or sell cocaine qualify as serious drug offenses under the ACCA. Pet. App. A2, at 2 n.1; Pet. App. A3, at 3. Thus, petitioner has three ACCA predicate convictions so long as either his Florida conviction for aggravated assault with a

firearm or his Florida conviction for attempted armed robbery qualifies as a violent felony. Petitioner's claim that neither of those convictions could qualify as a violent felony without resort to the now-invalidated residual clause did not "deserve encouragement to proceed further," Buck, 137 S. Ct. at 773 (citation omitted), particularly given that circuit precedent foreclosed his claim with respect to each conviction, see Pet. App. A2, at 2-3; United States v. Fritts, 841 F.3d 937, 939-944 (11th Cir. 2016) (determining that Florida armed robbery satisfies the ACCA's elements clause), cert. denied, 137 S. Ct. 2264 (2017); Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-1338 (11th Cir.) (same, for Florida aggravated assault), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015).

2. Petitioner contends (Pet. 10-14) that his prior conviction for attempted armed robbery, in violation of Fla. Stat. §§ 777.04 and 812.13 (2007), was not a conviction for a violent felony under the ACCA's elements clause. The Court is currently considering a related question in Stokeling v. United States, supra. The petition for a writ of certiorari in this case, however, need not be held pending the Court's decision in Stokeling. Even if petitioner's prior conviction for attempted armed robbery were not a conviction for a violent felony, petitioner would still have at least three ACCA predicate convictions.

Petitioner does not dispute that his two prior Florida drug convictions qualify as ACCA predicates. Pet. App. A2, at 2 n.1; Pet. App. A3, at 3. And he does not challenge the district court's determination that, under circuit precedent, his prior Florida conviction for aggravated assault with a firearm qualifies as a violent felony under the ACCA's elements clause. See Pet. App. A2, at 2-3 (citing United States v. Golden, 854 F.3d 1256, 1257 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017), and Turner, 709 F.3d at 1338). Thus, regardless of this Court's resolution of the question presented in Stokeling, petitioner would still be subject to sentencing under the ACCA.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General

BRIAN A. BENCZKOWSKI  
Assistant Attorney General

JOSHUA K. HANDELL  
Attorney

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