No. 18-5105

IN THE SUPREME COURT OF THE UNITED STATES

ATNAFU RAS MAKONNEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for felony battery, in violation of Fla. Stat. § 784.041 (1999), was 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).

2. Whether petitioner's prior conviction for attempted first-degree murder, in violation of Fla. Stat. §§ 777.04(1) and 782.04(1)(a) (1999), was a conviction for a "violent felony" under the ACCA's elements clause.

3. Whether petitioner's prior Florida conviction for sale of cocaine was a conviction for a "serious drug offense" under the the ACCA, 18 U.S.C. 924(e)(2)(A)(ii).

4. Whether petitioner's prior conviction for attempted armed robbery, in violation of Fla. Stat. § 812.13 (1997), was a conviction for a "violent felony" under the ACCA's elements clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 723 Fed. Appx. 905. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2018. A petition for rehearing was denied on April 4, 2018 (Pet. App. 13). The petition for a writ of certiorari was filed on June 29, 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) and 924(e)(1). Pet. App. 7. He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. Id. at 8-9. Petitioner did not appeal his conviction or sentence. Pet. 5. He later filed a motion under 28 U.S.C. 2255 to vacate his sentence, which the district court denied. 15-cv-14405 D. Ct. Doc. 13, at 1-3 (Feb. 25, 2016). The court of appeals granted a certificate of appealability (COA) and affirmed. Pet. App. 1-6.

1. In 2013, police officers executed a warrant to search a tattoo parlor in Port St. Lucie, Florida, where petitioner worked. 14-cr-14025 D. Ct. Doc. 23, at 1 (July 31, 2014). The officers searched a backpack belonging to petitioner and found cocaine, a digital scale with white powder residue, two plastic baggies, and a handgun loaded with ammunition. Ibid.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession of a firearm and ammunition 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 cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); 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). 14-

cr-14025 Indictment 1-2. Petitioner pleaded guilty to the felon-in-possession count. Pet. App. 7.

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). The ACCA defines a "serious drug offense" to include any "offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of

the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

The Probation Office classified petitioner as an armed career criminal under the ACCA based on prior Florida convictions for attempted armed robbery, attempted first-degree murder, felony battery, and sale of cocaine. Presentence Investigation Report (PSR) ¶¶ 20, 39-41, 45. Petitioner did not object to classification as an armed career criminal. Addendum to PSR 1. The district court sentenced petitioner to 188 months of imprisonment. Pet. App. 8. Petitioner did not appeal his conviction or sentence. Pet. 5.

3. In 2015, this Court held in Samuel 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 Samuel Johnson is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

In November 2015, petitioner moved to vacate his sentence under 28 U.S.C. 2255. 15-cv-14405 D. Ct. Doc. 1, at 1-7 (Nov. 23, 2015). Petitioner contended that Samuel Johnson's invalidation of

the residual clause meant that he no longer qualified as an armed career criminal under the ACCA. Id. at 5-6.

A magistrate judge recommended that petitioner's Section 2255 motion be denied because petitioner's prior Florida convictions for attempted armed robbery, attempted first-degree murder, and felony battery qualified as violent felonies under the ACCA's separate elements clause. 15-cv-14405 D. Ct. Doc. 9, at 5 (Jan. 13, 2016). The magistrate judge also determined that petitioner's prior Florida conviction for sale of cocaine qualified as a serious drug offense under the ACCA. Ibid. The district court adopted the magistrate judge's recommendation, denied petitioner's Section 2255 motion, and declined to issue a COA. 15-cv-14405 D. Ct. Doc. 13, at 2.

4. The court of appeals granted a COA on "[w]hether [petitioner] has at least two violent felonies, in combination with his serious drug offense, to qualify him as an armed career criminal, absent the ACCA's residual clause." 11/18/16 C.A. Order 1. The court affirmed the denial of petitioner's Section 2255 motion. Pet. App. 1-6.

The court of appeals observed that petitioner did "not dispute that his prior Florida conviction for selling cocaine qualifies as a serious drug offense." Pet. App. 5. The court thus found that petitioner had "abandon[ed] that issue, which, in any event, would be beyond the scope of the COA." Ibid. The court also observed that circuit precedent foreclosed petitioner's arguments that his

prior Florida convictions for felony battery and attempted armed robbery did not qualify as violent felonies under the ACCA's elements clause. Id. at 5-6 (citing United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 2620 (2018); United States v. Lockley, 632 F.3d 1238 (11th Cir.), cert. denied, 565 U.S. 885 (2011); and United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). The court accordingly determined that because petitioner "has one prior conviction for a serious drug offense and at least two prior convictions for violent felonies * * * without resorting to the ACCA's residual clause," "he has the requisite three ACCA predicate offenses to qualify as an armed career criminal." Id. at 6.

ARGUMENT

Petitioner contends (Pet. 13-24, 34-35) that his prior Florida convictions for felony battery, attempted first-degree murder, and sale of cocaine do not qualify as ACCA predicate convictions. Those contentions lack merit and do not implicate any circuit conflict warranting this Court's review.

Petitioner additionally contends (Pet. 25-33) that his prior Florida conviction for attempted armed robbery is not a violent felony under the ACCA's element clause. The Court is currently considering the question whether Florida robbery is a violent felony under the ACCA's elements clause in Stokeling v. United States, cert. granted, No. 17-5554 (oral argument scheduled for

Oct. 9, 2018). But because petitioner would still have at least three ACCA predicate convictions regardless of whether his Florida attempted armed robbery conviction qualifies as a violent felony, the petition for a writ of certiorari need not be held pending the decision in Stokeling. The Court recently denied a petition for a writ of certiorari in a case that was in a similar posture, see Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667), and it should do the same here.

1. Petitioner contends (Pet. 13-20) that his prior conviction for felony battery, in violation of Fla. Stat. § 784.041 (1999), does not qualify as a "violent felony" under the ACCA's elements clause because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. 924(e)(2)(B)(i). This Court has recently and repeatedly denied review of similar questions about whether Florida felony battery is a violent felony under the ACCA's elements clause or a crime of violence under the Sentencing Guidelines, and the same result is warranted here. See Solis-Alonzo v. United States, cert. denied, No. 17-8703 (Oct. 1, 2018); Flowers v. United States, cert. denied, No. 17-9250 (Oct. 1, 2018); Gathers v. United States, 138 S. Ct. 2622 (2018) (No. 17-7694); Green v. United States, 138 S. Ct. 2620 (2018) (No. 17-7299); Robinson v. United States, 138 S. Ct. 2620

(2018) (No. 17-7188); Vail-Bailon v. United States, 138 S. Ct. 2620 (2018) (No. 17-7151).[1]

a. In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court held that an offender uses "'physical force'" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(i), when he uses "violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140; see Sessions v. Dimaya, 138 S. Ct. 1204, 1220 (2018) (noting that "this Court has made clear that 'physical force' means 'force capable of causing physical pain or injury'") (quoting Curtis Johnson, 559 U.S. at 140). The Court concluded that the offense at issue in Curtis Johnson itself -- simple battery under Florida law, which requires only an intentional touching and may be committed by "[t]he most 'nominal contact,' such as a 'tap on the shoulder without consent'" -- does not categorically require such force. 559 U.S. at 138 (quoting State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007)) (brackets and ellipses omitted).

Application of Curtis Johnson's definition of "force" to the different offense at issue here, however, yields a different result. In contrast to the offense at issue in Curtis Johnson, Florida felony battery requires not only that an offender intentionally touch or strike another person against that person's will, but also that the offender "cause[] great bodily harm,

[1] A similar question is also raised in the pending petition for a writ of certiorari in Lewis v. United States, No. 17-9097 (filed May 23, 2018).

permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1) (1999). Because Florida felony battery requires force that actually causes great bodily injury, it necessarily requires "force capable of causing physical pain or injury" under Curtis Johnson, 559 U.S. at 140 (emphasis added). The en banc court of appeals in United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018), thus correctly determined that under "the plain language of Curtis Johnson" and its "definition of physical force," Florida felony battery has the "use of force" as an element. Id. at 1302.

b. Petitioner contends (Pet. 16) that Florida felony battery does not satisfy the ACCA's elements clause because under Fla. Stat. § 784.041 (1999), the "'great bodily harm, permanent disability, or permanent disfigurement'" that results from his intentional acts may be "unknowing and unintentional on the defendant's part." To satisfy the ACCA's elements clause, however, an offense need not involve a defendant's intent or knowledge that the victim will in fact be injured by his conduct. Rather, an offense satisfies the ACCA's elements clause so long as it involves the "use * * * of physical force." 18 U.S.C. 924(e)(2)(B)(i). That requirement is met here because, "by its terms, Florida Statute § 784.041 requires an intentional use of force -- a touch or strike -- that is against the victim's will and that causes the victim to suffer great bodily harm." Vail-Bailon, 868 F.3d at 1307. Petitioner does not identify any decision holding that a

state statute similar to Florida's felony battery statute falls outside the elements clause. See Douglas v. United States, 858 F.3d 1069, 1071-1072 (7th Cir.) (determining that Indiana's felony battery statute, which prohibits knowing and intentional touching "result[ing] in serious bodily injury," satisfies the ACCA's elements clause), cert. denied, 138 S. Ct. 565 (2017); see also United States v. Kendall, 876 F.3d 1264, 1267, 1271-1272 (10th Cir. 2017) (determining that D.C. Code § 22-405(c) (2009), which prohibits interference with a law enforcement officer "caus[ing] significant bodily injury," constitutes a "crime of violence" under Sentencing Guidelines § 4B1.2), cert. denied, 138 S. Ct. 1582 (2018).

Petitioner's reliance (Pet. 17) on Leocal v. Ashcroft, 543 U.S. 1 (2004), is misplaced. In Leocal, the Court determined that the word "use," within the context of 18 U.S.C. 16(a), "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9. Florida's felony battery statute, however, does not present any concern "that a defendant might be convicted * * * after engaging in accidental or at most negligent conduct" because, as explained above, the statute "requires an intentional use of force." Vail-Bailon, 868 F.3d at 1307.

2. Petitioner separately contends (Pet. 20-24) that his prior Florida conviction for attempted first-degree murder does

not qualify as a violent felony under the ACCA's elements clause. That contention likewise lacks merit.[2]

Under Florida law, "the elements of attempted first-degree murder are: (1) an act intending to cause death that went beyond just thinking or talking about it; (2) premediated design to kill; and (3) commission of an act which would have resulted in the death of the victim except that someone prevented the defendant from killing the victim or the defendant failed to do so." Gordon v. State, 780 So. 2d 17, 21 (Fla. 2001) (per curiam), abrogated on other grounds by Valdes v. State, 3 So. 3d 1067, 1077 (Fla. 2009); see Fla. Stat. §§ 782.04(1)(a), 777.04(1) (1999). Because it involves an attempt to kill someone that is frustrated by outside forces, attempted first-degree murder necessarily requires at least the "attempted use * * * of physical force" under the ACCA. 18 U.S.C. 924(e)(2)(B)(i).

Petitioner contends (Pet. 24) that attempted first-degree murder does not necessarily involve the attempted use of physical force because it may involve an attempt to cause death through indirect means such as by poisoning. In United States v. Castleman, 572 U.S. 157 (2014), however, the Court determined that the phrase "use of force" in a provision analogous to the ACCA's elements clause includes both the direct and indirect causation of physical harm. Id. at 171 (construing 18 U.S.C. 921(a)(33)(A)).

[2] The same issue is also raised in the pending petition for a writ of certiorari in Jones v. United States, No. 17-6140 (filed Sept. 25, 2017).

Castleman explained that "physical force" is a broad term encompassing all "force exerted by and through concrete bodies" and that Congress used the modifier "physical" to distinguish physical force from, for example, "intellectual force or emotional force." Id. at 170 (quoting Curtis Johnson, 559 U.S. at 138). Castleman accordingly determined that force may be applied directly -- through immediate physical contact with the victim -- or indirectly, such as by shooting a gun in the victim's direction, administering poison, infecting the victim with a disease, or "resort[ing] to some intangible substance, such as a laser beam." Ibid. (citation and internal quotation marks omitted). The Court reasoned that when, for example, a person "sprinkles poison in a victim's drink," id. at 171 (citation omitted), he or she has used force because the "'use of force' in [that] example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm," ibid. (second set of brackets in original).

Petitioner's examples (Pet. 24) involve the "attempted use * * * of physical force," 18 U.S.C. 924(e)(2)(B)(i), under the logic of Castleman. If, for example, a person "tripp[ed] someone at the edge of a precipice" in an attempt to cause death, Pet. 24, that person has attempted to "employ[] [tripping] knowingly as a device to cause physical harm," Castleman, 572 U.S. at 171. And petitioner's poison example is directly rebutted by Castleman. See id. at 170. The courts of appeals that have addressed the

question are nearly uniform (and may soon be fully uniform) in the application of Castleman's logic to the elements clause of the ACCA and other similarly worded provisions.[3] Petitioner does not address Castleman at all, or suggest any reason why it would not apply.

3. Petitioner additionally contends (Pet. 35) that his prior Florida conviction for sale of cocaine is not a serious drug offense under the ACCA. The court of appeals, however, found that petitioner had "abandon[ed] that issue" and that the issue was "beyond the scope of the COA." Pet. App. 5. Moreover, petitioner's Section 2255 motion sought relief only on the basis of this Court's invalidation of the ACCA's residual clause. See 15-cv-14405 D. Ct. Doc. 1, at 5-6; Samuel Johnson v. United States,

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[3] See, e.g., United States v. Ellison, 866 F.3d 32, 37-38 (1st Cir. 2017); Villanueva v. United States, 893 F.3d 123, 128-130 (2d Cir. 2018); United States v. Reid, 861 F.3d 523, 528-529 (4th Cir.), cert. denied, 138 S. Ct. 462 (2017); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017), cert. denied, No. 17-8413 (Oct. 1, 2018); United States v. Jennings, 860 F.3d 450, 458-460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018); United States v. Winston, 845 F.3d 876, 878 (8th Cir.), cert. denied, 137 S. Ct. 2201 (2017); Arellano Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017); United States v. Ontiveros, 875 F.3d 533, 537 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); United States v. DeShazior, 882 F.3d 1352, 1357-1358 (11th Cir. 2018), petition for cert. pending, No. 17-8766 (filed May 1, 2018); United States v. Haight, 892 F.3d 1271, 1280 (D.C. Cir. 2018), petition for cert. pending, No. 18-370 (filed Sept. 20, 2018). Two circuits -- the Third and the Fifth -- have recently granted rehearing en banc to consider whether the indirect causation of injury qualifies as the "use * * * of physical force" under the ACCA or the Sentencing Guidelines. See United States v. Harris, No. 17-1861 (3d Cir.); United States v. Reyes-Contreras, 892 F.3d 800 (5th Cir. 2018) (en banc).

135 S. Ct. 2551 (2015). The residual clause forms no part of the ACCA's definition of a serious drug offense, 18 U.S.C. 924(e)(2)(A)(ii), so Samuel Johnson had no effect on whether his prior drug conviction qualifies as an ACCA predicate. In any event, petitioner's prior conviction for sale of cocaine involved "distribut[ion]" of cocaine, ibid., regardless of whether the sale was "a small" one, Pet. 35. Petitioner's contention that his prior drug conviction was not a conviction for a serious drug offense therefore lacks merit.

4. Petitioner also contends (Pet. 25-33) that his prior conviction for attempted armed robbery, in violation of Fla. Stat. § 812.13 (1997), 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.

The court of appeals correctly determined that petitioner's prior Florida convictions for felony battery and sale of cocaine qualify as ACCA predicates. Pet. App. 5-6; see pp. 7-10, 13-14, supra. And although the court of appeals did not need to reach the issue, his prior Florida conviction for attempted first-degree murder qualifies as an ACCA predicate as well, as the district

court correctly found. 15-cv-14405 D. Ct. Doc. 9, at 5; 15-cv-14405 D. Ct. Doc. 13, at 2; see pp. 10-13, supra. 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.

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