

No. 18-5298

IN THE SUPREME COURT OF THE UNITED STATES

REUBEN STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1) (a) (1999), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924 (e) (2) (B) (i) .

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A5¹) is not published in the Federal Reporter but is reprinted at 711 Fed. Appx. 810.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2018. A petition for rehearing was denied on March 29, 2018 (Pet. App. A1). The petition for a writ of certiorari was filed

¹ This brief refers to the pages of the appendix to the petition for a writ of certiorari as if they were consecutively paginated.

on June 27, 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 Eastern District of Missouri, petitioner was convicted on 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 of heroin, in violation of 21 U.S.C. 844(a); and one count of possession of cocaine base, in violation of 21 U.S.C. 844(a). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A3-A5.

1. In 2016, police officers executed a warrant to search petitioner and his hotel room. Presentence Investigation Report (PSR) ¶ 10. The officers found three firearms and a shoe box containing crack cocaine in the room. PSR ¶ 11. They also found heroin and crack cocaine on petitioner's person. Ibid. Petitioner admitted that the firearms and the drugs belonged to him. Ibid.

A federal grand jury in the Eastern District of Missouri 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); one count of possession of heroin, in violation of 21 U.S.C. 844(a); and one count of possession of

cocaine base, in violation of 21 U.S.C. 844(a). Indictment 1-2. Petitioner pleaded guilty. Judgment 1.

2. A conviction for violating 18 U.S.C. 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).

The Probation Office classified petitioner as an armed career criminal under the ACCA based on a prior Florida conviction for aggravated assault with a deadly weapon and two prior Florida convictions for possession with intent to sell or deliver cocaine.

PSR ¶¶ 43, 51-52, 56, 69. Petitioner objected to classification as an armed career criminal, contending that Florida aggravated assault with a deadly weapon does not qualify as a violent felony because the offense requires a mens rea of only "culpable negligence." Sent. Tr. 2-3. The district court overruled the objection, id. at 6, finding that the offense "requires either intent or recklessness," id. at 5. The court sentenced petitioner to 180 months of imprisonment on the felon-in-possession count and one year of imprisonment on each of the remaining two counts, all to run concurrently. Id. at 9.

3. The court of appeals affirmed. Pet. App. A3-A5. The court observed that "Florida courts have held that the state can satisfy the mens rea element of aggravated assault by proving that the defendant acted with 'culpable negligence.'" Id. at A4. The court of appeals explained, however, that under Florida law, "culpable negligence" means "'[c]onduct of a gross and flagrant character, evincing reckless disregard of human life or the safety of persons exposed to its dangerous effects.'" Ibid. (citation omitted). The court determined that "the definition of that phrase makes clear that [the Florida courts] are really talking about recklessness." Id. at A5. Relying on circuit precedent, the court further determined that "reckless conduct can, in certain circumstances, be a 'use' of physical force." Ibid. (citing United States v. Fields, 863 F.3d 1012, 1015 (8th Cir. 2017)). The court

thus found that Florida aggravated assault qualifies as a violent felony under the ACCA's elements clause. Ibid.

ARGUMENT

Petitioner contends (Pet. 6-13) that his prior Florida conviction for aggravated assault with a deadly weapon is not a violent felony because reckless conduct cannot satisfy the ACCA's elements clause. The court of appeals correctly rejected that contention, as have most of the other circuits to consider it -- both under the ACCA and under similar provisions of the Sentencing Guidelines. And although the First Circuit has reached the opposite conclusion in a decision interpreting the ACCA, that shallow and recent disagreement does not justify further review in this case because it is far from clear that Florida aggravated assault can be committed through reckless conduct alone. This Court has recently denied similar petitions for writs of certiorari involving Florida aggravated assault, see Nedd v. United States, 138 S. Ct. 2649 (2018) (No. 17-7542); Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667), and the same result is warranted here.²

1. The court of appeals correctly determined that aggravated assault with a deadly weapon, in violation of Fla. Stat.

² The same issue is also raised in the pending petitions for writs of certiorari in Griffin v. United States, No. 17-8260 (filed Mar. 13, 2018); Flowers v. United States, No. 17-9250 (filed May 9, 2018); and Lewis v. United States, No. 17-9097 (filed May 23, 2018).

§ 784.021(1)(a) (1999), satisfies the ACCA's elements clause. The offense requires an "assault" "[w]ith a deadly weapon without intent to kill." Ibid. An "assault" is defined as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011(1) (1999) (emphasis added). And under Florida law, an instrument is a "deadly weapon" if it "will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design" or is "used or threatened to be used in a way likely to produce death or great bodily harm." Michaud v. State, 47 So. 3d 374, 376 (Fla. Dist. Ct. App. 2010).

A Florida conviction for aggravated assault necessarily "has as an element the use, attempted use, or threatened use of force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), because it requires a threat "to do violence to the person of another," Fla. Stat. § 784.011(1) (1999); see Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1338 (11th Cir.), cert. denied, 570 U.S. 925 (2013) (determining that Florida aggravated assault "will always include 'as an element the . . . threatened use of physical force against the person of another'" because it "necessarily includes an assault, which is 'an intentional, unlawful threat by word or act to do violence to the person of

another, coupled with an apparent ability to do so'") (citations and emphasis omitted). The additional element of use of a "deadly weapon," Fla. Stat. § 784.021(1)(a) (1999), required for petitioner's conviction, further establishes that his aggravated assault crime required at least the "threatened use of physical force," 18 U.S.C. 924(e)(2)(B)(i); see, e.g., United States v. Taylor, 848 F.3d 476, 493-494 (1st Cir.) (determining that assault with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(b), is a violent felony under the ACCA), cert. denied, 137 S. Ct. 2255 (2017). To satisfy that element, a defendant must use in the assault -- i.e., in the course of threatening violence -- an instrument that is likely to cause great bodily harm. See Vitko v. State, 363 So. 2d 42, 43 (Fla. Dist. Ct. App. 1978) (use of deadly weapon for purposes of Florida aggravated assault requires more than merely carrying a weapon); see also, e.g., Rodriguez v. State, 594 So. 2d 318, 319 (Fla. Dist. Ct. App. 1992) (defendant "use[d]" a deadly weapon by "pointing a pistol at the victim to secure acquiescence to his acts of simple battery").

2. Petitioner contends (Pet. 6-12) that Florida aggravated assault with a deadly weapon may be committed by reckless conduct and that such conduct does not satisfy the ACCA's elements clause. But even assuming that a conviction for aggravated assault with a deadly weapon under Florida law may be based on reckless conduct,

petitioner errs in asserting that such conduct would not satisfy the ACCA's elements clause.

In Voisine v. United States, 136 S. Ct. 2272 (2016), this Court held that a conviction for reckless causation of physical harm involves the "use . . . of physical force" for purposes of the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. 921(a)(33)(A)(ii) and 922(g)(9). 136 S. Ct. at 2276; id. at 2276-2280. The Court explained that the harm caused by "reckless behavior" -- which requires undertaking an act "with awareness of the[] substantial risk of causing injury" -- "is the result of a deliberate decision to endanger another" and thus not an "accident." Id. at 2279. The Court therefore determined that the word "use" includes "the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of [the defendant's] volitional conduct." Ibid.

The Court's reasoning in Voisine fully supports the inclusion of reckless conduct in the identical phrase "use * * * of physical force" in the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). Numerous courts of appeals have accordingly applied Voisine's logic to the ACCA or to Sentencing Guidelines provisions that employ the same language. See, e.g., Davis v. United States, 900 F.3d 733, 736 (6th Cir. 2018) (applying Voisine's reasoning to the ACCA's elements clause); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016) (same), cert. denied,

137 S. Ct. 2117 (2017); United States v. Pam, 867 F.3d 1191, 1207-1208 (10th Cir. 2017) (same); United States v. Haight, 892 F.3d 1271, 1280-1281 (D.C. Cir. 2018) (same); see also United States v. Mendez-Henriquez, 847 F.3d 214, 220-222 (5th Cir.) (applying Voisine's reasoning to conclude that reckless conduct is included in Sentencing Guidelines § 2L1.2's "crime of violence" definition), cert. denied, 137 S. Ct. 2177 (2017); United States v. Howell, 838 F.3d 489, 501 (5th Cir. 2016) (same, with respect to Sentencing Guidelines § 4B1.2(a)'s "crime of violence" definition), cert. denied, 137 S. Ct. 1108 (2017); United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017) (same, with respect to Sentencing Guidelines § 4B1.2(a)'s "crime of violence" definition), petition for cert. pending, No. 17-8413 (filed Apr. 3, 2018); United States v. Benally, 843 F.3d 350, 354 (9th Cir. 2016) (noting that Voisine suggested that reckless conduct may constitute a "crime of violence" under 18 U.S.C. 16, but declining to reach the issue where the challenged statute required "only gross negligence").

3. Petitioner does not point to any conflict among the courts of appeals on whether Florida aggravated assault with a deadly weapon qualifies as a violent felony under the ACCA's elements clause. See United States v. Pittro, 646 Fed. Appx. 481, 485 (6th Cir. 2016) (concluding that Florida aggravated assault satisfies the ACCA's elements clause); United States v. Koenig,

410 Fed. Appx. 971, 973 (7th Cir. 2010) (same); Turner, 709 F.3d at 1338 (same); see also United States v. Alonzo-Garcia, 542 Fed. Appx. 412, 416-417 (5th Cir. 2013) (per curiam) (concluding that Florida aggravated assault satisfies the elements clause of Sentencing Guidelines § 2L1.2's "crime of violence" definition).³

The First Circuit, however, has deviated from the approach followed by other courts of appeals on the question whether reckless conduct can qualify as the "use" of force under the ACCA. In a decision issued after the petition for a writ of certiorari was filed, the First Circuit made clear that its precedent "forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under [the ACCA's] force clause." United States v. Rose, 896 F.3d 104, 109 (2018). But that shallow conflict does not warrant review in this case. It is far from clear that Florida aggravated assault with a deadly weapon -- which requires, inter alia, "an intentional unlawful threat by word or act to do violence to the person of another," Fla. Stat. § 784.011(1) (1999) (emphasis added); see id. § 784.021(1)(a) -- can be committed through reckless conduct alone. Petitioner's interpretation (Pet. 6) of the state law as permitting conviction in such circumstances does not rest on any definitive interpretation by the Supreme Court of Florida.

³ Petitioner cites (Pet. 12) two unpublished district court decisions, but such decisions could not create a conflict warranting this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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