No. 18-6547

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER BROOKS, 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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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability on petitioner's claim that aggravated assault, in violation of Fla. Stat. § 784.021 (2007), is not a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

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OPINIONS BELOW

The order of the court of appeals denying petitioner's motion for a certificate of appealability (Pet. App. 1a-3a) is unreported. The order of the district court (Pet. App. 4a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2018. The petition for a writ of certiorari was filed on October 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 on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 1a; see Indictment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 2-3. The court of appeals affirmed, 448 Fed. Appx. 27, and this Court denied a petition for a writ of certiorari, 565 U.S. 1274. In 2016, petitioner filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255. D. Ct. Doc. 59 (June 24, 2016). Although the district court initially denied petitioner's motion as untimely, the court of appeals reversed and remanded for further consideration of the merits. 723 Fed. Appx. 703. On remand, the district court denied petitioner's motion and denied his request for a certificate of appealability (COA). Pet. App. 4a-7a. The court of appeals likewise denied petitioner's request for a COA. Id. at 1a-3a.

1. In October 2010, detectives in the Broward County Sheriff's Office pulled over a car with darkly tinted windows and a partially obscured license plate. D. Ct. Doc. 34, at 1 (Jan. 21, 2011) (Factual Proffer). The car, in which petitioner was a passenger, emitted a strong odor of marijuana, and the driver of the car consented to a search. Ibid. Petitioner exited the car

and denied having "any weapons or anything illegal on him," but when detectives began a pat-down he attempted to flee. Id. at 2. As detectives attempted to restrain petitioner, a loaded handgun fell from petitioner's waistband. Ibid. Petitioner had previously been convicted of numerous felonies in the state of Florida, including attempted murder, possession of cocaine with intent to deliver it, and aggravated assault with a weapon. Id. at 3; see Pet. App. 1a.

2. A federal grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1. Petitioner pleaded guilty, pursuant to a plea agreement. D. Ct. Doc. 33 (Jan. 21, 2011) (Plea Agreement).

A conviction for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g), typically exposes the offender to a statutory sentencing range of zero to ten years of imprisonment. See 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); see Custis v. United States, 511 U.S. 485, 487 (1994). 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).

In his plea agreement, petitioner acknowledged that he was subject to a 15-year statutory minimum term of imprisonment under the ACCA. Plea Agreement 2. The district court accepted petitioner's plea agreement and imposed the statutory minimum sentence of 15 years of imprisonment. Am. Judgment 2. Petitioner appealed, raising a Fourth Amendment issue not relevant here; the court of appeals affirmed, 448 Fed. Appx. 27, 28-29; and this Court denied certiorari, 132 S. Ct. 1779.

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 subsequently held in Welch v. United States, supra, that Johnson announced a "substantive" constitutional rule that applies retroactively to cases on collateral review. 136 S. Ct. at 1264-1265.

Shortly after Welch was decided, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, contending that he was entitled to be resentenced because two of his ACCA predicate convictions -- convictions for Florida aggravated assault, in violation of Fla. Stat. § 784.021 (2007), and Florida attempted murder -- qualified as violent felonies only under the ACCA's residual clause. Pet. App. 1a-2a.

The district court initially denied petitioner's motion as untimely, but the court of appeals reversed and remanded for further consideration. 723 Fed. Appx. 703. On remand, the district court again denied petitioner's motion. Pet. App. 4a-7a. It determined that, under circuit precedent, see Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017), cert. denied, No. 18-6385 (Feb. 19, 2019), petitioner was not entitled to Section 2255 relief because he failed to show that the sentencing court had in fact relied on the ACCA's residual clause. Pet. App. 6a. The court also denied petitioner's request for a COA. Id. at 2a.

4. In an unpublished order, the court of appeals likewise denied petitioner's request for a COA. Pet. App. 1a-3a. The court determined that, regardless of whether the district court was correct that petitioner had not shown that the sentencing court relied on the ACCA's residual clause, petitioner was not entitled to relief. Id. at 2a. The court explained that binding circuit precedent foreclosed petitioner's arguments that Florida

aggravated assault and attempted murder are not violent felonies under the ACCA's elements clause. Id. at 2a-3a (citing In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016); Hylor v. United States, 896 F.3d 1219 (11th Cir. 2018), petition for cert. pending, No. 18-7113 (filed Dec. 17, 2018)).

ARGUMENT

Petitioner contends (Pet. 5-11) that his conviction for Florida aggravated assault under Fla. Stat. § 784.021 does not qualify as a violent felony under the ACCA, on the theory that such assault may be committed recklessly and that reckless assault does not include as an element the "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i).[1] The court of appeals correctly declined to issue a COA to review that claim. The Eleventh Circuit has repeatedly determined that Florida aggravated assault is a violent felony under the ACCA's elements clause because it requires an intentional threat of violence, and that determination does not implicate the shallow circuit conflict that exists about whether assault committed with a mens rea of recklessness can qualify under the ACCA's elements clause. Further review is not warranted.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a

[1] Petitioner does not challenge (Pet. 9) the court of appeals' determination that Florida attempted murder satisfies the ACCA's elements clause.

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 and internal quotation marks omitted).

The court of appeals correctly denied a COA on petitioner's claim that his prior Florida conviction for aggravated assault does not qualify as a violent felony. Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), this 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 attempt to establish that his claim satisfies the COA standard, particularly given that circuit precedent foreclosed his argument. See In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016).

2. Even if petitioner could meet the standard required to obtain a COA, this case does not raise the question identified in the petition (Pet. i) of whether offenses committed with a mens rea of recklessness may qualify as violent felonies under the

ACCA's elements clause. The court of appeals' decision did not discuss whether Florida aggravated assault can be committed recklessly, or whether that would affect the court's analysis under the ACCA. See Pet. App. 2a. Instead, the court relied on a prior circuit decision, Hires, 825 F.3d at 1301, to explain that Florida aggravated assault is a violent felony under the elements clause. Ibid. And Hires did not rely on the proposition that petitioner disputes.

In Hires, the Eleventh Circuit reasoned "that a Florida conviction for aggravated assault under § 784.021 is categorically a violent felony under the ACCA's elements clause" because that offense "'will always include as an element the threatened use of physical force against the person of another.'" 825 F.3d at 1301 (quoting Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1338 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015)). It relied on the court's prior decision in Turner, supra, which had in turn relied on the plain language of Florida's assault statutes to determine that Florida aggravated assault requires proof of intent to threaten to do violence. 709 F.3d at 1337-1338. It observed that, under Florida law, 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." Ibid. (quoting Fla. Stat. § 784.011). In neither Hires nor Turner did the court of appeals analyze whether an offense committed with a mens rea of recklessness satisfies the ACCA's elements clause.

Petitioner contends (Pet. 9-10) that Turner was wrongly decided, citing Florida state court decisions that purportedly indicate that Florida aggravated assault requires only a mens rea of recklessness. But this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004).

3. Finally, even if petitioner's case properly presented the question of the mens rea necessary to satisfy the ACCA's elements clause, his petition still would not warrant review. Although petitioner correctly notes (Pet. 5-7) that the First Circuit has recently departed from the prevailing view, consistent with Voisine v. United States, 136 S. Ct. 2272 (2016), that a crime with a mens rea of recklessness can satisfy the ACCA's elements clause, that shallow disagreement does not presently warrant this Court's review for the reasons the government explained in its brief in opposition to the petition for a writ of certiorari in a case raising the same issue. Gov't Br. in Opp. at 5-8, Haight v.

United States, No. 18-370 (Dec. 13, 2018), cert. denied (Jan. 7, 2019).[2] And this case would represent a particularly unsuitable vehicle for reviewing the issue, given the COA posture in which petitioner's claim arises. See Slack, 529 U.S. at 484 (requiring assessment whether "jurists of reason would find it debatable whether" petitioner's Section 2255 motion states a valid constitutional claim).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] We have served petitioner with a copy of the government's brief in opposition in Haight.