No. 18-6979

IN THE SUPREME COURT OF THE UNITED STATES

LEWIS CARNELL JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the North Carolina offense of assault with a deadly weapon with intent to kill, in violation of N.C. Gen. Stat. § 14-32(c) (1993), is a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 738 Fed. Appx. 152. The order of the district court (Pet. App. 6a-13a) is not published in the Federal Supplement but is available at 2017 WL 455395.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2018. The petition for a writ of certiorari was filed on December 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to distribute marijuana and to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846; one count of aiding and abetting possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; one count of possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924. Pet. App. 6a; see Superseding Indictment 1-3. The district court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Pet. App. 7a; Judgment 2-3. The court of appeals affirmed. 423 Fed. Appx. 329. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 7a-8a. The district court denied petitioner's motion but granted his request for a certificate of appealability (COA). Id. at 6a-13a. The court of appeals affirmed. Id. at 1a-5a.

1. In February 2007, Raleigh Police Department officers arranged a controlled purchase of marijuana being transported by petitioner and two others. Presentence Investigation Report (PSR) ¶ 6. A search of the vehicle that petitioner and his confederates

had driven revealed a substantial quantity of marijuana along with assorted drug paraphernalia and more than $3000. Ibid. The officers also found a loaded handgun in the area where petitioner had been sitting, which petitioner admitted that he had possessed. Ibid.

In March 2007, an officer with the Scotland County Sheriff's Department conducted a traffic stop of another car petitioner was driving. PSR ¶ 7. A search of that car revealed a small quantity of marijuana and a stolen handgun. Ibid.

2. A federal grand jury indicted petitioner on one count of conspiracy to distribute marijuana and to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846; one count of aiding and abetting possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; one count of possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924. Superseding Indictment 1-3. Petitioner proceeded to trial and was convicted on all four counts. Pet. App. 6a.

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).

The Probation Office determined that, based on petitioner's numerous prior North Carolina convictions, he was subject to the ACCA's 15-year statutory minimum sentence on the Section 922(g)(1) count. Pet. App. 7a. The district court adopted the Probation Office's sentencing determination and imposed a total term of 360 months of imprisonment, to be followed by five years of supervised release. Ibid.; Judgment 2-3. Petitioner appealed, and his attorney filed a brief pursuant to Anders v. California, 386 U.S.

738 (1967), stating that no meritorious issues for appeal existed. 423 Fed. Appx. 329. The court of appeals affirmed. Ibid.

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 that Johnson announced a "substantive" constitutional rule that applies retroactively to cases on collateral review. Welch, 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. Pet. App. 7a. He contended, among other things, that he was entitled to be resentenced on the theory that one of his ACCA predicate convictions, a conviction for the North Carolina offense of assault with a deadly weapon with intent to kill, in violation of N.C. Gen. Stat. § 14-32(c) (1993), qualified as a violent felony only under the ACCA's invalidated residual clause. Pet. App. 10a-12a.

The district court denied petitioner's Section 2255 motion. Pet. App. 13a. As relevant here, it determined that assault with a deadly weapon with intent to kill qualifies as a violent felony under the ACCA's elements clause because it requires the "specific intent to kill." Id. at 12a (citing State v. Parks, 228 S.E.2d 248, 252 (1976)). The court, however, granted petitioner's request for a COA. Id. at 13a.

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1a-5a.

The court of appeals rejected petitioner's argument that assault with a deadly weapon with intent to kill "does not qualify as an ACCA predicate violent felony because it may be accomplished with mere culpable negligence." Pet. App. 2a. The court explained that, to the contrary, "North Carolina courts consistently have observed that [assault with a deadly weapon with intent to kill] 'has, as an element, specific intent to kill.'" Id. at 4a (quoting State v. Coble, 527 S.E.2d 45, 49 (N.C. 2000)). The court further explained that its recent decision in United States v. Townsend, 886 F.3d 441 (4th Cir. 2018), had found that to be the case with respect to a closely related North Carolina offense, assault with a deadly weapon with intent to kill inflicting serious injury. Ibid. (citing Townsend, 886 F.3d at 446-448). The court observed that Townsend had squarely rejected the argument that North Carolina "requires merely culpable negligence" when requiring the intent to kill. Ibid. The court thus affirmed the denial of Section 2255 relief.

ARGUMENT

Petitioner contends (Pet. 4-10) that his conviction for assault with a deadly weapon with intent to kill, in violation of N.C. Gen. Stat. § 14-32(c) (1993), does not qualify as a violent felony under the ACCA, on the theory that such assault may be

committed with a mens rea of "culpable negligence" and thus 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). The court of appeals correctly rejected that contention based on its construction of North Carolina law, and its decision 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. Petitioner contends (Pet. i) that his case raises the question "[w]hether a criminal offense with a mens rea of 'culpable negligence' qualifies" under the ACCA. But, as the court of appeals made clear, this case does not actually present that question. Instead, the court accepted that the "'[u]se of force' under the force clause of the ACCA 'means to act with a mens rea more culpable than negligence or recklessness.'" Pet. App. 4a (quoting United States v. Townsend, 886 F.3d 441, 445 (4th Cir. 2018)) (brackets in original). The court then determined -- relying on a recent circuit decision assessing the elements of North Carolina assault with a deadly weapon with intent to kill inflicting serious injury, see Townsend, 886 F.3d at 445-448 -- that assault with a deadly weapon with intent to kill includes as an element the "specific intent to kill." Pet. App. 4a (quoting State v. Coble, 527 S.E.2d 45, 49 (N.C. 2000)). Indeed, the court

observed that Townsend had expressly rejected the argument that the intent element could be satisfied by proof of "culpable negligence." Ibid. The court therefore correctly concluded that assault with a deadly weapon with intent to kill, like its aggravated counterpart involving serious injury, is categorically a violent felony under the ACCA. Ibid.

Petitioner asserts (Pet. 9-10) that Townsend was wrongly decided, relying a portion of a North Carolina Supreme Court decision that Townsend characterized as dicta. See Townsend, 886 F.3d at 447. 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). And although petitioner identifies (Pet. 6) a district court decision from the District of Columbia that expressed a different view of the state statute at issue, he does not identify any conflict among the courts of appeals on the meaning of North Carolina law.

2. Petitioner invokes (Pet. 4-6) a shallow and recent conflict among the courts of appeals over whether reckless conduct satisfies the ACCA's elements clause in the wake of Voisine v. United States, 136 S. Ct. 2272 (2016). Although petitioner correctly notes that the First Circuit has recently departed from

the prevailing view that reckless conduct qualifies, 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, cert. denied, No. 18-370 (Jan. 7, 2019).*

In any event, resolution of the disagreement among the circuits concerning recklessness would not change the outcome of petitioner's case. Petitioner has already benefitted from a favorable view on the mens rea question, because the court of appeals stated that his conviction could not qualify as a predicate felony under the ACCA unless the state statute "requires proving a mens rea greater than negligence or recklessness." Pet. App. 4a. Whether or not the court of appeals would adhere to that view in a case where it affected the outcome, cf. Townsend, 886 F.3d at 445 (expressing that view in similarly non-dispositive context), even the more defendant-favorable view did not aid petitioner here, because the court determined that the state statute at issue requires specific intent. Pet. App. 4a. This case thus does not implicate the circuit division that petitioner identifies.

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

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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