No. 18-7113

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IN THE SUPREME COURT OF THE UNITED STATES

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DEWEY HYLOR, 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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# MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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1. Petitioner contends (Pet. 9-10) that the court of appeals erred in determining that his prior conviction for robbery, in violation of Florida law, 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). Petitioner argues (Pet. 10) that Florida robbery may be committed by using force sufficient to overcome resistance, and that an offense that may be committed in that manner does not "ha[ve] 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).

After the petition for a writ of certiorari was filed, this Court decided Stokeling v. United States, 139 S. Ct. 544 (2019). The Court determined in Stokeling that a defendant's prior conviction for robbery under Florida law satisfied the ACCA's elements clause. See id. at 554-555. The Court explained that "the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery" -- namely, "force necessary to overcome a victim's resistance." Id. at 555. This Court's decision in Stokeling forecloses petitioner's contention that Florida robbery does not satisfy the ACCA's elements clause.

2. Petitioner also contends (Pet. 10-17) that the court of appeals erred in determining that his prior conviction for Florida aggravated assault, in violation of Fla. Stat. § 784.021 (1991), was a conviction for a "violent felony" under the ACCA's elements clause, 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).

Although the circuits do not uniformly agree that offenses committed with a mens rea of recklessness may qualify as violent felonies under the ACCA's elements clause, that question is not presented in this case. 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. A1, at 9. Instead, the court relied on

prior circuit decisions, including Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-1338 & n.6 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015), to explain that Florida aggravated assault is a violent felony under the elements clause. Ibid. And those prior circuit decisions do not rely on the proposition that petitioner disputes.

In Turner, the Eleventh Circuit 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 (1981)). Turner did not analyze whether an offense committed with a mens rea of recklessness satisfies the ACCA's elements clause. And the court of appeals has regularly applied Turner as binding precedent. See Pet. App A1, at 9; United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir.), petition for cert. pending, No. 17-8766 (filed May 1, 2018); United States v. Golden, 854 F.3d 1256, 1256-1257 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017); In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016).

Petitioner suggests (Pet. 15) 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).

This Court has repeatedly denied similar petitions for writs of certiorari involving Florida aggravated assault. See Stewart v. United States, 139 S. Ct. 415 (2018) (No. 18-5298); Flowers v. United States, 139 S. Ct. 140 (2018) (No. 17-9250); Griffin v. United States, 139 S. Ct. 59 (2018) (No. 17-8260); Nedd v. United States, 138 S. Ct. 2649 (2018) (No. 17-7542); Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667). The same result is warranted here.

The petition for a writ of certiorari should be denied.*

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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