No: 18-7113

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY HYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL CARUSO
Federal Public Defender

JANICE L. BERGMANN
Counsel of Record
Assistant Federal Public Defender
One E. Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

I. Whether a criminal offense with a reckless *mens rea* qualifies as a "violent felony" under the ACCA's elements clause is an important question that has divided the circuit courts.

The government expressly concedes that the circuit courts are split on Question 2, which asks whether an offense with a reckless *mens rea* qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i). MIO 2. And the government does not challenge Petitioner's assertion (Pet. 13-14) that this circuit conflict merits the Court's consideration. *See* MIO, *passim*. Indeed, the government has conceded elsewhere that this question "arises with some frequency." U.S. Br. in Opp., *Haight v. United States*, (U.S. No. 18-730) (*cert.* denied, Jan.7, 2019). The government also does not dispute that, under Florida law, aggravated assault may be committed recklessly. *See* Pet. 15-16 (citing numerous Florida cases so stating). Finally, the government nowhere argues that reckless conduct clearly satisfies the ACCA's elements clause. *See* MIO, *passim*. Yet the government nonetheless opposes review for three reasons. None withstand scrutiny.

1. First, the government argues the petition should be denied because the question "is not presented in this case," given that "[t]he 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." *Id.* at 2.

It is true that the Court's "traditional rule . . . precludes a grant of certiorari . . . when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). "[T]his rule," however, "operates . . . in the disjunctive." *Id.* "Any issue 'pressed *or* passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Communications, Inc., v. F.C.C.*, 535 U.S. 467, 530 (2002) (*quoting Williams*, 504 U.S. at 41) (internal quotation marks omitted in *Verizon Communications, Inc.*) (emphasis added here). Thus, a petitioner need not show both that the issue was "pressed . . . below" *and* also that it was "passed upon" by the circuit court. Here, the government argues only that the Eleventh Circuit did not *pass on* the question presented below. *See* MIO 2. Nowhere does it assert that Mr. Hylor did not *press* the question in the court of appeals. *See id., passim.* The government's omission is for a good reason: Mr. Hylor expressly pressed the question below.

In his initial brief in the court of appeals, Mr. Hylor acknowledged that the Eleventh Circuit's controlling precedent holding Florida aggravated assault to be a violent felony under the ACCA's elements clause, *Turner v. Warden Colman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013), *abrogated on other grounds by Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), was reaffirmed in *United States v. Golden*, 854 F.3d 1256, 1256-57 (11th Cir.) (*per curiam*), *cert. denied*, 138 S. Ct. 197 (2017). Appellant's Brf. at 28, *Hylor v. United States*, 896 F.3d 1219 (11th Cir. 2018) (No. 17-10856). Mr. Hylor's circuit brief argued,

however, that *Turner* was wrongly decided for the reasons stated in Judge Jill Pryor's concurring opinion in *Golden*. *Id.* at 29-30 (citing *Golden*, 854 F.3d at 1257-60 (J. Pryor, J., concurring in the result). Those stated reasons included that: Florida law allows a conviction for aggravated assault premised on recklessness; and a "conviction premised on a *mens rea* of recklessness does not satisfy" the elements clause. *See id.* (*citing Golden*, 854 F.3d at 1258 (J. Pryor, J., concurring in the result)).

Not only did Mr. Hylor press the issue below. Contrary to the government's position, the Eleventh Circuit *did* pass on the question presented when it cited *Turner* to deny relief. It is true, as the government asserts, that "*Turner* did not analyze whether an offense committed with a *mens rea* of recklessness satisfies the ACCA's elements clause," but rather "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." MIO 3 (emphasis added). However, despite *Turner*'s failure to mention recklessness or otherwise *expressly* "analyze" the *mens rea* issue, it implicitly resolved the question. Only a simple syllogism is required to show that this is so: *Turner* held that aggravated assault is a violent felony because it requires proof of a certain "intent." 709 F.3d at 1338. As demonstrated in ¶ 2 below, recklessness is the equivalent of "intent" under Florida law in certain circumstances. Therefore, *Turner* also necessarily decided that aggravated assault is a violent felony even if premised on a *mens rea* of recklessness.

Regardless, because Mr. Hylor pressed the issue below, it is irrelevant whether the Eleventh Circuit passed on it or not. *See Williams*, 504 U.S. 41; *Verizon Communications, Inc.*, 535 U.S. at 530. Question 2 is therefore "subject to this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Communications, Inc.*, 535 U.S. at 530. The government's argument to the contrary should be rejected.

2. Next, the government argues that the petition should be denied because it only "suggests . . . that *Turner* was wrongly decided, citing Florida state court decisions that purportedly indicate that Florida aggravated assault requires only a *mens rea* of recklessness" and "this Court has a settled and firm policy of deferring to regional courts of appeal in matters that involve the construction of state law." MIO 4 (citing Pet. 15) (internal quotation marks and citations omitted). But this Court does not defer to a federal court's state-law interpretation that is "clearly wrong," "clearly erroneous," or "unreasonable." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (citations omitted). Such is the case here.

When considering whether an offense "has, as an element, the use, attempted use, or threatened use of physical force" and therefore qualifies as an ACCA predicate under the elements clause, federal courts are bound by state court interpretations of the elements of state offenses. *Johnson v. United States*, 559 U.S. 133, 138 (2010). The Court most recently applied this rule in *Stokeling v. United States*, 139 S. Ct. 544, 554-55 (2019), when it considered not only the statutory

definition of Florida robbery, but also numerous state court cases explicating the elements comprising that offense, to conclude it is a qualifying predicate under § 924(e)(2)(B)(i).

Unlike this Court in *Johnson* and *Stokeling*, the Eleventh Circuit did not review Florida decisional law in *Turner* when it considered whether Florida aggravated assault was a qualifying ACCA predicate under the elements clause. *See* 709 F.3d at 1338. Rather, it merely restated the statutory definition of "assault" found Fla. Stat. § 784.011, "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." *Id.* (emphasis omitted). Without further discussion, the Eleventh Circuit concluded that a conviction for aggravated assault will therefore "always include 'as an element the . . . threatened use of physical force against the person of another,'" such that a conviction for aggravated assault necessarily qualifies as a violent felony under § 924(e)(2)(B)(i). *Id.* The Eleventh Circuit's use of this truncated analysis was clearly erroneous.

In sharp contrast, the Eighth Circuit very recently employed the exact approach used in *Johnson* and *Stokeling* – and neglected in *Turner* – and after reviewing Florida statutory *and* decisional law, concluded that Florida aggravated assault can be committed with a *mens rea* of recklessness. *United States v. Stewart*, 711 F. App'x 810, 811-12 (8th Cir. 2018). The Eighth Circuit began its analysis by stating the statutory definition of "assault" found in Fla. Stat. § 784.011, but it did not end there. *Id.* Rather, the Eighth Circuit immediately turned to Florida case

law, determining that Florida courts have found a *mens rea* of "culpable negligence" – *i.e.*, recklessness – can substitute for the intent required by the statutory language. *Id.* It stated: "The Florida courts have held that the state can satisfy the *mens rea* element of aggravated assault by proving the defendant acted with 'culpable negligence,' which 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; or that entire want of care which would raise the presumption of indifference to the consequences; or such wantonness or reckless or grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them. Momentary inattention or mistake of judgment does not constitute culpable negligence."

Id. (quoting *Dupree v. State*, 310 So.2d 396, 398 (Fla. Dist. Ct. App. 1975) (citations omitted)). "And," the Eighth Circuit continued, "although the Florida courts describe the *mens rea* element of aggravated assault as including 'culpable negligence,' the definition of that phrase makes clear that they are really talking about recklessness." *Id.* at 811-12.

Thus, although the statutory language of the Florida assault statute requires an "intentional . . . threat to do violence," Fla. Stat. § 784.011, Florida decisional law makes clear "'reckless indifference to the rights of others . . . is *equivalent to* an intentional violation of them.'" *Id.* at 811 (quoting *Dupree*, 310 So.2d at 398) (emphasis added here). *See also LaValley v. State*, 633 So.2d 1126, 1127 (Fla. Dist. Ct. App. 1994) ("'reckless disregard for the safety of others' [may] substitute for proof of intentional assault on the victim'") (quoting *Kelly v. State*, 552 So.2d 206, 208 (Fla.

Dist. Ct. App. 1989)). *Accord Golden*, 854 F.3d at 1258 (J. Pryor, J., concurring in result) (citing Florida case law to conclude that "the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness"). Because the Eighth Circuit applied the correct analysis, it reached the correct conclusion – that a Florida conviction for aggravated assault can be obtained upon proof of a *mens rea* of recklessness. *Stewart*, 711 F. App'x at 811-812.

The Eleventh Circuit in *Turner*, however, undertook an incomplete analysis of the elements of Florida's aggravated assault offense, and therefore reached an incorrect result. By relying solely on the statutory language, the Eleventh Circuit overlooked the many Florida decisions making clear that under Florida law, there are circumstances under which recklessness is considered the equivalent of an intentional act. *See id.* In sum, the analysis employed in *Turner* is "clearly wrong" and "clearly erroneous," and now also clearly in conflict with the Eighth Circuit's decision in *Stewart*. The Court should therefore reject the government's invitation to deny the petition based on "deference" to the lower court's reading of state law. *See Brockett*, 472 U.S. at 500 n.9.

3. Finally, the government asserts that the petition should be denied as to Question 2 because "[t]his Court has repeatedly denied similar petitions for writs of certiorari involving Florida aggravated assault," and cites five cases to support its assertion. MIO at 4 (citing *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)). None of these petitions, however, is truly "similar" to Mr. Hylor's. Their denial is therefore irrelevant.

First, three of these petitions – *Griffin*, *Nedd*, and *Jones* – do not even present the question presented by Petitioner in Question 2. *See* Pet. i, *Griffin*, No. 17-8260 (Mar. 13, 2018) (querying "whether, under *Curtis Johnson*, the causation of great bodily harm necessarily entails to use of 'violent force'?"); Pet. i, *Nedd*, No. 17-7542 (Jan. 22, 2018) (querying whether the Eleventh Circuit's "continued adherence to a flawed prior panel decision holding that a conviction under Florida's aggravated assault statute . . . qualifies as a violent felony under the ACCA's elements clause" is contrary to *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016); and "whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the original panel subsequently states that the panel's decision may be erroneous, misapplies the standard articulated by this Court . . .?"); Pet. i, *Jones*, No. 17-7667 (Jan. 24, 2018) (querying "whether reasonable jurists can, at a minimum, debate the issues of whether Florida convictions for robbery, aggravated assault, and resisting with violence qualify as 'violent felon[ies]' under the elements clause" of the ACCA).

The two remaining petitions are significantly poorer vehicles for resolving the question presented than the instant petition. The petition in *Stewart* was filed

pro se. *See* Pet., *Stewart*, No. 18-5298 (Jun. 27. 2018). And both petitions sought review of an unpublished circuit court decision. *See United States v. Flowers*, 724 F. App'x 820 (11th Cir. 2018); *Stewart*, 711 F. App'x at 810. Most importantly, the underlying ACCA predicate in both was not simple Florida aggravated assault, but aggravated assault with a deadly weapon. *See* BIO 3, *Stewart*, No. 18-5298 (Sep. 21, 2018); *Flowers*, 724 F. App'x at 823. The government argued in its brief in opposition in *Stewart* that "[t]he additional element of use of a 'deadly weapon' . . . further established" that aggravated assault with a deadly weapon was a violent felony under the ACCA elements clause. *See* BIO 7, *Stewart*, No. 18-5298 (Sep. 21, 2018).

Here, Mr. Hylor was convicted only of Florida aggravated assault. No deadly weapon element complicates this Court's consideration of the *mens rea* question presented. And the Eleventh Circuit concluded that offense qualified as a violent felony under § 924(e)(2)(B)(i) in a published decision. *Hylor v. United States*, 896 F.3d 1219, 1223 (11th Cir. 2018). Finally, Mr. Hylor's petition is an excellent vehicle for resolving the question presented for the additional reasons stated in the petition. *See* Pet. 14-15. The government does not argue otherwise. *See* MIO, *passim*.

II. **Whether the attempted commission of an offense automatically and categorically qualifies as an ACCA predicate if the completed crime is categorically an ACCA violent felony is an important question that merits this Court's attention.**

The government declined to respond to Question 3 in its memorandum in opposition. *See* MIO, *passim*. For the reasons stated in the Petition (at 18-23), the Court should call for a response as to this question, and then grant the petition as to Question 3.

CONCLUSION

For the reasons stated in the Petition and herein, the Court should grant the petition as to Questions 2 and 3.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
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