No. 18-8911

IN THE SUPREME COURT OF THE UNITED STATES

GERALD HUMBERT, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a certificate of appealability (COA) on his claim that his counsel was ineffective for failing to argue that possession with intent to sell or deliver a controlled substance, in violation of Fla. Stat. § 893.13 (2003), does not constitute a "serious drug offense" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1) and (2)(A), or a "controlled substance offense" for purposes of Sentencing Guidelines § 4B1.2(b) (2013).

2. Whether petitioner was entitled to a COA on his claim that his counsel was ineffective for failing to argue that resisting an officer with violence, in violation of Fla. Stat. § 843.01 (1989), does not constitute a "violent felony" for purposes of the ACCA, 18 U.S.C. 924(e)(1) and (2)(B).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Humbert, et al., No. 1:14-CR-20145 (Oct. 30, 2014)

Humbert v. United States, 1:16-CV-24018 (July 11, 2018) (order denying motion under 28 U.S.C. 2255 and denying certificate of appealability)

United State Court of Appeals (11th Cir.):

United States v. Humbert, No. 14-14992 (Nov. 23, 2015)

Humbert v. United States, No. 18-13164 (Jan. 16, 2019) (order denying certificate of appealability)

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OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (Pet. App. 1) is not published in the Federal Reporter. The order of the district court denying petitioner's motion under 28 U.S.C. 2255 and denying a certificate of appealability is not reported.

JURISDICTION

The order of the court of appeals denying a certificate of appealability was entered on January 16, 2019. The petition for a writ of certiorari was filed on April 2, 2019. 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 Southern District of Florida, petitioner was convicted on one count of conspiracy to possess with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and 846; one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); and one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). 14-cr-20145 Judgment (Judgment) 1; see 14-cr-20145 Superseding Indictment (Superseding Indictment) 1-3. Petitioner was sentenced to 280 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. The court of appeals affirmed, United States v. Humbert, 632 Fed. Appx. 542 (11th Cir. 2015) (per curiam), and petitioner did not seek review in this Court.

Petitioner subsequently moved to vacate his sentence under 28 U.S.C. 2255. Pet. App. 2. The district court denied that motion and denied a certificate of appealability (COA), 16-cv-24018 D. Ct. Doc. 42 (July 11, 2018), and the court of appeals likewise denied a COA, Pet. App. 1.

1. Petitioner was a senior member of a street-level drug-trafficking organization in Miami, Florida. Pet. App. 5; Presentence Investigation Report (PSR) ¶¶ 7-9. Petitioner

coordinated daily sales of narcotics and was responsible for passing money along to superiors in the organization. Pet. App. 6; PSR ¶ 10. According to an associate, petitioner frequently carried a firearm for protection against rival traffickers. Ibid.

In February 2014, as police approached petitioner on the street in Miami, he threw on the ground a bag that contained 20 smaller packages of crack cocaine. Pet. App. 6-7; PSR ¶ 16. A police officer arrested petitioner but ended a pat-down prematurely because petitioner was uncooperative and a hostile crowd had gathered. Pet. App. 7. As officers were driving petitioner to the police station, he removed a loaded .40-caliber pistol from somewhere in his clothing and threw it out of the patrol car. Id. at 7-8; PSR ¶ 16.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioner (as relevant here) with one count of conspiracy to possess with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and 846; one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); and one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Superseding Indictment 1-3. Following a jury trial, petitioner was convicted on all four of those counts. Pet. App. 8.

The default term of imprisonment for a felon-in-possession offense is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." Ibid. The ACCA defines a "serious drug offense" as either

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. 924(e)(2)(A). And, under its "elements clause," it defines a "violent felony" to include (inter alia) a crime punishable by a term of imprisonment exceeding one year that "has 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 Probation Office prepared a presentence report. Pet. App. 8. The report recounted that petitioner's criminal history included a 2003 conviction for possession with intent to sell or deliver cocaine within 1000 feet of a school, in violation of Fla. Stat. § 893.13(1)(c) (2003), PSR ¶ 43; two convictions (in 2001 and 2011) for possession with intent to sell or deliver cocaine, in violation

of Fla. Stat. § 893.13(1)(a) (2000 & 2008), PSR ¶¶ 39, 48; and a 2008 conviction for resisting an officer with violence to the officer's person, in violation of Fla. Stat. § 843.01 (1989), PSR ¶ 45. The Probation Office determined that petitioner qualified for sentencing under the ACCA on his felon-in-possession conviction. See PSR ¶¶ 32, 95.

The Probation Office additionally determined that petitioner was a career offender under Sentencing Guidelines § 4B1.1 (2013).[1] PSR ¶ 32. Section 4B1.1(a) provides that a defendant is a "career offender," subject to an increased offense level, if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Sentencing Guidelines § 4B1.1(a); see id. § 4B1.1(b) and (c). Section 4B1.2 defines a "crime of violence" to include (inter alia) an "offense under * * * state law, punishable by imprisonment for a term exceeding one year, that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 4B1.2(a)(1). And it defines a "controlled substance offense" to include "an offense under * * * state law, punishable by imprisonment for a term exceeding one

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[1] All citations of the Sentencing Guidelines refer to the 2013 version in effect at petitioner's sentencing. See PSR 1.

year, that prohibits the * * * possession of a controlled substance * * * with intent to * * * distribute." Id. § 4B1.2(b). The Probation Office determined that petitioner "was at least 18 years old at the time of the instant offense of conviction"; that "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense"; and that petitioner "ha[d] at least two prior felony convictions of either a crime of violence or a controlled substance offense," citing petitioner's 2003 conviction for possession with intent to sell or distribute cocaine within 1000 feet of a school, his 2008 conviction for resisting arrest with violence, and his 2011 conviction for possession with intent to sell or deliver cocaine. PSR ¶ 32.[2]

Petitioner filed objections to the presentence report, but he did not object to the Probation Office's determinations that he qualified for sentencing under the ACCA or was a career offender under the Sentencing Guidelines. See 14-cr-20145 D. Ct. Doc. 147, at 1-7 (Oct. 22, 2014). At sentencing in October 2014, the district court sustained in part one of petitioner's objections to the presentence report, and it also granted a two-level decrease in his base offense level in light of a Guidelines amendment set

[2] Petitioner's 2001 conviction for possession with intent to sell or deliver cocaine did not count for purposes of his Sentencing Guidelines criminal history because his sentence for that offense was less than 60 days and was imposed more than ten years before the commencement of the offenses for which he was being sentenced. See Sentencing Guidelines § 4A1.1(a)-(c), (e), comment. (n.3).

to take effect two days after petitioner's sentencing. 14-cr-20145 Sent. Tr. (Sent. Tr.) 40-41. The court ultimately calculated petitioner's total offense level to be 40. Ibid. Combined with his criminal-history category of VI, petitioner's Guidelines range was 360 months to life imprisonment. Id. at 45. The court varied downward from the Guidelines range and sentenced petitioner to 280 months of imprisonment, composed of 220-month sentences on each of the drug-related counts and a 180-month sentence on the felon-in-possession count, all to run concurrent to one another; and a 60-month sentence on the Section 924(c) count, to run consecutive to the other counts, as required by 18 U.S.C. 924(c)(1)(D). Sent. Tr. 47; see Judgment 2.

Petitioner appealed, challenging only his conviction and not his sentence. Humbert, 632 Fed. Appx. at 544. In a November 2015 decision, the court of appeals affirmed. See id. at 543-546.

3. a. In September 2016, petitioner filed a timely pro se motion under 28 U.S.C. 2255 collaterally attacking his sentence. Pet. App. 3-4, 11-12. As relevant here, petitioner contended that his counsel rendered ineffective assistance by failing to object to the Probation Office's determination that petitioner qualified for sentencing under the ACCA and as a career offender under Sentencing Guidelines § 4B1.1. Pet. App. 3, 27. In particular, petitioner argued that he lacked the required predicate convictions because the Florida statute proscribing possession with intent to sell or distribute a controlled substance "reads

broader than the federal drug statute" and is not a "generic" offense. 16-cv-24018 D. Ct. Doc. 1, at 8 (Sept. 20, 2016) (capitalization omitted).

A federal magistrate judge recommended that petitioner's motion be denied. Pet. App. 2-42. The magistrate judge observed that Eleventh Circuit precedent "has made clear that a Florida conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01, constitutes a violent felony under the ACCA elements clause." Id. at 30. The magistrate judge additionally observed that Eleventh Circuit precedent established that "a conviction under [Fla. Stat.] § 893.13(1) is a 'serious drug offense'" for purposes of the ACCA. Id. at 31. The magistrate judge thus found that petitioner therefore "ha[d] at least three prior qualifying predicate offenses to support the ACCA enhancement." Ibid. The magistrate judge also found that circuit precedent foreclosed petitioner's contention that his prior drug-distribution convictions did not constitute "controlled substance offense[s]" for purposes of the career-offender Guideline. Id. at 32-33. And the magistrate judge explained that petitioner could not prevail on his claim that his counsel provided ineffective assistance for failing to raise meritless sentencing claims. Id. at 33.

b. Over petitioner's objection, the district court adopted the magistrate judge's report and recommendation. 16-cv-24018 D. Ct. Doc. 42, at 5. The court noted that petitioner had "not

object[ed] to the Report's conclusion that he qualifies for the Career Offender Enhancement under Section 4B1.1 of the Sentencing Guidelines." Id. at 4 n.2. And the court found that petitioner "was subject to enhanced sentencing under the ACCA" because he had "two felony convictions under Florida Statute section 893.13 for distribution of narcotics" and "a prior conviction for resisting arrest with violence." Id. at 4. The court determined that, because the sentencing court had "correctly enhanced [petitioner's] sentence under the ACCA," petitioner could not "show deficient performance by his counsel or prejudice," as necessary to prevail on an ineffective-assistance-of-counsel claim. Ibid. The district court denied petitioner's Section 2255 motion and denied a COA. Id. at 5.

The court of appeals likewise denied a COA. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 1-34) that the court of appeals erred in denying a COA on his claim that his counsel was ineffective for failing to object to the imposition of an ACCA sentence and an enhancement under the career-offender Guideline. He asserts that (1) possession with intent to sell or deliver cocaine under Fla. Stat. § 893.13(1) (2003 & 2008) is not a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(1) and (2)(A), or a "controlled substance offense" under Sentencing Guidelines § 4B1.2, and (2) resisting an officer with violence, in violation of Fla. Stat. § 843.01 (1989), is not a "violent felony"

under the ACCA, 18 U.S.C. 924(e)(1) and (2)(B). The court of appeals correctly rejected those assertions, and its decision does not conflict with any decision of this Court or another court of appeals.

This Court recently granted certiorari, in the context of a direct appeal from a sentence, to address the question whether a conviction under Fla. Stat. § 893.13(1) (2012) is a "serious drug offense." Shular v. United States, No. 18-6662 (June 28, 2019). The petition in this case, however, need not be held pending the Court's decision in Shular because this case does not present that question. The question presented here is instead whether the court of appeals correctly denied a COA on petitioner's claims that his counsel was constitutionally ineffective for failing to argue that an offense under Section 893.13(1) is not a predicate offense under the ACCA or the career-offender Guideline. Regardless of the Court's ultimate decision in Shular, petitioner's counsel's performance was not deficient because the Eleventh Circuit had already (and correctly) rejected such an argument. And petitioner suffered no prejudice because the district court's application of the ACCA, as well as the career-offender Guideline, did not affect petitioner's overall sentence. Further review is not warranted.

1. Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant asserting a Sixth Amendment claim of ineffective assistance of counsel must show both (1) that counsel's performance was deficient, meaning that "counsel's representation fell below

an objective standard of reasonableness," id. at 688, and (2) that the deficient performance prejudiced the defendant, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694. The district court correctly rejected petitioner's Strickland claims, and petitioner did not make "a substantial showing of the denial of a constitutional right" that would warrant issuance of a certificate of appealability, 28 U.S.C. 2253(c)(2).

Petitioner contends that his counsel rendered inadequate assistance by not arguing that an offense under Section 893.13(1) is neither a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(1) and (2)(A), nor a "controlled substance offense" under Sentencing Guidelines § 4B1.2. Following petitioner's sentencing, the Eleventh Circuit correctly held in a published decision that petitioner's arguments with respect to the ACCA and Sentencing Guidelines § 4B1.2 lack merit. See United States v. Smith, 775 F.3d 1262, 1266-1268 (2014), cert. denied, 135 S. Ct. 2827 (2015). At least seven other circuits have adopted similar

constructions of the ACCA's "serious drug offense" definition.[3] As the government has previously acknowledged, however, the Ninth Circuit has taken a different approach in interpreting the ACCA, United States v. Franklin, 904 F.3d 793, 800-802 (2018), cert. dismissed, No. 18-1131 (June 4, 2019); see Gov't Cert. Br. at 10-13, Shular, supra (No. 18-6662), and this Court recently granted certiorari in Shular to consider that question.

Regardless of the outcome of Shular, petitioner cannot demonstrate that his counsel rendered ineffective assistance by not objecting to the presentence report's determination that the ACCA and career-offender Guideline applied to him. Before petitioner's sentencing in October 2014, the Eleventh Circuit had repeatedly held in unpublished decisions that an offense under Section 893.13(1) qualified as both a "serious drug offense" under the ACCA and as a "controlled substance offense" under Sentencing Guidelines § 4B1.2. See United States v. Samuel, 580 Fed. Appx. 836, 842-843 (2014) (per curiam) (ACCA), cert. denied, 135 S. Ct. 1168 (2015); United States v. Rudolph, 571 Fed. Appx. 752, 754

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[3] See United States v. McKenney, 450 F.3d 39, 42-43 (1st Cir.), cert. denied, 549 U.S. 1011 (2006); United States v. King, 325 F.3d 110, 113-114 (2d Cir.), cert. denied, 540 U.S. 920 (2003); United States v. Gibbs, 656 F.3d 180, 185-186 (3d Cir. 2011), cert. denied, 565 U.S. 1170 (2012); United States v. Brandon, 247 F.3d 186, 190-191 (4th Cir. 2001); United States v. Winbush, 407 F.3d 703, 707-708 (5th Cir. 2005); United States v. Bynum, 669 F.3d 880, 886 (8th Cir.), cert. denied, 568 U.S. 857 (2012); United States v. Williams, 488 F.3d 1004, 1009 (D.C. Cir.), cert. denied, 552 U.S. 939 (2007).

(per curiam) (Guidelines), cert. denied, 135 S. Ct. 731 (2014); United States v. Johnson, 570 Fed. Appx. 852, 856-857 (2014) (per curiam) (ACCA), cert. denied, 135 S. Ct. 999 (2015); United States v. Burton, 564 Fed. Appx. 1017, 1019 (2014) (per curiam) (Guidelines); United States v. Smith, 522 Fed. Appx. 564, 566 (2013) (per curiam) (Guidelines). Petitioner's counsel did not render inadequate performance by failing to raise an objection that the Eleventh Circuit had previously rejected. See, e.g., United States v. Fields, 565 F.3d 290, 294 (5th Cir.), cert. denied, 558 U.S. 914 (2009).

Moreover, even if petitioner could demonstrate that his counsel provided deficient performance, his ineffective-assistance claim still would fail because he cannot show prejudice. Petitioner's 180-month ACCA sentence on the felon-in-possession count was imposed concurrently to his longer, 220-month sentences on each of the drug-distribution counts. Judgment 2. Even if petitioner's counsel had successfully objected to the application of the ACCA, such that his sentence on the felon-in-possession count had been limited to the otherwise-applicable statutory maximum of 120 months, see 18 U.S.C. 924(a)(2), petitioner would not have received a shorter overall sentence.

Similarly, petitioner's career-offender designation did not affect his Guidelines range. Even without the career-offender enhancement, petitioner would have had a total offense level of 40 and a criminal history category of V. See PSR ¶¶ 32, 52; Sent.

Tr. 44-45. That combination would have yielded the same Guidelines range that the district court applied: 360 months to life. See Sentencing Guidelines Ch. 5, Pt. A. Further review is not warranted.

2. Petitioner additionally contends (Pet. 30-34) that his counsel rendered ineffective assistance by failing to argue that his prior conviction for resisting arrest with violence, in violation of Fla. Stat. § 843.01 (1989), does not constitute a "violent felony" under the ACCA, 18 U.S.C. 924(e)(1) and (2)(B). That contention similarly does not warrant review.

a. The Eleventh Circuit has correctly held that an offense under that statute is a violent felony. See United States v. Deshazior, 882 F.3d 1352, 1355 (2018), cert. denied, 139 S. Ct. 1255 (2019); United States v. Hill, 799 F.3d 1318, 1322 (2015) (per curiam); United States v. Romo-Villalobos, 674 F.3d 1246, 1248-1251 (per curiam), cert. denied, 568 U.S. 873 (2012). This Court has repeatedly denied review of petitions presenting that question. See Gubanic v. United States, 139 S. Ct. 77 (2018) (No. 17-8764); Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667); Brewton v. United States, 137 S. Ct. 2264 (2017) (No. 16-7686); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756); Telusme v. United States, 137 S. Ct. 2091 (2017) (No. 16-6476). Accordingly, even if this case directly presented that question, the same result would be warranted here.

The question petitioner raised below and presents in this Court, however, is whether petitioner's counsel was ineffective for failing to challenge his ACCA sentence on that basis. Even if petitioner were correct that his resisting-arrest-with-violence conviction is not a violent felony under the ACCA, his counsel was not ineffective for not pressing that argument. At the time of petitioner's sentencing, the Eleventh Circuit had held that an offense under Section 843.01 was a "crime of violence" under the elements clause in Sentencing Guidelines § 2L1.2 comment. (n.1). Romo-Villalobos, 674 F.3d at 1248-1251. The Eleventh Circuit's decision had noted that Section 2L1.2's elements clause was "the same as the elements clause[] of the [ACCA]," id. at 1248, and it had specifically rejected the claim that "the element of violence in § 843.01 can be satisfied by de minimis force" that might not qualify as "physical force" for elements-clause purposes, id. at 1249. Any argument that petitioner's conviction for resisting an officer with violence was not a violent felony under the ACCA would therefore have failed.

Petitioner also cannot demonstrate prejudice on this claim. Even if petitioner's counsel had successfully objected to the presentence report's reliance on the resisting-an-officer-with-violence conviction, petitioner still would have had the requisite three predicate offenses necessary to qualify for sentencing under the ACCA. In addition to his 2003 and 2011 convictions for possession with intent to sell or deliver cocaine, petitioner also

had a 2001 conviction for the same offense. That 2001 conviction did not count as a predicate offense under the career-offender Guideline because petitioner had received a sentence of less than 60 days and it was imposed more than ten years prior to the commencement of the offenses for which he was being sentenced. Sentencing Guidelines § 4A1.1(a)-(c), (e), comment. (n.3). But that 2001 conviction would constitute a "serious drug offense" for purposes of the ACCA, which contains no similar time limitation. 18 U.S.C. 924(e)(2)(A). Petitioner therefore had three "serious drug offense[s]" that qualified him for the ACCA enhancement, regardless of whether his conviction for resisting an officer with violence was a violent felony under 18 U.S.C. 924(e)(2)(B). The court of appeals correctly concluded that petitioner was not entitled to a COA on this claim. Further review is not warranted.

b. Petitioner contends (Pet. 30-34) that the Court should nevertheless grant the petition in this case, vacate the decision below, and remand for the same reasons it did in Franklin v. United States, 139 S. Ct. 1254 (2019) (No. 17-8401). Franklin, however, involved the ACCA classification of a different Florida crime, and the disposition of that case has no bearing on this one.

Franklin involved an ACCA sentence imposed based in part on a conviction for battery on a law-enforcement officer in violation of Fla. Stat. § 784.07(1)(a) and (2) (1985). That statute provides an enhanced sentence for violations of Florida's simple-battery statute, id. § 784.03(1), where the victim is a law-enforcement

officer. See Gov't Mem. at 3-4, Franklin, supra (No. 17-8401). The relevant subsection of the Florida simple-battery statute applies to "[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other." Fla. Stat. 784.03(1)(a) (1985). This Court has held that the intentional-touching component of simple battery under Florida law does not categorically qualify as a violent felony under the ACCA's elements clause. Johnson v. United States, 559 U.S. 133, 138-145 (2010). In Franklin, the government acknowledged that the subsection applying to "touch[ing] or strik[ing]" was not divisible and that there was nothing in the record indicating that the defendant had been convicted for "bodily harm" battery under a different subsection of Fla. Stat. § 784.03(1)(b) (1985). Gov't Mem. at 4-5, Franklin, supra (No. 17-8401). The government accordingly recommended that the Court grant the petition in Franklin, vacate the Eleventh Circuit's decision in that case, and remand, id. at 5-6, and the Court followed that course, see Franklin, 139 S. Ct. at 1254. The government recommended, and the Court adopted, the same course in Santos v. United States, 139 S. Ct. 1714 (2019) (No. 18-7096).

That approach is unwarranted here, however, because the Florida offense of resisting an officer with violence under Fla. Stat. § 843.01 (1989), at issue in petitioner's challenge to his ACCA sentence, is not similar to the battery offense in Franklin in any relevant respect. See Harris v. State, 5 So. 3d 750, 751

(Fla. Dist. Ct. App.), review denied, 16 So. 3d 132 (Fla. 2009). Unlike the Florida simple-battery statute, which can be violated by mere "touching," Fla. Stat. § 784.03(1)(a) (1985), the statute at issue here requires "offering or doing violence" to an officer. Id. § 843.01 (1989). Section 843.01 thus categorically requires the use, attempted use, or threatened use of "violent force," and it is therefore a violent felony under the ACCA. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

WILLIAM A. GLASER
Attorney

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