No. 19-5085

IN THE SUPREME COURT OF THE UNITED STATES

DARREN L. LEE, 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 erred in determining that the records of petitioner's prior convictions for felony battery, in violation of Fla. Stat. § 784.03 (2014), and aggravated battery of a pregnant victim, in violation of Fla. Stat. § 784.045(1)(b) (2000), demonstrated that those convictions were for "bodily harm" battery, id. § 784.03(1)(a)(2) (2014); id. § 784.03(1)(a)(2) (2000).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Fla.)

United States v. Lee, No. 17-cr-00063 (May 8, 2018)

United States Court of Appeals (11th Cir.)

United States v. Lee, No. 18-12082 (June 11, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is not published in the Federal Reporter but is available at 2019 WL 2448250.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2019. The petition for a writ of certiorari was filed on July 2, 2019. 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 Northern 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). Judgment 1. Petitioner was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A13.

1. In October 2016, law enforcement officers responded to a hotel room in Pensacola, Florida, after the occupants refused to vacate the room. Pet. App. A2. The room was registered in petitioner's name. Ibid. After the officers removed petitioner and the other occupants from the room, they found a .22 caliber revolver in the microwave. Ibid. A DNA swab revealed that petitioner was the major contributor of DNA on the gun. Ibid.

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 1-2. Petitioner pleaded guilty to that offense. Pet. App. A2; Judgment 1.

2. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of possession of a firearm by a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has at least "three previous convictions" that are each "for a violent felony or a serious drug

offense" committed on a different occasion. 18 U.S.C. 924(e)(1). As relevant here, the ACCA defines a "'violent felony'" to include an offense punishable by more than one year in prison 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). That portion of the definition is known as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

To determine whether a prior conviction constitutes a "violent felony" under the elements clause, courts apply the "categorical approach." See Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Taylor v. United States, 495 U.S. 575, 602 (1990). Under the categorical approach, courts consider "the elements of the crime of conviction." Mathis, 136 S. Ct. at 2248. If the statute of conviction lists multiple alternative elements, rather than different factual means for satisfying the same element, it is "'divisible,'" and a court may apply the "'modified categorical approach'" and "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Id. at 2249 (citation omitted); see Shepard v. United States, 544 U.S. 13, 26 (2005).

The Probation Office determined that petitioner had four prior Florida convictions that qualified as serious drug offenses or violent felonies under the ACCA: a 2001 conviction for delivery or sale of a controlled substance, in violation of Fla. Stat.

§ 893.13 (2000); a 2001 conviction for aggravated battery of a pregnant victim, in violation of Fla. Stat. § 784.045(1)(b)(2) (2000); and two 2015 convictions for felony battery, in violation of Fla. Stat. § 784.03 (2014). Presentence Investigation Report (PSR) ¶¶ 24, 32, 33, 41, 42. Based on petitioner's criminal history category of VI and his total offense level of 30, the Probation Office calculated an advisory Sentencing Guidelines range of 180 to 210 months of imprisonment. PSR ¶ 78.

Petitioner objected to his classification as an armed career criminal, contending that his convictions for aggravated battery of a pregnant victim and felony battery were not violent felonies under the ACCA. Pet. App. A4. The Florida simple battery statute provides that a person commits the offense of battery if he:

> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.

Fla. Stat. § 784.03(1)(a) (2014); id. § 784.03(1)(a) (2000). Under Florida law, a person commits aggravated battery (a second-degree felony) if "the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant." Id. § 784.045 (2000). A person commits felony battery (a third-degree felony) if he "has one prior conviction for battery, aggravated battery, or felony battery and * * * commits any second or subsequent battery." Id. § 784.03(2) (2014).

The district court determined that petitioner was subject to sentencing under the ACCA. C.A. App. 32-56, 97-102. The court explained that Florida's simple battery statute, Fla. Stat. § 784.03(1)(a) (2014); id. § 784.03(1)(a) (2000), is divisible into two offenses -- "bodily harm battery," which satisfies the ACCA's elements clause, and "touch or strike battery," which does not. C.A. App. 44, 50-56, 100-101. And it considered the record documents from petitioner's state convictions and determined that petitioner's aggravated battery conviction and at least one of his 2015 felony battery convictions were for bodily harm battery. Id. at 56, 98; see id. at 44 n.10.

The district court observed that, in pleading nolo contendere to each of those offenses, petitioner entered into plea agreements that expressly "incorporated by reference" the underlying arrest reports and stated that the reports were "agreed to by the defendant as a factual basis" for the plea. Pet. App. A3-A4; see C.A. App. 43-46. The arrest report for petitioner's conviction for aggravated battery on a pregnant person stated that petitioner "beat * * * up" the victim, who was six months pregnant, by repeatedly pushing and striking her; that authorities found her lying on the ground vomiting; and that she was taken to the hospital. C.A. App. 45, 98; see Pet. App. A3. The arrest report for the relevant felony battery conviction stated that petitioner "pulled the victim's hair, hit her repeatedly, and pried open the side of her mouth, which caused bleeding and visible cuts and tears

in the corners of her lips." C.A. App. 99; see id. at 46. The court determined from the arrest reports that petitioner was "necessarily convicted on the basis of bodily harm battery" in both cases. Id. at 45-46, 99.

The district court rejected petitioner's argument that the factual bases in the arrest reports were irrelevant because he pleaded nolo contendere. C.A. App. 47-50. The court observed that "[u]nder Florida law, the procedure for entering a nolo plea is the same as [for] entering a guilty plea," and that the trial court must ensure an adequate factual basis for the plea. Id. at 48. The district court explained that although "[a] nolo plea 'does not admit the allegations of the charge in a technical sense,' * * * once 'accepted by the court, it becomes an implied confession of guilt and ... admits for the purposes of the case all facts which are well pleaded.'" Ibid. (quoting Vinson v. State, 345 So. 2d 711, 715 (Fla. 1977); Peel v. State, 150 So. 2d 281, 292 (Fla. Dist. Ct. App. 1963), appeal dismissed, 168 So. 2d 147 (Fla. 1964), and cert. denied, 380 U.S. 986 (1965)).

The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. C.A. App. 107-110; Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A13.

The court of appeals first rejected petitioner's contention that this Court's decision in Shepard, "does not authorize the application of the modified categorical approach to nolo

contendere pleas." Pet. App. A8. The court explained that circuit precedent had consistently "treat[ed] Florida nolo convictions no differently than convictions based on guilty pleas or verdicts of guilt." Ibid. (citing United States v. Gandy, 917 F.3d 1333, 1341-1342 (11th Cir. 2019), petition for cert. pending, No. 19-5089 (filed July 2, 2019); United States v. Drayton, 113 F.3d 1191, 1193 (11th Cir. 1997) (per curiam)).

The court of appeals also agreed with the district court that petitioner's convictions for felony battery and aggravated battery on a pregnant person satisfied the ACCA's elements clause. Pet. App. A9-A13. The court of appeals explained that petitioner did not dispute that Florida simple battery was divisible between "touch[ing] or strik[ing]" battery and "caus[ing] bodily harm" battery, the latter of which the court had already recognized as a violent felony under the ACCA's elements clause. Id. at A9 (citation omitted); see id. at A9-A11; see also United States v. Vereen, 920 F.3d 1300, 1315-1316 (11th Cir. 2019); Gandy, 917 F.3d at 1340 (determining that bodily harm battery is a crime of violence under the Sentencing Guidelines).

The court of appeals then determined that the arrest reports incorporated into petitioner's plea agreements demonstrated that he had been convicted of bodily harm battery. Pet. App. A11-A12. With respect to petitioner's 2001 conviction for aggravated battery on a pregnant person, the court observed that the arrest report's factual basis for the plea was "plainly sufficient for a

charge of intentionally causing bodily harm," and that petitioner had provided "no reason to think that this case would have been prosecuted as just a simple touching-or-striking battery." Id. at A11. With respect to petitioner's 2015 conviction for felony battery, the court likewise observed that the arrest report's factual basis "plainly show[ed] bodily harm to the victim." Id. at A12.

ARGUMENT

Petitioner contends (Pet. 10-15) that the court of appeals misapplied the modified categorical approach, asserting that the record lacks an adequate basis for determining that his prior convictions for felony battery and aggravated battery on a pregnant person were for bodily harm battery. Petitioner separately contends (Pet. 15-27) that the modified categorical approach is entirely inapplicable to his nolo contendere pleas. The court of appeals correctly rejected those contentions, and its decision does not warrant review.[1]

1. The court of appeals did not err in determining, under the modified categorical approach, that petitioner's prior convictions were for bodily harm battery.

a. As this Court explained in Shepard v. United States, 544 U.S. 13 (2005), courts applying the modified categorical approach may consider "the statement of factual basis for the charge,

[1] The petition for a writ of certiorari in Gandy v. United States, No. 19-5089 (filed July 2, 2019), raises a similar question in the context of the Sentencing Guidelines.

shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." Id. at 20 (citation omitted). The arrest reports that were incorporated by reference into petitioner's plea agreements, and provided the "factual basis" for each plea, could therefore properly be considered in determining the nature of his convictions. See United States v. Almazan-Becerra, 537 F.3d 1094, 1097-1100 (9th Cir. 2008) (explaining that the defendant's "stipulation []that the police reports contained a factual basis for his plea[] incorporated the police reports into the plea colloquy, and were thus properly relied upon by the district court" under Shepard); United States v. Castillo-Morales, 507 F.3d 873, 876 (5th Cir. 2007) (explaining "that when a defendant stipulates that 'a factual basis' for his plea is present in 'court documents,' courts may use any uncontradicted facts in those documents to establish an element of a prior conviction"), cert. denied, 552 U.S. 1158 (2008).

The arrest reports clearly demonstrated that petitioner's convictions were for "caus[ing] bodily harm" battery. Fla. Stat. § 784.03(1)(a) (2014); id. § 784.03(1)(a) (2000). With respect to petitioner's 2001 aggravated battery conviction, the arrest report stated -- and made the factual basis for petitioner's plea -- that petitioner had pushed and struck the pregnant victim several times, that she was found lying on the ground vomiting, and that her

injuries required immediate medical treatment. Pet. App. A5, A11. With respect to petitioner's 2015 felony battery conviction, the arrest report stated -- and likewise made the factual basis for petitioner's plea -- that petitioner's actions caused the victim to suffer "'cuts on the corner[s] * * * of her lips,'" and that her injuries resulted in "blood on the victim's shirt and the couch cushions." Id. at A12. Petitioner accordingly does not dispute (Pet. 13) that the facts described in the arrest reports "could support a conviction" for "'bodily harm'" battery.

Petitioner nevertheless argues (Pet. 13) that he should be deemed to have been convicted for "touch or strike" battery because the facts also could support convictions for that offense. Pet. 13. In his view, the modified categorical approach incorporates a "demand for certainty," Pet. 12 (quoting Shepard, 544 U.S. at 21), that precludes classifying his battery convictions as violent felonies because he caused the bodily harm by touching or striking his victims. But this Court has never required that offenses be mutually exclusive in order for the modified categorical approach to apply. Instead, the "demand for certainty" is satisfied where the "plea agreement" or "comparable findings of fact" demonstrate that the plea "'necessarily' rested on the fact identifying the [crime]" as a violent felony. Shepard, 544 U.S. at 20-21 (citation omitted). Here, petitioner agreed to factual bases specifically

identifying the bodily harm he caused to his victims.[2] But on petitioner's theory, the factual bases could not demonstrate that he was convicted of "bodily harm" battery unless they discussed the resulting injuries without mentioning the way in which petitioner caused them. This Court's precedents do not require that nonsensical result.

Petitioner errs (Pet. 14) in asserting that such a result finds support in this Court's statement in Moncrieffe v. Holder, 569 U.S. 184 (2013), that a court "must presume that [a] conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized." Id. at 190-191 (quoting Curtis Johnson v. United States, 559 U.S. 133, 137 (2010)) (second and third sets of brackets in original). That statement was addressing the purely legal inquiry into whether the definition of a crime encompasses conduct that would make it broader than the federal definition to which it is being compared (e.g., whether bodily harm battery in fact "has as an element the use, attempted use, or threatened use

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[2] The Florida cases petitioner cites (Pet. 12-13) are not to the contrary. Those decisions make clear that the prosecution in each case focused on the defendant's acts in "touching" or "striking" the victim, rather than on any resulting bodily harm. See Jomolla v. State, 990 So. 2d 1234, 1237-1238 (Fla. Dist. Ct. App. 2008) (upholding conviction for touching or striking battery despite erroneous instruction on both theories, because "the prosecution did not rely upon the uncharged theory that the battery was committed by intentionally causing bodily harm to the victim"); State v. Clyatt, 976 So. 2d 1182, 1183 (Fla. Dist. Ct. App. 2008) (court recounted facts underlying charged touching or striking battery, without any mention of resulting bodily injuries); Byrd v. State, 789 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 2001) (per curiam) (same).

of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i)). See Moncrieffe, 569 U.S. at 191. Moncrieffe went on to explain that "this rule is not without qualification," and that where a statute is divisible "a court may determine which particular offense the [defendant] was convicted of by examining" the record of conviction. Ibid. Moncrieffe thus does not require a court, in making such a determination, to disregard the plain implications of a defendant's plea, simply because a fragment of the factual basis for the plea, in isolation, would support conviction for a different crime.

b. Petitioner contends (Pet. 13-15) that the decision below conflicts with the Eighth Circuit's decision in United States v. Horse Looking, 828 F.3d 744 (2016). In Horse Looking, the court considered whether the defendant's prior South Dakota conviction for "Simple Assault Domestic Violence" was a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9), which is defined as an offense that has "as an element the use or attempted use of physical force, or the threatened use of a deadly weapon" and that involves specified victims, 18 U.S.C. 921(a)(33)(A)(ii). 828 F.3d at 746. The defendant had pleaded guilty to an indictment charging him with violating three subsections of the South Dakota statute, which the parties agreed defined separate crimes, including allegations that the defendant "(4) [a]ttempt[ed] by physical menace or credible threat to put [his wife] in fear of imminent bodily harm," or "(5) [i]ntentionally cause[d] bodily injury to

[her]." Ibid.; see id. at 747; see also S.D. Codified Laws § 22-18-1(1), (4), and (5) (2006). During the plea colloquy, the defendant admitted that he pushed his wife and that she fell down, and his attorney added that the defendant's wife had testified that she suffered abrasions on her ankle or knee. Horse Looking, 828 F.3d at 748.

The Eighth Circuit concluded that the record did not establish that the defendant had been convicted of a misdemeanor crime of domestic violence. Horse Looking, 828 F.3d at 748-749. The court reasoned that although the plea colloquy "establishe[d] that Horse Looking could have been convicted under subsection (5)," which the parties agreed was a qualifying offense, the colloquy did "not exclude the possibility that Horse Looking was convicted under subsection (4)," which the parties agreed was not a qualifying offense, because pushing his wife would be "sufficient to establish a 'physical menace.'" Id. at 748. The court observed that "convictions under the two alternatives" were not "mutually exclusive," and it took the view that the judicial record of the South Dakota conviction failed to meet the "'demand for certainty'" regarding whether the defendant was convicted of a qualifying offense. Ibid. (citation omitted).

The differences between the reasoning in Horse Looking and in the unpublished decision below do not warrant this Court's review. Unlike this case, Horse Looking did not include a plea agreement that specifically incorporated a factual basis with facts that

would be irrelevant to a conviction for one of the two crimes under debate -- as the facts about the bodily harm suffered by the victims here would be for "touching or striking" battery -- indicating an upfront understanding by the parties that the conviction would necessarily reflect conviction of the crime that the factual basis as a whole establishes. In any event, any conflict is recent, shallow, and undeveloped. Petitioner also offers no indication that the issue arises with great frequency. No further review of it is warranted here.

2. The court of appeals also correctly rejected petitioner's broader argument that his nolo contendere plea cannot support application of the modified categorical approach at all.

a. The court of appeals observed that it has repeatedly "treat[ed] Florida nolo convictions no differently than convictions based on guilty pleas or verdicts of guilt" for purposes of the modified categorical approach. Pet. App. A8. That is consistent with other courts of appeals, which have likewise recognized that the modified categorical approach generally applies to nolo contendere pleas. See, e.g., United States v. Cartwright, 678 F.3d 907, 915 (10th Cir.), cert. denied, 568 U.S. 952 (2012); United States v. Williams, 664 F.3d 719, 722-723 (8th Cir. 2011), overruled on other grounds, United States v. Tucker, 740 F.3d 1177 (8th Cir. 2014); United States v. Snyder, 643 F.3d 694, 697-698 (9th Cir. 2011), cert. denied, 566 U.S. 941

(2012); United States v. Kappell, 418 F.3d 550, 558, 560-561 (6th Cir. 2005), cert. denied, 547 U.S. 1056 (2006).

Like a guilty plea, a plea of nolo contendere is "an admission of guilt for the purposes of the case," Hudson v. United States, 272 U.S. 451, 455 (1926), and requires a defendant to "admit every essential element of the offense that is well pleaded in the charge," Lott v. United States, 367 U.S. 421, 426 (1961) (brackets, citation, and internal quotation marks omitted). Florida courts, in particular, have made clear that "[a] plea of nolo contendere is construed for all practical purposes as a plea of guilty." Russell v. State, 233 So. 2d 148, 149 (Fla. Dist. Ct. App. 1970); see 18 U.S.C. 921(a)(20) (defining the ACCA term "'crime punishable by imprisonment for a term exceeding one year'" according to "the law of the jurisdiction in which the proceedings were held"). Under Florida law, a plea of nolo contendere "'admits the facts for the purpose of the pending prosecution' and is the same as a guilty plea insofar as it gives the court the power to punish." Mills v. State, 840 So. 2d 464, 466 (Fla. Dist. Ct. App. 2003) (quoting Vinson v. State, 345 So. 2d 711, 715 (Fla. 1977)); accord Chesebrough v. State, 255 So. 2d 675, 676 (Fla. 1971), cert. denied, 406 U.S. 976 (1972); see also Stewart v. State, 586 So. 2d 449, 450-451 (Fla. Dist. Ct. App. 1991) (holding that no-contest plea admitted facts alleged in affidavit for violation of probation); Fla. R. Crim. P. 3.172 (2019) (same procedures govern acceptance of guilty pleas and nolo contendere pleas).

Here, the Florida courts adjudicated petitioner guilty of the offenses to which he pleaded nolo contendere. PSR ¶¶ 33, 41-42. The court of appeals therefore did not err in determining that petitioner's convictions pursuant to nolo contendere pleas could qualify as violent felonies under the ACCA. See United States v. Drayton, 113 F.3d 1191, 1192-1193 (11th Cir. 1997) (per curiam) ("[A] nolo contendere plea where * * * there is subsequently an adjudication of guilt is a conviction under Florida law which satisfies the requirements of the [ACCA].").

b. Contrary to petitioner's assertion (Pet. 21-23), the decision below does not conflict with decisions of other courts of appeals in which those courts have concluded that records of particular nolo contendere pleas, or other pleas that did not necessarily admit guilt, see North Carolina v. Alford, 400 U.S. 25 (1970), failed to establish the offense of conviction under the modified categorical approach. This Court has repeatedly denied petitions for writs of certiorari asserting substantially the same purported circuit conflict. See Lopez-Gutierrez v. United States, 136 S. Ct. 1514 (2016) (No. 15-7132); Valdavinos-Torres v. United States, 572 U.S. 1063 (2014) (No. 13-7521); Amos v. United States, 568 U.S. 1196 (2013) (No. 12-7473); Snyder v. United States, 566 U.S. 941 (2012) (No. 11-8149); Sanchez-Zarate v. United States, 565 U.S. 830 (2011) (No. 10-10090). The same result is warranted here.

No disagreement exists in the circuits. In United States v. De Jesus Ventura, 565 F.3d 870 (2009), the D.C. Circuit concluded that the defendant's prior Virginia conviction for felonious abduction, which was based on a plea of nolo contendere, was not a "crime of violence" under the Sentencing Guidelines. See id. at 875-880. In applying the modified categorical approach, the court declined to consider the prosecutor's factual proffer during the plea proceeding, because "[i]n Virginia, a defendant who pleads nolo contendere admits only the truth of the charge" and "[a]t no point did [the defendant], his counsel, or the judge confirm the truth of the facts as stated by the Commonwealth in its proffer." Id. at 879; see id. at 878-879. The court accordingly stated that "[o]n this record, we cannot conclude that [the defendant] was convicted of the facts alleged in the Commonwealth's proffer." Id. at 879 (emphasis added). De Jesus Ventura thus "stand[s] [only] for the proposition that an Alford plea is not, in itself, an admission of the facts in the prosecution's proffer of facts"; it does not "foreclose the possibility that a defendant can, independently of his plea entry, confirm the prosecution's proffer of facts." United States v. Flores-Vasquez, 641 F.3d 667, 671 (5th Cir.), cert. denied, 565 U.S. 927 (2011). And here, in contrast to De Jesus Ventura, Florida law treats a plea of nolo contendere effectively the same as a guilty plea, and petitioner stipulated to, and the state courts accepted, the factual bases in the arrest reports. Pet. App. A11-A12.

Petitioner's reliance on United States v. Savage, 542 F.3d 959 (2d Cir. 2008), and United States v. Alston, 611 F.3d 219 (4th Cir. 2010), is misplaced for similar reasons. See Flores-Vasquez, 641 F.3d at 671 (explaining that Savage and Alston rest on the same circumstance-specific logic as De Jesus Ventura). In Savage, the Second Circuit concluded that the colloquy for the defendant's no-contest plea could not be used to narrow the basis for his prior Connecticut drug conviction because, by entering his plea, he "did not, by design, confirm the factual basis for his plea"; indeed, the defendant had affirmatively expressed his disagreement with the prosecutor's recitation of the factual basis for his plea. 542 F.3d at 966; see id. at 962-963. In Alston, the Fourth Circuit concluded that the defendant's no-contest plea to a Maryland offense could not serve as a predicate conviction under the ACCA because the charging document "did not show on its face that the crime was a violent felony," the defendant did not admit facts proffered by the prosecutor as part of his no-contest plea, and the state court was not required to find those facts to accept the plea. 611 F.3d at 221; see id. at 227. The court reasoned, in part, that the "distinguishing feature" of an Alford plea "'is that the defendant does not confirm' that factual basis," Id. at 227 (quoting Savage, 542 F.3d at 962), and elsewhere noted that the defendant had merely agreed that the State's witnesses would testify along the lines proffered by the prosecutor, id. at 223, 227. In contrast to Savage and Alston, the court of appeals

here found that petitioner stipulated to the factual basis for each of his nolo contendere pleas. See, e.g., Pet. App. A3-A4 (noting each plea agreement's statement that the arrest report was "incorporated by reference and agreed to by the defendant as a factual basis for this plea").

c. Petitioner further claims (Pet. 26-27) that the lower courts' reliance on his nolo contendere pleas violated the Full Faith and Credit Act, 28 U.S.C. 1738, on the theory that "Florida courts would not recognize the prior nolo convictions as findings of violent battery." Pet. 27. The court of appeals did not address that argument, and this 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) (citation omitted). In addition, although petitioner raised the argument in the court of appeals, his failure to preserve it in the district court means that review would be for plain error. Fed. R. Crim. P. 52(b).

Petitioner cannot show that any plain error occurred. The circuits are in agreement that the Full Faith and Credit Act is "not implicated when a federal court endeavors to determine how a particular state criminal proceeding is to be treated, as a matter of federal law, for the purpose of sentencing the defendant for a distinct and unrelated federal crime." United States v. Fazande, 487 F.3d 307, 308-309 (5th Cir. 2007) (per curiam); see United States v. Jones, 415 F.3d 256, 265 (2d Cir. 2005); United States

v. Guthrie, 931 F.2d 564, 571 (9th Cir. 1991); see also United States v. Lewis, 609 Fed. Appx. 890, 891 (8th Cir. 2015) (per curiam) (unpublished); United States v. Carter, 186 Fed. Appx. 844, 847 (10th Cir. 2006) (unpublished).

Moreover, petitioner is incorrect in his reading of Florida law. As explained above, Florida courts have made clear that "[a] plea of nolo contendere is construed for all practical purposes as a plea of guilty." Russell, 233 So. 2d at 149. Therefore, even if the Full Faith and Credit Act applied, the courts below complied with it by giving petitioner's nolo contendere pleas the same effect they would receive under Florida law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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