No. 19-5089

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD B. GANDY, JR., 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 record of petitioner's prior conviction for battery of a detainee, in violation of Fla. Stat. § 784.082 (2010), demonstrated that the conviction was for "bodily harm" battery, in violation of Fla. Stat. § 784.03(1)(a)(2) (2010).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Gandy, No. 16-cr-55 (Oct. 10, 2017)

United States Court of Appeals (11th Cir.)

United States v. Gandy, No. 17-15035 (Mar. 6, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 917 F.3d 1333.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2019. A petition for rehearing was denied on May 2, 2019 (Pet. App. B1). 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 jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on one count of possession with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C)-(D); 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)(i); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1; see Pet. App. 6. Petitioner was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A15.

1. In May 2016, police officers on foot patrol in a parking lot in Pensacola, Florida, observed petitioner seated inside a running vehicle with bags containing a white substance on his lap. Presentence Investigation Report (PSR) ¶ 6. As the officers approached the vehicle, petitioner tried to drive away. Ibid. The officers stopped him and recovered approximately three ounces of cocaine, an ounce of marijuana, a digital scale, $847 in cash, and a loaded pistol from petitioner's vehicle and person. PSR ¶¶ 6-8.

A grand jury charged petitioner with one count of possession with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C)-(D); 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)(i); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. A6. A jury found petitioner guilty on all three counts. Ibid.

2. Applying the 2016 version of the Sentencing Guidelines, the Probation Office determined that petitioner qualified as a "career offender" under Sentencing Guidelines § 4B1.1. PSR ¶ 25; see id. ¶ 13. Under Section 4B1.1, a defendant is subject to an enhanced advisory sentencing range if (1) he was at least 18 years old at the time of the offense of conviction, (2) the offense of conviction is a felony "crime of violence" or "controlled substance offense," and (3) he "has at least two prior felony convictions" for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a)(2016). As relevant here, Section 4B1.2(a) defines a "'crime of violence'" as "any offense under federal or 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).

To determine whether a prior conviction constitutes a "crime of violence," courts apply the "categorical approach." See Pet. App. A10; see also 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 qualified as a career offender based on one prior conviction for a controlled substance offense and two prior convictions for crimes of violence -- specifically, a 2010 conviction for battery upon a detainee, in violation of Fla. Stat. § 784.082 (2010), and a 2012 conviction for felony battery, in violation of Fla. Stat. § 784.03 (2012). Pet. App. A6; PSR ¶¶ 25, 44, 48, 50. With the career-offender enhancement, petitioner's Sentencing Guidelines offense level was 32 and his criminal history category was VI. PSR ¶¶ 27, 58. Because petitioner was a career offender and had been convicted under 18 U.S.C. 924(c) (2012), his advisory Sentencing Guidelines range was 360 months to life. PSR ¶ 94; U.S.S.G. § 4B1.1(c)(2)(B) and (c)(3).

Petitioner objected to his classification as a career offender, arguing that his battery convictions were not crimes of violence. Pet. App. A6. 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) (2012); id. § 784.03(1)(a)(2010). Under Florida law, battery is a third-degree felony if the defendant is a detainee and the victim is "any visitor to the detention facility" or "any other detainee in the detention facility." Id. § 784.082 (2010). Battery is also a third-degree felony when "[a] person who has one prior conviction for battery, aggravated battery, or felony battery * * * commits any second or subsequent battery." Fla. Stat. § 784.03(2) (2012).

The government conceded that petitioner's 2012 felony battery conviction did not qualify as a crime of violence. Pet. App. A9. But it maintained that petitioner still had the two required predicate offenses because petitioner's 2010 conviction for battery upon a detainee did qualify as a crime of violence. Ibid. At the time, circuit precedent held that the Florida simple battery statute was divisible between "'touching,'" "'striking,'" and "'[i]ntentionally caus[ing] bodily harm'" battery. United States v. Green, 842 F.3d 1299, 1322 (11th Cir. 2016) (citation omitted; first set of brackets in original), opinion vacated and superseded on denial of reh'g, 873 F.3d 846 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018). The government argued that the 2010 conviction was for "striking" battery, or in the alternative, that even if "the touch[or] strike subsection of the statute is not

divisible," the record documents showed that petitioner was convicted for "battery causing bodily harm." C.A. App. 69-70; see Pet. App. A9.

In support of that position, the government provided the district court with the 2010 conviction's sentence-recommendation form, which is "the equivalent of [a] plea agreement." Pet. App. A7. That form indicated that petitioner pleaded nolo contendere to "Battery Upon a Jail Visitor or Other Detainee," and "incorporated by reference" the underlying arrest report and stated that petitioner "agreed to" the arrest report "as a factual basis for this plea." Ibid. (citation and emphases omitted). The incorporated arrest report included a statement of probable cause alleging that petitioner "did knowingly and intentionally commit the offense of Battery Causing Bodily Harm" and stating that petitioner "was charged with battery causing bodily harm." Id. at A7-A8 (citation and emphases omitted). The arrest report listed the charge as "Battery Caus[ing] Bodily Harm," and it referred specifically to Fla. Stat. § 784.03(1)(a)(2) (2010), the subsection that applies to "intentionally causing bodily harm." Pet. App. A8 (brackets in original). The report further recounted that petitioner had struck a fellow inmate multiple times in the head, causing "a cut below [the victim's] right eye, a scratch below his right ear, a bruise on the top of his head, a minor cut on his nose and a cut above his left eye." Ibid. (citation omitted).

The district court determined that petitioner was a career offender based on the "binding precedent" of Green, without addressing the government's alternative argument. Pet. App. A9; see C.A. App. 68-70. The court varied downward from the Sentencing Guidelines range of 360 months to life and sentenced petitioner to 300 months of imprisonment, consisting of 240 months on Count 1, a concurrent 120-month sentence on Count 3, and a consecutive 60-month sentence on Count 2. C.A. App. 93; Judgment 2.

3. The court of appeals affirmed. Pet. App. A1-A15.

a. The court of appeals first noted that following petitioner's sentencing, it had withdrawn its decision in Green holding that Florida battery was divisible between "touching" and "striking" battery, and replaced it with a decision that did not address the statute's divisibility. Pet. App. A9 (citing United States v. Green, 873 F.3d 846 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018)). The court then affirmed petitioner's sentence on the alternative ground that petitioner "was necessarily convicted" of battery based on "'intentionally causing bodily harm.'" Id. at A11.

In determining that petitioner was convicted of a crime of violence, the court of appeals explained that it applied the modified categorical approach. Pet. App. A10. Petitioner did not dispute that Florida battery was divisible between "touching or striking" battery and "bodily harm" battery, and the parties agreed that the former did not constitute a crime of violence. Id. at

A11. The court explained that "'bodily harm'" battery, however, does qualify as a "crime of violence" because it requires the defendant to "intentionally use[] 'force capable of causing physical pain or injury to another person.'" Ibid. (quoting Curtis Johnson v. United States, 559 U.S. 133, 140 (2010)).

The court of appeals then determined that the documents underlying petitioner's 2010 conviction showed that he was "necessarily convicted of" battery by intentionally causing bodily harm because the arrest report incorporated into his plea agreement "clearly identifie[d] his offense as bodily harm battery." Pet. App. A11-A12. The court recognized that courts "ordinarily do not rely on police reports" to determine whether a defendant was convicted of a specific crime under the modified categorical approach "because a defendant ordinarily does not admit the conduct described in them." Id. at A12. But the court explained that "an arrest report that is incorporated by reference in a plea agreement qualifies as a 'record of comparable findings of fact adopted by the defendant upon entering the plea' that we may consider." Ibid. (quoting Shepard, 544 U.S. at 20).

The court of appeals rejected petitioner's contention that it could not rely on the arrest report's "statements identifying his offense as bodily harm battery" because the statements were "'legal conclusions'" rather than "'factual allegations.'" Pet. App. A12. The court explained that Florida law requires a factual basis for a nolo contendere plea, and "[b]ecause a factual basis is used to

compare the factual allegations with the elements of the offense of conviction, a factual basis often includes both legal and factual elements." Id. at A12 (citation omitted). And the court explained that "because [petitioner] agreed to the arrest report as the factual basis for his plea without qualification, he agreed with the statements describing his offense as bodily-harm battery" and "necessarily pleaded nolo contendere to that offense." Id. at A13.

The court of appeals rejected petitioner's argument that because he pleaded nolo contendere the court could not "rely on the factual basis in the arrest report." Pet. App. A14; see Pet. C.A. Br. 29-31. The court observed that it had "repeatedly explained that we treat Florida nolo convictions no differently than convictions based on guilty pleas or verdicts of guilt for purposes of the Sentencing Guidelines." Pet. App. A14.

b. Judge Rosenbaum dissented. Pet. App. A15-A24. She agreed with the majority that the Florida battery statute was "divisible into two separate offenses"; that bodily harm battery qualifies as a crime of violence; and that the district court "was entitled to look to the arrest report." Id. at A15. But in her view, the arrest report did not show that petitioner was "'necessarily'" convicted of bodily harm battery, on the theory that "a factual basis that satisfies the elements of two crimes," one of which qualifies as a crime of violence and one of which does not, is insufficient "to show that a defendant charged in the

alternative with both crimes was 'necessarily' convicted of the qualifying crime," and that the arrest report's references to the offense of battery causing bodily harm were not part of the "factual basis" for the plea. Id. at A18; see id. at A18-A24.

ARGUMENT

Petitioner contends (Pet. 11-16) that the court of appeals misapplied the modified categorical approach, asserting that the record lacks an adequate basis for determining that his prior conviction for battery on a detainee was for bodily harm battery. Petitioner separately contends (Pet. 17-29) that the modified categorical approach is entirely inapplicable to his nolo contendere plea. The court of appeals correctly rejected those contentions, and its decision does not warrant review. In addition, this case would be an unsuitable vehicle for review because it involves a claim under the Sentencing Guidelines.[1]

1. The court of appeals did not err in determining, under the modified categorical approach, that petitioner's prior conviction was 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, shown by a transcript of plea colloquy or by written plea agreement

[1] The petition for a writ of certiorari in Lee v. United States, No. 19-5085 (filed July 2, 2019), raises a similar question in the context of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

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 report that was incorporated by reference into petitioner's plea agreement, and provided its "factual basis," could therefore properly be considered in determining the nature of that conviction. 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).

That arrest report clearly demonstrated that petitioner's conviction was for "caus[ing] bodily harm" battery. Fla. Stat. § 784.03(1)(a) (2010). The arrest report stated three different times that petitioner was charged with battery causing bodily harm, and it listed only the subsection of the statute that requires bodily harm. Pet. App. A7-A8. The report also stated that the victim was "bleeding" and had multiples cuts, a scratch, and a bruise. Id. at A8. Petitioner accordingly does not dispute (Pet.

15) that the facts described in the arrest report "could support a conviction" for "'bodily harm'" battery.

Petitioner nevertheless argues (Pet. 15) that he should be deemed to have been convicted for "touch or strike" battery because the facts also could support a conviction for that offense. In his view, the modified categorical approach incorporates a "demand for certainty," Pet. 13 (quoting Shepard, 544 U.S. at 21), that precludes classifying his battery conviction as a crime of violence because he caused the bodily harm by striking his victim. 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 crime of violence. Shepard, 544 U.S. at 20-21 (citation omitted). Here, petitioner agreed to a factual basis specifically explaining that he committed bodily harm battery, and identifying the bodily harm he had caused his victim.[2] But on petitioner's theory, the

[2] The Florida cases petitioner cites (Pet. 15) 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

factual basis could not demonstrate that he was convicted of "bodily harm" battery unless it 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. 16) 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 of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1)). 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

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v. State, 789 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 2001) (per curiam) (same).

because a fragment of the factual basis for the plea would, in isolation, support conviction for a different crime.

b. Petitioner contends (Pet. 11-16) 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 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 crimes under debate -- as the facts about the bodily harm suffered by the victim 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 estabilshes. Indeed, the factual basis here specifically references the "bodily harm" form of battery. 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 Sentencing Guidelines." Pet. App. A14. 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). 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 (same procedures govern acceptance of guilty pleas and nolo contendere pleas).

Here, a Florida court adjudicated petitioner guilty of the offense to which he pleaded nolo contendere. PSR ¶ 48. The court of appeals therefore did not err in determining that petitioner's conviction pursuant to the nolo contendere plea could qualify as a crime of violence under the Sentencing Guidelines. 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 Armed Career Criminal statute.").

b. Contrary to petitioner's assertion (Pet. 23-24), 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. Petitioner first cites (Pet. 23-24) United States v. De Jesus Ventura, 565 F.3d 870 (2009), in which 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 court accepted the factual basis in the arrest report. Pet. App. A14.

Petitioner's reliance (Pet. 24) 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 Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), 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, 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 his nolo contendere plea. See, e.g., Pet. App. A7 (noting 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") (citation and emphasis omitted).

c. Petitioner further claims (Pet. 28-29) that the lower courts' reliance on his nolo contendere pleas violated the Full Faith and Credit Act, 28 U.S.C. 1738, because "Florida courts would not recognize the prior nolo conviction as finding of violent

battery." Pet. 29. 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.

3. Finally, even if the question presented warranted review, this case would be an unsuitable vehicle because it involves a claimed error in applying the advisory Sentencing Guidelines. This Court ordinarily does not review decisions interpreting the Guidelines because the Sentencing Commission can amend the Guidelines and accompanying commentary to eliminate a conflict or correct an error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). No reason exists for the Court to deviate from that practice here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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