No. 19-5129

IN THE SUPREME COURT OF THE UNITED STATES

KENDELL LEE STARKS, 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

SONJA M. RALSTON
Attorney

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

QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to grant a certificate of appealability (COA) from the denial of petitioner's motion to vacate his sentence based on Samuel Johnson v. United States, 135 S. Ct. 2551 (2015), where the district court found that petitioner had failed to show that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which was invalidated in Samuel Johnson, as opposed to the ACCA's still-valid elements clause.

2. Whether the court of appeals correctly declined to grant a COA on petitioner's claim that his prior convictions for resisting an officer with violence, in violation of Fla. Stat. § 843.01 (1997 and 2002), were not convictions for "violent felon[ies]" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Starks, No. 07-cr-175 (Apr. 16, 2008)

Starks v. United States, No. 09-cv-1048 (Sept. 19, 2011)

Starks v. United States, No. 16-cv-1145 (Jan. 24, 2018)

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

United States v. Starks, No. 08-11975 (Jan. 29, 2009)

Starks v. United States, No. 11-15438 (Apr. 18, 2012)

In re Starks, No. 16-12736 (June 15, 2016)

Starks v. United States, No. 18-11204 (Apr. 9, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A2) is unreported. The order of the district court (Pet. App. B1-B7) is not published in the Federal Supplement but is available at 2018 WL 4925494.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2019. The petition for a writ of certiorari was filed on July 8, 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 Middle District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1; Pet. App. B1-B2. The district court sentenced petitioner to 232 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. 309 Fed. Appx. 322. The district court later denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentence, and both the district court and the court of appeals declined to issue a certificate of appealability (COA). 09-cv-1048 D. Ct. Doc. 26 (Sept. 16, 2011); 11-15438 C.A. Order (Apr. 18, 2012). In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of Samuel Johnson v. United States, 135 S. Ct. 2551 (2015). 16-12736 C.A. Order (June 15, 2016). The district court denied the motion and declined to issue a COA. Pet. App. B1-B7. The court of appeals likewise denied a COA. Id. at A2.

1. In 2007, petitioner had an active arrest warrant for armed robbery. Presentence Investigation Report (PSR) ¶ 5. Police officers learned of his address and staked out the house. Ibid. After petitioner and a female companion left the house in a car, the officers executed a traffic stop and arrested petitioner. PSR ¶ 7. During a search of the car, the officers found two

firearms and ammunition. PSR ¶ 8. A federal grand jury in the Middle District of Florida indicted petitioner on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Following a trial, a jury found petitioner guilty. Judgment 1; Pet. App. B1-B2.

A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" as an offense punishable by more than a year in prison that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office's presentence report informed the district court that petitioner had a 1992 Florida conviction for robbery with a firearm, a 1997 Florida conviction for battery on a law enforcement officer, a 1997 Florida conviction for resisting an officer with violence, and 2002 Florida convictions for battery on a law enforcement officer and resisting an officer with violence, committed on the same occasion. PSR ¶¶ 32, 35-37. At sentencing, petitioner objected that his Florida convictions for battery on a law enforcement officer did not qualify as violent felonies under the ACCA. Sent. Tr. 16. The government responded that petitioner had four ACCA predicate convictions, each of which "involves the use of force" or "potential use of force against another." Id. at 17.

The district court overruled petitioner's objection. Sent. Tr. 16-19. The court determined that "battery on law enforcement by any definition is a violent felony," id. at 19, and that petitioner's "criminal history clearly supports an armed career criminal designation," id. at 16. The court sentenced petitioner to 232 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. 309 Fed. Appx. 322.

In 2009, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging ineffective assistance of counsel. 9-cv-1048 D. Ct. Doc. 1, at 4-8 (June 18, 2009). The district court denied petitioner's motion and declined to issue a COA.

09-cv-1048 D. Ct. Doc. 26, at 16. The court of appeals likewise denied a COA. 11-15438 C.A. Order.

2. In 2015, this Court concluded in Samuel Johnson v. United States, supra, that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court subsequently held that Samuel Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268.

In 2016, the court of appeals granted petitioner's application for leave to file a second Section 2255 motion to vacate his sentence. 16-12736 C.A. Order. In his second Section 2255 motion, petitioner argued that Samuel Johnson establishes that he was wrongly classified and sentenced as an armed career criminal. 16-cv-1145 D. Ct. Doc. 1, at 4 (June 19, 2016). Petitioner contended that none of his prior convictions qualified as convictions for violent felonies under the ACCA's enumerated-offenses clause or elements clause, and that Samuel Johnson precluded reliance on the residual clause. 16-cv-1145 D. Ct. Doc. 11, at 3 (Mar. 1, 2017).

The district court denied petitioner's motion. Pet. App. B1-B7. The court explained that, under circuit precedent, petitioner bore the burden of "establish[ing] that his sentence enhancement turned on the validity of the residual clause." Id. at B3 (quoting Oxner v. United States, 719 Fed. Appx. 916, 918 (11th Cir. 2017) (per curiam), cert. denied, 139 S. Ct. 102 (2018), in turn quoting

Beeman v. United States, 871 F.3d 1215, 1221 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019)). The court explained that "[i]f the record is unclear, and it is just as likely that the sentencing court relied on a different clause when it enhanced [petitioner's] sentence, 'then [petitioner] has failed to show that his enhancement was due to use of the residual clause.'" Ibid. (quoting Oxner, 719 Fed. Appx. at 918, in turn quoting Beeman, 871 F.3d at 1222) (emphasis omitted). The court determined that petitioner had failed to make that showing. Id. at B5.

The district court observed that the sentencing court "did not indicate under which provision of the ACCA" petitioner's prior convictions qualified as violent felonies, and that "one month after [p]etitioner was sentenced in 2008, the Eleventh Circuit held that battery was a violent felony under the ACCA's elements clause in accordance with circuit precedent that a Florida battery conviction was a violent felony under the Sentencing Guidelines." Pet. App. B4. And the district court found no cases from the Eleventh Circuit "issued prior to [p]etitioner's sentencing in which a court held that Florida convictions for battery on a law enforcement officer, robbery, or resisting an officer with violence were violent felonies under the residual clause of the ACCA." Id. at B5. The district court therefore determined that petitioner had "not established that he would not have been sentenced as an armed career criminal but for the residual clause." Ibid.

The district court further explained that, "[t]o the extent [p]etitioner argues that his convictions for resisting an officer with violence and robbery do not qualify as violent felonies under the elements clause of the ACCA, this is a claim pursuant to Descamps v. United States, 570 U.S. 254 (2013)." Pet. App. B5. The court determined that petitioner "is not entitled to relief pursuant to Descamps" because "'Descamps is not retroactive for purposes of a second or successive § 2255 motion.'" Ibid. (citation omitted). The court also noted that "the Eleventh Circuit has held that Florida convictions for robbery with a firearm and resisting an officer with violence are violent felonies under the elements clause." Ibid. The court denied a COA. Id. at B6.

3. The court of appeals likewise denied a COA. Pet. App. A2.

ARGUMENT

Petitioner contends (Pet. 6-8) that the court of appeals incorrectly declined to grant him a COA. In his view, the district court erred in requiring him, as a prerequisite for relief on a claim premised on Samuel Johnson v. United States, 135 S. Ct. 2551 (2015), to show that his ACCA enhancement more likely than not was based on the residual clause that Samuel Johnson invalidated.[1]

[1] Other pending petitions for writs of certiorari raise similar issues. See Wilson v. United States, No. 18-9807 (filed June 24, 2019); McCarthan v. United States, No. 19-5391 (filed July 25, 2019).

This Court has recently and repeatedly denied review of similar issues in other cases, and it should follow the same course here.[2] The unpublished disposition below does not provide a suitable vehicle for further review in any event, because petitioner could not prevail under any circuit's approach. Petitioner also makes the subsidiary contention (Pet. 8-12) -- which would be relevant only if the Court were to agree that his second Section 2255 motion is validly based on Samuel Johnson -- that he is not ACCA-eligible

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[2] See Ziglar v. United States, No. 18-9343 (Oct. 15, 2019); Morman v. United States, No. 18-9277 (Oct. 15, 2019); Levert v. United States, No. 18-1276 (Oct. 15, 2019); Zoch v. United States, 140 S. Ct. 147 (2019) (No. 18-8309); Walker v. United States, 139 S. Ct. 2715 (2019)(No. 18-8125); Ezell v. United States, 139 S. Ct. 1601 (2019) (No. 18-7426); Garcia v. United States, 139 S. Ct. 1547 (2019) (No. 18-7379); Harris v. United States, 139 S. Ct. 1446 (2019) (No. 18-6936); Wiese v. United States, 139 S. Ct. 1328 (2019) (No. 18-7252); Beeman v. United States, 139 S. Ct. 1168 (2019) (No. 18-6385); Jackson v. United States, 139 S. Ct. 1165 (2019) (No. 18-6096); Wyatt v. United States, 139 S. Ct. 795 (2019) (No. 18-6013); Curry v. United States, 139 S. Ct. 790 (2019) (No. 18-229); Washington v. United States, 139 S. Ct. 789 (2019) (No. 18-5594); Prutting v. United States, 139 S. Ct. 788 (2019) (No. 18-5398); Sanford v. United States, 139 S. Ct. 640 (2018) (No. 18-5876); Jordan v. United States, 139 S. Ct. 593 (2018) (No. 18-5692); George v. United States, 139 S. Ct. 592 (2018) (No. 18-5475); Sailor v. United States, 139 S. Ct. 414 (2018) (No. 18-5268); McGee v. United States, 139 S. Ct. 414 (2018) (No. 18-5263); Murphy v. United States, 139 S. Ct. 414 (2018) (No. 18-5230); Perez v. United States, 139 S. Ct. 323 (2018) (No. 18-5217); Safford v. United States, 139 S. Ct. 127 (2018) (No. 17-9170); Oxner v. United States, 139 S. Ct. 102 (2018) (No. 17-9014); Couchman v. United States, 139 S. Ct. 65 (2018) (No. 17-8480); King v. United States, 139 S. Ct. 60 (2018) (No. 17-8280); Casey v. United States, 138 S. Ct. 2678 (2018) (No. 17-1251); Westover v. United States, 138 S. Ct. 1698 (2018) (No. 17-7607); Snyder v. United States, 138 S. Ct. 1696 (2018) (No. 17-7157).

under current law on the theory that his prior convictions for resisting an officer with violence, in violation of Fla. Stat. § 843.01 (1997 and 2001), were not convictions for violent felonies under the ACCA's elements clause. This Court has denied petitions for writs of certiorari raising similar contentions, and the same result is warranted here.[3] In all events, this case is not a suitable vehicle for reviewing either question presented because neither question alone is outcome-determinative.

1. A federal prisoner seeking to appeal the denial of a motion under Section 2255 to vacate his sentence must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted). Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), this Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that]

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[3] 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).

the issues presented are adequate to deserve encouragement to proceed further," and that any procedural grounds for dismissal were debatable, ibid. (citation omitted). Petitioner failed to make that showing.

2. For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Couchman v. United States, 139 S. Ct. 65 (2018) (No. 17-8480), and King v. United States, 139 S. Ct. 60 (2018) (No. 17-8280), a defendant who files a second or successive Section 2255 motion seeking to vacate his sentence based on Samuel Johnson is required to establish, through proof by a preponderance of the evidence, that his sentence in fact reflects Samuel Johnson error. To meet that burden, a defendant may point either to the sentencing record or to any case law in existence at the time of his sentencing proceeding that shows that it is more likely than not that the sentencing court relied on the now-invalid residual clause, as opposed to the enumerated-offenses or elements clauses. See Br. in Opp. at 13-18, King, supra (No. 17-8280); see also Br. in Opp. at 12-17, Couchman, supra (No. 17-8480).[4] That approach makes sense because Samuel Johnson "does not reopen all sentences increased by the Armed Career Criminal Act, as it has nothing to do with enhancements under the elements clause or the enumerated-crimes

[4] We have served petitioner with a copy of the government's briefs in opposition in Couchman and King.

clause." Potter v. United States, 887 F.3d 785, 787 (6th Cir. 2018).

The decision below is therefore correct, and the result is consistent with cases from the First, Sixth, Eighth, and Tenth Circuits. See Dimott v. United States, 881 F.3d 232, 242-243 (1st Cir.), cert. denied, 138 S. Ct. 2678 (2018); Potter, 887 F.3d at 787-788 (6th Cir.); Walker v. United States, 900 F.3d 1012, 1015 (8th Cir. 2018), cert. denied, 139 S. Ct. 2715 (2019); United States v. Snyder, 871 F.3d 1122, 1130 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018). As stated in the government's briefs in opposition in Couchman and King, however, some inconsistency exists in circuits' approach to Samuel Johnson-premised collateral attacks like petitioner's. Those briefs note that the Fourth and Ninth Circuits have interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A) -- which provides that a claim presented in a second or successive post-conviction motion shall be dismissed by the district court unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable," ibid.; see 28 U.S.C. 2244(b)(4), 2255(h) -- to require only a showing that the prisoner's sentence "may have been predicated on application of the now-void residual clause." United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017); see United States v. Geozos, 870 F.3d 890, 896-897

(9th Cir. 2017); see also Br. in Opp. at 17-19, Couchman, supra (No. 17-8480); Br. in Opp. at 16-18, King, supra (No. 17-8280).

After the government's briefs in opposition in those cases were filed, the Third Circuit interpreted the phrase "relies on" in Section 2244(b)(2)(A) in the same way, United States v. Peppers, 899 F.3d 211, 221-224 (2018), and it found the requisite gatekeeping inquiry for a second or successive collateral attack to have been satisfied where the record did not indicate which clause of the ACCA had been applied at sentencing, id. at 224. Further review of inconsistency in the circuits' approaches remains unwarranted, however, for the reasons stated in the government's previous briefs in opposition. See Br. in Opp. at 17-19, Couchman, supra (No. 17-8480); Br. in Opp. at 16-18, King, supra (No. 17-8280).

In any event, this case is not a suitable vehicle for this Court's review because petitioner could not prevail under any circuit's approach. The classification of his two Florida convictions for battery on a law enforcement officer did not depend on the residual clause. When petitioner was sentenced in 2008, circuit precedent held that Florida battery on a law enforcement officer was a "crime of violence" under the Sentencing Guidelines because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." United States v. Glover, 431 F.3d 744, 749 (11th Cir. 2005) (per curiam) (citation omitted), abrogated by Curtis Johnson v. United States,

559 U.S. 133 (2010). Given that precedent, petitioner's two prior Florida convictions for battery on a law enforcement officer plainly qualified as violent felonies under the ACCA's identically worded elements clause at the time of his sentencing. See Pet. App. B4-B5. Even under the minority approach to the burden of proof to establish that a successive Section 2255 motion is premised on Samuel Johnson error, their ACCA classification would not be subject to a collateral attack under Samuel Johnson, because in these circumstances, petitioner cannot even show that their classification "may have been" premised on the residual clause. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897.

Following this Court's decision in Curtis Johnson -- which held that battery under Florida law does not categorically require the use of physical force, 559 U.S. at 138-143 -- a conviction for Florida battery on a law enforcement officer no longer categorically qualifies as a violent felony under the ACCA's elements clause. See Gov't Mem. at 1-6, Santos v. United States, No. 18-7096 (Mar. 21, 2019). But developments in statutory-interpretation case law years after petitioner's sentencing do not show that petitioner "may have been" sentenced under the residual clause at the time of his original sentencing. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897. And a statutory-interpretation claim is not a valid basis for a second or successive Section 2255 motion. See 28 U.S.C. 2255(h); see also 28 U.S.C. 2244(b)(2).

3. Even if petitioner's Section 2255 motion were premised on a Samuel Johnson claim, he still would not be entitled to relief. Petitioner acknowledges (Pet. 8 n.2) that this Court held in Stokeling v. United States, 139 S. Ct. 544 (2019), that Florida robbery satisfies the ACCA's elements clause, id. at 555, and he therefore does not challenge the classification of his 1992 Florida robbery conviction as an ACCA predicate. And he would have two more violent felony convictions for resisting an officer with violence, in violation of Fla. Stat. § 843.01 (1997 and 2002). See PSR ¶¶ 36-37. Petitioner's contrary contention (Pet. 8-12) -- that those convictions do not qualify as ACCA predicates -- does not warrant this Court's review.

a. This Court held in Curtis Johnson v. United States, supra, that an offense involves "physical force" for purposes of the ACCA's elements clause when it requires "violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. In Stokeling v. United States, supra, the Court determined that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by" Curtis Johnson. 139 S. Ct. at 553.

Violence is an element of Section 843.01, which provides that any person who "knowingly and willfully resists, obstructs, or opposes any officer * * * in the lawful execution of any legal duty, by offering or doing violence to the person of such officer * * * is guilty of a felony of the third degree." Fla. Stat.

§ 843.01 (1997 and 2002) (emphasis added). And in applying a Florida sentencing statute with language and interpretation similar to the ACCA, see United States v. Vail-Bailon, 868 F.3d 1293, 1303 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 2620 (2018), Florida courts have explained that "[o]ffering to do violence plainly involves the 'threat of physical force or violence' while actually doing violence plainly involves the 'use . . . of physical force or violence,'" Harris v. State, 5 So. 3d 750, 751 (Fla. Dist. Ct. App. 2009) (quoting Fla. Stat. § 775.082(9)(a)(1)(o) (2006)). The court of appeals in United States v. Hill, 799 F.3d 1318 (11th Cir. 2015) (per curiam), thus correctly determined that "a prior conviction for resisting an officer with violence [under Florida law] categorically qualifies as a violent felony under the elements clause of the ACCA." Id. at 1322.

b. Petitioner relies (Pet. 9) on two Florida appellate decisions to argue that resisting an officer with violence under Florida law may involve no more than nominal force. But those decisions do not establish that resisting an officer with violence may involve a degree of force less than the "physical force" required by the ACCA's elements clause.

In I.N. Johnson v. State, 50 So. 529 (1909), the Florida Supreme Court affirmed a defendant's conviction for resisting an officer with violence where the defendant "gripped the hand of the officer, and forcibly prevented him from opening [a] door for the

purpose of making [an] arrest." Id. at 530. Because the defendant's conduct "necessarily involve[d] resistance," ibid., it was "inherently 'violent' in the sense contemplated by" Curtis Johnson. Stokeling, 139 S. Ct. at 553.

In State v. Green, 400 So. 2d 1322 (Fla. Dist. Ct. App. 1981), the Florida intermediate appellate court declined to dismiss a pending Section 843.01 charge at the pretrial motion-to-dismiss stage, where "ambiguity" in the description of the defendant's conduct created a factual question for the jury about whether the defendant's "resistance" "constitute[d] 'violence'" under the statute. Id. at 1323-1324. "Given the posture in which [the court in Green] was viewing the case, and its repeated references to this posture," the decision in Green does not establish that "de minimis force is sufficient to establish violence in § 843.01." United States v. Romo-Villalobos, 674 F.3d 1246, 1249 (11th Cir.) (per curiam), cert. denied, 568 U.S. 873 (2012).

c. Petitioner further contends (Pet. 11) that resisting an officer with violence under Section 843.01 does not satisfy the ACCA's elements clause because the statute does not require "specific intent" to use violence. In Frey v. State, 708 So. 2d 918 (1998), the Florida Supreme Court held that Section 843.01 is a general intent, rather than a specific intent, statute. Id. at 919-920. Petitioner, however, is incorrect that specific intent to use violence is required to constitute the "use * * * of physical force" under the ACCA's elements clause. Pet. 11-12

(citation omitted). Rather, it is sufficient that the defendant "knowingly and willfully * * * offer[] or do[] violence to the person" of another, as the Florida statute here requires. Fla. Stat. § 843.01 (1997 and 2002); see Romo-Villalobos, 674 F.3d at 1250 n.3 (explaining that Frey "held that the entire crime is one of general intent").

Petitioner's reliance (Pet. 10-11) on Leocal v. Ashcroft, 543 U.S. 1 (2004), is misplaced. The issue in Leocal was whether the defendant's prior conviction for driving under the influence of alcohol (DUI) was for a "crime of violence" under 18 U.S.C. 16(a), which defines "crime of violence" to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Court held that a "crime of violence" under that definition requires "a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense." Leocal, 543 U.S. at 11. The Florida statute at issue here satisfies that requirement. It requires general intent, see Frey, 708 So. 2d at 919-920, which is "a higher mens rea than" negligence or even recklessness.[5]

Contrary to petitioner's contention (Pet. 11), the courts of appeals have repeatedly rejected the argument that general intent

[5] Because the mental-state requirement is higher than recklessness, no need exists to hold this case pending the disposition of Walker v. United States, cert. granted, No. 19-373 (Nov. 15, 2019), in which the Court will consider whether crimes that can be committed with a mens rea of recklessness can qualify as ACCA predicates under the elements clause.

crimes cannot constitute violent felonies under the elements clause. See, e.g., United States v. Deiter, 890 F.3d 1203, 1212-1214 (10th Cir.) (rejecting argument that federal bank robbery, in violation of 18 U.S.C. 2113(a), does not quality as a violent felony under the elements clause because it is a "general intent crime," and noting that every circuit to address the issue had reached the same conclusion), cert. denied, 139 S. Ct. 647 (2018); United States v. Campbell, 865 F.3d 853, 857 (7th Cir.) (same for federal bank robbery under Sentencing Guidelines § 4B1.2(a) (2015)), cert. denied, 138 S. Ct. 347 (2017); United States v. Laurico-Yeno, 590 F.3d 818, 823 n.4 (9th Cir.) ("A general intent crime can satisfy the generic definition of a 'crime of violence"' in Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2009)), cert. denied, 562 U.S. 886 (2010).

The two cases cited by petitioner (Pet. 11) do not show any division in the circuits on this issue. The Ninth Circuit's decision in United States v. Sahagun-Gallegos, 782 F.3d 1094 (2015), contains only dictum in a footnote suggesting that a subsection of the Arizona aggravated assault statute would not constitute a "crime of violence" under the Sentencing Guidelines if the statute were a general intent crime. Id. at 1099 n.4. The other, a non-precedential opinion of the Fifth Circuit, concluded that an Iowa assault conviction did not constitute a "crime of violence" under Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2011) because the statute did not require the

defendant to have an "intent to harm or apprehension by the victim of potential harm," and "could include an accidental or jesting pointing of the weapon." United States v. Rico-Mendoza, 548 Fed. Appx. 210, 214 (2013) (per curiam). Neither the text of Section 843.01 nor Florida court decisions suggest that accidental or jesting behavior could similarly violate that provision.

d. Petitioner does not identify any precedential decision of another court of appeals on whether resisting an officer with violence under Florida law satisfies the ACCA's elements clause. Instead, petitioner cites (Pet. 9-10) the Tenth Circuit's unpublished decision in United States v. Lee, 701 Fed. Appx. 697, 700 (2017), which determined that "a conviction under § 843.01 does not qualify as an ACCA predicate," id. at 701. That unpublished decision, however, is "not precedential." 10th Cir. R. 32.1(A). And it relied on a narrow conception of "physical force" that has since been abrogated by this Court's decision in Stokeling. Compare Lee, 701 Fed. Appx. at 701 (stating that "struggling and grabbing during a robbery * * * does not arise to the requisite level of force"), with Stokeling, 139 S. Ct. at 555 (explaining that robbery committed by "grab[bing] the victim's fingers and peel[ing] them back" involves the requisite level of force). Accordingly, Lee does not create a conflict warranting this Court's review.

4. In all events, this case is a poor vehicle for further review of either question presented because neither question alone

is outcome-determinative. As discussed, see p. 14, supra, petitioner would have to prevail on both questions presented in order to be entitled to vacatur of his ACCA sentence. And the Court could not even reach the second question presented unless he prevails on the first. No further review is 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

SONJA M. RALSTON
Attorney

DECEMBER 2019