No. 19-6405

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST VEREEN, 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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QUESTIONS PRESENTED

1. Whether the record of petitioner's prior conviction for felony battery, in violation of Fla. Stat. § 784.03 (2010), demonstrated that the conviction was for "bodily harm" battery, a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

2. Whether petitioner was entitled to a jury instruction that possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), allows for an affirmative defense of "innocent transitory possession."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 920 F.3d 1300.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2019. A petition for rehearing was denied on May 31, 2019 (Pet. App. 42a). On August 19, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 28, 2019, and the petition was filed on October 25, 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 by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 32a. He was sentenced to 293 months of imprisonment, to be followed by five years of supervised release. Id. at 33a-34a. The court of appeals affirmed. Id. at 1a-31a.

1. In September 2015, a postal worker delivering mail at a Florida apartment complex noticed a gun in the mailbox of Apartment 43. Pet. App. 2a-3a. He left the gun, locked the mailbox door, and reported the gun to the police. Id. at 3a. Officers then saw petitioner "exit Apartment 43 and walk quickly to the mailbox while looking all around." Ibid. He opened the box with a key, removed the gun, closed the mailbox, placed the gun in his right back pocket, and began walking back toward his apartment. Ibid. The officers intercepted petitioner and told him to put his hands up. Ibid. He initially hesitated and reached toward his right back pocket, but eventually complied. Id. at 3a-4a. The officers arrested petitioner and seized the gun, along with a cell phone. Ibid. The officers then searched petitioner's apartment, where they found a black shotgun and a box of ammunition that matched the caliber of the gun in the mailbox. Id. at 5a.

A grand jury in the United States District Court for the Middle District of Florida 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. At trial, petitioner testified that he had been surprised to see the firearm in his mailbox. 11/1/16 Tr. 9-10. He stated that he removed the gun and placed it in his back pocket because he did not want his children to see him with it. Ibid. He further stated that he intended to report the gun to the police, but that the officers approached him as soon as he walked across the street toward his apartment. Id. at 10. Although petitioner had his cell phone with him when he found the gun, he stated that he did not want to stand by the mailbox and call the police because he was worried that "someone" might "come and try to shoot" him. Id. at 14.

Petitioner asked the district court to give the jury an "innocent possession" instruction, which would have required acquittal if the jury found that (1) "[t]he firearm was obtained innocently and held with no illicit purpose"; (2) petitioner's "[p]ossession of the firearm was transitory"; and (3) petitioner "took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." D. Ct. Doc. 29, at 3 (Mar. 2, 2016); see 11/1/16 Tr. 45. The district court declined to give that instruction. 11/1/16 Tr. 78-79. The court stated that such an instruction might be appropriate if, for example, petitioner needed to get the gun away from children "so nobody hurts themselves." Id. at 61. But the court contrasted that situation with the facts of this case, in which petitioner "had a locked

place where the gun could be kept" -- the mailbox where it was found -- and also "had a cell phone" that he could use to "call the police." Ibid. The court noted that the D.C. Circuit had adopted a form of an innocent-possession defense in United States v. Mason, 233 F.3d 619 (2001), but stated that "even if I agreed with the Mason case, I think that our facts are distinguishable." 11/1/16 Tr. 75; see id. at 71, 78-79.

The jury found petitioner guilty of possession of a firearm by a felon, in violation of Section 922(g)(1) and 924(e). Pet. App. 5a, 32a.

2. The default term of imprisonment for a violation of Section 922(g)(1) is zero to 120 months. 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), prescribes a term of 15 years to life if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense," 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 of 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 a "categorical approach," under which they consider "the elements of

the crime of conviction" to determine whether the crime is a violent felony. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (citation omitted). If the statute of conviction lists multiple alternative elements, rather than different factual means for satisfying the same element, the statute is "'divisible,'" and a court may apply a "'modified categorical approach,'" id. at 2249 (citation omitted), that "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy)" -- described in Shepard v. United States, 544 U.S. 13 (2005) -- "to determine what crime, with what elements, [the] defendant was convicted of," Mathis, 136 S. Ct. at 2249 (citing Shepard, 544 U.S. at 26). The court then assesses whether that crime is a violent felony -- i.e., whether it "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).

In this case, the Probation Office determined that petitioner qualified for sentencing under the ACCA because he had three prior Florida convictions for violent felonies: a 1999 conviction for child abuse, a 2000 conviction for aggravated battery, and a 2011 conviction for aggravated battery. Presentence Investigation Report (PSR) ¶¶ 16, 24, 32, 34, 39. The Probation Office further determined that the advisory Sentencing Guidelines range for petitioner's offense was 235-293 months of imprisonment. Pet. App. 6a. Petitioner objected to his classification as an armed career criminal under the ACCA, contending that his prior Florida

convictions were not for violent felonies. Gov't C.A. Br. 9-10. The government responded that all three of petitioner's prior convictions qualified as ACCA predicates, and that he also had a fourth qualifying conviction: a 2012 Florida conviction for felony battery. 3/9/17 Tr. 6; 3/10/17 Tr. 10, 19, 49; see PSR ¶ 40.

A person commits felony battery under Florida law if he commits a battery "subsequent[ly]" to a conviction for battery, aggravated battery, or felony battery. Fla. Stat. § 784.03(2) (2010). And a person commits 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." Id. § 784.03(1)(a); see Pet. App. 26a. The criminal information underlying petitioner's felony-battery conviction alleged that petitioner "did actually and intentionally touch or strike [the victim] against the will of [the victim], or did intentionally cause bodily harm to [the victim.]." D. Ct. Doc. 141-1, at 39 (Mar. 7, 2017). Petitioner pleaded guilty to that offense. Pet. App. 163a-164a. During the plea colloquy in state court, the prosecutor provided the factual basis for the plea, stating that petitioner had falsely imprisoned the victim for approximately ten hours, during which time he "repeatedly hit and struck" her "on her face and on her arm," and that police "observed injuries on [the victim] consistent with * * * the batteries that had been reported." Id. at 166a-167a. Petitioner accepted those facts. Id. at 167a.

The district court concluded that petitioner's 2012 felony-battery offense qualified as an ACCA predicate, based on an application of the modified categorical approach that looked to the transcript of the 2012 plea hearing, which petitioner acknowledged was an appropriate document to consider under Shepard. See Pet. App. 27a-28a; 3/9/17 Tr. 12.[1] The court further concluded that petitioner's aggravated-battery and child-abuse convictions qualified as violent felonies, for a total of four ACCA-predicate convictions. Pet. App. 6a. The court therefore concluded that petitioner was subject to the ACCA's minimum sentence of 15 years of imprisonment. Ibid. After considering the sentencing factors set forth in 18 U.S.C. 3553(a), the court sentenced petitioner to 293 months of imprisonment. Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 1a-31a.

a. The court of appeals first determined that the district court did not abuse its discretion in declining to give the innocent-possession instruction petitioner requested. Pet. App.

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[1] In the district court, the government argued, and the court concluded, that petitioner's 2012 felony-battery conviction qualified as an ACCA predicate because the "touch-or-strike" portion of the Florida battery statute was itself divisible into separate touching and striking offenses, and petitioner had committed a violent felony by striking the victim. Pet. App. 27a n.7. That argument relied on the Eleventh Circuit's then-extant decision in United States v. Green, 842 F.3d 1299 (2016), which was later vacated and superseded by a new decision that did not address whether a conviction under the "strike" prong qualifies as a violent felony, see United States v. Green, 873 F.3d 846, 860, 868-869 (2017), cert. denied, 138 S. Ct. 2620 (2018); see also Pet. App. 27a n.7.

7a-20a. The court of appeals observed that "the D.C. Circuit is the only appellate court -- out of at least half a dozen -- to have" recognized any form of an innocent-possession defense. Id. at 15a (citing Mason, 233 F.3d at 624-625). And the court here could "find nothing in the text to suggest the availability of [an innocent-possession] defense to a § 922(g)(1) charge." Id. at 8a. The court therefore "join[ed] the overwhelming majority of [its] sister circuits that have declined to recognize the theory of 'temporary innocent possession.'" Id. at 13a.

The court of appeals added that "the facts of Mason are peculiar, involving a firearm found in the open near a schoolyard where young children roam freely and could have discovered it." Pet. App. 16a. The court accordingly noted the "possib[ility] that, under the facts in Mason, the defense of necessity or justification would have been available to the defendant." Ibid. And the court observed that it, "like many other[circuits], has recognized that a necessity or justification defense" -- of a sort well-established at common law -- "may be available in § 922(g)(1) cases." Id. at 17a; see id. at 17a-18a. But the court explained that in this case petitioner had "explicitly declined to seek an instruction of necessity," and "instead sought" a defense that was not "long-established" under the common law and that "Congress would [not] have been familiar with." Id. at 18a-19a (citing Dixon v. United States, 548 U.S. 1, 13-14 (2006)).

Finally, the court of appeals determined that "even if the innocent transitory possession defense was somehow available," the "district court would not have abused its discretion in declining to give the instruction in this case" because it "is plain from this record that [petitioner] did not rid himself of possession of the firearm as promptly as reasonably possible," as required under his proposed instruction. Pet. App. 19a. The court observed that petitioner "testified that he had a cellphone on his person at the time that he saw the gun in the mailbox," and that petitioner therefore "could have left the gun in the mailbox and called the police to immediately report the firearm," but did not do so. Id. at 19a-20a. The court added that "police found during a search of [petitioner's] apartment a black shotgun, as well as a box of ammunition matching the caliber of the firearm [petitioner] took from the mailbox." Id. at 20a.

b. The court of appeals also affirmed the district court's determination that petitioner had at least three prior felony convictions that qualified as violent felonies and was therefore subject to sentencing under the ACCA. Pet. App. 22a-30a. As noted above, the district court had found that petitioner had four prior convictions that qualified as violent felonies under the ACCA. Id. at 6a. Applying circuit precedent, the court of appeals likewise found that petitioner's two aggravated-battery convictions were ACCA predicates. Id. at 24a-25a. And it further

found that the 2012 felony-battery conviction was a violent felony. Id. at 26a-29a.

The court of appeals explained that the Florida battery statute is divisible into two offenses: "touch or strike" battery (which is not categorically a violent felony) and "bodily harm" battery (which is). Pet. App. 27a-29a & n.7. The court acknowledged that the government had argued in the district court that, under then-extant but since-vacated circuit precedent, the "touch or strike" provision was itself divisible into separate "touch" and "strike" offenses, and petitioner had committed a violent felony by striking the victim. See id. at 27a n.7; p. 7 n.1, supra. But, the court of appeals emphasized, "the record makes it clear that" the government "relied on both the striking and bodily harm prongs at sentencing." Pet. App. 28a. After reviewing the relevant Shepard documents, all of which were before the district court, the court of appeals was "satisfied that [petitioner] was convicted of a form of Florida battery that is a violent felony -- the bodily harm prong." Id. at 27a. The court relied on, among other things, the plea colloquy in which the state prosecutor had explained -- and petitioner had agreed -- that police observed "injuries on [the victim] consistent with" petitioner's admitted batteries. Ibid. (brackets in original).

After determining that petitioner's two aggravated-battery and one felony-battery convictions provided the three violent felony convictions necessary to trigger the ACCA's enhanced

sentence, the court of appeals declined to consider whether petitioner's prior child-abuse conviction also qualified as an ACCA predicate. Pet. App. 30a.

ARGUMENT

Petitioner contends (Pet. 7-13) that the court of appeals misapplied the modified categorical approach, asserting that the record in this case lacks an adequate basis for determining that his prior conviction for Florida felony battery came under the bodily-harm prong of the statute. That factbound contention lacks merit; the court's record-specific decision does not implicate any conflict in authority warranting this Court's review; and this Court has recently denied petitions for writs of certiorari raising similar claims, see Gandy v. United States, No. 19-5089 (Nov. 18, 2019); Lee v. United States, No. 19-5085 (Nov. 18, 2019). In any event, this case is an unsuitable vehicle for addressing the first question presented, because petitioner has three qualifying ACCA predicates even without the felony-battery conviction.

Petitioner also renews his contention (Pet. 13-19) that the district court erred in declining to instruct the jury on his proposed innocent-possession defense. The court of appeals correctly recognized that 18 U.S.C. 922(g)(1) does not contain such a defense; petitioner "explicitly declined" to raise a common-law defense such as necessity, Pet. App. 18a-19a; and no significant conflict exists between the decision below and the D.C. Circuit's narrow decision in United States v. Mason, 233 F.3d

619 (2001). This Court has repeatedly declined to review petitions for writs of certiorari asserting similar claims. See, e.g., Kirkland v. United States, 555 U.S. 1072 (2008) (No. 08-5314); Baker v. United States, 555 U.S. 853 (2008) (No. 07-11175); Johnson v. United States, 549 U.S. 1266 (2007) (No. 06-8099); Gilbert v. United States, 549 U.S. 832 (2006) (No. 05-10763); Teemer v. United States, 544 U.S. 1009 (2005) (No. 04-9445); Hendricks v. United States, 540 U.S. 856 (2003) (No. 02-11129). The Court should follow the same course here, particularly because petitioner would not prevail even if an innocent-possession defense were available.[2]

1. a. The court of appeals did not err in determining, under the modified categorical approach, that petitioner's prior conviction for felony battery was an ACCA predicate. Pet. App. 22a-30a. Petitioner does not dispute that the Florida felony-battery statute is divisible into two offenses -- "touch or strike" battery and "bodily harm" battery -- the latter of which constitutes a violent felony under the ACCA. Id. at 26a; see id. at 29a; see also Fla. Stat. § 784.03(1)(a) (2010). Petitioner instead disputes (Pet. 7-9) whether the records underlying his felony-battery conviction adequately demonstrate that he was convicted of "bodily harm" rather than "touch or strike" battery. The court of appeals correctly applied Shepard v. United States, 544 U.S. 13 (2005), to resolve that record—intensive question.

[2] The same question is presented in the pending petition for a writ of certiorari in Faircloth v. United States, No. 19-6249 (filed Oct. 3, 2019).

Shepard explained that a court 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 presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." 544 U.S. at 20 (citation omitted). Here, the district court considered the transcript of the plea colloquy from petitioner's 2012 conviction for Florida felony battery, which demonstrated that the conviction was for "bodily harm" battery. Fla. Stat. § 784.03(1)(a) (2010); see Pet. App. 27a. In providing the factual basis for the felony-battery charge, the Florida prosecutor stated that petitioner had "repeatedly hit and struck" his victim "on her face and on her arm," resulting in "injuries on [the victim] consistent with * * * the batteries that had been reported." Pet. App. 166a-167a. Petitioner agreed to that factual basis for the charge. Id. at 167a. The court of appeals properly relied on that evidence to determine that his conviction for causing "injuries" by "hit[ing]" the victim was for bodily harm battery. Id. at 28a.

Petitioner contends (Pet. 7) that there is a "demand for certainty" when determining whether a defendant was convicted of an ACCA predicate, and that no such certainty exists here because petitioner admitted to facts that could also have supported a conviction for "touch or strike" battery. See Pet. 7-8 (suggesting that plea colloquy must "exclude the possibility that the defendant

was convicted under" the subsection of a divisible statute that would not qualify as an ACCA predicate). 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 a factual basis that specifically stated that he had caused bodily harm to his victim. See Pet. App. 167a. Petitioner therefore pleaded guilty to the bodily harm prong of Florida's battery statute -- the only prong that requires "caus[ing] bodily harm to another person." Fla Stat. § 784.03(1)(a)(2) (2010).

Petitioner suggests (Pet. 9-11) that the court of appeals erred by "looking beyond the proper Shepard documents." But as petitioner elsewhere acknowledges (Pet. 12), a "plea colloquy is an appropriate Shepard document." Shepard expressly identified a "colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant" as a permissible document to consult. 544 U.S. at 26. Petitioner also asserts (Pet. 11-12) that the court of appeals "ran afoul of this Court's holding" in Mathis v. United States, 136 S. Ct. 2243 (2016), "that the entire inquiry in determining an ACCA predicate focuses upon the elements of the prior crime." But in consulting the plea colloquy to determine which separate offense prescribed by the

Florida battery statute is reflected by petitioner's conviction, the court of appeals here did precisely what Mathis contemplates: it "look[ed] to a limited class of documents * * * to determine what crime, with what elements, [petitioner] was convicted of." Id. at 2249.

b. Petitioner contends (Pet. 7-8) that the decision below conflicts with United States v. Horse Looking, 828 F.3d 744 (8th Cir. 2016), and United States v. Kennedy, 881 F.3d 14 (1st Cir. 2018). No such conflict exists.

i. In Horse Looking, the Eighth Circuit 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 involves specified victims, 18 U.S.C. 921(a)(33)(A)(ii). 828 F.3d at 746. The defendant in Horse Looking had pleaded guilty to an indictment charging him with violating three subsections of the state statute -- including allegations that the defendant "(1) [a]ttempt[ed] to cause bodily injury to [his wife]," "(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]" -- which the parties agreed defined separate crimes. Ibid.; see id. at 747. The parties agreed that subsections (1) and (5)

qualify as misdemeanor crimes of domestic violence but that subsection (4) does not. Id. at 747.

During the plea colloquy, the South Dakota court "summarized the charges against [the defendant] by stating" that he had "'threatened to cause or[] * * * intentionally caused bodily injury to'" his wife. Horse Looking, 828 F.3d at 747. As the Eighth Circuit observed, that summary sheds little light on his offense because it "covers all three subsections" of the South Dakota statute. Id. at 747-748. The South Dakota court then asked the defendant if there was "some injury" to his wife. Id. at 748. The defendant said that "he was not aware of any" injuries, but his "attorney volunteered that the victim 'testified that she had some abrasions on her ankle or knee.'" Ibid.

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 [the defendant] could have been convicted under subsection (5)," which the parties agreed was a qualifying offense, the colloquy "d[id] not exclude the possibility that [the defendant] 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'" when determining whether a defendant was convicted of a qualifying offense. Ibid. (citation omitted).

The decision in Horse Looking, on a substantially different record, does not suggest a conflict with the record-specific decision below that would warrant this Court's review. Among other differences, the South Dakota court in Horse Looking couched the crimes in the alternative during the plea colloquy itself, stating that the defendant "threatened to cause or * * * intentionally caused bodily injury" to his wife. 828 F.3d at 747 (emphasis added). In the plea colloquy at issue here, by contrast, the Florida prosecutor plainly stated and petitioner agreed that the victim had suffered injuries consistent with his battery. Pet. App. 166a-167a. Moreover, the defendant in Horse Looking responded to the court's question by denying the injuries, 828 F.3d at 748, while petitioner here acknowledged them, Pet. App. 167a. Given the differences in the records, it is far from clear that the Eighth Circuit would have reached a different result than the court below in petitioner's case, or that the court below would have reached a different result than the Eighth Circuit in Horse Looking.

ii. The First Circuit's decision in Kennedy likewise does not indicate that another court of appeals would have reached a different result on the facts here. The question in Kennedy was whether the defendant's prior Massachusetts conviction for assault

and battery with a dangerous weapon (ABDW) qualified as a violent felony under the ACCA. 881 F.3d at 19. The First Circuit presumed that Massachusetts ABDW was divisible into two offenses: "intentional" ABDW, which is a violent felony, and "reckless" ABDW, which the First Circuit would not recognize as a violent felony. Ibid. The First Circuit concluded that the record of the defendant's prior conviction did not allow it "to find that he pled guilty to intentional ABDW." Id. at 20. The court observed that "the criminal complaint lacks any express allegation concerning [the defendant's] mental state," and that "the clerk's description of the accepted plea at the end of the colloquy" likewise "makes no mention of [the defendant's] state of mind." Ibid. The court noted that it might be possible to "infer" from facts admitted at the plea colloquy that the defendant had acted intentionally, but observed that the defendant never actually stated that he in fact had "acted intentionally * * * other than by implication." Id. at 21. Unable to locate in the plea colloquy "something that resembles what [the court] would find in a charging document or jury verdict in a tried case," id. at 23 -- as it believed this Court's precedents require -- the First Circuit declined to conclude that the defendant "was charged with and pled guilty to" the "intentional form of ABDW," id. at 21.

The decision in Kennedy would not foreclose the First Circuit from reaching the same result as the decision below on the record here. The First Circuit suggested that its approach could depend

in part on whether a mens rea was at issue, see Kennedy, 881 F.3d at 22, which it was not in this case. And the court of appeals here did not need to "infer" from petitioner's admitted behavior that he "was convicted of the ACCA-qualifying form of the offense." Id. at 21. Instead, petitioner's plea colloquy contained an "explicit discussion" of the issue that differentiated one possible offense of conviction from the other, id. at 23 -- namely, that petitioner had caused "injuries" to the victim, Pet. App. 166a-167a. Thus, unlike the plea colloquy in Kennedy, which did not even mention the dispositive mental state, the plea colloquy here "resembles what [a court] would find in a charging document or jury verdict in a tried case," 881 F.3d at 23 -- an express statement that the petitioner admitted committing bodily harm battery, resulting in injury.

c. In any event, this case would be an unsuitable vehicle to address the first question presented because, even if petitioner's felony-battery conviction does not count as a conviction for a violent felony, he nevertheless has the requisite three ACCA predicate offenses to qualify as a career offender. As noted above, the district court found that "all four" of petitioner's prior Florida convictions -- a 2000 conviction for aggravated battery, a 2011 conviction for aggravated battery, a 1999 conviction for child abuse, and the 2012 conviction for felony battery -- qualified as ACCA predicates. Pet. App. 6a. Petitioner does not challenge the court of appeals' determination that the

charging documents from both of his aggravated-battery convictions indicate that those convictions qualify as ACCA predicates. See id. at 24a-25a. And his child-abuse conviction likewise qualifies as a violent felony.

Florida law defines child abuse as the "[i]ntentional infliction of physical or mental injury upon a child." Fla. Stat. § 827.03(a) (1997). The district court determined that the statute was divisible into two offenses -- child abuse inflicting physical injury (which is an ACCA predicate) and child abuse inflicting mental injury (which it viewed not to be an ACCA predicate) -- and that petitioner had committed a physical-injury offense because the criminal information charged him with "knowingly or willfully abus[ing]" a child "by hitting and/or slapping" the child. D. Ct. Doc. 141-1, at 10; see 3/10/17 Tr. 13-19, 21, 34-35; see also Gov't C.A. Br. 38-39. Although the court of appeals did not reach the issue, see Pet. App. 30a, petitioner has not provided any basis to disturb the district court's determination. Petitioner is therefore incorrect (Pet. 19) that his ACCA "enhancement would be vacated" if this Court "were to reject the Eleventh Circuit's analytical approach" with respect to his felony-battery conviction. Petitioner would still have three ACCA predicates and would still be subject to sentencing under the ACCA. This Court's resolution of the first question presented would therefore have no meaningful effect on his sentence, further counseling against this Court's review.

2. As further explained in the government's brief in opposition in Faircloth v. United States, No. 19-6249, petitioner's assertion (Pet. 13-19) of an "innocent possession" defense to knowing possession of a firearm by a felon under Section 922(g)(1) likewise does not warrant further review.

a. Section 922(g)(1) makes it unlawful for a person "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce[] any firearm." 18 U.S.C. 922(g)(1). A person who "knowingly" violates Section 922(g)(1) can be imprisoned for up to 10 years (or longer under the ACCA). 18 U.S.C. 924(a)(2); see 18 U.S.C. 924(e)(1). The "term 'knowingly'" in a criminal statute "requires proof of knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193 (1998); see, e.g., Rehaif v. United States, 139 S. Ct. 2191, 2195-2196 (2019); Dixon v. United States, 548 U.S. 1, 5 (2006). This Court has construed that term here to require proof that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." Rehaif, 139 S. Ct. at 2194.

Contrary to petitioner's suggestion (Pet. 13-16), nothing in the language of Section 922(g)(1) or 924(a)(2) indicates that Congress considered knowing possession of a firearm by a person who knows he is a felon to be "innocent" under any circumstances. If Congress meant to require an inquiry into a felon's purpose for possessing a prohibited firearm, rather than a felon's knowledge

that he possessed a prohibited firearm, it would have included a mens rea term like "willfully," rather than "knowingly." Indeed, Congress expressly used "willfully" elsewhere in Section 924, 18 U.S.C. 924(a)(1)(D); see 18 U.S.C. 924(d)(1), which strongly indicates that Congress did not mean to implicitly require such a mens rea when it used "knowingly" in 18 U.S.C. 924(a)(2), see Russello v. United States, 464 U.S. 16, 23 (1983).

Petitioner observes that Rehaif v. United States, supra, highlighted the historical importance of "'a vicious will,'" or "culpable mental state" in describing general principles of federal mens rea. Pet. 18 (quoting Rehaif, 139 S. Ct. at 2196). But the Court's discussion was in support of its holding that Section 924(a)(2)'s "knowingly" requirement applies both to Section 922(g)'s possession element and to the status element at issue in that case. Rehaif, 139 S. Ct. at 2196-2197. The Court did not suggest that any background principles required unwritten exceptions applicable to a defendant who satisfies the knowledge requirement that Congress specified in Section 924(a)(2). Unlike, for example, possession of child pornography, as to which Congress explicitly provided an affirmative defense where the defendant "reported the matter to a law enforcement agency and afforded that agency access to each such image," Congress carved out no similar exception here. 18 U.S.C. 2252A(d); see United States v. Williams, 553 U.S. 285, 302 (2008) (discussing this "affirmative defense"); see also 18 U.S.C. 1466A(e) (similar defense).

Petitioner notes (Pet. 14-15) that this Court has suggested that federal courts may be able to recognize affirmative defenses that are not expressly stated in federal statutes under some circumstances. See Dixon, 548 U.S. at 13 & n.7; United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001); United States v. Bailey, 444 U.S. 394, 415 n.11 (1980). But to the extent the Court has assumed such authority exists, see Dixon, 548 U.S. at 13 & n.7; Oakland Cannabis, 532 U.S. at 490, it has indicated that only traditional and "strongly rooted" common-law affirmative defenses such as necessity and duress would be available, Dixon, 548 U.S. at 13 n.6; see Bailey, 444 U.S. at 415 n.11. Petitioner does not identify any common-law defense analogous to his proposed innocent-possession defense. See Pet. App. 18a-19a. In particular, he has differentiated his proposed defense from the defense of necessity, which he "explicitly declined to seek an instruction" on below, even though the Eleventh Circuit has recognized such a defense in Section 922(g) cases. Id. at 18a. The court of appeals was accordingly correct to conclude that petitioner is not entitled to the instruction he sought.

b. The court of appeals' decision does not implicate any conflict that would warrant this Court's review. The court of appeals here expressly joined the "overwhelming majority of * * * circuits that have declined to recognize" an innocent-possession defense of the kind sought by petitioner. Pet. App. 13a; see, e.g., United States v. Baker, 508 F.3d 1321, 1324-1327 (10th Cir.

2007), cert. denied, 555 U.S. 853 (2008); United States v. Johnson, 459 F.3d 990, 997-998 (9th Cir. 2006), cert. denied, 549 U.S. 1266 (2007); United States v. Gilbert, 430 F.3d 215, 216 (4th Cir. 2005), cert. denied, 549 U.S. 832 (2006); United States v. Teemer, 394 F.3d 59, 64-65 (1st Cir.), cert. denied, 544 U.S. 1009 (2005); United States v. DeJohn, 368 F.3d 533, 545-546 (6th Cir.), cert. denied, 543 U.S. 988 (2004); United States v. Hendricks, 319 F.3d 993, 1006-1008 (7th Cir. 2003), cert. denied, 540 U.S. 856 (2003).

As petitioner notes (Pet. 13-14), the D.C. Circuit allowed a form of an "innocent possession" defense in Mason. See 233 F.3d at 623; see ibid. ("At oral argument, Government counsel forthrightly conceded that, although narrow, there must be an innocent-possession defense."). Mason involved a distinctive set of facts in which a delivery-truck driver allegedly found a gun in a paper bag near a school and "took possession of the gun only to keep it out of the reach of the young children at the school," who might otherwise have readily accessed it. Id. at 620. Recognizing an affirmative defense in that circumstance may not squarely conflict with the decision below; the court of appeals acknowledged the "possib[ility] that, under the facts in Mason, the defense of necessity or justification would have been available to the defendant." Pet. App. 16a. In addition, Mason predates this Court's decisions in Oakland Cannabis and Dixon, which recognize the need for any judicially implied affirmative defense to be consistent with the statutory text and common-law principles. See

p. 23, supra. Particularly given the broad consensus rejecting its position on this issue, the D.C. Circuit might revisit Mason in an appropriate case.

c. In any event, this case would not be a suitable one in which to depart from the Court's consistent practice of denying certiorari on this question. See p. 12, supra. Petitioner would not be entitled to an "innocent possession" instruction even if that defense were available on the terms that the D.C. Circuit allowed in Mason and that petitioner requested in the district court.

As the court of appeals explained, "even if the innocent transitory possession defense was somehow available in this Circuit," the "district court would not have abused its discretion in declining to give the instruction in this case," because petitioner "did not rid himself of possession of the firearm as promptly as reasonably possible." Pet. App. 19a. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988). Petitioner's proposed defense required him to show that (1) "[t]he firearm was obtained innocently and held with no illicit purpose"; (2) the firearm possession was "transitory"; and (3) petitioner "took adequate measures to rid himself of possession of the firearm as promptly as reasonably

possible." D. Ct. Doc. 29, at 3; see Mason, 233 F.3d at 624 (similar). Petitioner did not satisfy those requirements here.

Most tellingly, petitioner testified that he had his cell phone when he saw the gun in the mailbox. Pet. App. 19a-20a. He therefore "could have left the gun in the mailbox and called the police to immediately report the firearm." Id. at 20a. He then "could have waited by the mailbox for the police to arrive, without ever touching the gun." Ibid. And "if he was somehow reluctant to call the police in a public place while he stood at the box, [petitioner] could have locked the gun back in the mailbox and returned to his apartment to make the call." Ibid. Yet petitioner did none of those things. Instead, he removed the gun from mailbox, where it was safe, and put it in his back pocket. Id. at 3a. In those circumstances, a jury would not conclude that petitioner "took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible," as petitioner's proposed instruction required. D. Ct. Doc. 29, at 3. Moreover, as the court of appeals correctly observed, any argument that petitioner's possession of the firearm was innocent is undercut by the fact that "police found during a search of his apartment a black shotgun, as well as a box of ammunition matching the caliber of the firearm [petitioner] took from the mailbox." Pet. App. 20a. Petitioner is therefore incorrect (Pet. 19) that the second question presented is "dispositive."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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