No. 19-6618

IN THE SUPREME COURT OF THE UNITED STATES

DELVIN DEON TINKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner's challenges to the decision below -- all three of which would have to succeed for him to be entitled to relief from his sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) -- lack merit and do not warrant this Court's review. The courts below found that he has four ACCA predicates (one more than necessary); both of the ones he disputes (resisting an officer with violence and aggravated assault) qualify as predicate offenses because they have "as an element the use, attempted use, or threatened use of physical force against the person of another" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i); and his challenge to the court of appeals'

determination that his collateral attack fails at the threshold for failure to assert a constitutional violation at sentencing is mistaken and in any event lacks significance to the lawfulness of his sentence.

1. Petitioner contends (Pet. 13-14) that the court of appeals erred in determining that his prior conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01 (2010), was a conviction for a violent felony under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). Pet. App. A4-A5; see Presentence Investigation Report (PSR) ¶ 36. This Court has denied petitions for writs of certiorari raising similar contentions, and the same result is warranted here.[1] For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Gubanic v. United States, 139 S. Ct. 77 (2018) (No. 17-8764), the court of appeals correctly determined that resisting an officer with violence under Florida law satisfies the ACCA's elements clause, and that determination does not implicate any conflict warranting this Court's review. See Br. in Opp. at 9-15, Gubanic, supra (No. 17-8764).[2]

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[1] See Starks v. United States, No. 19-5129 (Jan. 13, 2020); 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).

[2] We have served petitioner with a copy of the government's brief in opposition in Gubanic.

2. Petitioner also contends (Pet. 7-12) that the court of appeals erred in determining that his prior conviction for aggravated assault, in violation of Fla. Stat. § 784.021 (1997), was a conviction for a violent felony under the ACCA's elements clause. Pet. App. A4-A5; see PSR ¶ 28. Petitioner asserts (Pet. 10) that such assault may be committed recklessly and that reckless assault does not include "as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

The Court is currently considering in Walker v. United States, cert. granted, No. 19-373 (Nov. 15, 2019), whether an offense that can be committed with a mens rea of recklessness satisfies the ACCA's elements clause. The petition for a writ of certiorari in this case, however, need not be held pending the Court's decision in Walker. Even if petitioner's prior conviction for Florida aggravated assault were not a conviction for a violent felony, petitioner would still have three ACCA predicate convictions. Petitioner does not dispute that his two prior convictions for Florida robbery and Florida aggravated battery qualify as violent felonies under the ACCA's elements clause. Pet. App. A4; see PSR ¶¶ 28, 37. And as explained above, his prior Florida conviction for resisting an officer with violence likewise qualifies as a violent felony under the ACCA's elements clause. See p. 2, supra. Thus, regardless of whether his prior conviction for Florida

aggravated assault qualifies as a violent felony, petitioner would still be subject to sentencing under the ACCA.

In any event, the question before this Court in Walker is not presented in this case. The court of appeals' decision in this case did not discuss whether Florida aggravated assault can be committed recklessly, or whether that would affect the court's analysis under the ACCA. Pet. App. A3-A5. Instead, the court relied on prior circuit decisions, including Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-1338 & n.6 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015), to explain that Florida aggravated assault is a violent felony under the ACCA's elements clause. Pet. App. A3-A5. And those prior circuit decisions do not rely on the proposition that petitioner disputes.

In Turner, the Eleventh Circuit relied on the plain language of Florida's assault statutes to determine that Florida aggravated assault requires proof of intent to threaten to do violence. 709 F.3d at 1337-1338. It observed that, under Florida law, an "assault" is defined as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Ibid. (quoting Fla. Stat. § 784.011 (1981)). Turner thus did not need to consider, and did not consider, whether an offense committed with a mens rea of recklessness satisfies the ACCA's

elements clause. And the court of appeals has regularly applied Turner as binding precedent. See Pet. App. A3, A5; United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018), cert. denied, 139 S. Ct. 1255 (2019); United States v. Golden, 854 F.3d 1256, 1256-1257 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017); In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016).

Petitioner suggests (Pet. 10) that Turner was wrongly decided, citing Florida state court decisions that, in his view, indicate that Florida aggravated assault requires only a mens rea of recklessness. But this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). This Court has recently and repeatedly denied similar petitions for writs of certiorari involving Florida aggravated assault.[3] The same result is warranted here.

[3] See Brooks v. United States, 139 S. Ct. 1445 (2019) (No. 18-6547); Hylor v. United States, 139 S. Ct. 1375 (2019) (No. 18-7113); Lewis v. United States, 139 S. Ct. 1256 (2019) (No. 17-9097); Stewart v. United States, 139 S. Ct. 415 (2018) (No. 18-5298); Flowers v. United States, 139 S. Ct. 140 (2018) (No. 17-9250); Griffin v. United States, 139 S. Ct. 59 (2018) (No. 17-8260); Nedd v. United States, 138 S. Ct. 2649 (2018) (No. 17-7542); Jones, supra (No. 17-7667).

3. Petitioner additionally contends (Pet. 5-7) that the court of appeals erred in requiring him, as a prerequisite for relief on a claim premised on Johnson, supra, to show that his ACCA enhancement more likely than not was based on the residual clause that Johnson invalidated. Pet. App. A2-A3. This Court has recently and repeatedly denied review of similar issues in other cases.[4] It should follow the same course here.

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[4] See Starks v. United States, No. 19-5129 (Jan. 13, 2020); Wilson v. United States, No. 18-9807 (Jan. 13, 2020); McCarthan v. United States, No. 19-5391 (Dec. 9, 2019); 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). Other pending petitions for writs of certiorari raise similar issues. See, e.g., Anzures v. United States, No. 19-6037 (filed Sept. 17, 2019).

For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Morman v. United States, cert. denied, No. 18-9277 (Oct. 15, 2019), and Casey v. United States, 138 S. Ct. 2678 (2018) (No. 17-1251), a defendant who files a motion under 28 U.S.C. 2255 seeking to vacate his sentence on the basis of Johnson is required to establish, through proof by a preponderance of the evidence, that his sentence in fact reflects 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 9-10, Morman, supra (No. 18-9277); Br. in Opp. at 7-9, 11-13, Casey, supra (No. 17-1251).[5] The decision below is therefore correct. As noted in the government's briefs in opposition in Casey and Morman, however, some inconsistency exists in circuits' approach to Johnson-premised collateral attacks like petitioner's. See Br. in Opp. at 10-12, Morman, supra (No. 18-9277); Br. in Opp. at 13-15, Casey, supra (No. 17-1251). But further review of inconsistency in the circuits' approaches remains unwarranted. See Br. in Opp. at 10-12, Morman, supra (No. 18-9277); Br. in Opp. at 14-15, Casey, supra (No. 17-1251).

[5] We have served petitioner with copies of the government's briefs in opposition in Morman and Casey.

In any event, this case would be an unsuitable vehicle for reviewing the question presented. Even if petitioner's Section 2255 motion were premised on a Johnson claim, he still would not be entitled to relief. As explained above, petitioner does not dispute that his two prior convictions for Florida robbery and Florida aggravated battery qualify as violent felonies under the ACCA's elements clause, see p. 3, supra, and his prior Florida conviction for resisting an officer with violence likewise qualifies as a violent felony under the ACCA's elements clause, see p. 2, supra. Because petitioner would still have three ACCA predicate convictions, he would still be classified as an armed career criminal, and he would not be entitled to any relief.

The petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JANUARY 2020

[6] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.