No. 19-8929

IN THE SUPREME COURT OF THE UNITED STATES

TEDAREL LESHUN PRESTON, 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

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN C. RABBITT
Acting Assistant Attorney General

FINNUALA K. TESSIER
Attorney

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

QUESTION PRESENTED

Whether petitioner's prior conviction for aggravated assault, in violation of Fla. Stat. § 784.021 (1989), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Preston, No. 18-cr-60008 (May 24, 2018)

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

United States v. Preston, No. 18-12343 (Apr. 17, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-8929

TEDAREL LESHUN PRESTON, 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

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-4) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 707.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2019. A petition for rehearing was denied on January 24, 2020 (Pet. App. A2, at 1). The petition for a writ of certiorari was filed on June 18, 2020. 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 Southern District of Florida, petitioner was convicted on one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1, at 1-4.

1. During a traffic stop in 2017, police observed petitioner reach into his waistband, remove an object, and place it under a seat in the car. Presentence Investigation Report (PSR) ¶¶ 5-6. As petitioner was removed from the vehicle, a loaded handgun was found in that location. Ibid.

The following year, a federal grand jury indicted petitioner on one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1. He was convicted following a jury trial. Judgment 1.

2. A conviction under 18 U.S.C. 922(g)(1) has a default statutory 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, 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * 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). The first clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office's presentence report classified petitioner as an armed career criminal under the ACCA based on a prior Florida conviction for aggravated assault and two prior Florida convictions for cocaine possession. PSR ¶¶ 19, 23, 31, 32. Petitioner objected to classification as an armed career criminal, contending that Florida aggravated assault does not qualify as a violent felony. Sent. Tr. 11-21. The district court overruled that objection, explaining that this offense "certainly qualifies" as a violent felony under Eleventh Circuit precedent. Id. at 21. The court then sentenced petitioner to 180 months of imprisonment. Id. at 21, 29.

3. The court of appeals affirmed. Pet. App. A1, at 1-4. The court explained that in Turner v. Warden Coleman FCI (Medium),

709 F.3d 1328 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 576 U.S. 591 (2015), it had held that "aggravated assault under Fla. Stat. § 784.021 is a violent felony under the elements clause of the ACCA," and that it had recently "reaffirmed Turner's holding." Pet. App. A1, at 3 (citing United States v. Golden, 854 F.3d 1256 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017), and United States v. Deshazior, 882 F.3d 1352 (11th Cir. 2018), cert. denied, 139 S. Ct. 1255 (2019)).

ARGUMENT

Petitioner contends (Pet. 5) that the court of appeals erred in determining that his prior conviction for Florida aggravated assault, in violation of Fla. Stat. § 784.021 (1989), was a conviction for a "violent felony" under the ACCA's elements clause. Specifically, he asserts that Florida aggravated assault may be committed with a mens rea of recklessness and that such assault does not include "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). Although this Court has granted review in Borden v. United States, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), to address whether an offense that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" in the ACCA's elements clause, that question is not presented in this case. The petition here should therefore be denied.

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. See Pet. App. A1, at 2. Instead, the court relied on a prior circuit decision, Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1338 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 576 U.S. 591 (2015), to explain that Florida aggravated assault is a violent felony under the ACCA's elements clause. Pet. App. A1, at 2. And Turner does 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 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.'" Id. at 1137-1138 (quoting Fla. Stat. § 784.011 (1981)). The court explained that, in light of that definition, Florida aggravated assault "will always include as an element the threatened use of physical force against the person of another." Id. at 1338 (citation and ellipsis omitted). Turner therefore had no need to consider, and did not address, whether an offense committed with a mens rea of recklessness can satisfy the ACCA's elements clause.

And as the decision below exemplifies, the court of appeals has regularly applied Turner as binding precedent without needing to consider, or addressing, that ACCA issue. See, e.g., Pet. App. A1, at 3-4; 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 does not provide any explanation of why the analysis in Turner is mistaken or would warrant this Court's review. At most, petitioner notes (Pet. 4) that he argued below that Turner "overlooked" unidentified "Florida decisional law" that, in his view, indicates that Florida aggravated assault requires only a mens rea of recklessness. But it is far from clear that Florida aggravated assault -- which requires, inter alia, "an intentional unlawful threat by word or act to do violence to the person of another," Fla. Stat. § 784.011(1) (1989) (emphasis added); see id. § 784.021(1) -- can be committed through reckless conduct alone. And in any event, 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.* The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

FINNUALA K. TESSIER
Attorney

SEPTEMBER 2020

* See Ponder v. United States, No. 19-7076 (June 8, 2020); Brooks v. United States, No. 19-7504 (May 4, 2020); Tinker v. United States, 140 S. Ct. 1137 (2020); Brooks v. United States, 139 S. Ct. 1445 (2019); Hylor v. United States, 139 S. Ct. 1375 (2019); Lewis v. United States, 139 S. Ct. 1256 (2019); Stewart v. United States, 139 S. Ct. 415 (2018); Flowers v. United States, 139 S. Ct. 140 (2018); Griffin v. United States, 139 S. Ct. 59 (2018); Nedd v. United States, 138 S. Ct. 2649 (2018); Jones v. United States, 138 S. Ct. 2622 (2018).