No. 20-5157

IN THE SUPREME COURT OF THE UNITED STATES

DENARD STOKELING, 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

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QUESTIONS PRESENTED

1. Whether petitioner, who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1), was entitled to plain-error relief because the district court did not advise him during the plea colloquy that one element of that offense is knowledge of his status as a felon, where the court of appeals determined that he had failed to show that the district court's error affected the outcome of the proceedings.

2. Whether petitioner's conviction for robbery under Florida law qualifies as a violent felony under the Armed Career Criminal Act, 18 U.S.C. 924(e), as this Court held in petitioner's previous appeal, 139 S. Ct. 544.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Stokeling, No. 15-cr-20815 (Apr. 28, 2016)

United States v. Stokeling, No. 15-cr-20815 (Mar. 8, 2019)

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

United States v. Stokeling, No. 16-12951 (Apr. 6, 2017)

United States v. Stokeling, No. 19-11003 (Jan. 6, 2020)

Supreme Court of the United States:

Stokeling v. United States, No. 17-5554 (Jan. 15, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-3) is not published in the Federal Reporter but is reprinted at 798 Fed. Appx. 443. An earlier opinion of the court of appeals (Pet. App. A7, at 1-5) is not published in the Federal Reporter but is reprinted at 684 Fed. Appx. 870. The order of the district court is not published in the Federal Supplement but is available at 2016 WL 8983383.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2020. A petition for rehearing was denied on February 10, 2020

(Pet. App. A2, at 1). The petition for a writ of certiorari was filed on July 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea 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). Pet. App. A1, at 2; Judgment 1-2. The district court sentenced petitioner to 73 months of imprisonment, to be followed by two years of supervised release. Pet. App. A6, at 2-3; Judgment 1-2. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A7, at 1-2. This Court granted petitioner's petition for a writ of certiorari and affirmed. 139 S. Ct. 544. On remand, the district court sentenced petitioner to 180 months of imprisonment, to be followed by two years of supervised release. Pet. App. A9, at 2-3. The court of appeals affirmed. Pet. App. A1, at 1-3.

1. On July 27, 2015, two people burgled the Tongue & Cheek restaurant in Miami Beach, Florida. 139 S. Ct. at 549. Petitioner was an employee of the restaurant, and local police "identified him as a suspect based on surveillance video from the burglary and witness statements." Ibid. Police learned from a criminal background check that petitioner had previously been convicted of three felonies -- home invasion, kidnapping, and robbery -- for

which he had been sentenced to a total of 12 years of imprisonment. Ibid.; D. Ct. Doc. 30, at 1 (Mar. 2, 2016); 2017 Presentence Investigation Report (PSR) ¶ 27. When confronted, petitioner admitted that he had a gun in his backpack, and police indeed found in the backpack a 9-mm semiautomatic firearm, a magazine, and 12 rounds of ammunition. 139 S. Ct. at 549.

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). Pet. App. A3. In March 2016, after a colloquy conducted under Federal Rule of Criminal Procedure 11, petitioner pleaded guilty without a plea agreement. Pet. App. A4, at 1. The magistrate judge who presided over the hearing reviewed with petitioner the constitutional rights that he was waiving and described "the nature of the charge" to which petitioner was pleading guilty as requiring proof that petitioner "had been convicted of a felony involving a sentence in excess of one year" and that he "did unlawfully possess and obtain a weapon and ammunition." Id. at 12. Consistent with the courts of appeals' uniform interpretation of the felon-in-possession offense at that time, the magistrate judge did not advise petitioner that the government would also need to prove that he was aware that he was a felon when he possessed the firearm. See United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam) (holding that knowledge of status is not an element of an offense under 18 U.S.C. 922(g) and 924(a)(2)), abrogated by Rehaif v. United States,

139 S. Ct. 2191 (2019); see also Rehaif, 139 S. Ct. at 2195 (noting prior uniformity).

After considering petitioner's answers to the questions posed during the colloquy, the magistrate judge found that petitioner was "aware of the nature of the charges and the consequences of his plea of guilty, and the plea is a knowing and voluntary plea supported by" an adequate factual basis. Pet. App. A4, at 13. In making that determination, the magistrate judge noted that the parties had entered into a stipulation of facts that the government would be able to prove beyond a reasonable doubt if the case proceeded to trial. Id. at 13-14. Those facts included that petitioner "had been sentenced to twelve years in prison" for his three prior felony convictions under Florida law. D. Ct. Doc 30, at 1.

2. The Probation Office prepared a presentence report recommending that petitioner be sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). 139 S. Ct. at 549. The ACCA specifies a statutory sentencing range of 15 years to life imprisonment when a defendant convicted of violating 18 U.S.C. 922(g) has three or more prior convictions for "serious drug offense[s]" or "violent felon[ies]" that were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). The term "violent felony" is defined to include "any crime punishable by imprisonment for a term exceeding one year * * * that * * * has as an element the use, attempted use, or threatened use of

physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). That portion of the statutory definition is commonly referred to as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1262 (2016).

Petitioner objected to the Probation Office's recommendation, arguing that his 1997 conviction for robbery under Florida law did not satisfy the elements clause. 139 S. Ct. at 549. Florida law defined "robbery" to "mean[] the taking of money or other property * * * with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1995). The district court sustained petitioner's objection, reciting the facts underlying the 1997 conviction -- that petitioner "grabbed [the victim] by the neck and tried to remove her necklaces" while she "held onto" them, Pet. App. A5, at 10 -- and concluding that "these facts do not qualify under the existing law to justify an enhancement," id. at 11. The court sentenced petitioner to 73 months of imprisonment. Id. at 23.

3. On the government's appeal, the court of appeals vacated and remanded for resentencing. Pet. App. A7, at 1-2. The court of appeals explained that the district court had erred in looking to the underlying facts of petitioner's crime instead of applying a categorical approach that focuses on the elements of the offense. Id. at 1. And the court of appeals observed that, applying the

categorical approach, it had "held many times that a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the" ACCA. Ibid. The court further explained that it had reached that conclusion in precedential opinions after considering "'even the least culpable of the[] acts'" reached by the statute, which the court understood to be robbery by putting the victim in fear. Ibid. (quoting United States v. Fritts, 841 F.3d 937, 941 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)).

This Court granted petitioner's petition for a writ of certiorari and affirmed. 139 S. Ct. at 555. The Court stated that petitioner's case required it "to decide whether a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of 'physical force' within the meaning of" the ACCA's elements clause. Id. at 548. After considering the ACCA's statutory text and history, and relevant precedents interpreting the elements clause, this Court answered that question in the affirmative. Id. at 548-555. The Court then applied its construction of the elements clause "to Florida's robbery statute." Id. at 554.

After quoting the language of Section 812.13(1) and reviewing pertinent decisions of the Florida courts, this Court held that "the application of the categorical approach to the Florida robbery statute is straightforward." 139 S. Ct. at 555. "Because the term 'physical force' in ACCA encompasses the degree of force

necessary to commit common-law robbery, and because Florida robbery requires that same degree of 'force,' Florida robbery qualifies as an ACCA-predicate offense under the elements clause." Ibid.; see ibid. ("Robbery under Florida law corresponds to that level of force and therefore qualifies as a 'violent felony' under ACCA's elements clause."). The Court accordingly "affirm[ed] the judgment of the Eleventh Circuit." Ibid.

4. On remand for resentencing, petitioner again objected to being sentenced under the ACCA. D. Ct. Doc. 82 (Jan. 24, 2019); D. Ct. Doc. 86 (Feb. 20, 2019). He argued in relevant part that, notwithstanding this Court's decision, his Florida robbery conviction is not a violent felony because the putting-in-fear variant of the offense purportedly employs "a negligence standard" and does not entail the use or threatened use of physical force. Pet. App. A8, at 15, 22, 38; D. Ct. Doc. 82, at 10-13. The government responded that this Court had held without qualification that a Florida robbery conviction satisfies the ACCA's elements clause and that petitioner's argument based on the putting-in-fear language in Section 812.13(1) was in any event foreclosed by circuit precedent. Pet. App. A8, at 27-30. The district court agreed with the government, calling it the court's "responsibility and duty to follow" the decisions that this Court and the court of appeals "earlier pronounced in the same case." Id. at 40. The court accordingly overruled petitioner's objections and sentenced him to 180 months of imprisonment. Ibid.

After pronouncing sentence, the district court asked petitioner's attorneys whether they had any objections to the sentence other than ones already presented. Pet. App. A8, at 42. Petitioner's counsel stated that she wanted to "preserve one issue for appeal" and noted "a case" then pending before this Court, Rehaif v. United States, No. 17-9560. Pet. App. A8, at 43-44. The court stated that petitioner had not mentioned that case in his sentencing arguments, despite the court giving him "the opportunity" to do so. Id. at 44. Petitioner's counsel responded that she had not done so because circuit law was to the "contrary" and it was "impossible for [the court] to rule in our favor now." Ibid. Counsel did not describe the question presented in Rehaif, did not explain how a decision in that case could affect petitioner, and did not identify or request any particular form of relief. Ibid.

5. Before petitioner filed his opening brief on appeal, this Court issued its decision in Rehaif. In Rehaif, this Court concluded that the courts of appeals had erred in their interpretation of the mens rea required to prove unlawful firearm possession under 18 U.S.C. 922(g) and 924(a)(2). Abrogating the precedent of every circuit, the Court held that the government not only "must show that the defendant knew he possessed a firearm," but "also that he knew he had the relevant status" -- e.g., that he was a felon -- "when he possessed it." 139 S. Ct. at 2194; see Pet. App. A6 (recognizing abrogation). Petitioner then filed an

opening brief renewing his sentencing challenge and also arguing that, in light of Rehaif, his indictment was defective and his guilty plea was not knowing and voluntary. Pet. C.A. Br. 20-28. He further argued in his reply brief that, if his challenge to his guilty plea were subject to plain-error review, he was entitled to relief because the error was "structural" in nature and assertedly subject to correction even without any showing of prejudice. Pet. C.A. Reply Br. 21-26.

The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1, at 1-3. The court determined as a threshold matter that petitioner's "new argument[] concerning * * * the voluntariness of his guilty plea" could be reviewed "for plain error" only, and that to prevail under that standard petitioner "must prove an error occurred that was plain and that affected his substantial rights." Id. at 2. The court noted the government's concession that petitioner could show a clear error because, in light of Rehaif, "the district court erred * * * when it failed to advise [petitioner] during his plea colloquy that the government had to prove that he knew he was a felon when he possessed the firearm and ammunition." Id. at 3.

The court of appeals determined, however, that petitioner was not entitled to "vacatur of his conviction because he shows no reasonable probability that, but for the error, he would not have entered his plea." Pet. App. A1, at 3 (brackets and quotation marks omitted). The court observed that petitioner had "not

argue[d] that he would not have pleaded guilty had he been told" of Rehaif's knowledge requirement. Ibid. And the court found that "silence * * * unsurprising" because petitioner had admitted his prior felony convictions during the plea colloquy and had signed a "factual proffer" further admitting that "he had served 12 years in prison." Ibid. "Because the record establishes that [petitioner] knew of his status as a felon," the court explained, "he cannot prove that he was prejudiced by the error during his plea colloquy." Ibid.

The court of appeals also rejected petitioner's challenge to his sentence as "barred by the law of the case." Pet. App. A1, at 3. The court observed that the law-of-the-case doctrine bars a party "from relitigating an issue that a court necessarily or by implication decided against him in an earlier appeal." Ibid. The court explained that its initial decision in petitioner's case, "which the Supreme Court affirmed," foreclosed his "argument that robbery by putting in fear does not involve violent force." Ibid. And the court found that "[n]one of the exceptions to the law of the case doctrine" would support revisiting that decision. Ibid.

DISCUSSION

Petitioner contends (Pet. 14-19) that the district court erred by not informing him during his plea colloquy that knowledge of felon status is an element of the felon-in-possession offense, and that review is warranted to resolve a circuit conflict over whether, in light of this Court's decision in Rehaif v. United

States, 139 S. Ct. 2191 (2019), such an error automatically entitles a defendant to relief on direct appeal without any showing of prejudice. Petitioner also contends (Pet. 19-23) that, notwithstanding this Court's 2019 decision affirming a remand for resentencing under the ACCA, his previous conviction for robbery under Florida law does not qualify as a violent felony under that statute.

The court of appeals correctly determined that petitioner is not entitled to vacatur of his felon-in-possession conviction because he cannot show that an error during his plea colloquy affected his substantial rights or seriously undermined the fairness, integrity, or public reputation of judicial proceedings. See United States v. Marcus, 560 U.S. 258, 262 (2010). Petitioner is correct, however, that the decision below implicates a circuit conflict that has arisen in the wake of Rehaif. As the government explains in its petition for a writ of certiorari in United States v. Gary, No. 20-___ (filed Oct. 5, 2020) (Gary Pet.), that conflict warrants the Court's view this term. Because Gary is a better vehicle for resolving the first question that petitioner also seeks to present, the Court should hold the petition in this case pending its consideration of the petition in Gary and then dispose of it as appropriate.[1] Further review is unwarranted on the second

[1] The same issue is also presented by the petitions for writs of certiorari in Rolle v. United States, No. 20-5499 (filed Aug. 21, 2020); Lavalais v. United States, No. 20-5489 (filed Aug. 20, 2020); Ross v. United States, No. 20-5404 (filed Aug. 14, 2020); Hobbs v. United States, No. 20-171 (filed Aug. 13, 2020);

question presented, however, because this Court held in petitioner's previous appeal that his Florida robbery conviction qualifies as a violent felony under the ACCA, and his current challenges to that determination lack merit.

1. For the reasons stated on pages 9 to 21 of the government's petition for a writ of certiorari in Gary, a defendant who pleaded guilty to possessing a firearm as a felon in violation of 18 U.S.C. 922(g)(1) and 924(e)(1) without being advised that knowledge of status is an element of that offense is not automatically entitled to plain-error relief.[2] Rather, the defendant may obtain such relief only if he can make a case-specific showing on both the third and fourth prerequisites for plain-error relief. The court of appeals correctly denied plain-error relief to petitioner, who cannot satisfy either of those requirements.

As an initial matter, the court of appeals correctly reviewed (Pet. App. A1, at 2) petitioner's forfeited challenge to the voluntariness of his guilty plea for plain error. See Fed. R. Crim. P. 52(b). Petitioner did not cross-appeal from his original judgment to lodge any challenge to his indictment or guilty plea. And while petitioner did mention the then-pending Rehaif case at the end of his resentencing hearing after stating that he "want[ed]

Sanchez-Rosado v. United States, No. 20-5453 (filed Aug. 6, 2020); and Blackshire v. United States, No. 19-8816 (filed June 22, 2020).

[2] We have served petitioner with a copy of the government's petition for a writ of certiorari in Gary.

to preserve one issue for appeal," petitioner never explained the relevance of that decision to his case or what relief he was seeking from the district court. Pet. App. A8, at 43-44. As a result, that statement did not serve to bring any "claimed error" affecting his guilty plea "'to the court's attention.'" See Holguin-Hernandez v. United States, 140 S. Ct. 762, 766 (2020) (quoting Fed. R. Crim. P. 52(b)).

A defendant is entitled to plain-error relief only if he can show (1) "an error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Marcus, 560 U.S. at 262 (citation and internal quotation marks omitted). For a defendant who pleaded guilty to a felon-in-possession offense without being advised that conviction requires proof that he knew his felon status, this Court's decision in Rehaif suffices to establish the first two requirements, because it shows an error that was clear or obvious "at the time of direct appellate review." Henderson v. United States, 568 U.S. 266, 269 (2013).

A defendant who asserts such an error, however, must still make case-specific showings of prejudice and an effect on the fairness, integrity, or public reputation of judicial proceedings. To satisfy the third element, the defendant must show a reasonable probability that he would have proceeded to trial had he been so

advised. See Gary Pet. 9-18. And the fourth element is not satisfied where it is evident that the defendant was in fact aware of his status as a felon. See id. at 18-21. Accordingly, the court of appeals correctly determined that petitioner's inability to show a reasonable probability that he would have insisted on a trial (or even to claim that he would have), as well as petitioner's admission that "he had served 12 years in prison," foreclosed plain-error relief here. Pet. App. A1, at 2.

2. Although the decision below is correct, this Court should grant review this Term to address the circumstances in which plain-error relief is warranted for a defendant who asserts Rehaif error in his plea colloquy. As petitioner observes (Pet. 14, 16-17), the courts of appeals are in conflict as to whether a defendant in a Section 922(g) case is automatically entitled to plain-error relief when the district court has not advised him of the knowledge-of-status element during his plea colloquy, without regard to whether that error affected the outcome of the proceedings. See Gary Pet. 21-22. For the reasons explained in the government's petition in Gary, that conflict requires this Court's intervention.

This case, however, is not a suitable vehicle for plenary review, for two reasons. First, the circuit conflict has arisen in the context of plain-error review, when defendants have challenged their guilty pleas based on Rehaif for the first time on appeal. See Gary Pet. 21-22. Yet petitioner continues to

dispute that his claim under Rehaif is subject to plain-error review. Petitioner asserts (Pet. 10-11, 18) that he "preserved" his challenge "in the district court" by briefly mentioning the then-pending decision in Rehaif after the court had resentenced him. He also suggests (Pet. 18) -- incorrectly -- that the court of appeals "applied de novo * * * review." See Pet. App. A1, at 2 (reviewing "for plain error" petitioner's "new argument[] concerning * * * the voluntariness of his guilty plea"). The potential need to address a threshold dispute as to the appropriate standard of review makes this case an unsuitable vehicle for resolving a circuit conflict over whether, on plain-error review, not adivising a pleading defendant of Rehaif's knowledge-of-status requirement is a structural error that entitles a defendant to relief without a showing of prejudice.

Second, the court of appeals' short, unpublished opinion addresses only the third of the four requirements for obtaining plain-error relief. Pet. App. A1, at 3. Because it found that petitioner could not satisfy that requirement, it did not need to consider (and, in fact, does not mention) the "additional" requirement (Pet. 18) -- which this Court found dispositive in United States v. Cotton, 535 U.S. 625, 633-634 (2002), and Johnson v. United States, 520 U.S. 461, 468-469 (1997) -- that the error have seriously affected the fairness, integrity, and public reputation of the judicial proceedings. In contrast, the Fourth Circuit's precedential opinion in United States v. Gary, 954 F.3d

194 (2020), expressly held that a district court's failure to advise a pleading defendant of Rehaif's knowledge element "is structural" error and automatically satisfies both the third and the fourth requirements of this Court's plain-error test. Id. at 198, 202-208. And three other courts of appeals have acknowledged but rejected the Fourth Circuit's approach in precedential opinions, including in opinions that similarly address the third and fourth requirements of the plain-error test. See Trujillo, 960 F.3d at 1205-1207; Lavalais, 960 F.3d at 188. Granting review in Gary would put squarely before the Court a decision that addresses both plain-error requirements about which the circuits are divided. Granting review in this case would not.

For those reasons, Gary presents a better vehicle for plenary review. But because the Court's disposition in Gary could potentially affect the proper resolution of this case, the petition in this case should be held pending the Court's consideration of the petition in Gary and then disposed of as appropriate.

3. Petitioner separately contends (Pet. 19-23) that his 1997 conviction for Florida robbery is not a violent felony under the ACCA, notwithstanding this Court's determination in his prior appeal that "[r]obbery under Florida law * * * qualifies as a 'violent felony' under ACCA's elements clause." 139 S. Ct. at 555. Petitioner's contention does not warrant further review.

a. As an initial matter, petitioner presents no argument that the court of appeals erred in finding his challenge to his

ACCA sentence to be barred by the law-of-the-case doctrine. Pet. App. A1, at 3. That "doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided.'" Musacchio v. United States, 136 S. Ct. 709, 716 (2016) (quoting Messenger v. Anderson, 225 U.S. 436, 444 (1912)). It also "may describe an appellate court's decision not to depart from a ruling that it made in a prior appeal in the same case." Ibid. The doctrine informs this Court's consideration of whether to depart from a decision it issued at an earlier stage of the same litigation. See Agostini v. Felton, 521 U.S. 203, 236 (1997) (considering exceptions to the doctrine before overruling a decision issued in the same litigation). And the concerns underlying the doctrine are fully applicable here, where petitioner's current argument would mean that no Florida robbery conviction qualifies as a violent felony, see Pet. C.A. Br. 45; Pet. App. A8, at 29-30 -- the exact opposite result from the one that this Court reached in Stokeling.

Petitioner contends (Pet. 19) that the Court in Stokeling had no "occasion to consider or decide" whether the putting-in-fear variant of "Florida's indivisible robbery statute * * * would also meet the elements clause." But the government argued to this Court, without rebuttal from petitioner, that he did "not dispute that the 'intimidation' form of Florida robbery, which requires placing the victim in fear of bodily harm, or injury, * * * categorically satisfies the ACCA's elements clause." U.S. Br. 9,

Stokeling, supra, No. 17-5554 (Aug. 9, 2018) (citation omitted). Members of the Court questioned the government about the putting-in-fear language in Fla. Stat. § 812.13(1) (1995) at oral argument. See Tr. of Oral Argument 37-40, Stokeling, supra (Oct. 9, 2018); see also Pet. C.A. Br. 29-30 & n.4 (discussing the colloquy). And the Court twice quoted the language of Section 812.13(1), including "putting in fear," before holding that "Florida robbery qualifies as an ACCA-predicate offense under the elements clause." 139 S. Ct. at 549, 554-555.

The Court's opinion "affirm[ing]" (139 S.Ct. at 555) a decision that had determined that Florida robbery "categorically qualifies as a violent felony under the elements clause," Pet. App. A7, at 1, therefore leaves no room for additional arguments by the same defendant that would mean that no conviction under Section 812.13(1) so qualifies. And the threshold law-of-the-case issue, which petitioner does not meaningfully address, would prevent the Court from even reaching the second question presented in the petition.

b. In any event, petitioner's new argument fails to establish that the earlier decision of this Court (or the court of appeals) is "clearly erroneous and would work a manifest injustice," Arizona v. California, 460 U.S. 605, 618 n.8 (1983), so as to trigger an exception to the law-of-the-case doctrine, or even that his objection to classifying his previous conviction as a violent felony has merit. Petitioner cites (Pet. 19, 21) several Florida

appellate decisions that he claims demonstrate that Florida robbery may involve no more than "negligent conduct." But Florida courts have never suggested that robbery in violation of Section 812.13(1) can be committed negligently. See United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir.) (finding it "inconceivable that any act which causes the victim to fear death or great bodily harm" in the course of taking the victim's property "would not involve the use or threatened use of physical force"), cert. denied, 565 U.S. 885 (2011).

In the cases cited by petitioner (Pet. 20) -- namely, State v. Baldwin, 709 So. 2d 636, 637-638 (Fla. Dist. Ct. App. 1998); Smithson v. State, 689 So. 2d 1226, 1228 (Fla. Dist. Ct. App. 1997); and Magnotti v. State, 842 So. 2d 963, 965 (Fla. Dist. Ct. App. 2003) -- the state court addressed only the mental state of the victim, not the mens rea of the defendant. In Baldwin, for example, the court observed that under Section 812.13(1)'s putting-in-fear prong, "actual fear need not be proved"; rather, the test is whether "the circumstances attendant to the robbery were such as to ordinarily induce fear in the mind of a reasonable person." 709 So. 2d at 637. Baldwin and the other cases that petitioner cites did not say anything about the requisite mens rea of the defendant under the putting-in-fear prong, much less suggest that a defendant could be convicted of Florida robbery through a negligent threat of death or great bodily harm.

c. Both before and after its decision in Stokeling, this Court denied petitions for writs of certiorari raising the same argument concerning the mens rea required to prove robbery under Florida law. See, e.g., Shotwell v. United States, 139 S. Ct. 1251 (2019) (No. 17-6540); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756). And since Stokeling, the courts of appeals have uniformly applied its holding to state robbery statutes that have putting-in-fear or intimidation variants analogous to Florida's. See, e.g., United States v. Dinkins, 928 F.3d 349, 357 & n.6 (4th Cir. 2019) (North Carolina); United States v. Fuller-Ragland, 931 F.3d 456, 464-465 (6th Cir. 2019) (Michigan); Jones v. United States, 922 F.3d 864, 867 (8th Cir. 2019) (Missouri).

Petitioner nevertheless asserts (Pet. 21-23) that the Court's review is warranted because the court of appeals' decision here conflicts with United States v. Dixon, 805 F.3d 1193, 1197 (2015), in which the Ninth Circuit held that a California robbery statute that encompassed the "accidental" use of force did not satisfy the elements clause; and that his petition should at least be held pending resolution of Borden v. United States, cert. granted, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), in which the Court has granted review to consider whether the "use * * * of physical force" under 18 U.S.C. 924(e)(2)(B)(i) includes reckless conduct. But both of petitioner's assertions rest on the premise that the "putting in fear" language in Florida's robbery statute

permits conviction based on a negligence (or, at least, recklessness) standard. As explained above, see p. 18-19, supra, he provides no meaningful support for that premise.

Accordingly, petitioner has not demonstrated either that the decision below implicates a circuit conflict or that the forthcoming decision in Borden, however it resolves the question presented there, will affect the judgment in this case. The petition for certiorari therefore need not be held pending Borden and, as to the second question presented, should be denied.

CONCLUSION

On the first question presented, the petition for a writ of certiorari should be held pending consideration of the government's petition for a writ of certiorari in United States v. Gary, No. 20-___ (filed Oct. 5, 2020), and then disposed of as appropriate. On the second question presented, the petition should be denied.

Respectfully submitted.

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