

No. 20-8047

IN THE SUPREME COURT OF THE UNITED STATES

CORNELIUS R. CAPLE, 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 contends (Pet. 8) that his prior conviction for Florida aggravated assault, in violation of Fla. Stat. § 784.021 (1997), does not qualify as a “crime of violence” under Sentencing Guidelines § 4B1.2(a)(1), on the ground that an offense that can be committed with a mens rea of recklessness does not include as an element the “use, attempted use, or threatened use of physical force against the person of another.”¹ In Borden v. United States,

¹ Petitioner separately contends (Pet. 7) that his prior conviction for possessing cocaine and heroin with intent to sell, in violation of Fla. Stat. § 893.13(a)(1) (2006), is not a “controlled substance offense” under Sentencing Guidelines § 4B1.2(b). In doing so, he relies on the arguments presented in the petition for a writ of certiorari in Curry v. United States,

141 S. Ct. 1817 (2021), this Court determined that Tennessee reckless aggravated assault, in violation of Tenn. Code Ann. § 39-13-102(a)(2) (2003), lacks a mens rea element sufficient to satisfy the definition of a “violent felony” under a similarly worded provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). A remand of this case for further consideration in light of Borden is not warranted, however, because the resolution of the question presented in Borden does not affect the reasoning of the decision below.

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 Guidelines. See Pet. App. A4-A5. Instead, the court relied on prior circuit decisions in 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, 135 S. Ct. 2551 (2015), and United States v. Golden, 854 F.3d 1256, 1257 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017), to explain that Florida aggravated assault is a crime of violence. Pet. App. A4-A5. In Turner, the court determined that Florida aggravated assault is a violent felony under the ACCA’s elements clause. 709 F.3d at 1338. And in Golden, the court applied that determination

No. 20-7284 (Feb. 24, 2021). For the reasons stated in the government’s brief in opposition in that case (a copy of which has been provided to petitioner, and which is available on this Court’s online docket), those arguments lack merit. This Court denied certiorari in Curry, and it should do the same here.

to the similarly worded elements clause of Section 4B1.2(a)(1). 854 F.3d at 1257.

Turner's determination, however, did not rest on a view that the ACCA's elements clause encompasses crimes that can be committed with a mens rea of recklessness. Instead, the Eleventh Circuit in Turner found that Florida aggravated assault requires proof of intent to threaten to do violence. 709 F.3d at 1337-1338. The court 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(1) (1981)). Turner thus did not need to consider, and did not consider, the question that Borden addressed, namely, whether an offense committed with a mens rea of recklessness can satisfy the ACCA's elements clause.

Petitioner does not discuss Turner or Florida's definition of assault. He asserts that "Florida aggravated assault * * * can be committed with a mens rea of mere recklessness." Pet. 8 (emphasis omitted). This Court, however, has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." 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). And petitioner provides no reason to deviate from that practice in this case. This Court has

recently and repeatedly denied similar petitions for writs of certiorari involving Florida aggravated assault.² The same result is warranted here.

Indeed, petitioner's Florida conviction for aggravated assault with a firearm would independently qualify as a crime of violence under Section 4B1.2(a)(2)'s enumerated-offenses clause because it corresponds to the generic offense of aggravated assault. To determine whether a prior state conviction constitutes a crime of violence under that clause, a court generally applies the "categorical approach," which involves comparing the elements of the offense of conviction to the elements of the "generic" offense listed in the Guideline (here, aggravated assault). Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). As the Eleventh and Fifth Circuits have both determined in unpublished decisions (addressing Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)), Florida's offense of aggravated assault with a firearm -- which requires that a defendant engage in "an assault * * * [w]ith a deadly weapon without intent to kill," Fla. Stat. § 784.021(1)(a) (2013)

² See Billings v. United States, No. 20-7101 (June 7, 2021); Ponder v. United States, 141 S. Ct. 90 (2020) (No. 19-7076); Tinker v. United States, 140 S. Ct. 1137 (2020) (No. 19-6618); 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 v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667).

-- corresponds to the generic offense of aggravated assault, which is defined as "a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon." United States v. Palomino Garcia, 606 F.3d 1317, 1332 (11th Cir. 2010); see United States v. Escobar-Pineda, 428 Fed. Appx. 961, 962 (11th Cir. 2011) (per curiam) (reasoning that, because Florida aggravated assault under "Fla. Stat. § 784.021(1)(a) requires the use of a deadly weapon, it 'prohibits behavior that is * * * within the generic, contemporary meaning of aggravated assault'" (quoting Palomino Garcia, 606 F.3d at 1333); United States v. Romero-Ortiz, 541 Fed. Appx. 460, 461 (5th Cir. 2013) (per curiam) (similar).

The petition for a writ of certiorari should be denied.³

Respectfully submitted.

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³ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.