No. 24-5776

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN HARRIS, 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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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's prior convictions for aggravated assault, in violation of Fla. Stat. § 784.021 (1989), qualify as convictions for a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is available at 2024 WL 304268686.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2024. On August 20, 2024, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 16, 2024. The petition was filed on October 15, 2024. 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 following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 8a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 9a-10a. The court of appeals affirmed. Id. at 1a-7a.

1. In February 2021, police officers discovered a loaded shotgun in the passenger seat of petitioner's car while conducting a traffic stop. Pet. App. 2a; Presentence Investigation Report (PSR) ¶¶ 9-10. A federal grand jury charged petitioner with one count of possessing a firearm and ammunition following a felony conviction. Petitioner pleaded guilty to the count charged. Pet. App. 2a.

The Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶¶ 22, 102. At the time of petitioner's offense, the default term of imprisonment for possessing a firearm following a felony conviction was zero to 10 years. See 18 U.S.C. 924(a)(2) (2006).[1] However, the ACCA prescribes a penalty of 15 years to life imprisonment if the

[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A., Tit. II, § 12004(c), 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The ACCA defines "violent felony" to include any crime punishable by more than 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). This is often called the ACCA's "elements clause." See, e.g., Borden v. United States, 593 U.S. 420, 424 (2021) (plurality opinion).

The Probation Office determined that three prior Florida convictions for offenses that qualified as ACCA predicates: convictions in 2003 and 2015 for aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1)(a) (1989), and a conviction in 2007 for delivery of cocaine. PSR ¶¶ 30, 45, 51. The Probation Office further determined that those offenses were committed on different occasions. Id. ¶ 22.

Petitioner objected to ACCA classification on the theory (inter alia) that "recklessness suffices for conviction of Florida aggravated assault," and the offense is therefore excluded from the elements clause under Borden v. United States. D. Ct. Doc. 34, at 5 (Apr. 12, 2022); see id. at 3-7. The district court, however, agreed with the Probation Office that petitioner qualified for sentencing under the ACCA and sentenced petitioner to 180 months of imprisonment. See Pet. App. 2a-3a, 9a.

2. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-7a.

The court of appeals rejected petitioner's argument that a conviction for Florida aggravated assault "does not categorically qualify as a violent felony because the offense 'can be committed with a merely reckless mens rea.'" Pet. App. 4a (citation omitted). The court observed that in Somers v. United States, 66 F.4th 890, 895-896 (11th Cir. 2023), it had recognized "that Florida aggravated assault cannot be committed recklessly and thus categorically qualifies as a violent felony under the elements clause of the ACCA." Pet. App. 4a.

ARGUMENT

Petitioner renews his contention (Pet. 10-29) that his prior convictions for Florida aggravated assault were not convictions for a "violent felony" under the ACCA's elements clause because they could have been committed with a mens rea of recklessness. He argues that the court of appeals' contrary decision gave insufficient weight to Florida intermediate appellate decisions that were on the books at the time of his convictions but have since been abrogated. Petitioner's contention lacks merit. The decision below is consistent with this Court's ACCA precedents, and there is no generalized conflict over the weight to give pre-conviction decisions of state intermediate appellate courts in determining whether a state offense satisfies the elements clause. And the recent narrow disagreement between the Eleventh Circuit

and the Seventh Circuit on the specific question whether Florida aggravated-assault convictions from the early 2000s qualify as violent felonies under the ACCA stems from a disagreement about how Florida courts interpret Florida statutes, concerns an issue of diminishing importance, and does not warrant this Court's review. This Court has repeatedly denied petitions for writs of certiorari presenting the question whether Florida aggravated assault is a violent felony under the ACCA.[2] It should follow the same course here.

1. The court of appeals correctly determined that petitioner's prior convictions for Florida aggravated assault qualify as convictions for violent felonies under the ACCA's elements clause.

The "elements clause" of the ACCA defines a "violent felony" as "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

[2] See, e.g., Jones v. United States, 141 S. Ct. 2827 (2021) (No. 20-7447); Preston v. United States, 141 S. Ct. 661 (2020) (No. 19-8929); Ponder v. United States, 141 S. Ct. 90 (2020) (No. 19-7076); Brooks v. United States, 140 S. Ct. 2743 (2020) (No. 19-7504); Tinker v. United States, 140 S. Ct. 1137 (2020) (No. 19-6618); Brooks v. United States, 587 U.S. 920 (2019) (No. 18-6547); Hylor v. United States, 586 U.S. 1249 (2019) (No. 18-7113); Lewis v. United States, 586 U.S. 1192 (2019) (No. 17-9097); Stewart v. United States, 586 U.S. 968 (2018) (No. 18-5298); Flowers v. United States, 586 U.S. 850 (2018) (No. 17-9250); Griffin v. United States, 586 U.S. 827 (2018) (No. 17-8260); Nedd v. United States, 585 U.S. 1005 (2018) (No. 17-7542); Jones v. United States, 584 U.S. 1034 (2018) (No. 17-7667).

another." 18 U.S.C. 924(e)(2)(B). To determine whether a prior conviction was for a "violent felony" under the ACCA, courts apply a "categorical approach," which requires analysis of "elements of the crime of conviction" rather than the defendant's particular offense conduct. Mathis v. United States, 579 U.S. 500, 504 (2016). In Borden v. United States, 593 U.S. 420 (2021), this Court interpreted the elements clause to exclude the category of offenses that can be committed with a mens rea of recklessness. Id. at 425 (plurality opinion); id. at 446 (Thomas, J., concurring in the judgment).

Here, the court of appeals correctly determined that -- as a matter of state law -- Florida aggravated assault, for which petitioner was twice convicted, "cannot be committed recklessly." Pet. App. 4a. Florida defines an "assault" 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." Fla. Stat. § 784.011 (1989). The State's definition of "aggravated assault" incorporates that definition of "assault." Id. § 784.021. As the Eleventh Circuit has long recognized in light of that definition, Florida assault categorically maps onto the text of the ACCA's elements clause, because it "will always include 'as an element the . . . threatened use of physical force against the person of another.'"

Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1338, cert. denied, 570 U.S. 925 (2013) (citation omitted).

After this Court's decision in Borden, the Eleventh Circuit certified questions to the Supreme Court of Florida about the requisite mens rea for committing assault and aggravated assault under Florida law. See Somers v. United States, 15 F.4th 1049 (2021) (Somers I). The Eleventh Circuit observed that while "[p]anel decisions from each of Florida's intermediate appellate courts seem to support the plain reading of the text" -- namely, that a "specific intent to threaten another person is indeed a necessary element of simple assault" -- two panels of Florida's Fifth District Court of Appeal had previously "explicated Florida's law of aggravated assault in a different way." Id. at 1054-1055 (citing Kelly v. State, 552 So. 2d 206, 208 (Fla. Dist. Ct. App. 1990); LaValley v. State, 633 So. 2d 1126, 1128 (Fla. Dist. Ct. App. 1994)).

The Supreme Court of Florida answered the certified question in a unanimous opinion explaining that "Florida's assault statute, section 784.011(1), requires not just the general intent to volitionally take the action of threatening to do violence, but also that the actor direct the threat at a target, namely, another person." Somers v. United States, 355 So. 3d 887, 892-893 (Fla. 2022) (Somers II). The court observed that it "need not look further than the plain language of section 784.011(1), which confirms that assault does require what the Somers court refers to

as 'specific intent' to direct action at another. The act that section 784.011(1) prohibits (when the second and third elements also exist, of course) is an intentional threat to do violence to another person." Id. at 891. And the court made clear that "[b]ecause section 784.011(1) does require that the intentional threat to do violence be directed at or targeted towards another individual, it is 'aimed in that prescribed manner' referred to by the Supreme Court in Borden, and therefore cannot be accomplished via a reckless act." Id. at 892 (citation omitted).

After the Supreme Court of Florida returned the Somers case to the Eleventh Circuit, the Eleventh Circuit recognized that because Florida aggravated assault "cannot be committed with a mens rea of recklessness," it qualifies as a violent felony under the ACCA. 66 F.4th 890, 893-896 (11th Cir. 2023) (Somers III). And noting that "'[w]hen the Florida Supreme Court . . . interprets a statute, it tells us what that statute always meant,'" the Eleventh Circuit found that "Somers cannot rely on earlier decisions of Florida's intermediate courts of appeal to avoid" the "clear holding" of the Supreme Court of Florida on the certified question. Id. at 896 (quoting United States v. Fritts, 841 F.3d 937, 943 (11th Cir. 2016), cert. denied, 582 U.S. 917 (2017)) (brackets omitted). The Eleventh Circuit then applied the Supreme Court of Florida's definitive interpretation of the aggravated-assault statute to petitioner's case. Pet. App. 4a. That application of the Supreme Court of Florida's explication of the

plain text of the Florida statute, as it existed at the time of petitioner's crimes, was correct.

Petitioner errs in asserting (Pet. 24-27) that the Eleventh Circuit's approach is inconsistent with this Court's decision in McNeill v. United States, 563 U.S. 816 (2011), and Brown v. United States, 602 U.S. 101 (2024). McNeill held that when determining whether a "previous conviction" qualifies as an ACCA predicate (there, as a "serious drug offense" rather than a "violent felony") a court should "consult the law that applied at the time of that conviction." 563 U.S. at 820 (citations omitted). And Brown reaffirmed that "ACCA requires sentencing courts to examine the law as it was when the defendant violated it, even if that law is subsequently amended." 602 U.S. at 111. The issue in this case, however, does not concern changes to the statutory scheme of the sort at issue in McNeill and Brown. See McNeill, 563 U.S. at 818-819; Brown, 602 U.S. at 106-107. Instead, it involves only the application of the definitive interpretation of the plain text of a state statute, as it existed at the time of petitioner's prior crimes, by the highest court in the State.

Petitioner denies (Pet. 28) that the Supreme Court of Florida's interpretation applies to his case, on the theory that certain statutory-interpretation decisions of that court do not explicate "what that statute always meant," Somers III, 66 F.4th at 896 (citation omitted), such that the convictions that remain on his record might reflect conduct that was in fact not a crime

under the Florida aggravated-assault statute. But even if that theory were correct, it is at bottom an argument that the court of appeals misapplied Florida law, not an argument that the court misapplied the ACCA. Particularly given the Eleventh Circuit's longstanding recognition that Florida aggravated assault is an elements-clause crime, see Turner, 709 F.3d at 1338, and the Supreme Court of Florida's reliance on the plain text of the state statute to confirm that understanding, see Somers II, 355 So. 3d at 892, petitioner's claim does not warrant this Court's review. See Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.").

2. Petitioner contends that the decision below implicates a broad conflict over "which state court decisions federal courts should consult" when evaluating the state of the law at the time of a defendant's prior conviction. Pet. 11. In his view, the Eleventh Circuit placed weight on the definitive interpretation of the Supreme Court of Florida in circumstances where the First, Fourth, Fifth, Seventh, and Eighth Circuits would instead have focused exclusively on disagreement among nondefinitive state decisions that predated his prior convictions -- even if the state supreme court has subsequently made clear what the plain text of the state statute means. See id. at 11-16. No such methodological conflict exists. And while the Seventh Circuit has recently disagreed with the Eleventh Circuit on the narrow question of how

to evaluate Florida assault convictions from the early 2000s, that disagreement turns on questions of Florida law and does not merit this Court's review.

a. Petitioner does not identify a decision of the First, Fourth, Fifth, or Eighth Circuits that would clearly have given dispositive weight to preconviction decisions on one side of a disagreement among state appellate courts as to the interpretation of a state statute, where the State's highest court has since clarified that those decisions were wrong. For example, in United States v. Cornette, 932 F.3d 204, 213-215 (2019), the Fourth Circuit treated an apparently undisputed decision of an intermediate appellate court as "the binding interpretation of Georgia law." Id. at 214. In United States v. Roblero-Ramirez, 716 F.3d 1122 (2013), the Eighth Circuit looked to the law as announced by a state supreme court itself at the time of the defendant's state conviction. Id. at 1126-1127. The Fifth Circuit likewise relied on a decision of the state's highest court in its since-vacated decision in United States v. Vickers, 967 F.3d 480, 486 (2020), cert. granted, judgment vacated, 141 S. Ct. 2783 (2021). And United States v. Faust, 853 F.3d 39 (2017) is even further afield, as the First Circuit simply declined to rely on a decision of a state intermediate appellate court that postdated a defendant's state crime as indicative of the prior interpretation of state law. See id. at 57.

Here, in contrast, petitioner here does not contend that Florida law was settled in his favor before the state supreme court's definitive decision. Instead, as the Eleventh Circuit observed, and petitioner does not dispute, before the issue was certified for a final decision by the state supreme court, "[p]anel decisions from each of Florida's intermediate appellate courts seem[ed] to support the plain reading of the text" -- as the state supreme court itself later would -- "that a specific intent to threaten another person is indeed a necessary element of simple assault." Somers I, 15 F.4th at 1054; see United States v. Anderson, 99 F. 4th 1106, 1110 (7th Cir. 2024) (likewise noting conflict in state intermediate appellate courts before the time of petitioner's convictions).

Moreover, the decisions "explicat[ing] Florida's law of aggravated assault in a different way" were from the Fifth District Court of Appeal, id. at 1055, not the Third and Second Districts, where petitioner's convictions were entered, PSR ¶¶ 30, 51. And because "Florida courts were split on the breadth of the assault statute" by the time of petitioner's convictions, Anderson, 99 F. 4th at 1110, those out-of-district decisions were not binding on the trial courts in his case, Pardo v. State, 596 So. 2d 665, 667 (Fla. 1992) (discussing when intermediate appellate decisions bind Florida trial courts). Indeed, they did not even appear to bind the Fifth District itself, which later reasoned that "[t]o establish an aggravated assault, the State must prove that the

defendant had the specific intent to do violence to the person of another." Denard v. State, 30 So. 3d 595, 596 (Fla. Dist. Ct. App. 2010).

b. Petitioner does identify (Pet. 16-18) one narrow and nascent disagreement, between the Eleventh Circuit and the Seventh Circuit. As petitioner notes, a divided panel of the Seventh Circuit in United States v. Anderson recently concluded that a 2001 conviction for Florida aggravated assault is not categorically a violent felony under the ACCA because it could have been committed with a mens rea of recklessness.

The panel acknowledged that the Supreme Court of Florida had made clear that Florida assault could be considered recklessly. Anderson, 99 F.4th at 1111. And it recognized that, "[u]nder rules of federal statutory construction, we ordinarily presume that a court's construction of a federal statute merely clarifies existing law and is 'an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" Id. at 1111 (quoting Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312-313 (1994)). But it declined to apply that presumption here.

Instead, the panel took the view that "Florida has a unique approach to statutory interpretation," under which the state supreme court's decision would not definitively resolve the meaning of the Florida aggravated-assault statute in 2001. Anderson, 99 F.4th at 1110-1111. And because intermediate state

appellate courts were at the time divided on whether Florida assault could be committed recklessly, the panel concluded that, at the time of Anderson's conviction in 2001, "there was no 'law of the state.'" Id. at 1111-1112 (citation omitted). The panel then concluded that in 2001, "there was a realistic probability that courts would punish conduct that included recklessness" in 2001, which it deemed enough to disqualify that offense as a violent felony under the ACCA. Id. at 1112.

The crux of the analytical disagreement between the Seventh and Eleventh Circuits centers on an issue of state law, namely, "Florida's rules of statutory construction" regarding retroactivity, Anderson, 99 F.4th at 1111, and their proper application. The Seventh Circuit's view that "there was no 'law of the state,'" 99 F.4th at 1111-1112 (citation omitted), was wrong. As discussed above, there was law: the plain text of the statute, whose import has been confirmed by both the state intermediate appellate courts, see Somers I, 15 F.4th at 1054, and more recently the state supreme court, see Somers II, 355 So. 3d at 891. Nor would the Seventh Circuit's view even apply on its own terms to petitioner, whose 2003 and 2015 convictions took place in districts that had precedent taking the same view of the statute that the state supreme court later would. See Lavin v. State, 754 So. 2d 784, 787 (Fla. Dist. Ct. App. 2000) (decision of Third District explaining that "[a]ggravated assault requires proof of a specific intent to do violence to the person of another"); Swift

v. State, 973 So. 2d 1196, 1199 (Fla. Dist. Ct. App. 2008) (decision of Second District reversing conviction for aggravated assault on an officer because the evidence "did not tend to establish that [the defendant] had a specific intent to threaten [the officer]"); Pinkney v. State, 74 So. 3d 572, 577 n.3 (Fla. Dist. Ct. App. 2011) (en banc) (decision of Second District explaining that Swift's "reasoning is ultimately correct" because the evidence had not shown that the defendant "had intentionally threatened the officer") (citation omitted).

In any event, disagreement on the state-law effect of the Supreme Court of Florida's recent decision does not warrant this Court's review. As noted above, this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." Bowen, 487 U.S. at 908; see, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). Petitioner offers no sound reason to deviate from that rule here, to address the interpretation at former times of the substantive criminal law of a State in the Eleventh Circuit. Indeed, that historical issue is of diminishing and limited importance as time passes -- particularly in the Seventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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