

IN THE SUPREME COURT OF THE UNITED STATES

ALBERT NEDD, 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 denied a certificate of appealability on petitioner's claim that aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1), does not constitute a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 2) is unreported. The opinion of the district court (Pet. App. A2, at 1-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2017. The petition for a writ of certiorari was filed on January 22, 2018. 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 Middle District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. A2, at 1-2. The district court sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 2. Petitioner did not appeal, but he later moved to vacate his sentence under 28 U.S.C. 2255. Pet. App. A2, at 1-4. The district court denied the motion and denied a certificate of appealability (COA). Id. at 1-5. The court of appeals likewise denied a COA. Pet. App. A1, at 2.

1. In December 2012, police officers observed petitioner conceal what appeared to be a firearm. Presentence Investigation Report (PSR) ¶ 7. After petitioner failed to comply with the officers' instructions to stop and show his hands, officers detained him. PSR ¶¶ 7-9. They recovered a Colt .38 special caliber revolver and ammunition. PSR ¶ 9.

Petitioner had several prior felony convictions. PSR ¶ 10. He had been convicted three times of Florida aggravated assault, twice in 1990 and once in 2008. PSR ¶¶ 22, 30, 31, 36. He had also been convicted of Florida robbery in 1996 and of violently resisting arrest in 2008. PSR ¶¶ 33, 37.

2. A grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). PSR

¶¶ 1-2. Petitioner pleaded guilty, pursuant to a plea agreement.
PSR ¶ 3.

a. A conviction for violating Section 922(g)(1) exposes the offender to a default statutory sentencing range of zero to ten years of imprisonment. See 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), requires a sentencing range of 15 years to life of imprisonment. 18 U.S.C. 924(e)(1); see Custis v. United States, 511 U.S. 485, 487 (1994).

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," while the latter portion of the second clause (beginning with "otherwise") is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

b. The Probation Office classified petitioner as an armed career criminal under the ACCA based on his three convictions for aggravated assault, in violation of Fla. Stat. § 784.021(1) (1987) (1989) (2007), as well as his convictions for robbery and resisting an officer with violence. PSR ¶ 22. Petitioner did not object to his classification as an armed career criminal. See Sent. Tr. 3; PSR ¶¶ 22, 76. In 2013, the district court sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. Pet. App. A2, at 2. Petitioner did not appeal. Ibid.

3. On June 26, 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the residual clause of the ACCA's definition of violent felony is void for vagueness. Id. at 2557. The Court explained that its decision invalidating the residual clause "d[id] not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA]'s definition of a violent felony." Id. at 2563. The Court later held in Welch that Johnson's holding with respect to the residual clause is a substantive rule that applies retroactively to prisoners seeking collateral relief from ACCA sentences. 136 S. Ct. at 1265.

In 2016, within a year of Johnson, petitioner moved to vacate his sentence under 18 U.S.C. 2255. D. Ct. Doc. 1 (June 23, 2016). Petitioner argued that, after Johnson, his three Florida aggravated-assault convictions could not qualify as "violent

felon[ies]" under the ACCA's invalidated residual clause or under its elements clause. D. Ct. Doc. 5, at 3-4 (July 25, 2016). With respect to the elements clause, petitioner contended that "a conviction for aggravated assault does not require more than a reckless mens rea." Id. at 4. He therefore argued that Florida aggravated assault does not have as an element the "use of physical force" because a "use" of force requires a higher degree of intent than merely negligent or accidental conduct. Ibid. (citing Leocal v. Ashcroft, 543 U.S. 1 (2004)).

The district court denied petitioner's Section 2255 motion. Pet. App. A2, at 4. The court explained that, because "[p]etitioner did not file a direct appeal," his claim "is procedurally barred." Id. at 3. In the alternative, the court rejected petitioner's claim on the merits, observing that, under Eleventh Circuit precedent, Florida aggravated assault is a "violent felony" within the meaning of the elements clause. Id. at 3-4 & n.5 (citing United States v. Golden, 854 F.3d 1256, 1256-1257 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017)). The district court denied petitioner's request for a COA. Id. at 4-5.

4. The court of appeals denied petitioner's application for a COA. Pet. App. A1, at 2. It stated that petitioner had "failed to show that reasonable jurists would find debatable both (1) the

merits of [the] underlying claim and (2) the procedural issues he seeks to raise." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-9) that the court of appeals should have issued a COA to determine whether his Florida convictions for aggravated assault qualify as "violent felon[ies]" under the ACCA, 18 U.S.C. 924(e)(2)(B)(i). The court of appeals correctly denied a COA, and its decision does not conflict with any decision of this Court or of another court of appeals. Moreover, even if the question presented warranted this Court's review, this case would be a poor vehicle for considering it, because petitioner would not be entitled to relief in light of the district court's alternative holding that his claim was procedurally defaulted. Further review is not warranted.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Where a district court denies a claim in a Section 2255 motion on procedural grounds, the prisoner must make two threshold showings: "[1] that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district

court was correct in its procedural ruling.” Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). The court of appeals correctly denied petitioner’s request for a COA here, and petitioner identifies no court of appeals that would have done otherwise.

a. Petitioner acknowledges (Pet. 5) that his Section 2255 claim is foreclosed by binding Eleventh Circuit precedent, which holds that Florida aggravated assault is a “violent felony” under the elements clause. See Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1341, cert. denied, 570 U.S. 925 (2013). Although petitioner contends (Pet. 5-8) that Turner was incorrectly decided, that contention relies on a single concurring opinion that has been overtaken by this Court’s decisions.

The ACCA’s elements clause defines “violent felony” 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). To determine whether a prior conviction constitutes a “violent felony” under the elements clause, a court applies the “categorical approach.” Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Taylor v. United States, 495 U.S. 575, 602 (1990). Under the categorical approach, courts “focus solely” on “the elements of the crime of conviction,” not “the particular facts of the case.” Mathis, 136 S. Ct. at 2248. If the statute

of conviction lists multiple alternative elements, it is “‘divisible,’” and a court may apply the “‘modified categorical approach’” and “look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of.” Id. at 2249 (citations omitted).

Florida aggravated assault requires “an assault: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony.” Fla. Stat. § 784.021(1). Florida “assault,” in turn, 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. § 784.011(1). Applying the categorical approach, the Eleventh Circuit held in Turner that “a conviction under section 784.021 will always include ‘as an element the threatened use of physical force against the person of another.’” 709 F.3d at 1338 (quoting 18 U.S.C. 924(e)(2)(B)(i)) (ellipsis omitted).

Petitioner asserts (Pet. 6) that Turner erroneously “failed to consider the least of the acts criminalized by the aggravated assault statute,” citing this Court’s subsequent decision in Moncrieffe v. Holder, 569 U.S. 184 (2013). In particular, petitioner relies on the concurring opinion of Judge Jill Pryor in United States v. Golden, which took the view that, under Florida

law, “the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness.” 854 F.3d 1256, 1258 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017). According to Judge Pryor, the requirement of reckless rather than intentional conduct meant that Florida aggravated assault is not categorically a violent felony, because “a conviction predicated on a mens rea of recklessness does not satisfy the ‘use of physical force’ requirement of the elements clause.” Ibid. (quoting United States v. Palomino Garcia, 606 F.3d 1317, 1334–1336 (11th Cir. 2010)).

That view, however, overlooks this Court’s recent decision in Voisine v. United States, 136 S. Ct. 2272 (2016), which concluded in the context of 18 U.S.C. 922(g)(9) that the “use of physical force” includes the reckless use of violence. 136 S. Ct. at 2279 (citation omitted). The Court’s reasoning in Voisine supports the inclusion of reckless conduct in the identical phrase “use of physical force” in the ACCA’s elements clause, as several courts of appeals have concluded. See, e.g., United States v. Verwiebe, 874 F.3d 258 (6th Cir. 2017), petition for cert. pending, No. 17–8413 (filed Apr. 3, 2018); United States v. Pam, 867 F.3d 1191, 1207–1208 (10th Cir. 2017); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); see also United States v. Mendez-Henriquez, 847 F.3d 214, 220–221 (5th Cir. 2017) (applying Voisine’s reasoning to conclude that reckless

conduct is included in the Sentencing Guidelines' "crime of violence" definition), cert. denied, 137 S. Ct. 2177 (2017); United States v. Benally, 843 F.3d 350, 354 (9th Cir. 2016) (noting that Voisine suggested that reckless conduct may constitute a "crime of violence" under 18 U.S.C. 16, but declining to reach the issue where the challenged statute required "only gross negligence"); but see United States v. Windley, 864 F.3d 36 (1st Cir. 2017) (adopting the reasoning of Bennett v. United States, 868 F.3d 1, withdrawn and vacated as moot, 870 F.3d 34 (1st Cir. 2017)). Because this Court indicated in Voisine that reckless violence constitutes the "use of physical force," petitioner's challenge to the Eleventh Circuit's precedent fails, even if Judge Pryor properly described the elements of aggravated assault under Florida law.

b. Petitioner contends (Pet. 8-10) that the court of appeals applied the wrong standard in determining whether to issue a COA. That contention is incorrect and does not warrant this Court's review.

To obtain a COA, a Section 2255 movant must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), and show that "jurists of reason" could debate whether his claim was properly denied or "deserve[s] encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). As petitioner acknowledges (Pet. 9), the court of appeals

"phrased its decision in [his] case using the proper terms -- that reasonable jurists would not debate whether [petitioner] is entitled to relief." See Pet. App. A1, at 2. The court did not "adopt[] a rule that COAs be adjudicated on the merits," or otherwise state that the decision whether to grant a COA "essentially requires a merits determination," as petitioner asserts (Pet. 8, 10).

Rather, given binding circuit precedent that foreclosed petitioner's claim, the court of appeals was entitled to conclude that Judge Pryor's expression of doubt in a pre-Voisine concurrence does not establish the "substantial showing" of a constitutional violation necessary to obtain a COA. 28 U.S.C. 2253(c)(2). That does not mean that the court reached out to decide the merits of a close case; it means that the court determined that the merits were not debatable under binding law. See Tompkins v. Secretary, Dep't of Corr., 557 F.3d 1257, 1261 (11th Cir.) ("[I]f a habeas petitioner's contention is foreclosed by a binding decision -- one from the Supreme Court or this Court that is on point -- the attempted appeal does not present a substantial question, because reasonable jurists will follow controlling law.") (citation and internal quotation marks omitted), cert. denied, 555 U.S. 1161 (2009). Petitioner does not identify (Pet. 8-10) anything in Miller-El or in this Court's decision in Buck v. Davis, 137 S. Ct.

759 (2017)), that precludes a court from denying a COA in such a circumstance.

2. In any event, this case would be a poor vehicle for addressing the issues petitioner raises, because he failed to challenge his ACCA designation in the district court, and he did not appeal his sentence. Pet. App. A2, at 2-3. The district court therefore determined that his Section 2255 claim had been procedurally defaulted. Id. at 3-4. And because the court denied petitioner's motion in part on procedural grounds, petitioner was required to demonstrate "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," as well as demonstrating that his motion presents a debatable constitutional question. Gonzalez, 565 U.S. at 141; see Pet. App. A1, at 2. Petitioner failed to contest the district court's procedural determination before the court of appeals, and he fails to contest it here. That alone is a sufficient reason for this Court to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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