

No. 17-7667

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER JOSE JONES, 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 erred in denying a certificate of appealability on petitioner's claim that he lacked a third predicate conviction under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), because none of the following was a conviction for a "violent felony" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i): (a) a conviction for aggravated assault, in violation of Fla. Stat. § 784.021 (1993); (b) a conviction for obstructing an officer with violence, in violation of Fla. Stat. § 843.01 (2007); and (c) a conviction for robbery, in violation of Fla. Stat. § 812.13 (1995).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A7) is unreported. The order of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2017. The petition for a writ of certiorari was filed on January 24, 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). 14-cr-281 Judgment (Judgment) 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal his conviction or sentence. Pet. App. A2. He later filed a motion to vacate his sentence under 28 U.S.C. 2255. 15-cv-2206 D. Ct. Doc. 18, at 1 (June 25, 2016) (Motion). The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. B1-B8. The court of appeals similarly denied a COA. Id. at A1-A7.

1. On March 28, 2014, officers from the Hillsborough County Sheriff's Office executed a search warrant at petitioner's apartment in Tampa, Florida. 14-cr-281 Plea Agreement 17. The officers recovered three firearms, assorted ammunition, 111 grams of cocaine, and more than \$2000 in cash. Ibid. Following his arrest, petitioner admitted that all of the items were his. Id. at 17-18.

A federal grand jury in the Middle District of Florida returned a three-count indictment charging petitioner with one count of possession with intent to distribute 28 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); one count of possession of a firearm in furtherance of a drug

trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). 14-cr-281 Indictment 1-3. Petitioner pleaded guilty to the felon-in-possession count. Judgment 1.

2. A conviction for violating Section 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 defendant 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) (citation omitted).

The Probation Office classified petitioner as an armed career criminal under the ACCA based on a number of prior Florida convictions, including a 1995 conviction for aggravated assault with a deadly weapon, a 2004 conviction for possession of cocaine with intent to sell or deliver, and a 2006 conviction for possession of cocaine with intent to sell. 14-cr-281 Presentence Investigation Report (PSR) ¶¶ 24, 30, 38-39. At sentencing, the government argued that petitioner had two additional Florida convictions that qualified as ACCA predicates -- namely, a 1995 conviction for robbery and a 2009 conviction for obstructing an officer with violence. 14-cr-281 Sent. Tr. (Sent. Tr.) 3; see PSR ¶¶ 31, 42.

Petitioner objected to his classification as an armed career criminal. Sent. Tr. 7-24. The district court overruled his objection, finding that the prior convictions identified by the Probation Office and the government were ACCA predicates. Id. at 24-28. The court imposed the statutory-minimum ACCA sentence of 180 months of imprisonment. Id. at 42. Petitioner did not appeal his conviction or sentence. Pet. App. A2.

3. In 2015, this Court held in Samuel Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. The Court subsequently made clear that the holding of Samuel Johnson is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

After seeking pro se to vacate his sentence under 28 U.S.C. 2255, Pet. App. A2, petitioner filed, with the assistance of counsel, an amended Section 2255 motion in 2016, Motion 1. Petitioner did not dispute that his 2004 conviction for possession of cocaine with intent to sell or deliver and his 2006 conviction for possession of cocaine with intent to sell qualified as serious drug offenses under the ACCA. 15-cv-2206 D. Ct. Doc. 24, at 2 n.2 (Oct. 5, 2016). Petitioner claimed, however, that Samuel Johnson's invalidation of the ACCA's residual clause meant that none of his other prior convictions -- for aggravated assault with a deadly weapon, for obstructing an officer with violence, and for robbery -- could now qualify as a violent felony that would provide a third ACCA predicate. Id. at 3-17.

The government responded that petitioner's claim was procedurally barred. 15-cv-2206 D. Ct. Doc. 29, at 3-6 (Jan. 6, 2017). The government also argued that petitioner's prior convictions for aggravated assault with a deadly weapon, obstructing an officer with violence, and robbery each still qualified as a violent felony under the ACCA's elements clause. Id. at 6-14.

The district court denied petitioner's Section 2255 motion. Pet. App. B1-B8. The court explained that because petitioner had previously failed to "challenge the constitutionality of the ACCA's residual clause or appeal his sentence," his claim that he should not have been sentenced as an armed career criminal was

"procedurally defaulted, unless he can demonstrate either cause and prejudice or a colorable showing of actual innocence." Id. at B3. The court determined that even if petitioner had "made a sufficient showing of cause," he had not made "a showing of actual prejudice," because "independent of the ACCA's residual clause," petitioner "has at least five prior convictions qualifying as violent felonies or serious drug offenses under the ACCA." Id. at B5. The court explained that both of petitioner's prior drug convictions qualified as serious drug offenses. Id. at B6. And relying on circuit precedent, the court determined that each of petitioner's prior convictions for aggravated assault with a deadly weapon, obstructing an officer with violence, and robbery qualified as a violent felony under the ACCA's elements clause. Id. at B6-B7 (citing United States v. Fritts, 841 F.3d 937 (11th Cir. 2016) (robbery), cert. denied, 137 S. Ct. 2264 (2017); United States v. Hill, 799 F.3d 1318 (11th Cir. 2015) (per curiam) (obstructing an officer with violence); Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328 (11th Cir.) (aggravated assault), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Samuel Johnson v. United States, supra). The court denied a COA. Id. at B8.

4. The court of appeals likewise denied a COA. Pet. App. A1-A7. The court explained that under circuit precedent, petitioner's "Florida convictions for aggravated assault, robbery, possession of cocaine with intent to sell, and obstructing an

officer with violence all qualify as ACCA predicate offenses, even post-[Samuel] Johnson." Id. at A7 (citing, inter alia, Fritts, 841 F.3d at 938-943; Hill, 799 F.3d at 1322; and Turner, 709 F.3d at 1340-1342). The court reasoned that because "reasonable jurists will follow controlling precedent," they "would not debate the District Court's dismissal of [petitioner's] § 2255 motion." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-20) that the court of appeals erred in denying a COA on his claim that none of his prior Florida convictions for aggravated assault, obstructing an officer with violence, and robbery are violent felonies under the ACCA's elements clause. The court correctly declined to issue a COA. It is well established under circuit precedent that aggravated assault and obstructing an officer with violence under Florida law satisfy the ACCA's elements clause. That precedent is correct and does not implicate any circuit conflict warranting this Court's review.

The Court is currently considering the question whether Florida robbery is a violent felony under the ACCA's elements clause in Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). But because petitioner would still have at least three ACCA predicate convictions regardless of whether his prior Florida robbery conviction qualifies as a violent felony, the petition for a writ of certiorari need not be held pending the

decision in Stokeling. The petition for a writ of certiorari therefore should be denied.

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, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

Contrary to petitioner's contention (Pet. 18-19), the court of appeals did not err in denying a COA on his claim that he lacks three prior convictions for violent felonies or serious drug offenses under the ACCA. Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), the Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). Petitioner does not dispute that his two prior Florida drug convictions qualify as serious drug offenses under the ACCA. Pet. 4 n.1. Thus, petitioner has three ACCA predicate convictions so long as any one of his remaining prior Florida convictions -- for aggravated assault, for obstructing an officer with violence, or for robbery

-- qualifies as a violent felony. Petitioner's claim that none of those convictions could qualify as a violent felony without resort to the now-invalidated residual clause did not "deserve encouragement to proceed further," Buck, 137 S. Ct. at 773 (citation omitted), particularly given that circuit precedent foreclosed his claim with respect to each conviction, see United States v. Fritts, 841 F.3d 937, 939-944 (11th Cir. 2016) (concluding that Florida robbery satisfies the ACCA's elements clause), cert. denied, 137 S. Ct. 2264 (2017); United States v. Hill, 799 F.3d 1318, 1322 (11th Cir. 2015) (per curiam) (same, for resisting or obstructing an officer with violence under Florida law); Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-1338 (11th Cir.) (same, for Florida aggravated assault), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Samuel Johnson v. United States, 135 S. Ct. 2551 (2015).

2. In Turner, 709 F.3d at 1337-1338, the court of appeals determined that aggravated assault, in violation of Fla. Stat. § 784.021, qualifies as a "violent felony" under the ACCA's elements clause, which encompasses "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 determination was correct and does not warrant further review.

a. Florida's aggravated-assault statute provides that "[a]n 'aggravated assault' is 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) (1993). “[T]he offense necessarily includes an assault.” Turner, 709 F.3d at 1338. Under Florida law, “[a]n ‘assault’ is 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 (1993) (emphases added). Given that threatened violence is an element of Florida aggravated assault, “a conviction under section 784.021 will always include ‘as an element the . . . threatened use of physical force against the person of another.’” Turner, 709 F.3d at 1338 (quoting 18 U.S.C. 924(e) (2) (B) (i)). The court of appeals in Turner thus correctly determined that Florida aggravated assault is a violent felony under the ACCA’s elements clause. Ibid.

b. Petitioner contends (Pet. 16-17) that Florida aggravated assault may be committed by reckless conduct and that such conduct does not satisfy the ACCA’s elements clause. But even assuming that a conviction for aggravated assault under Florida law may be based on reckless conduct, petitioner errs in asserting that such conduct would not satisfy the ACCA’s elements clause. In Voisine v. United States, 136 S. Ct. 2272 (2016), this Court concluded that a conviction for reckless causation of physical harm involves the “use . . . of physical force,” for purposes of the definition of “misdemeanor crime of domestic violence” in 18 U.S.C.

921(a)(33)(A)(ii) and 922(g)(9). 136 S. Ct. at 2276-2280. The Court explained that the harm caused by "reckless behavior" -- which requires undertaking an act "with awareness of the[] substantial risk of causing injury" -- "is the result of a deliberate decision to endanger another" and thus not an "accident." Id. at 2279. The Court therefore determined that the word "use" includes "the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." Ibid.

The Court's reasoning in Voisine fully supports the inclusion of reckless conduct in the identical phrase "use * * * of physical force" under the ACCA's elements clause, as nearly every court of appeals to have considered the issue has concluded. See, e.g., United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); United States v. Pam, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); see also United States v. Mendez-Henriquez, 847 F.3d 214, 220-221 (5th Cir.) (applying Voisine's reasoning to conclude that reckless conduct is included in Sentencing Guidelines § 2L1.2's "crime of violence" definition), cert. denied, 137 S. Ct. 2177 (2017); United States v. Howell, 838 F.3d 489, 501 (5th Cir. 2016) (same, with respect to Sentencing Guidelines § 4B1.2(a)'s "crime of violence" definition), cert. denied, 137 S. Ct. 1108 (2017); United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017) (same, with respect to Sentencing Guidelines § 4B1.2(a)'s "crime of violence"

definition), petition for cert. pending, No. 17-8413 (filed Apr. 3, 2018); 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, 38 (1st Cir. 2017) (per curiam) (concluding that reckless conduct does not satisfy the ACCA’s elements clause).

c. Petitioner does not point to any conflict among the courts of appeals on whether Florida aggravated assault qualifies as a violent felony under the ACCA’s elements clause. See United States v. Pittro, 646 Fed. Appx. 481, 485 (6th Cir. 2016) (concluding that Florida aggravated assault satisfies the ACCA’s elements clause); United States v. Koenig, 410 Fed. Appx. 971, 973 (7th Cir. 2010) (same); see also United States v. Alonzo-Garcia, 542 Fed. Appx. 412, 416 (5th Cir. 2013) (per curiam) (concluding that Florida aggravated assault satisfies the elements clause of Sentencing Guidelines § 2L1.2’s “crime of violence” definition). Instead, petitioner cites (Pet. 16-17) a concurring opinion in United States v. Golden, 854 F.3d 1256 (11th Cir. 2017) (per curiam), which argued that Turner was wrongly decided and that Florida aggravated assault “cannot qualify as a violent felony under the elements clause because a conviction can be obtained where the defendant merely was reckless.” Id. at 1260 (J. Pryor, J., concurring in result). The concurrence in Golden, however,

represents the view of only a single circuit judge and did not address this Court's decision in Voisine. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Further review of petitioner's contention that Florida aggravated assault is not a violent felony is accordingly unwarranted.

3. Petitioner also contends (Pet. 11-16) that his prior conviction for obstructing an officer with violence, in violation of Fla. Stat. § 843.01 (2007), does not qualify as a violent felony under the ACCA's elements clause. This Court has previously denied petitions for writs of certiorari raising similar contentions, see Brewton v. United States, 137 S. Ct. 2264 (2017) (No. 16-7686); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756); Telusme v. United States, 137 S. Ct. 2091 (2017) (No. 16-6476), and the same result is warranted here.

a. This Court held in Curtis Johnson v. United States, 559 U.S. 133 (2010), that an offense involves "physical force" for purposes of the ACCA's elements clause when it requires "violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140. Such force might "consist * * * of only that degree of force necessary to inflict pain," such as "a slap in the face." Id. at 143.

Violence is an element of Fla. Stat. § 843.01 (2007), which provides that any person who "knowingly and willfully resists,

obstructs, or opposes any officer * * * in the lawful execution of any legal duty, by offering or doing violence to the person of such officer * * * is guilty of a felony of the third degree.” Ibid. (emphasis added). And in applying a Florida sentencing statute with language and interpretation similar to the ACCA, see United States v. Vail-Bailon, 868 F.3d 1293, 1303 (11th Cir. 2017) (en banc), petition for cert. pending, No. 17-7151 (filed Dec. 20, 2017), Florida courts have held that “[o]ffering to do violence plainly involves the ‘threat of physical force or violence’ while actually doing violence plainly involves the ‘use . . . of physical force or violence,’” Harris v. State, 5 So. 3d 750, 751 (Fla. Dist. Ct. App. 2009) (quoting Fla. Stat. § 775.082(9)(a)(1)(o) (2006)). The court of appeals in Hill thus correctly determined that “a prior conviction for resisting an officer with violence [under Florida law] categorically qualifies as a violent felony under the elements clause of the ACCA.” 799 F.3d at 1322.

Contrary to petitioner’s contention (Pet. 11-12), the Florida Supreme Court in I.N. Johnson v. State, 50 So. 529 (1909), did not hold that the use of de minimis force can satisfy the “violence” element of Section 843.01. Although the court in that case stated that the force alleged was “unlawful, and as such [wa]s synonymous with violence,” id. at 530, petitioner errs (Pet. 12) in reading the decision as requiring Florida courts to find that any force that is “unlawful” under Florida law, including “a simple battery proscribed by Fla. Stat. § 784.03,” qualifies as violence under

Section 843.01. To the contrary, Florida courts have held that "resisting an officer with violence to his or her person, in violation of section 843.01, differs significantly from simple battery on a law enforcement officer." Harris, 5 So. 3d at 751. Whereas "simple 'battery on a law enforcement officer' might involve merely a nonviolent, albeit unwanted, touching," ibid. (quoting State v. Hearns, 961 So. 2d 211, 213 (Fla. 2007)), "resisting arrest with violence is a felony that involves the use or threat of physical force or violence," ibid. (quoting Walker v. State, 965 So. 2d 1281, 1283 (Fla. Dist. Ct. App. 2007)).

b. Petitioner cites (Pet. 13) several Florida appellate decisions that he argues demonstrate that obstructing an officer with violence under Florida law may involve no more than de minimis force. But those cases do not establish that obstructing an officer with violence may involve a degree of force less than the "physical force" required by the ACCA's elements clause.

In I.N. Johnson, the Florida Supreme Court affirmed a defendant's conviction for obstructing an officer with violence where the defendant "gripped the hand of the officer, and forcibly prevented him from opening [a] door for the purpose of making [an] arrest." 50 So. at 530. Gripping an officer's hand with force sufficient to prevent him from opening a door involves more than the "merest touching," Curtis Johnson, 559 U.S. at 139, and is "capable of causing physical pain or injury," id. at 140.

In State v. Green, 400 So. 2d 1322 (Fla. Dist. Ct. App. 1981), the Florida intermediate appellate court declined to dismiss a pending Section 843.01 charge at the pretrial motion-to-dismiss stage, where "ambiguity" in the description of the defendant's conduct created a factual question for the jury about whether the defendant's struggle with officers to avoid arrest "constitute[d] 'violence'" under the statute. Id. at 1323-1324. "Given the posture in which [the court in Green] was viewing the case, and its repeated references to this posture," the decision in Green does not establish that "de minimis force is sufficient to establish violence in § 843.01." United States v. Romo-Villalobos, 674 F.3d 1246, 1249 (11th Cir.) (per curiam), cert. denied, 568 U.S. 873 (2012).

In Wright v. State, 681 So. 2d 852 (Fla. Dist. Ct. App. 1996), the evidence showed that the defendant "pushed and fought * * * off" an officer who was attempting to arrest him and that even after a second officer had "tackled" him, the defendant "struggled, kicked, and flailed his arms and legs." Id. at 853. The conduct in Wright thus involved a "degree of force necessary to inflict pain," not unlike "a slap in the face." Curtis Johnson, 559 U.S. at 143.

In Yarusso v. State, 942 So. 2d 939 (Fla. Dist. Ct. App. 2006), the Florida intermediate appellate court did not decide whether the defendant's conduct amounted to violence because "it [wa]s undisputed that an act of violence occurred when [the

defendant] fled from the officers.” Id. at 942. In any event, the evidence showed that the defendant “put his truck in drive and sped off, hitting [an officer’s] hand with the truck’s rearview mirror in the process.” Id. at 941. The force employed in hitting someone with a truck is plainly “capable of causing physical pain or injury” and would thus qualify as “physical force” under the ACCA’s elements clause. Curtis Johnson, 559 U.S. at 140.

In Miller v. State, 636 So. 2d 144 (Fla. Dist. Ct. App. 1994) (per curiam), the record established that the defendant “scuffled with the officers,” id. at 151, causing both the defendant and an officer to “fall[] to the ground,” id. at 148. And in Kaiser v. State, 328 So. 2d 570 (Fla. Dist. Ct. App. 1976) (per curiam), the evidence showed that the defendant “engag[ed] in physical combat” with an officer, who required “the help of two other officers” to “subdue[]” the defendant. Id. at 571. In each of those cases, the defendant used “force capable of causing physical pain or injury to another person,” Curtis Johnson, 559 U.S. at 140 -- in Miller, force causing an officer to fall to the ground, and in Kaiser, force amounting to physical combat.

c. The court of appeals’ conclusion that obstructing an officer with violence under Florida law satisfies the ACCA’s elements clause does not implicate any conflict warranting this Court’s review.

Petitioner observes (Pet. 13-14) that in United States v. Flores-Cordero, 723 F.3d 1085 (2013), the Ninth Circuit determined

that resisting arrest in violation of Ariz. Rev. Stat. § 13-2508(A)(1) (1999), is not a "crime of violence" under the Sentencing Guidelines. 723 F.3d at 1088. The Ninth Circuit, however, understood Arizona law to hold that "the use of minimal force is sufficient to constitute 'resisting arrest.'" Ibid. Under Florida law, by contrast, "de minimis force" is not "sufficient to establish violence in § 843.01." Romo-Villalobos, 674 F.3d at 1249; see pp. 13-17, supra. Because a perceived difference in state law explains the outcome in Flores-Cordero, the Ninth Circuit's decision in that case does not give rise to any conflict warranting this Court's review. To the extent that the Ninth Circuit might be viewed as applying a different definition of "physical force" from the Eleventh Circuit, it is unclear that the Ninth Circuit would reach a different result from the Eleventh Circuit in the context of the specific statute and case law at issue here.

Petitioner also asserts (Pet. 15) a conflict between the court of appeals' decision in this case and the Tenth Circuit's unpublished decision in United States v. Lee, 701 Fed. Appx. 697, 700 (2017), which determined that "a conviction under § 843.01 does not qualify as an ACCA predicate," id. at 702. The Tenth Circuit's unpublished decision in Lee, however, is "not precedential." 10th Cir. R. 32.1(A). Accordingly, that decision does not create a conflict warranting this Court's review.

d. In any event, this case would be a poor vehicle for further review of whether obstructing an officer with violence under Florida law is a violent felony, because this Court's resolution of that question would not affect petitioner's classification as an armed career criminal. Petitioner does not dispute that his two prior Florida drug convictions qualify as ACCA predicates. Pet. 4 n.1. And as explained above, see pp. 9-13, supra, petitioner's prior Florida conviction for aggravated assault qualifies as a violent felony under the ACCA's elements clause. Thus, regardless of whether petitioner's prior conviction for obstructing an officer with violence qualifies as a violent felony, petitioner would still have at least three ACCA predicate convictions and be subject to sentencing under the ACCA.

4. Petitioner additionally contends (Pet. 7-11) that his prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1995), was not a conviction for a violent felony under the ACCA's elements clause. The Court is currently considering an identical question in Stokeling v. United States, supra. The petition for a writ of certiorari in this case, however, need not be held pending the Court's decision in Stokeling. Even if petitioner's prior conviction for Florida robbery were not a conviction for a violent felony, petitioner would still have at least three ACCA predicate convictions -- namely, his two prior Florida drug convictions, Pet. 4 n.1; his prior Florida conviction for aggravated assault, see pp. 9-13, supra; and his prior Florida

conviction for obstructing an officer with violence, see pp. 13-19, supra. Thus, regardless of this Court's resolution of the question presented in Stokeling, petitioner would still be subject to sentencing under the ACCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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