No. 17-8401

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY LEE FRANKLIN, 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

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Petitioner seeks review of several questions, including whether the court of appeals erred in denying his request for a certificate of appealability (COA) to challenge the district court's determination that his prior conviction for battery on a law enforcement officer under Florida law qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). See Pet. i, 24-35. For the reasons set forth below, the government now agrees that petitioner's Florida battery conviction is not a violent felony under the ACCA's elements clause. Accordingly, this Court should

grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of the position expressed in this memorandum.

1. Petitioner pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and the district court sentenced him, pursuant to the ACCA, to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. A3, at 1-3. The ACCA provides for a statutory sentencing range of 15 years to life imprisonment for a defendant who violates Section 922(g) and has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another." See 18 U.S.C. 924(e)(1).[1]

Under the elements clause of the ACCA, a "violent felony" includes any felony 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, a court generally applies the "categorical approach." See Mathis v. United States, 136 S.

[1] Apart from petitioner's conviction for battery on a law enforcement officer, petitioner has more than three prior convictions for robbery, attempted robbery, and aggravated assault. See Pet. App. A8, at 2. The district court correctly determined, however, that many of those prior convictions were for crimes that were not "committed on occasions different from one another." Id. at 5 n.4 (citation omitted). If petitioner's conviction for battery on a law enforcement officer is not a conviction for a violent felony, he would not qualify for an ACCA sentence. Ibid.

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, however, the statute of conviction lists multiple alternative elements, it is "divisible" into different offenses, and a court may apply the "modified categorical approach," which permits the court to "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 (citation omitted).

2. The district court's order denying relief rests on, inter alia, its conclusion that petitioner's Florida conviction for battery on a law enforcement officer qualified as a violent felony under the modified categorical approach. That conclusion was incorrect.

The Florida battery statute provides that the offense of battery occurs when a person:

> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to an individual.

Fla. Stat. § 784.03(1)(a) and (b) (1985). Under Florida law, battery is a third-degree felony when the victim is a "law

enforcement officer" or "correctional officer" who is "engaged in the lawful performance of his duties." Id. § 784.07(1)(a) and (2).

In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court held that simple battery under Florida law does not categorically qualify as a violent felony under the ACCA's elements clause. Id. at 138-145. The Court determined that an offender uses "physical force" for purposes of the ACCA's elements clause when he uses "violent force -- that is, force capable of causing physical pain or injury to another person," id. at 140 (emphasis omitted), and that Florida simple battery, which requires only an intentional touching and "is satisfied by any intentional physical contact, 'no matter how slight,'" does not categorically require such force. Id. at 138, 141 (quoting State v. Hearns, 961 So. 2d 211, 218 (Fla. 2007) (emphasis omitted)). The Court, however, did not address the application of the modified categorical approach to the Florida simple battery statute in Curtis Johnson.

The Florida simple battery statute, Fla. Stat. § 784.03 (2018), is divisible into two parts: Subsection (1)(a)(1), which covers "[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other," and Subsection (1)(a)(2), which covers "[i]ntentionally caus[ing] bodily harm to another person." Preston Johnson v. United States, No. 16-15560, 2018 WL 2435402, at *5-*6 (11th Cir. May 30, 2018) (emphasis omitted), petition for cert. pending, No. 17-9308 (filed June 6, 2018) (citing

Florida state-court decisions and model jury instructions); see Byrd v. State, 789 So. 2d 1169, 1171 (Fla. Dist. Ct. App. 2001) (per curiam) (Florida simple battery statute includes "two distinct definitions of the offense of battery"). Although simple battery is divisible between "touching or striking" battery and "bodily harm" battery, the offense of "touching or striking" battery is not further divisible because "touching" and "striking" refer to alternative ways to commit a single offense, not alternative elements. See Fla. Standard Jury Instructions in Criminal Cases 8.3 (1981) (treating "touched or struck" as a single offense element). And because a conviction for "touching or striking" battery may rest upon the "most 'nominal contact,' such as a 'tap on the shoulder without consent,'" a conviction for that type of simple battery does not categorically qualify as a "violent felony" under the ACCA. Curtis Johnson, 559 U.S. at 138 (quoting Hearns, 961 So. 2d at 219) (brackets and ellipses omitted).

Nothing in the record of this case indicates that petitioner's conviction for battery on a law enforcement officer was for "bodily harm" battery under Fla. Stat. § 784.03(1)(b) (1985). And because "touching or striking" battery does not categorically require the use of violent force, petitioner's battery conviction does not qualify as a violent felony under the ACCA's elements clause. Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and

remand for further consideration of petitioner's challenge to his ACCA sentence in light of the government's position set forth in this memorandum.[2]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

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[2] Petitioner also contends (Pet. 14-19) that the court of appeals erred in denying his application for a COA on his claim that his prior convictions for Florida armed robbery and attempted armed robbery do not qualify as violent felonies under the ACCA's elements clause. This Court is currently considering whether a conviction for Florida robbery under Fla. Stat. § 812.13 (1995) qualifies as a violent felony under the elements clause. See Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). Because vacatur and remand is warranted on the question whether petitioner's conviction for battery on a law enforcement officer is a violent felony, however, no reason exists to hold the petition for Stokeling. The government waives any further response to the petition unless this Court requests otherwise.