

No. 17-8764

IN THE SUPREME COURT OF THE UNITED STATES

FRANK GUBANIC, 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 neither his prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1987), nor his prior conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01 (1989), was a "violent felony" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is available at 2018 WL 1635999. The order of the district court (Pet. App. B1-B9) is not published in the Federal Supplement but is available at 2017 WL 3336463.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2018. The petition for a writ of certiorari was filed on April 30, 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 ammunition by a felon, in violation of 18 U.S.C. 922(g) (1) and 924(e) (1). 8-cr-499 Judgment (Judgment) 1. He was sentenced to 184 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. Petitioner did not appeal his conviction or sentence. Pet. 3. In 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, which the district court denied. 10-cv-1356 D. Ct. Doc. 13, at 1-15 (Jan. 30, 2012). In 2016, the court of appeals granted authorization for petitioner to file a second Section 2255 motion. 16-12468 C.A. Order 1-5 (June 15, 2016). The district court denied petitioner's second Section 2255 motion and declined to issue a certificate of appealability (COA). Pet. App. B1-B9. The court of appeals similarly denied a COA. Id. at A1-A4.

1. In 2008, a confidential informant contacted petitioner about petitioner's possession of firearms and controlled substances in his residence in St. Petersburg, Florida. Presentence Investigation Report (PSR) ¶ 11. Petitioner subsequently sold a firearm to the confidential informant. 8-cr-499 Plea Agreement 12. The firearm was loaded with two rounds of ammunition. Ibid.

A federal grand jury in the Middle District of Florida indicted petitioner on one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e), and one count of distribution and possession with the intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). 8-cr-499 Indictment 1-2. 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).

The Probation Office classified petitioner as an armed career criminal under the ACCA based on a number of prior Florida convictions -- namely, a 1988 conviction for robbery, 1990 convictions for battery on a law enforcement officer and for resisting an officer with violence, 1993 convictions for trafficking in cocaine and for sale of cocaine, and a 1993 conviction for battery on a probation officer. PSR ¶¶ 32, 38-39, 42-43. Petitioner did not object to his classification as an armed career criminal, 8-cr-499 Sent. Tr. 4, and the district court sentenced him to 184 months of imprisonment, id. at 7. Petitioner did not appeal his conviction or sentence. Pet. 3.

3. In 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 10-cv-1356 D. Ct. Doc. 1 (June 16, 2010). The district court denied the motion and declined to issue a COA. 10-cv-1356 D. Ct. Doc. 13, at 14.

4. 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 Samuel Johnson's holding is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

In 2016, the court of appeals granted petitioner leave to file a second Section 2255 motion. 16-12468 C.A. Order 1-5. In

his second Section 2255 motion, petitioner claimed that Samuel Johnson's invalidation of the residual clause meant that his prior convictions for robbery, battery on a law enforcement officer, resisting an officer with violence, and battery on a probation officer no longer qualified as violent felonies. 16-cv-1626 D. Ct. Doc. 9, at 4-9 (Jan. 25, 2017). Petitioner also argued that his prior offenses of trafficking in cocaine and sale of cocaine occurred on the same occasion and thus should not be treated as separate ACCA predicate offenses. Id. at 2 n.3.

The government responded that petitioner's claims were procedurally barred and that petitioner had failed to demonstrate that the district court had relied on the residual clause in sentencing him. 16-cv-1626 D. Ct. Doc. 12, at 5-18 (Mar. 14, 2017). The government also argued that petitioner's prior convictions for robbery and resisting an officer with violence qualified as violent felonies under the ACCA's distinct elements clause and that his prior convictions for trafficking in cocaine and sale of cocaine should count as two separate serious drug offenses under the ACCA. Id. at 18-23.

The district court denied petitioner's motion. Pet. App. B1-B9. Relying on circuit precedent, the court determined that petitioner's Florida robbery conviction qualified as a violent felony under the ACCA's elements clause. Id. at B5 (citing United States v. Fritts, 841 F.3d 937, 944 (11th Cir. 2016), cert. denied,

137 S. Ct. 2264 (2017)). The court also determined that petitioner's prior drug offenses occurred on separate occasions and therefore counted as distinct predicate offenses under the ACCA. Id. at B5-B8. The court accordingly reasoned that petitioner's prior convictions for "robbery, trafficking in cocaine, and sale of cocaine are enough to qualify as the necessary predicate offenses for an ACCA enhancement." Id. at B8. The court declined to issue a COA. Id. at B8-B9.

5. The court of appeals likewise denied a COA. Pet. App. A1-A4. The court observed that petitioner had abandoned his contention that his two prior drug convictions qualified as only a single ACCA predicate offense. Id. at A2. And relying on circuit precedent, the court determined that petitioner's prior Florida robbery conviction "qualifies as a violent felony under the ACCA's elements clause." Id. at A4; see id. at A3 (citing Fritts, 841 F.3d at 939-945). The court thus found that petitioner "continues to have at least three predicate offenses under the ACCA, such that reasonable jurists would not find debatable whether the district court correctly denied his § 2255 motion." Id. at A4.

ARGUMENT

Petitioner contends (Pet. i, 6-16) that the court of appeals erred in denying a COA on his claim that neither his prior Florida conviction for robbery nor his prior Florida conviction for

resisting an officer with violence is a violent felony under the ACCA's elements clause. The court correctly declined to issue a COA. It is well established under circuit precedent that resisting an officer with violence under Florida law satisfies 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 Court recently denied a petition for a writ of certiorari in a case that was in a similar posture, see Jones v. United States, cert. denied, No. 17-7667 (June 11, 2018), and it should do the same here.

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. 14-16), 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 seek review of the lower courts' determination that his two prior Florida drug convictions -- for trafficking in cocaine and for sale of cocaine -- qualify as serious drug offenses under the ACCA. Pet. 3 n.3. Thus, petitioner has three ACCA predicate convictions so long as either his conviction for robbery or his conviction for resisting an officer with violence qualifies as a violent felony. Petitioner's claim that neither 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 an officer with violence under Florida law).

2. Petitioner contends (Pet. 9-14) that his prior conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01 (1989), 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 Jones v. United States, supra; 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 in this case.

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 (1989), 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), cert. denied, No. 17-7151 (June 11, 2018), 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. 9-10), 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. 10) 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. Hearn, 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. 11) several Florida appellate decisions that he argues demonstrate that resisting an officer with violence under Florida law may involve no more than de minimis force. But those cases do not establish that resisting 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' determination in Hill that resisting 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. 11-12) 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. 9-13, 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. 13-14) 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 (2017), which determined that "a conviction under § 843.01 does not qualify as an ACCA predicate," id. at 701. 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.

3. Petitioner also contends (Pet. 6-9) that his prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1987), 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.

Petitioner does not seek review of the lower courts' determination that his two prior Florida drug convictions qualify as ACCA predicates. Pet. 3 n.3. And although the courts below did not need to reach the issue, his prior Florida conviction for resisting an officer with violence qualifies as a violent felony under the ACCA's elements clause. See pp. 9-15, 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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