No. 18-7096

IN THE SUPREME COURT OF THE UNITED STATES

REINALDO SANTOS, 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 to challenge the district court's conclusion 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, 15-32. 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. See Franklin v. United States, No. 17-8401 (Feb. 25, 2019) (granting a petition for a writ of certiorari raising the same question, vacating the judgment of the court of appeals, and remanding the case in light of the position asserted by the Solicitor General in his brief for the United States).

1. Following a jury trial, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A5, at 1. The district court sentenced him, pursuant to the ACCA, to 360 months of imprisonment on each count, to be served concurrently. Id. at 2. 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." 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

[1] Apart from petitioner's conviction for battery on a law enforcement officer, petitioner has prior convictions for Florida aggravated battery and Florida aggravated assault. Pet. App. A1, at 8; Pet. App. A4, at 1-2. 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.

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." 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, 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 qualifies as a conviction for a violent felony under the modified categorical approach. Pet. App. A11, at 9-12. That conclusion was incorrect.

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

> (a) Actually and intentionally touches or strikes another person against the will of the other; or
>
> (b) Intentionally causes bodily harm to an individual.

Fla. Stat. § 784.03(1) (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) (1985).

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 is divisible into two parts: one subsection that covers "[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other" and a separate subsection that covers "[i]ntentionally caus[ing] bodily harm" to another person. Fla. Stat. § 784.03(1)(a) and (b) (1985); see Preston Johnson v. United States, 735 Fed.

Appx. 1007, 1012-1014 (11th Cir.) (per curiam) (citing Florida state-court decisions and model jury instructions), cert. denied, 139 S. Ct. 149 (2018) (No. 17-9308); 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 means of committing a single offense, not alternative elements of different offenses. See Preston Johnson, 735 Fed. Appx. at 1014 (explaining that Florida's standard jury instruction for battery treats "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 ellipsis 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. See Franklin, supra (No. 17-8401).[2]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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[2] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.