No. 14-5227

IN THE
Supreme Court of the United States

DANIEL ARROYO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

Donna Lee Elm
Federal Defender

M. Allison Guagliardo
Research and Writing Attorney
Federal Defender's Office
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-mail: allison_guagliardo@fd.org
Counsel of Record for Petitioner

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

As the government acknowledges (Br. Opp. 8-13), the circuits are split on the important question of whether battery on a law enforcement officer is a violent felony under the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). Petitioner's case presents an ideal vehicle to resolve this split.

1. Five circuits have weighed in on this question; three circuits (the First, Tenth, and Eleventh) have held that such a prior conviction is a violent felony,[1] while two circuits (the Fourth and Seventh) have held that it is not.[2] Although the government suggests that further consideration in the lower courts is appropriate (Br. Opp. 13), further consideration will only add to the number of federal defendants who receive disparate sentences depending on their geographic circuit.

Notably, courts within the jurisdiction of the Fourth and Eleventh Circuits had "*more than half* of the cases that involved an offender who qualified as an armed career criminal under ACCA" in fiscal year 2010. U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 284 (Oct. 2011) (emphasis added). The Fourth and Eleventh Circuits are on opposite sides of the split. Should these circuits continue to have the majority of ACCA cases, the existing circuit split will affect a significant number of federal defendants.

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[1] *See* Pet. App. A2 (citing *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir.), *cert. denied,* 133 S. Ct. 2873 (2013)); *United States v. Anderson*, 745 F.3d 593, 597 (1st Cir. 2014) (citing *United States v. Dancy*, 640 F.3d 455 (1st Cir. 2011)), *pet. for cert. pending*, No. 14-5229 (filed July 12, 2014); *United States v. Williams*, 559 F.3d 1143, 1147-49 (10th Cir. 2009). As discussed in the petition (Pet. 6), the Tenth Circuit reasoned that the "ordinary case" prosecuted under the Oklahoma statute it considered "involves far more violence than slight touching." *Williams*, 559 F.3d at 1148.

[2] *United States v. Carthorne*, 726 F.3d 503, 510-15 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1326 (2014); *United States v. Hampton*, 675 F.3d 720, 729-31 (7th Cir. 2012).

In arguing that review should be denied, the government asserts that the Eleventh Circuit's decision below is correct. Br. Opp. 8-9. But that decision indisputably conflicts with decisions of the Fourth and Seventh Circuits (Pet. 7-12; Br. Opp. 13), and only this Court can ultimately resolve which of the lower courts are correct.

Petitioner is among those currently seeking review on this question. *See* Br. Opp. 8 (citing pending petitions in *Kilgore v. United States*, No. 13-8034; *Anderson v. United States*, No. 14-5229). These cases demonstrate the recurring nature of the issue and the need for this Court's review to resolve the split that already involves nearly half the circuits.

2. Petitioner's case presents an ideal vehicle to resolve the circuit split.

a. Petitioner's ACCA sentence is based on his prior Florida conviction for battery on a law enforcement officer, which has the same simple battery element ("touch[ing]") that this Court considered in *Johnson v. United States*, 559 U.S. 133 (2010). Indeed, like *Johnson*, nothing in the record of Petitioner's battery conviction permits the conclusion that his conviction rested on anything more than "touch[ing]." 559 U.S. at 136-37; Doc. 62-Exh. 4.[3] This simple battery offense may be satisfied by any slight physical contact, such as a tap on the shoulder. 559 U.S. at 138 (citing *State v. Hearns*, 961 So. 2d 211, 218-19 (Fla. 2007)). The offense is ordinarily a misdemeanor, but is punished as a felony when committed on certain individuals, including law enforcement and pregnant women. Fla. Stat. §§ 784.03, 784.07(2).

In *Johnson,* this Court held that a Florida simple battery conviction resting on touching is not a violent felony under the ACCA's elements clause, § 924(e)(2)(B)(i), because it lacks an

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[3] The district court, consistent with the parties' arguments below and this Court's precedent, did not rely on the PSR's alleged "facts" (*see* Br. Opp. 3 n.1) in sentencing Petitioner under the ACCA. Doc. 71 at 15, 17-19, 22-23; *Shepard v. United States*, 544 U.S. 13, 26 (2005).

element of "physical force" – "that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. Since *Johnson*, the Eleventh Circuit has decided that this same simple battery offense – which this Court held does not have as an element "force capable of causing physical pain or injury to another person" – nonetheless "presents a serious potential risk of physical injury to another" when committed on a law enforcement officer. *See* Pet. App. A. Petitioner's case thus squarely presents the issue of whether the simple battery offense considered in *Johnson* is a violent felony under the residual clause, when the person touched is a law enforcement officer.

b. Petitioner preserved his challenge to his ACCA sentence, arguing that his Florida conviction for battery on a law enforcement officer is not a violent felony before the district court and court of appeals. PSR Addendum (dated May 6, 2013) (including Petitioner's objection); Doc. 60 at 4; Doc. 70 at 6; Doc. 71 at 13-15; Pet. App. A. The government has apparently overlooked Petitioner's PSR objections (Br. Opp. 5), but the parties agree that Petitioner preserved this issue in both the district court and court of appeals. *See* Br. Opp. 5-7.

c. A decision by this Court would be outcome-determinative and significantly affect the statutory penalties. Should the Court grant this petition and agree with the Fourth and Seventh Circuits that the mere touching of a law enforcement officer is not a violent felony, Petitioner would lack the requisite three prior convictions to be eligible for a sentence under the ACCA. *See* Br. Opp. 6. He would then face a statutory maximum of only 10 years in prison, rather than a 15-year minimum. 18 U.S.C. § 924(a)(2); 18 U.S.C. § 924(e). Petitioner's case is therefore unlike *Bargman v. United States*, cited by the government (Br. Opp. 13). *See* Brief for the United States in Opposition at 15, *Bargman v. United States*, No. 13-6776 (Dec. 9, 2013) (arguing, based on other prior convictions, that "[Bargman] would still

qualify as an armed-career criminal under Section 924(e), even if he prevailed on his claim that battery of a law enforcement officer is not a violent felony").

d. Petitioner's ACCA sentence is final. Although the government characterizes the decision below as "interlocutory" (Br. Opp. 8, 13-14), the court of appeals remanded solely based on an unrelated Sentencing Guidelines error. Pet. App. A4-A5. The court of appeals affirmed Petitioner's ACCA sentence and calculated his applicable guideline range as an armed career criminal. Pet. App. A2-A5. The issue is therefore ripe for review.

In sum, Petitioner's case presents the opportunity for this Court to resolve a circuit split on an important and recurring question, in a case where the issue is squarely presented, preserved, outcome-determinative, and final. Petitioner therefore maintains his request for this Court's review.

CONCLUSION

For the reasons stated above and in his petition for writ of certiorari, Petitioner requests that this Court grant the petition.

Respectfully submitted,

Donna Lee Elm
Federal Defender

M. Allison Guagliardo
Research and Writing Attorney
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile : (813) 228-2562
E-mail: allison_guagliardo@fd.org
Counsel of Record for Petitioner