No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

MARIO DONATE LOCKHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Florida crime of resisting an officer with violence, in violation of Fla. Stat. §843.01, is a "violent felony" under the Armed Career Criminal's elements clause.

2. Whether the Florida drug offense under Fla. Stat. §893.13 constitute serious drug offenses under the Armed Career Criminal Act, and whether those offenses can be found to have been committed on occasions different from another under Florida and federal law.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner Mario Lockhart respectfully petitions for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals, *United States v. Lockhart*, No. 17-13022, 2018 WL 1916188 (11th Cir. 2018) (App. A).

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case pursuant to 18 U.S.C. §3231. Pursuant to 28 U.S.C. §1291, the Court of Appeals for the Eleventh Circuit had jurisdiction to review the final order of the district court. The Eleventh Circuit's decision was issued on April 24, 2018. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

The Armed Career Criminal Act states that a person convicted under 18 U.S.C. §922(g)(1), who has three or more prior convictions for a violent felony or serious drug offense "committed on occasions different from one another," shall be imprisoned not less than 15 years. 18 U.S.C. § 924(e)(1).

STATEMENT OF THE CASE

1. On November 22, 2016, a federal grand jury returned a one-count indictment charging Mr. Lockhart with being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g). Mr. Lockhart pleaded guilty to count one of the indictment, without a plea agreement.

Prior to sentencing, the United States Probation Office prepared a pre-sentence investigation report (PSR). The PSR calculated Mr. Lockhart's base offense level at a level 24 under United States Sentencing Guideline (USSG) §2K2.1(a)(2), based upon Mr. Lockhart's two prior controlled substance offenses: Delivery of Cocaine and Possession of Cocaine With Intent to Sell or Deliver, Case No. 03-CF-001248; and Possession of Cocaine With Intent to Sell or Deliver and Delivery of Cocaine, Orange County Circuit Court; Case No. 03-CF-003242. The PSR added two-levels for obstruction of justice under USSG §3C1.2. The total adjusted offense level before acceptance of responsibility was calculated at a level 26. The PSR, however, determined that Mr. Lockhart qualified for the armed career criminal sentencing enhancement under USSG §4B1.4, based upon these convictions:

- Delivery of Cocaine, Orange County Circuit Court, Case No. 98-CF-10836, a serious drug offense committed on August 5, 1998;
- Resisting Officer With Violence, Orange County Circuit Court, Case No. 00-CF-006959, a violent felony committed on May 20, 2000;
- Delivery of Cocaine, Orange County Circuit Court, Case No. 03-CF-01248, a serious drug offense committed on January 29, 2003;
- Possession of Cocaine With Intent to Distribute, Orange County Circuit Court, Case No. 03-CF-03242, a serious drug offense committed on March 5, 2003;
- Delivery of Cocaine, Orange County Circuit Court, Case No. 10-CF-17710, a serious drug offense committed on October 22, 2010;

The total enhanced offense level therefore was set at level 33 under USSG §4B1.2. After applying a three-level reduction for acceptance of responsibility, the PSR determined the final offense level to be 30.

Under USSG §4B1.4, Mr. Lockhart's total criminal history category was calculated at a category VI. Based upon a total offense level of 30 and a criminal history category of VI, the PSR calculated the guideline imprisonment range at 168 months to 210 months. However, because of applying the armed career criminal enhancement, the statutorily authorized minimum sentence became 15 years' imprisonment, and therefore the guideline range was set at 180 months to 210 months under USSG §5G1.1(c)(2).

Mr. Lockhart filed written objections to the PSR's imposition of the armed career criminal sentencing enhancement and objected to each offense listed as qualifiers for the enhancement. He also objected to all factual narrative statements about prior convictions not derived from documents approved under *Shepard v. United States*, 544 U.S. 13 (2005). The Probation Office responded to Mr. Lockhart's objection, finding that Mr. Lockhart met the criteria for the armed career criminal enhancement.

At sentencing, Mr. Lockhart reiterated his objection to the armed career criminal sentencing enhancement. Specifically, Mr. Lockhart's counsel stated, "it's still on the Government to prove to the Court that this enhancement does apply for Mr. Lockhart. So we would ask that the Court make a finding on that, make a ruling on that[.]" The government declined to respond to Mr. Lockhart's objection.

The district court then overruled Mr. Lockhart's objection, stating, "with regard to Paragraph No. 22 being a career criminal, the Court does find that this defendant is -- what is…36? And he's got 21 prior convictions. What else could the Court think, other than he was a

career criminal?" The district court thereafter sentenced Mr. Lockhart to 180 months' imprisonment.

2. Mr. Lockhart appealed his 180-month sentence for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). He argued that the district court erred in concluding that he was an armed career criminal because (a) a conviction under Fla. Stat. § 843.01 for resisting a police officer with violence is not a "violent felony" under the ACCA, (b) a conviction under Fla. Stat. § 893.13 for delivering cocaine or possessing cocaine with the intent to deliver it is not a "serious drug offense" under the ACCA, and (c) the government failed to prove that he had three ACCA-qualifying convictions for offenses committed on separate occasions.

3. The Eleventh Circuit rejected those arguments and affirmed Mr. Lockhart's conviction and sentence. The Eleventh Circuit concluded that, "[w]e have held that a conviction under Fla. Stat. § 843.01 qualifies as a violent felony under the ACCA. *United States v. Hill*, 799 F.3d 1318, 1322–23 (11th Cir. 2015). We have also held that a conviction under Fla. Stat. § 893.13 is a 'serious drug offense' under the ACCA. *United States v. Smith*, 775 F.3d 1262, 1266–68 (11th Cir. 2014). Finally, where—as here—the undisputed facts recited in the presentence report demonstrate that the crimes are 'temporally distinct,' they constitute separate offenses for purposes of the ACCA. *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010)." App. A at 6.

REASONS FOR GRANTING THE WRIT

This Court has held that for a prior conviction to constitute an ACCA predicate, sentencing courts look only to the elements of the offense forming the basis for the conviction. *See Taylor v. United States*, 495 U.S. 575, 600-01 (1990); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016). Mr. Lockhart raises a challenge to each of his ACCA qualifying predicates because the district court's finding that his prior convictions qualify as ACCA predicates violates the rule in *Taylor*, *Descamps*, and *Mathis*.

A. Resisting arrest with violence in violation of Fla. Stat. §843.01 does not qualify as a violent felony under the elements clause of the Armed Career Criminal Act.

In *United States v. Hill*, the Eleventh Circuit concluded that the Florida crime of resisting an officer with violence, in violation of § 843.01, is a "violent felony" under the ACCA's elements clause. 799 F.3d 1318, 1322-23 (11th Cir. 2015). However, that was not the issue addressed by the district court in *Hill.* The appeal in *Hill* involved the district court's failure to give a jury instruction requested by Hill. Hill's initial brief did not discuss the ACCA or Fla. Stat. § 843.01. On cross-appeal, the government raised the district court's refusal to sentence Hill under the ACCA's residual clause based upon prior convictions for Florida resisting arrest with violence, and battery on a law enforcement officer.

The Eleventh Circuit had previously ruled that violations of Fla. Stat. § 843.01 qualified as crimes of violence under the ACCA's "residual clause." *See United States v. Nix*, 628 F.3d 1341, 1342 (11th Cir. 2010) (per curiam). In 2015, this Court held that the ACCA's residual clause was unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551, 2557-58 (2015). For approximately five-years, or more, prior convictions for violating Fla. Stat. § 843.01 were

routinely utilized as qualifiers for ACCA enhancements by the government and courts under the ACCA's residual clause.

An examination of the government's reply briefs in *Hill* and the decision in *Hill,* show that the government sought to use *Hill's* prior convictions for Florida battery on a law enforcement officer and resisting arrest with violence under the ACCA's residual clause. *Hill,* 799 F.3d at 1321. The government's reply briefs in *Hill* sought to reverse the district court's decision not to use the ACCA's residual clause. Government's Reply Brief at 1-6, *United States v. Hill,* 799 F.3d 1318 (11th Cir. 2015) (No. 14-12294-EE). The Supreme Court did not decide in *Johnson* until June 26, 2015. All briefing by the parties in *Hill* related to the ACCA's residual clause, and the issue presented was whether the district court erred when it determined that these Florida prior convictions did not qualify under the ACCA's residual clause. The elements clause of the ACCA was raised for the first time in *Hill* by the Eleventh Circuit's published decision, as the parties, nor district court, ever considered that clause.

Two-months after the decision in *Johnson*, the *Hill* opinion was issued. The *Hill* decision used the "categorical approach" to determine whether Florida resisting arrest with violence statute is a violent felony under the ACCA's elements clause. The court looked at two decisions from Florida's intermediate courts of appeal to aid in its determination whether violating Fla. Stat. §843.01 is a crime of violence under the elements clause of the ACCA. *Hill*, 799 F.3d at 1322.

The first opinion relied upon by the Court in *Hill* was *Rawlings v. State,* 976 So.2d 1179, 1181 (Fla. 5th DCA 2008). *Rawlings* involved a vicious attack on two police officers trying to arrest a suspect, resulting in multiple batteries by the suspect on one officer's groin. That same officer suffered a portion of a tazing while physically locked with the suspect, and brutal fisticuffs were also exchanged. Importantly, *Rawlings* involved the denial of the right to cross-examination,

and his qualification as a Florida prison release re-offender (PRR). The *Rawlings* opinion ruled that Florida resisting arrest with violence qualifies as a predicate conviction for PRR, "because violence is a necessary element of the offense." *Rawlings*, 976 So.2d at 1181-82 (*citing Walker v. State*, 965 So.2d 1281 (Fla. 2nd DCA 2007)).

The second ruling relied upon in *Hill* was the afore-mentioned decision in *Walker.* The decision in *Walker* did not include the details of the offense conduct, but provided that *Walker* was convicted of both resisting arrest with violence, attempted robbery, and battery on a police officer and firefighter. Like *Rawlings*, *Walker* involved whether Florida's resisting arrest with violence statute qualified as a predicate crime for PRR sentencing. Critically, crimes that qualify for enhanced sentencing under the Florida PRR statute include, "[a]ny felony that involves the use or threat of physical force or violence against an individual." *Walker v. State*, 965 So.2d 1281, 1284 (Fla. 2nd DCA 2007) (*citing* Fla. Stat. § 775.082(9)(a)(1)(o)). The *Walker* ruling determined that Florida resisting arrest with violence qualified as a PRR predicate because, "[o]ne of the elements of resisting arrest with violence under § 843.01 is either offering to do violence or actually doing it." *Id.*

What the two intermediate court decisions relied upon in *Hill* fail to note is the necessary level of violence for Fla. Stat. § 843.01 is. It is clear that under the ACCA for the "statutory definition of "*violent* felony," the phrase "physical force" means *violent* force - that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 130 S.Ct. 1265, 1271 (2010) (emphasis in original). This Court clarified that, "[e]ven by itself, the word "violent" in § 924(e)(2)(B) connotes a substantial degree of force." *Id.* Yet, Florida's resisting arrest with violence statute requires nowhere near that level of violence to support a

conviction. The most note-worthy example of the minimal level of physical force required for conviction under Fla. Stat. § 843.01 is in *State v. Green,* 400 So.2d 1322 (1981).

In *Green*, the defendant was charged with violating Fla. Stat. § 843.01 for holding onto a doorknob, refusing to let go, and "wiggling and struggling, in an effort to free himself." *Green*, 400 So.2d at 1323. Green moved to dismiss the charge against him, under Florida Rule of Criminal Procedure 3.190(c)(4). Importantly, a motion to dismiss under Florida Rule 3.190(c)(4) states that "[t]here are no material disputed facts ...." Fla. R. Crim. P. 3.190(c)(4). The parties to the case in *Green* agreed that the facts were as described. *Green*, 400 So.2d at 1323. The above-referenced facts in *Green* were not in dispute. The Florida Circuit Court granted Green's motion to dismiss, finding that Green's actions did not constitute the violent conduct for conviction under the statute. Florida's Fifth District Court of Appeal disagreed with the Circuit Court, ruling that the stipulated facts "do not establish, as a matter of law, that Green's actions did not constitute 'violence."' *Id.* at 1324.

The threshold for what constitutes "violence" for the Florida statute is far below that which would qualify under the ACCA. The *Hill* decision relied upon the statements in two Florida decisions declaring that "violence is a necessary element of" Fla. Stat. § 843.01 to conclude that Florida resisting arrest with violence qualifies under the ACCA's elements clause as a crime of violence. Yet, the *Hill* decision neglected to determine whether Florida was using a differing definition of what constituted sufficient "violent" conduct. The differing definitions of "violent conduct," are further apparent in the decisions of Florida courts regarding the requisite intent for violating Fla. Stat. § 843.01.

The Supreme Court of Florida ruled in *Frey v. State*, 708 So.2d 918, 920 (Fla. 1998), that voluntary intoxication is not a defense to resisting arrest with violence, because the offense

requires "only a general intent" *mens rea.* Frey was intoxicated when he resisted arrest with violence. Frey's blood alcohol level was "approximately four times the legal limit for driving," at the time of the offense. *Id.* at 920. Yet, Frey was not permitted a jury instruction informing the jurors of a voluntary intoxication defense, because the statute is not a specific intent crime. Further, the intent required for conviction under Florida's resisting arrest with violence statute is only a "general intent to 'knowingly and willfully' impede an officer in the performance of his or her duties." *Id.* Thus, the violent conduct need not be intentional, the only intentional act required is to impede the officer's duties. Nor is there a requirement that the violent conduct be done "malicious [ly]." *Polite v. State*, 973 So.2d 1107, 1112 (Fla. 2007) ('Willful' conduct has been defined as 'voluntary and intentional, but not necessarily malicious'").

By contrast, the ACCA requires that the predicate violent prior conviction has "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Leocal v. Ashcroft*, 125 S.Ct. 377, 383 (2004). Admittedly, *Leocal* examined the terms in 18 U.S.C. § 16, yet 18 U.S.C. § 16(a) and the ACCA's elements clause are identical. The decision in *Leocal* has equal effect to the ACCA. In that regard, the difference between the *mens rea* in Florida's resisting arrest with violence statute, and that required for § 16(a), and by clear extension, the ACCA's elements clause, are strikingly different. The *Leocal* ruling stated unequivocally that, "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.*

It is evident that the *Hill* decision, without the benefit of briefing by the parties on the ACCA's elements clause, failed to realize that Florida's conclusion that Fla. Stat. § 843.01 is a crime of violence for its PRR statute, can be based on minimal conduct that falls below the

threshold established in *Curtis Johnson*, and permits that conduct to be committed with no specific intent, as required by *Leocal.*

Further, Florida's PRR statute, like the elements clause of the ACCA includes the "threatened use of physical force," as qualifying criteria. 18 U.S.C. § 924(e)(2)(B)(i). It is clear that Fla. Stat. § 843.01 may be committed by an offer to do violence, and that the offer to do violence is the least serious act that could satisfy the ACCA. The Court's analysis, under the categorical approach, should have focused on the least serious act that could satisfy the ACCA. *See Curtis Johnson*, 130 S.Ct. at 1269; *Shepard v. United States*, 125 S.Ct. 1254, 544 U.S. 13, 26 (2005).

The court in *Hill* had to focus upon the "offer" to do violence portion of Fla. Stat. § 843.01, rather than the actual doing of violence. To that effect, neither of the Florida decisions relied upon in *Hill* were "offer" cases, as both also involved convictions for battery on the police officer and resisting arrest with violence. A person can violate Fla. Stat. § 843.01 without actually engaging in violence.

The Supreme Court of Florida clarified this in its decision in *State v. Henriquez*, 485 So.2d 414, 415 (Fla. 1986). *Henriquez* determined that violating Fla. Stat. § 843.01 could occur without a companion offense of battery on a law enforcement officer, because "one could obstruct or oppose a law enforcement officer by threatening violence...." *Id.* Similarly, in *Larkins v. State*, 476 So.2d 1383, 1385 (Fla. 1st DCA 1985), an intermediate Court of Appeal determined that a person can violate Fla. Stat. § 843.01 "with a verbal offer of violence." *Id.* The Florida Supreme Court determined that mere words alone could not satisfy the threatened violence element of Fla. Stat. § 843.01. The person making the threats must have "the capacity to achieve that result." *Scullock v. State*, 377 So.2d 682, 683 (Fla. 1979). A person who threatens, or offers to do violence to a law

enforcement officer while "hog-tied," and therefore cannot act upon the threats, may not be convicted under Fla. Stat. § 843.01. *Kirkland v. State*, 647 So.2d 142, 143 (Fla 1st DCA 1994). To be convicted of violating Fla. Stat. § 843.01 for offering to do violence, the perpetrator must engage in conduct akin to an assault, as the offer of violence must be coupled with a capacity to follow through with the offer. Yet, the same general intent standard applies to the "offer to do violence" portion of Fla. Stat. § 843.01. As in the case of actually engaging in "violent" conduct, the only intentional act required is the intent to impede, not to engage in violence, or an offer to engage in violence. *Polite v. State*, 973 So.2d 1107, 1112 (Fla. 2007). The statute runs afoul of *Leocal,* whether the conduct was actual violence or threatened violence.

B. Prior Florida convictions under Fla. Stat. § 893.13 do not qualify as serious drug offenses for the ACCA because the Florida statute includes no *mens rea* element.

The ACCA defines a serious drug offense to include any offense involving the manufacture, distribution, or possession with intent to manufacture or distribute drugs. 18 U.S.C. § 924(e)(2)(A)(ii); *United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016). The Eleventh Circuit has held that convictions under Fla. Stat. §893.13(1) qualify as serious drug offenses under the ACCA, despite the Florida statute's lack of a *mens rea* element. *United States v. Smith*, 775 F.3d 1262, 1266-68 (11th Cir. 2014).

The defendant in *Smith* argued that his violations of section 893.13(1) did not qualify as ACCA predicates because Florida law does not require the state to prove as an element of the crime that the defendant knew the illicit nature of the controlled substance. *Id*. at 1267. The Eleventh Circuit concluded that "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied" by the ACCA's definition of serious drug offense.

Id. The court held, therefore, that the defendant qualified as an armed career criminal based on his three prior convictions for violating section 893.13(1). *Id*. at 1268.

Mr. Lockhart respectfully maintains that his prior §893.13(1) convictions are not serious drug offenses under the ACCA. Congress did not intend to include strict liability offenses as ACCA predicates. *See Begay v. United States*, 553 U.S. 137, 145 (2008) (interpreting the violent felony definition, given the ACCA's purpose to punish more severely those more likely to commit crimes with a gun, to be limited to purposeful offenses).

The ACCA defines a "serious drug offense" to mean:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A).

In this definition, Congress did not clearly dispense with a requirement that the defendant know of the illicit nature of the substance. The closest federal analogue to Fla. Stat. § 893.13, at issue here, is 21 U.S.C. § 841, which contains a *mens rea* element requiring that the defendant know of the illicit nature of the controlled substance. *See* 21 U.S.C. § 841(a) ("knowingly or intentionally"); *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013) ("The federal statute [§ 841(a)], in contrast to Florida's current law, requires the government to establish, beyond a reasonable doubt and without exception, that the defendant had knowledge of the nature of the substance in his possession.") (citation omitted).

Because Congress did not clearly dispense with a *mens rea* requirement, § 924(c)(2)(A)(ii) should be interpreted to require knowledge of the illicit nature of the substance. *See McFadden v. United States*, 135 S. Ct. 2298, 2302, 2305 (2015) (interpreting 21 U.S.C. § 813 to require that the defendant know that the substance is a controlled substance, or know the specific substance involved); *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (addressing mental state required for conviction under 18 U.S.C. § 875(c); stating, "The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent" should not be read 'as dispensing with it.'") (citation omitted); *Staples v. United States*, 511 U.S. 600, 618-19 (1994) (concluding that *mens rea* was an element of the offense at issue; had Congress intended to dispense with *mens rea* requirement, it should have made that clear). This conclusion is further supported by the severity of punishment mandated by the ACCA; given the 15-year mandatory-minimum penalty, it is unlikely that Congress intended to include a strict liability offense, like § 893.13, as a qualifying prior offense. *See Begay*, 553 U.S. at 146-47.

The Florida statute is non-generic, because it does not correspond to Congress's definition in § 924(e)(2)(A)(ii). *See Taylor v. United States*, 495 U.S. 575, 590, 601-02 (1990); *see also Adkins*, 96 So. 3d at 423-24 & n.1 (Pariente, J., concurring in result) (recognizing that the post-2002 version of Fla. Stat. § 893.13 was "out of the mainstream" of state drug statutes, since the "overwhelming majority" – either by statute or judicial decision – require knowledge of the illicit nature of the substance as an element of the offense). Mr. Lockhart therefore respectfully maintains this argument for further review and contends that his prior convictions under § 893.13 relied upon to sentence him under the ACCA are not serious drug offenses.

C. The Government did not prove that Mr. Lockhart has at least three prior qualifying offenses committed on different occasions from one another.

The government had to prove that Mr. Lockhart qualified for the ACCA's increased penalties, including that he has at least three prior convictions for qualifying offenses that were "committed on different occasions from one another." 18 U.S.C. § 924(e); *see United States v. Canty*, 570 F.3d 1251, 1256-57 (11th Cir. 2009); *United States v. Braun*, 801 F.3d 1301, 1304 (11th Cir. 2015).

To prove that the prior offenses occurred on different occasions, the government must use only those documents approved in *Shepard v. United States*, 544 U.S. 13 (2005), such as the charging documents, plea agreements and colloquies, jury instructions, and other comparable judicial records. *United States v. Sneed*, 600 F.3d 1326, 1332–33 (11th Cir. 2010).

Mr. Lockhart asserts that the government failed to prove that he committed three qualifying offenses on different occasions. And he contends that this Court's decisions in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), abrogated *United States v. Weeks,* 711 F.3d 1255, 1260 (11th Cir. 2013).

Mr. Lockhart acknowledges that courts may determine the factual nature of prior convictions, including whether they were committed on different occasions, so long as they limit themselves to *Shepard*-approved sources. And, he further acknowledges that in both *Descamps* and *Mathis*, the Supreme Court examined the question of when sentencing courts may apply the "modified categorical approach" to determine if a crime qualifies as an ACCA violent felony, given that the "elements" of a crime must be proven beyond a reasonable doubt. *Mathis*, 136 S. Ct. at 2243; *Descamps*, 133 S. Ct. at 2276.

Nonetheless, Mr. Lockhart contends here the district court, over his objection, determined that the government met its burden to establish that the ACCA applied based evidently on Mr. Lockhart being 36 years old at the time of sentencing and that he had 21 prior convictions. Doc. 50 at 6. Mr. Lockhart's age and the number of his prior convictions do not establish the different occasions requirements of the ACCA. Nor do those facts establish the criteria in *Sneed* or *Weeks* to make a different occasions determination.

Further, to the extent the court relied upon the dates alleged in charging documents or judgments, which the court did not specify that it relied upon those facts, the dates alleged in the charging documents are not elements under Florida law. *See Tingley v. State*, 549 So. 2d 649, 650 (Fla. 1989). Therefore, even though the dates were alleged in the *Shepard*-approved charging documents, the district court could not rely on these non-elemental facts to impose a sentence under the ACCA. *See Descamps*, 133 S. Ct. at 2288-89 (precluding reliance on non-elemental fact from the Shepard-approved plea colloquy). Indeed, based on *Descamps* and *Mathis*, courts should no longer rely on factual allegations in charging documents (even though they are *Shepard*-approved documents), when those facts were not elements of the prior offense. *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014).

Therefore, the district court erred, because the government did not prove the ACCA's different-occasions requirement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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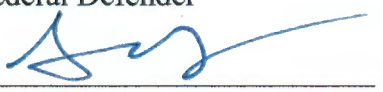
Federal Defender



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