

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

DARRELL LYNN DANCY — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DARRELL LYNN DANCE  
(Your Name)

PMB 1000  
(Address)

Talladega , AL 35160  
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

A "serious drug offense," under the Armed Career Criminal Act, 18 U.S.C. § 924(e), is one involving manufacturing, distribution or possessing with intent to manufacture or distribute a controlled substance.

Alabama State Code : 13A-12-211 Unlawful distribution of a controlled substance:  
(a) A person commits the crime of unlawful distribution of controlled substance if except as otherwise authorized, he or she, sells, furnishes gives away, delivers or distributes a controlled substance enumerated in schedule I through V.

The first question presented is whether the Appeals Court and District Court err by failing to address Petitioners factual innocence claim.

The second question presented is whether Dancy properly presented a claim of factual innocence of the offense, unlawful distribution of controlled substance, by the fact that no controlled substance enumerated in I through V exist, in one of the counts in CC-2002-808.

The third question presented is whether the Armed Career Criminal Act (ACCA) has a factual innocence exception which invalidates the ACCA enhancement, when the defendant provided clear and convincing evidence that he did not commit the crime or enter the conduct that serves as the predicate for the enhanced portion of the sentence.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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**TABLE OF AUTHORITIES**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

**[x] For cases from **federal courts**:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[x] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[x] is unpublished.

**[ ] For cases from **state courts**:**

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 29, 2017.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 27, 2018, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.  
\*

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
\*

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) provides:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(A) provides:

[T]he term "serious drug offense" means--

(i) an offense under the Controlled Substance Act (21 U.S.C. § 801 et seq.) the Controlled Substance 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 Substance Act (21 U.S.C. § 802) for which a maximum of imprisonment of ten years or more is prescribed by law.

Ala Code § 13A-12-211 Unlawful distribution of controlled substance provides:

(a) A person commits the crime of unlawful distribution of controlled substance if except otherwise authorized, he or she sells, furnishes, gives away, delivers or distributes a controlled substance enumerated in schedule I through V.

Blacks Law Dictionary "Criminal statute or Code" states:

Federal and state laws enacted by legislative bodies which define, classify and set forth punishment for specific crimes.

Blacks Law Dictionary "Elements of Crime" states:

A term used by the common law to refer to each component of the actus reus, causation, and the mens reas that must be proved in order to establish that a given offense has occurred.

## STATEMENT OF THE CASE

The Armed Career Criminal Act("ACCA"), 18 U.S.C. § 924(e) is a federal statute that enhances the sentence of certain defendants convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g). In the ordinary case, the maximum punishment for the offense is a 10-year term of imprisonment. 18 U.S.C. § 924(a)(2). But under the ACCA, in the case of a person who has three previous convictions for a violent felony or a serious drug offense or both, the mandatory minimum punishment is a 15-year term of imprisonment and the maximum is life. 18 U.S.C. § 924(e).

In Mckay v United States 657 F.3d 1190 (11th Cir. 2011) (quoting 1199-1200) the Eleventh Circuit stated consonant with the principle articulated in Bousley and Sawyer, the Second and Fourth Circuits have made clear that, for the actual innocence exception to apply in the non-capital sentencing context, a movant must show that he is factually innocent of the conduct or underlying crime that serves as the predicate for the enhanced sentence.

In Bousley v United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed. 2d 828 (1998) the Supreme Court recognized that a prisoner may establish that he is "actually innocent" of a crime for the purpose of passing through the gate and having defaulted claim considered on the merits where there has been an intervening change in the law. Bousley had pled guilty to using a firearm during and in relation to a drug offense under 18 U.S.C. § 924(c) when he merely possessed the firearm. Subsequently, the Supreme Court rejected the broad reading of "use" and held that a conviction under this section required active employment of the firearm during the crime. Bousley stood convicted of an act that the law did not make criminal at 620. While Bousley had procedurally defaulted his claim by not raising it on direct review, the Court remanded the case so that the lower courts could consider whether Bousley was actually innocent based on the intervening change in the law. In doing so, the court emphasized that actual innocence meant factual innocence, and not legally

insufficient evidence at 623-624. Bousley bore the burden of proving that he was factually innocent and that in light of all the evidence, it was more likely than not that no reasonable juror would have convicted him at 623.

**2. The district court maintains Dancy's ACCA status.**

Petitioner Dancy pled guilty in 2008 to possession of a firearm by convicted felon in violation of section 18 U.S.C. § 922(g). The presentence investigation report (PSR) recommended the ACCA enhancement to Mr. Dancy based on three ACCA predicate convictions:

- (1) Shooting into an occupied vehicle, in violation of Ala. Code § 13A-11-61(a)
- (2) Unlawful distribution of a controlled substance, in violation of Ala. Code § 13A-12-211 ; and
- (3) Unlawful distribution of a controlled substance, in violation of Ala. Code § 13A-12-211.

On April 22nd of 2016 a motion to vacate Mr. Dancy's sentence was filed under section 28 U.S.C. 2255 concerning the decision in Johnson v United States, 135 S. Ct. 2551 (2015). The Johnson decision and United States v Estrella, 758 F.3d. 1239 (11th Cir 2014) made the offense of shooting into an occupied vehicle unusable as an ACCA violent felony predicate.

The Government agreed Dancy's sentence should be vacated for resentencing " Appendix E."

The District Court did not agree "Appendix C " in the Memorandum opinion the District Court offered a third ACCA predicate of unlawful distribution of controlled substance and denied Dancy's motion to vacate and certificate of appealability "Appendix C."

**3. The District Court denied reconsideration.**

Mr. Dancy filed a motion for reconsideration in the District Court in regards to the denial of his motion to vacate 28 U.S.C. § 2255. His request for reconsideration was due to some facts that reveal he was factually innocent of one of the unlawful distribution of controlled substance offenses now being used as a third predicate to maintain the ACCA enhancement as valid. He provided evidence such as a letter to the Tuscaloosa county clerks office where it was stated that case no: CC-2002-808 only had one certificate of analysis for two counts of the offense unlawful distribution of controlled substance, which occurred months apart. Also provided was a copy of the certificate of analysis and a copy of the "Notice of Grand Jury" Joinder"" that revealed one of the offenses was returned a NO BILL.

The District Court found no reason to reconsider their decision and denied reconsideration of its memorandum opinion "Appendix D".

**4. The Eleventh Circuit denied motion for Certificate of Appealability.**

Mr. Dancy applied for Certificate of Appealability (COA) to the Eleventh Circuit, arguing that his ACCA status was in violation of the United States Constitution by violation of Due Process of Law, his sentence was above the statutory maximum of 1 to 10 year range due to being based on invalid predicates. Mr. Dancy reiterated his innocence claims. At no time did the Eleventh Circuit review Dancy's claims of factual innocence. The Eleventh Circuit denied application for Certificate of Appealability "Appendix A".

**5. The Eleventh Circuit denied reconsideration of denial of Certificate of Appealability.**

Mr Dancy requested the Eleventh Circuit to reconsider its decision which had

denied him Certificate of Appealability. He once again reiterated he was factually innocent of one of the unlawful distribution of controlled substance offenses which the ACCA enhancement was now based on. The Eleventh Circuit found no reason to reconsider Dancy's denial of COA "Appendix B."

## REASONS FOR GRANTING THE PETITION

This case presents a clear circuit conflict on an important and recurring question concerning factual innocence. Although the Eleventh Circuit provides a factual innocence exception which extends beyond noncapital sentencing when a movant has shown that he is factually innocent of the conduct or underlying crime that serves as the predicate for the enhanced sentence, this Circuit has not excepted anyone. The Ninth Circuit's decision's on innocence conflict with the Eleventh's.

Dancy challenges his Armed Career Criminal Act (ACCA) status which is based on three unlawful distribution of controlled substance offenses, in violation of Ala. Code section 13A-12-211, predicates. His challenge was due to his factual innocence of one of the offenses in predicate CC-2002-808, making his ACCA status invalid.

To commit the crime of Ala.Code.section 13A-12-211 unlawful distribution of controlled substance the statute states (a) A person commits the crime of unlawful distribution of controlled substance if except as otherwise authorized, he or she sells, furnishes, gives away, delivers or distributes a controlled substance enumerated in schedule I though V.

In CC-2002-808 Dancy pled guilty to two counts of unlawful distribution of a controlled substance offenses. Now these two counts are being used as predicate offenses for his ACCA status. In 2011, Dancy requested discovery material from the Tuscaloosa circuit clerk. The discovery material reveal there was only one set of forensic evidence for two counts of distribution which occurred months apart. Knowing that there was suppose to be two sets of lab reports another request was made in an attempt to get the second lab report. The Tuscaloosa circuit clerk explain that there was only one set of certificate of analysis for this file. The certificate of analysis provides the date the chain of custody began, description of evidence and

the results of analyses. To add to the evidence of Dancy's factual innocence the Circuit court clerk provided a Notice of Grand Jury "Joinder" , this document reveal that one of the offenses in CC-2002-808 had been No Bill by the grand jury, but joined. Ala code section 13A-12-211 requires the distribution of a controlled substance enumerated in schedule I though V. Dancy cannot have twice committed the offense of unlawful distribution with one set of results that revealed a controlled substance. Therefore his ACCA status should be invalid.

The Eleventh Circuit's decisions conflict with the Ninth's. The Eleventh Circuit fail to recognize that one can be factually innocent because one's actions fail to accomplish the elements of a designed statute of a state.

In Rozzelle v Secretary, Florida Doc 672 F.3d 1000. Rozzelle was charged with second degree murder after Greg Leier ended up dying after a fight with Rozzelle. Rozzelle , had explain the fight was because he discovered Leier with his girlfriend in a compromising position. Fla. Stat § 782.04(2) defines second degree murder as the unlawful killing of a human being, when perpetrated by any imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual. Fla. Stat § 782.03 provides homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

The Eleventh Circuit fail to find that Rozzelle was factually innocent of second degree murder because his actions did not accomplish that designed statute. It would seem that this decision would conflict with Bousley v United States, 523

U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) Bousley had pled guilty to using a firearm during and in relation to a drug offense under 18 U.S.C. § 924(c) when he merely possessed the firearm. Subsequently, the Supreme Court rejected the broad reading of "use" and held that a conviction under this section required active employment of the firearm during the crime. In the Ninth Circuit in the case Vosgien v Persson 742 F.3d. 1131 (2014) Vosgien was charged with a ten-count information for sexual offenses. Within those charges he was charged with three counts of compelling prostitution. In Oregon, Compelling Prostitution statute Or.Rev.Stat. 167.017 apply only to defendants who induce someone to "engage in prostitution with others." Vosgien brided his daughter in order to procue sexual favors for himself.

The Ninth Circuit stated Vosgien need not demonstrate that he was actually innocent of any criminal wrong doing. He need only demonstrate he was actually innocent compelling prostitution, the counts under which he was convicted. It was stated that Vosgien had successfully demonstrated , in light of subsequent Oregon case law, actual innocence under Schlup as to the compelling prostitution convictions.

To commit a crime an individual must inter the conduct of the prohibited act that violate the designed statutes.

2. Whether the Eleventh Circuit has a factual innocent exception that invalidates an ACCA enhancement when a movant has shown that he is factually innocent of the conduct or underlying crime that serves as the predicate for the enhanced sentence.

The Eighth and Tenth Circuit held that actual innocence exceptions is limited, to capital sentencing context. Embrey v Hershberger 131 F.3d.739, 740 (8th Cir 1997)(en banc)( We think that Sawyer, in terms, applies only to the sentencing phase of death cases.") United States v Richards, 5 F. 3d. 1369, 1371 (10th Cir. 1993) ("A person cannot be actually innocent of a noncapital sentence....")

The Eighth and Tenth Circuit decisions conflict with the Eleventh and Fourth Circuit. The Eleventh Circuit states Mckay v United States 657 F. 3d. 1190-1199 (11th Cir 2011) stating for the actual innocence exception to apply in the noncapital sentencing context, movant must show that he is factually innocent of the conduct of underlying crime that serves as the predicate for the enhanced sentence. United States v Pettiford 612 F. 3d. 270 (4th Cir 2010) the Fourth Circuit expressly clarified that the actual innocence of sentence exception "applies in the context of habitual offender provisions only where the challenge to eligibility stems from factual innocence of the predicate crime, and not from the legal classification of the predicate crime."

This Court decided factual innocence in Bousley. Bousley v United States, 523 U.S. 614 118 S. Ct. 1604, 140 L. Ed. 2d. 828 (1998) Bousley pleaded guilty to "using" a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). Five years later, while his appeal was pending, the Supreme Court defined the "use" prong of § 924(c)(1) holding that the Government is required to show active employment of the firearm. "Bailey v United States 516 U.S. 137, 144, 133 L. Ed. 2d. 472 116 S. Ct. 501 (1995) Under the new interpretation of §924, petitioner did not appear to qualify as having "used" a firearm. The Supreme Court remanded Bousley so that the lower court could consider whether he was

actually innocent stating "Actual innocence" means factual innocence not mere legal insufficiency at 523 U.S. 623-624.

Many individuals have sought relief from the ACCA enhancement claiming to be factually innocent in light of the Mckay/Bousley exception, however I can find not one case in the Eleventh Circuit where relief has been granted due to one's innocence. These important questions being answered will help resolve whether the ACCA enhancement can stand on a false foundation built on a predicate offense which the movant's conduct fail to accomplish the designed statute or factually innocent of.

The Armed Career Criminal Act is a federal sentencing enhancement that applies to hundreds of defendants each year. Its consequence carries a minimum sentence of 15 years imprisonment, without this enhancement an individual would face the maximum of 10 years.

Should this court find that Dancy properly provided a factual innocent claim, concerning the third predicate necessary to apply the ACCA enhancement, this Court should address whether the 15 year sentence is valid.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Darrell Dancy

Date: 4-28-18