No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

SHELDON JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

ON PETITION FOR 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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QUESTIONS PRESENTED

The broad question presented by this case is whether the Eleventh Circuit Court of Appeals erroneously affirmed Mr. Jackson's sentence under the Armed Career Criminal Act (ACCA), which was above the statutory maximum for his offense of possession of a firearm by a convicted felon. Specifically, this case presents the following questions:

I. Whether a Florida conviction for resisting with violence under Fla. Stat. § 843.01 a "violent felony" under the ACCA's elements clause, where:

(a) The statute only requires any "unlawful" force, which can be completed by the same mere touch found not to qualify as a "violent felony" in *Johnson v. United States*, 559 U.S. 133, 140 (2010); and

(b) There is no mens rea requirement as to the "doing violence" element of the offense, *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (stating that the "use" of physical force suggests a higher degree of intent than negligent or accidental conduct).

II. Whether a Florida conviction for possession with intent to sell cocaine under Fla. Stat. § 893.13 is a "serious drug offense" under the ACCA.

LIST OF PARTIES

Petitioner, Sheldon Jackson, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Sheldon Jackson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion is provided in Appendix A-1.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on June 6, 2018. Appendix A-1. The Eleventh Circuit denied rehearing and rehearing en banc on January 18, 2019. Appendix A-2. This petition is timely filed under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS

This case involves the ACCA, 18 U.S.C. § 924(e). The ACCA provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [A]ny 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).

Florida Statutes § 843.01 proscribes "Resisting officer with violence to his or her person" and provides, in relevant part:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . .

STATEMENT OF THE CASE

In February of 2017, Mr. Jackson pled guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He was sentenced under the ACCA based on three prior Florida convictions: two convictions for possession with intent to sell cocaine and one conviction for resisting an officer with violence. Because of his ACCA enhancement, he was subject to a mandatory-minimum sentence of 15 years' imprisonment and a guideline range of 180 to 188 months' imprisonment based on a total offense level of 31 and a criminal history category of IV. Without the ACCA enhancement, his total offense level would be 18 (or 16 with an adjustment for acceptance of responsibility) and his criminal history category would be III, resulting in an advisory guideline range of 33 to 41 months (or 27 to 33 months) and a statutory sentencing range of zero to 10 years.

At sentencing, Mr. Jackson objected to the ACCA enhancement, arguing that resisting with violence is not a "violent felony" under the ACCA. However, he acknowledged binding Eleventh Circuit precedent holding that it was. After

overruling his objection based on that precedent, the district court sentenced him to the mandatory-minimum term of 180 months' imprisonment.

On direct appeal, Mr. Jackson again argued that resisting an officer with violence did not constitute a "violent felony." On June 6, 2018, the Eleventh Circuit affirmed his sentence. *See* App. A-1. On January 28, 2019, the Eleventh Circuit denied his petition for rehearing. *See* App. A-2.

REASONS FOR GRANTING THE WRIT

Mr. Jackson's sentence was enhanced under the ACCA based on his prior Florida convictions for resisting with violence and possession with intent to sell cocaine. Had he been sentenced in the Tenth Circuit, he would not have been subject to the ACCA's mandatory-minimum sentence or an enhanced Guideline range because the Tenth Circuit has held that the Florida offense of resisting with violence is not a "violent felony." *See United States v. Lee*, 701 F. App'x 697 (10th Cir. 2017). Mr. Jackson requests certiorari review to resolve the circuit conflict regarding Florida's resisting-with-violence offense. Also, because the Eleventh Circuit's decision conflicts with this Court's holdings regarding the mens rea required to establish the use of physical force, he requests certiorari review to resolve the conflict between the precedents of the court below and this Court in *Leocal*.

Moreover, he also requests certiorari review of whether a Florida conviction for possession with intent to sell cocaine under Fla. Stat. § 893.13 is a "serious drug offense." Notably, this same issue is pending before this Court in *Eddie Lee Shular v.*

United States, Supreme Court Case No. 18-6662, where the Solicitor General has asked for certiorari review.[1]

I. The circuits are divided over whether resisting with violence under Fla. Stat. § 843.01 is a "violent felony."

The Florida offense of resisting with violence, *see* Fla. Stat. § 843.01, can qualify as a "violent felony" only if it has "as an element" the use, attempted use, or threatened use of physical force, that is, "*violent* force . . . force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140; *see Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (reiterating that nominal physical contact, such as the touching conduct in Florida's battery statute, is different from the "violent" force contemplated in *Johnson*). As set forth below, resisting with violence does not require "physical force." Moreover, its mens rea requirement does not amount to the "use" of such force. *See Leocal*, 543 U.S. at 9.

A. The circuits are divided over whether Fla. Stat. § 843.01 has as an element the use, attempted use, or threatened use of physical force against the person of another.

A prior conviction under Florida Statutes § 843.01 is a violent felony in the Eleventh Circuit but not in the Tenth Circuit. *See Lee*, 701 F. App'x at 700 & n.1. The two circuits have taken different approaches to determine whether the offense is a violent felony. Employing the analysis used in *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), the Tenth Circuit considered the minimum conduct criminalized by § 843.01,

[1] If this Court grants certiorari review in *Shular*, Mr. Jackson requests that his petition be held pending *Shular*'s disposition. Although he did not raise this issue below, the outcome of *Shular* will necessarily determine whether he can prevail on this issue on plain error review.

Fla. Stat., as defined by the Florida Supreme Court. But through rote application of its prior panel precedent rule, the Eleventh Circuit improperly analyzed the typical conduct punished, rather than the minimum conduct criminalized. The Court should review Petitioner's judgment to resolve this circuit split.

The Eleventh Circuit reflexively held that Petitioner's argument was foreclosed by the prior panel precedents of *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012), and *United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015). These precedents, however, failed to consider the Florida Supreme Court's definition of the minimum conduct criminalized by the offense as required by *Moncrieffe*. In *Romo-Villalobos*, which pre-dated *Moncrieffe*, the Eleventh Circuit failed to assume that the conviction under Florida Statutes § 843.01 "rested upon nothing more than the least of the acts criminalized." *Moncrieffe*, 564 U.S at 191 (internal brackets and quotation marks omitted). Instead, the Eleventh Circuit "emphasized . . . Florida [intermediate appellate court] cases where defendants had engaged in more substantial, and more violent, conduct" instead of the controlling Florida Supreme Court case and other intermediate appellate cases describing the least culpable conduct under the statute. *Lee*, 701 F. App'x at 700 & n.1.

The minimum conduct required by the Florida Supreme Court to satisfy the "violence" element of § 843.01 is the use of unlawful force. *See I.N. Johnson v. State*, 50 So. 529 (Fla. 1909). "Unlawful" force in Florida can be as minor as the unwanted touch proscribed by the simple battery statute addressed by this Court in *Johnson*.

Florida case law confirms that point. In *I.N. Johnson*, the state charged the defendant with "knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence" to an officer. *Id.* at 529.[2] The charging document alleged "a knowing and willful resistance . . . by gripping the hand of the officer and forcibly preventing him from opening the door of the room . . . thereby obstructing the officer in entering the room to make the arrest." *Id.* at 529-30. The Florida Supreme Court found that this allegation met the "violence" element of the statute:

> The allegation that the defendant gripped the hand of the officer, and forcibly prevented him from opening the door for the purpose of making the arrest under the capias, necessarily involves resistance, and an act of violence to the person of the officer while engaged in the execution of legal process. The force alleged is unlawful, and as such is synonymous with violence.

Id. at 530.

Such a touch, while sufficient to sustain a conviction under § 784.03 or § 843.01, does not contain the degree of force necessary – violent force or strong physical force – to be a violent felony or a crime of violence. Indeed, this Court has now confirmed twice that the touch in § 784.03 does not contain the force necessary – violent force or strong physical force – to be an ACCA predicate. *Johnson*, 559 U.S. at 140; *Stokeling*, 139 S. Ct. at 553.

[2] The charge was brought under Section 3500 of the General Statutes of 1906, a predecessor to today's § 843.01.

The Florida Supreme Court's decision in *I.N. Johnson* has not been abrogated or overruled. The federal court is bound by the state supreme court's interpretation of state law, including its determination of the elements of a state criminal offense. *See Johnson*, 559 U.S. at 138. "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

More recent cases from Florida's intermediate courts of appeal show that, like the gripping of the officer's hand in *I.N. Johnson*, the force required by "offering or doing violence" under § 843.01 is not violent force or strong physical force. In particular, the State of Florida established a "prima facie case" for resisting an officer with violence where the State alleged that the defendant was holding onto a doorknob and "wiggling and struggling" to free himself. *State v. Green*, 400 So. 2d 1322, 1323-24 (Fla. 5th DCA 1981). In another case, the defendant "struggled, kicked, and flailed his arms and legs," even though he never actually struck an officer. *Wright v. State*, 681 So. 2d 852, 853-54 (Fla. 5th Cir. DCA 1996).

The Eleventh Circuit in *Romo-Villalobos* discounted, overlooked, or ignored these Florida cases demonstrating the minimum conduct constituting the offense and instead focused on other Florida intermediate appellate cases describing something more than the least culpable conduct. This approach contradicts *Moncrieffe*'s clear instruction to assume that Petitioner's conviction under Florida Statutes § 843.01 "rested upon nothing more than the least of the acts criminalized." *Moncrieffe*, 564

U.S. at 191. But of course, the panel in *Romo-Villalobos* did not have the benefit of *Moncrieffe* at the time it issued its decision.

Although the Eleventh Circuit had an opportunity in *Hill*, to revisit the issue after *Moncrieffe* and consider the minimum conduct criminalized by Florida Statute § 843.01, the Eleventh Circuit failed to cite *Moncrieffe* or incorporate the analysis. Petitioner argued to the court below that the proper application of the categorical approach – as informed by *Moncrieffe* – would result in a finding that a conviction under § 843.01 is not a violent felony. The Eleventh Circuit, however, refused to consider this in light of its prior precedent rule. *See* App. A-1.

Indeed, application of the approach mandated by *Moncrieffe* and urged by Petitioner has led the Tenth Circuit to a different result and created the current conflict between the circuits, which this Court should resolve. Considering the minimum conduct criminalized by Florida Statutes § 843.01 as described by the Florida Supreme Court, the Tenth Circuit held that a conviction for the offense does not qualify as a violent felony. Overtly disagreeing with the Eleventh Circuit, the Tenth Circuit explained that "our job is not to find what kind of conduct is most routinely prosecuted, and evaluate *that*. Under the categorical approach, we consider only the 'minimum conduct criminalized,' not the typical conduct punished." *Lee*, 701 F. App'x at 700, n.1 (citing *Moncrieffe*, 133 S. Ct. at 1685).

Adding to the tension between the circuits, the Fourth Circuit recently held that a similar South Carolina conviction for assaulting, beating, or wounding a law enforcement officer while resisting arrest is not a "violent felony" because it can be

committed by an attempt to touch an officer in a rude or angry manner while resisting arrest. *United States v. Jones*, 914 F.3d 893, 903 (4th Cir. 2019). The Fourth Circuit noted that *Stokeling* "reaffirmed [*Johnson*'s] definition of physical force, and nothing therein supports the proposition that an offense that can be committed by an attempt to touch another in a rude or angry manner" can satisfy the elements clause. *Id.* at 905–06. And the Fourth Circuit noted that the South Carolina resisting offense and similar offenses do not share the same "statutory or textual connection" to the ACCA as robbery offenses like the one in *Stokeling*. *Id.* Likewise, the Florida resisting offense does not share that same connection to the ACCA and can be committed through an unwanted touch.

Thus, this Court should grant certiorari to resolve the circuit conflict regarding Florida's resisting-with-violence offense as well as the tension regarding similar resisting offenses.

B. The decision below conflicts with this Court's precedent regarding the mens rea required to qualify as "use" of physical force.

The word "use" in the elements clause requires an "active employment" of force, which "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9 (interpreting the elements clause of 18 U.S.C. § 16); *see also United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010) (holding that an offense that may be committed by reckless conduct cannot qualify as a crime of violence under the Guidelines' elements clause). The Eleventh Circuit's invocation of prior precedent to implicitly reject Petitioner's argument that the mens

rea required by Florida law for resisting with violence does not meet the federal "use" of physical force definition conflicts with this Court's precedent in *Leocal*.

The court below affirmed because Mr. Jackson's argument was squarely foreclosed by the circuit precedent of *Romo-Villalobos*, which held that resisting an officer with violence under Florida Statutes § 843.01 categorically qualifies as a crime of violence under the Guidelines. In *Romo-Villalobos*, the Eleventh Circuit required proof of "general intent" as to all elements of the Florida offense – not only "resist[ing], obstruct[ing], or oppos[ing] any officer," but also the final "doing violence" element. 674 F.3d at 1250, n.3.

As an initial matter, the Florida Supreme Court has established that a general intent is required only for the first elements of the statute, "resist[ing], obstruct[ing], or oppos[ing] any officer," and that no intent is required as to the final "doing violence element, which makes the crime "akin" to a strict liability crime. *See Frey v. State*, 708 So. 2d 918 (Fla. 1998); *see also Polite v. State*, 973 So. 2d 1107 (Fla. 2007). The Florida Supreme Court's construction of § 843.01 in *Frey* remains the law of Florida, and that construction is binding on all federal courts. *See Johnson*, 559 U.S. at 138. Thus, to the extent the Eleventh Circuit's determination of the mens rea in *Romo-Villalobos* conflicts with the Florida Supreme Court's determination of the mens rea in *Frey*, the Eleventh Circuit's decision runs afoul of this Court's reminder in *Johnson* that the federal courts are bound by the Florida Supreme Court's interpretation of state law.

But even if, *arguendo*, a conviction under § 843.01 requires proof of "general

intent" as to all elements of the offense, the Eleventh Circuit's conclusion in *Romo-Villalobos* that general intent crimes "are not exempted from the 'crime of violence' definition," *id*. at 1251, contradicts this Court's controlling precedent of *Leocal*, which the court in *Romo-Villalobos* neither cited nor considered. As indicated by *Leocal*, the federal elements clause requires a specific intent to apply violent force; it is not satisfied by a mere general intent to commit the *actus reus* of the crime (here, "resist[ing], obstruct[ing], or oppos[ing]" an officer). *See Leocal*, 543 U.S. at 9.

Indeed, other circuits have found that general intent crimes are indeed "overbroad" by comparison to an offense that "has as an element the use, intended use, or threatened use of physical force against the person of another." *See, e.g.*, *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1099 n.4 (9th Cir. 2015) (stating that if, as the government argued, the state aggravated assault statute at issue in that case "were a general intent crime, application of the enhancement would fail because the statute would be overbroad"); *United States v. Rico-Mendoza*, 548 F. App'x 210, 212-14 (5th Cir. 2013) (stating that when the least culpable act of the predicate offense was "the defendant '[i]ntentionally point[ing] any firearm toward another, or display[ing] in a threatening manner any dangerous weapon toward another,'" such crime did not qualify as the "use of force" under the elements clause because no "intent to harm or apprehension by the victim of potential harm," was required; the offense could include "an accidental or jesting pointing of the weapon"). Consistent with the *mens rea* analysis in *Leocal* and these other circuit decisions, a conviction for resisting with violence in violation of § 843.01, a general intent crime,

is categorically "overbroad" by comparison to an offense that has the "use" of physical force as an element. It is thus not a "crime of violence" within the elements clause. This Court should review the conflict between the circuit court below and this Court's precedent regarding the mens rea required to qualify as the use of force under the elements clause.

II. The circuits are divided over how to apply the categorical approach to the "serious drug offense" definition.

Mr. Jackson's conviction under Fla. Stat. § 893.13 is not a "serious drug offense" under the ACCA. The district court found that it is based on prior Eleventh Circuit precedent holding that § 893.13 is an ACCA predicate regardless of its lack of a mens rea requirement. *See United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014). As noted above, Mr. Jackson did not challenge this finding on appeal. However, in *Shular*, both the petitioner and the Solicitor General have asked for review of this issue because of the circuit split regarding how to apply the categorical approach in the context of the "serious drug offense" definition—specifically, what it means for an offense to "involve[e]" manufacturing, distributing, or possession with intent to manufacture or distribute. Thus, if this Court grants review in *Shular* and the petitioner prevails, Mr. Jackson will be able to prevail on plain error review.

Similar to the enumerated offenses in the "violent felony" definition of the ACCA, the "serious drug offense" definition provides a list of enumerated drug offenses that qualify—those that "involve[e]" manufacturing, distributing, or possession with intent to manufacture or distribute. According to the Ninth and Sixth Circuits, the same type of categorical analysis should apply to both definitions. Thus,

the elements of Mr. Jackson's Fla. Stat. § 893.13 offense must be compared to the elements of generic manufacturing, generic distributing, and generic possession with intent to manufacture or distribute. *See United States v. Franklin*, 904 F.3d 793, 800–803 (9th Cir. 2018) (holding that an offense is not a "serious drug offense" if it is broader than its generic federal analogues); *United States v. Goldston*, 906 F.3d 390, 396–397 (6th Cir. 2018) (comparing the defendant's delivery offense to the "generic definition of 'deliver' under the ACCA).

Contrary to Eleventh Circuit precedent, a Fla. Stat. § 893.13 conviction does not qualify, because it is broader than these generic drug analogue offenses, which require a mens rea element. *See McFadden v. United States*, 135 S. Ct 2298 (2015); *State v. Adkins*, 96 So. 3d 412, 429–430 (Fla. 2012) (surveying case law nationwide). In May 2002, the Florida legislature enacted Fla. Stat. § 893.101, which states that "knowledge of the illicit nature of a controlled substance is not an element" of a Florida drug offense. *See Shelton v. Secretary, Dep't of Corr.*, 691 F.3d 1348, 1349–51 (11th Cir. 2012); *State v. Adkins*, 96 So. 3d 412, 414–16 (Fla. 2012). Thus, Florida's drug offenses do not require the prosecution to prove that a defendant knew the nature of the substance in his possession—that it was, for example, cocaine. By removing that knowledge requirement, the Florida legislature made Fla. Stat. § 893.13 a non-generic drug offense. Therefore, it cannot qualify as a "serious drug offense" under the ACCA.

CONCLUSION

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

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