No. 18-9547

ORIGINAL
Supreme Court, U.S.
FILED
MAY 29 2019
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ANTWAN WILLIAMS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

ANTWAN WILLIAMS #67494-018
(Your Name)

FEDERAL CORRECTIONAL INSTITUTION
(Address)

PO. BOX. 1032, COLEMAN, FL 33521
(City, State, Zip Code)

(Phone Number)

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QUESTION(S) PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit erroneously concluded in finding Petitioner's Fla. Stat. § 893.13 drug offe nses qualifies within the ACCA's definition of a "serious drug offense" where mens rea is not even an implied element of the definition of a "serious drug offense" in § 924(e) or § 4B1.2(b), according to their preceidential opinion in United States v. Smith, 775 F.3d 1262 (11th Cir. 2014) ?

2. Whether the Gourt should grant certiorari to correct the Eleventh Circuit's clear error in United States v. Smith, that a conviction under a strict liability state drug offense is a proper - ACCA predictae in conflict with Elonis and McFadden ?

3. Whether the Florida offense of resisting an officer with violence is a violent felony for the purposes of the ACCA enhancement ?

4. Whether this case shuld be remanded (GVR) in light of Franklin v. United States, 17-8401 ?

LIST OF PARTIES

[X] 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:

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[X] is unpublished.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 B 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[X] is unpublished.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

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

The date on which the United States Court of Appeals decided my case was April 3, 2019.

[X] 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: _____, 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. § 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

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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STATEMENT OF THE CASE

On December 1, 2016, Petitioner plead guilty to unlawfully possessing a firearm as a convicted felon. Because the court determined that Petition er qulaified as a armed career criminal under the ACCA, the Court sentende him to a mandatory mini mum sentence of 180 months.

Petitioner did not take any direct appeal. However he sought a petition for writ of federal habeas corpus 28 U.S.C. § 2255, which was denied by the United States District Court for the ... Middel District of Florida on October 3, 2018.

Petitioner filed a timely notice of appeal an prosecuted his Certificate of Appealability (COA) to the Eleventh Circuit Court of Appeals which was denied in an endorsed order on April 3, 2019, leaving him stranded on certiorari to this Court without any meaningful opinion that may aid in this courts determination of the .. reasons for the denial. Petitioner files this writ in good faith, and for the Court to now consider his questions presented for review that were preserved in the district court.

REASONS FOR GRANTING THE PETITION

A. Taylor, set out the essential rules governing - ACCA cases more than a quater century ago. All that counts under the Act, "we held then," are "the eleme nts of the statute of conviction." 494 U.S. at 601. Johnson, was suppose to put an end to the ACCA ... litigation nightmare. However, this protracted ..... litigation has plagued the district courts as well as the United States Court of Appeals for nearly 30 years with no end in sight. Once again another ACCA case enters - the arena. (48) States, either by .. statute or judicial decision, require that the state prosecution prove as an element of a criminal narcot ics offense, that the defendant knew of the elicit nature of the substance he possessed. Irrespective of this Nationwide concensus, the Eleventh Circuit held in a precedential and far-reaching decision, in United States v. Smith, 775 F.3d 1262 (11th Cir. 2014) that **mens rea** is not even an implied element of the definition of a "serious drug offense" in § 924(e)(2)(A)(ii) of the ACCA, or the similarly-worded definit ion in U.S.S.G. § § 4B1.2(b). In so holding, the ... Eleventh Circuit explained:

> We need not search for the elements of "generic" definitions of "serious drug offense" and "contro lled substance offense" because these terms are defined by a federal statute and the United States

Sentencing Guidelines, respectively. A "serious drug offense" is "an offense under State law," ... punishable by at least ten years of imprisonment, "involving manufacturing, distributing, or ..... possessing with intent to manufacture or ..... distribute, a controlled substance." 18 U.S.C. §.. 924(e)(2)(A)(ii). And a "controlled substance ... offense" is any offense under state law punishable by more than one year of imprisonment, "that ..... prohibits the manufacture, import, export, ... distribution, or dispensing of a controlled ..... substance...with intent to manufacture, import, .. export, distribute, or dispense," U.S.S.G. § 4B1.2 (b)

No element of mens rea with respect to the illicit nature of the controlled substance is expressed .. or implied by either definition. We look to the . plain language of the definitions to determine ... their elements, United States v. Duran,596 F.3d .. 1283, 1291 (11th Cir. 2010), and we presume that . Congress and the Sentencing Commission "said what [they] meant and meant what [they] said," United.. States v. Strickland, 261 F.3d 1271, 1274 (11th .. Cir. 2001) (internal quotation marks and citation omitted); see also United States v. Shannon, 631 . F.3d 1187, 1190 (11th Cir. 2011). The definitions require only that the predicate offense ..... "involv[es]," 18 U.S.C. § 924(e)(2)(A)(ii), and .. "prohibit[s]," U.S.S.G. § 4b1.2(b), certain ..... activities related to controlled substances.....

> Smith and Nunez argue that the presumption in .... favor of mental culpability and the rule of lenity Staples v. United States, 551 U.S. 600, 606, 114 . S.Ct. 1793, 1797, 1804, 128 L.Ed.2d 608 (1994), .. require us to imply an element of mens rea in the federal definitions, but we disagree. The ..... presumption in favor of mental culpability and ... the rule of lenity apply to sentencing ..... enhancements only when the text of the statute or guideline is ambiguous. United States v. Dean ... 517 F.3d 1224, 1229 (11th Cir. 2008); ..... United States v. Richardson,8 F.3d 769, 770 (11th Cir. 1993). The definitions of "serious drug .... offense," 18 U.S.C. § 924(e)(A)(ii), and ..... "controlled substance offense," U.S.S.G. § 4B1.2 (b), are unambiguous.

Smith, 775 F.3d at 1267. The defendants in Smith .... jointly petitioned the Eleventh Circuit to rehear .... their case en banc, but the Eleventh Ciruit denied ... rehearing. As a result, a conviction under the pre .. and post-2002 version of Fla. Stat. § 893.13--one of . the only strict liability possession with intent to .. distribute statute in the nation--may now preperly be counted as both an ACCA and Career Offender predicate. The Eleventh Circuit has so held in countless other .. cases since Smith.

Because this Court's precedents and well-settled rules of construction suggest that any predicate for the harsh ACCA and similarly-worded Career Offender enhancements neccessitates proof of mens rea, and because other circuits have arrived at diametrically opposed conclusions after construing identical or provisions in a manner more closely aligned with this Court's precedents and rules of construction, this Court, as the final outlet for relief on this issue.

A. The Eleventh Circuit's interpretation of §924 (e)(2)(A)(ii) disregards and conflicts with this Court's longstanding adherence to the categorical approach in construing whether a prior state conviction qualifies under the ACCA

1. The common law favors the inclusion of mens rea as a necessary element of a crime, and silence on the issue of mens rea in a statue does not necessarily mean that Congress intended to dispense with a conventional mens rea requirement

In conducting its overly simplified and erroneous analysis in Smith, the Eleventh Circuit improperly attempted to avoid the presumption of mens rea this Court dictated in Staples. In fact, without legal

basis, it misstated and then ignored the rule in ..... Staples, and applied the opposite presumption--that .. Congress "said what [it] meant and meant what [it] ... said"--in construing a provision in a harshly-..... penalized federal criminal statute without an express mens rea term. In so holding, the Eleventh Circuit .. hinged a precedential and far-reaching decision on a . patently inapposite case, United States v. Strickland, 261 F.3d 1271, 1274 (11th Cir. 2001), in which the ... question of construction had nothing to do with mens . rea.

Although the "plain language" rule applied in .... Strickland is generally the preferred rule of ..... construction, this Court was clear in Staples that the "plain language" rule is never an appropriate rule of construction in construting a harshly-penalized ..... statute without an express mens rea term. In that ... unique statutory context (different from the context . in Strickland), the proper presumption has always been the common law presumption that an offender must know the facts that make his conduct illegal. Mens rea is the rule, this Court explained in Staples, not the ... exception. And therefore, mens rea must be presumed . to be an element of any harshly-penalized criminal ... offense---even one without an express mens rea term--.

so long as there is no indication, either express or implied, that Congress intended to dispense with a ... conventional mens rea element. Staples, 511 U.S. at 618-19; see also id. at 605 (noting that "silence" as to mens rea is drafting a statute "does not ..... necessarily suggest that Congress intended to dispense with a conventional mens rea element");id. at 618 .... (further noting that "a severe penalty" is a "factor tending to suggest that Congress did not intend to ... eliminate a mens rea requirement").

This Court has previously found it neccessary to correct the Eleventh Circuit's misapprehensions ..... regarding the presumption in favor of mental ..... culpability as an element of an offense in United..... States v. Dean, 517 F.3d 1224, 1229 (11th Cir. 2008), a case upon which the Eleventh Circuit relied in Smith The Eleventh Circuit notably did not even acknowledge Staples in Dean. Instead, it took a narrow, literal, "plain language" approach to a question of contruction about mens rea, and from that circumscribed inquiry, concluded that the sentencing enhancement for ..... discharge of a firearm under 18 U.S.C. § 924(c)(1)(A). (iii) did not only apply to intentional discharges of

the firearm because § 924(c)(1)(A)(iii) requires only that a person "use or carry" the firearm and says .... about a "mens rea requirement." Dean, 517 F.3d at .... 1229-1230.

This Court granted certiorari to review the ..... Eleventh Circuit's reasoning, and it is clear from ... this Court's opinion that it found the Eleventh ..... Circuit's strict "plain language" approach to a ..... question about mens rea unwarranted and wrong. See .. Dean v. United States, 556 U.S. 568 (2009). While ... this Court did ultimately agree with the Eleventh .... Circuit's conclusion that § 924(c)(1)(A)(iii)does not require proof of intent, this Court did not base its . own conclusion on the mere absence of the words ..... "knowingly" or "intentionally" in the plain language . of § 924(c)(1)(A)(iii). Instead, this Court reached . its conclusion only after carefully considering the .. language Congress used in that specific provision, the language and the structure of the entire statue, and, most importantly for the arguments advanced herein, .. the presumption of mens rea dictated by Staples.

In its review of the language and structure of ... § 924(c) as a whole, this Court noted with ..... significance that Congress had expressly included an .

intent requirement for "brandishing" in subsection ... (ii) of § 924(c)(1)(A), but declined to include one in subsection (iii). Id. at 572-573. But this Court did not stop its analysis there. It acknowledged the .... presumption in Staples that criminal prohibitions .... require the government to prove the defendant intended the conduct made criminal, and suggested that the .... Staples presumption would apply to a harsh penalty ... provision if such an enhancement would otherwise be .. predicated upon "blameless" conduct. But in the case before it, the Court declined to apply the Staples ... presumption and imply a mens rea term into § 924(c)... (1)(A)(ii) because there, the "unlawful conduct was .. not an accident.... [T]he fact that the actual ..... discharge of a gun covered under § 924(c)(1)(A)(iii).. may be accidental does not mean that the defendant is. blameless." Id. at 575-576.

The opposite conclusion, however, is compelled ... here. Had the Eleventh Circuit considered and applied this Court's reasoning and analysis in Dean to the ... question of whether mens rea should be implied as an element of any "serious drug offense"--had it ..... considered the language and structure of the ACCA as a

whole, the Staples presumption, and that a conviction under Fla. Stat. § 893.13 is effectively for ..... "blameless conduct" since the state is not required to prove the defendant "knew the illicit nature of the . substance" possessed--the Eleventh Circuit would have have correctly found that mens rea is an implied .... element of any "serious drug offense" within § 924(e). (2)(A)(ii).

This Court's analysis and searching approach to .. the mens rea question in Dean is consistent with, and supports, a reading of the definition of "serious drug offense" in § 924(e)(2)(A)(ii) to include an implied . mens rea element. And the analysis in Dean also ..... confirms the error in the Eleventh Circuit's continual superficial approach to questions of construction .... involving mens rea. Unfortunately, since Smith is ... precedential in the Eleventh Circuit, the unfounded .. reasoning and declarations about Staples in the Smith decision have reverberated and currently control ..... Petitioner's case.

2. A history of committing strict liabitlity ..... crimes says nothing about the kind or degree of .. danger an offender would pose were he to possess a

a gun, and therefore, strict liability crimes are improper ACCA predicates.

In Begay v. United States, 553 U.S. 137 (2008), this Court held that the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(ii) must be interpreted in light of Congress' purpose in amending the ACCA in 1986 to more harshly punish the "particular subset of offender" whose "past crimes" had predictive value regarding the "possibility of future danger with a gun." Begay, 553 U.S. at 145-147. The "relevance" of an ACCA predicate is not that it reveals the offender's mere "callousness toward risk," but rather that it "show[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." Id. at 146. And, there is "no reason to believe that Congress intended a 15-year mandatory prison term "where that increased likelihood does not exist," Id. While a prior record of "purposeful, violent, and aggressive" crimes increases that likelihood, a prior record of strict liability crimes is "different," and does not. Id. at 148.

Pettioner's pre-or post ..... 2002 conviction for possession with intent to sell, manufacture, or deliver a controlled substance under Fla. Stat. §893.1

is indisputably a prior record of strict liability ... crime because, on May 2, 2002, the Florida legislature formally clarified the judicially-implied knowledge .. element from § 893.13. By enacting Fla. Stat. ..... 893.101, the Florida legislature declared that any ... conviction under § 893.13 going forward would not..... require the prosecution to prove as an "element" that the defendant "knew the illicit nature" of the ..... substance he possessed with intent to sell, or sold. Accordingly, for the precise reasons this Court held . in Begay that a prior conviction for DUI is not a .... predictor of future dangerousness with a gun, so too . should the Eleventh Circuit have held that a post-2002 conviction for violating Fla. Stat. § 893.13-which ... contains no mens rea element, and like DUI, is a ..... liability crime--is not a proper ACCA predicate.

3. Consideration of this Court's decisions in .... Staples and Begay make clear that Congress did not intend--and could never have imagined that a ..... conviction under a strict liability drug statute.. would be counted as a "serious drug offense" under Carrer Offender

In adding a "serious drug offense" as an ACCA ... predicate in 1986--and defining that new predicate in

in parallel provisions of § 924(e)(2)(A)--Congress ... gave no indication that it intended to cast a wider .. net for qualifying state drug crimes than federal drug crimes; or that it sought to include strict liability state drug crimes as ACCA predicates. Notably, all .. of the federal drug crimes Congress designated as ACCA predicates in 18 U.S.C. § 924(e)(2)(A)(i)--e.g, ... "offense[s] under the Controlled Substance 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" -- ..... indisputably require proof of mens rea as an element. There is no indication that Congress intended its ... parallel definition of qualifying state drug offenses to be any different in this crucial respect.

It was wrong and illogical for Congress to ..... interpret § 924(e)(2)(A)(ii) in a manner suggesting Congress had defined the same term--"serious drug .. offense"--in a manner that required proof mens rea for federal drug trafficking offenses but not for .. state drug trafficking offenes. The Eleventh .....

Circuit's inconsistent reading of Congress' parallel definitiions of "serious drug offense" violated .... multiple well-settled rules of construction. For .. instance, it violated the rule that individual ..... sections of a single statute passed by the same .... Congress must be read in pari materia and "construed together." See, e.g., Erlenbaugh v. United States, 409 U.S. 239, 243-244 (1972). It also violated the rule that in matters of statutory contruction no ... word or provision in a statute can or should ever be read "in insolation," See, e.g,. Yates v. United ... States, 135 S. Ct. 1074, 1081-1082 (2015). And .... finally it violated the corollary of that rule where if the same term is used throughout a statute, ... courts must consider its meaning throughout. See, e.g., United States v. Santos, 553 U.S. 507, 512 ... (2008).

But mostly inexplicably, the Eleventh Circuit .. chose to simply ignore, and therefore also violate, the very rules of construction this Court has ..... carefully applied in interpreting related provisions in the ACCA. The problem goes beyond the fact that

the Eleventh Circuit ignored Begay and Congress' ... stated intent in passing the ACCA (as outline in ... Begay). In McNeil v. United States, this Court .... interpreted the definition of "serious drug offense" by considering the "[t]he 'broader context of the .. statute as whole,' specifically the adjacent ..... definition of 'violent felony.''' 563 U.S. 816, 821 (2011) (noting that the broader ACCA context ..... confirmed its interpretation of the term "serious .. drug offense"; emphasizing that in any statutory ... construction case the Court must not only consider . the language itself, but also "the context in which that language is used'''). Siminlarly, in Curtis .. Johnson, this Court did not consider the term ..... "physical force" in § 924(e)(2)(B)(i) in isolation . or restrict its attention to the dictionary meaning of those terms, but instead considered the phrase .. "physical force" in "the context of a statutory .... definition of 'violent feloney.''' Against that .... context, it was able to conclusively determine that "physical force' means violent force." (Curtis) .... Johnson v. United States, 559 U.S. 113, 140 (2010).

Here, the Eleventh Circuit ignored "context" ... entirely, as it notably has done in other statutory construction cases reversed by this Court. It ..... considered only the plain, dictionary meaning of the words used in § 924(e)(2)(A)(ii), in complete ..... isolation from their context, and without any regard for Congress' clearly-expressed intent that only ... "serious" prior drug crimes that involved ..... "trafficking" (which necessitates that the defendant know the illicit nature of the substance he is ..... trafficking) qualify an offender under § 922(g)(1).. for the harsh ACCA enhancement. While this Court in Curtis Johnson refused to adopt any construction of the term "violent felony" in the ACCA that would be a "comical misfit," that is precisely what the ..... Eleventh Circuit's construction of the term ..... "serious drug offense" is here.

There is no logical reason Congress could or ... would have intended for a conviction under a strict liability state drug statute to serve as a predicate for an ACCA enhancement when at the time mens rea .. was an express or judicially-implied element in .... every federal drug trafficking statute and in 48 out

of the 50 state controlled substance statutes ..... (including Florida's). According to a survey ..... conducted by the Maryland Court of Appeals as of ... 1988, only two states out of fifty (North Dakota and Washington) construed their drug statutes not to ... require proof of mens rea as an element of "the .... offense of possession of controlled substances." ... Dawkins v. State, 547 A.2d 1041, 1045 & n.7 (Md. ... 1988). But even that is not an entirely accurate .. statistic because notably, Washington has only .... construed its "mere possession" statute, and not its "possession with intent to distribute statute," as a strict liability crime. See State v. Bradshaw, 152 Wash. 2d 528 (Wash. 2004) (en banc). Therefore, in . 1986, there actually was only one state --North .... Dakota--that treated its "possession with intent to deliver" offense as a strict liability crime. See . State v. Rippley, 319 N.W.2d 129 (N.D. 1982). And .. there is no evidence that Congress even knew that .. North Dakota was an outlier in 1986--let alone that it intended to sweep in a conviction under any state that did not require proof of mens rea--when it ....

defined the new "serious drug offense" ACCA ..... predicate.

In any even, only a few years after Congress ... wrote its definitions of "serious drug offense" into the ACCA, the North Dakota Legislature repealed its strict liability "possession with intent to ..... distribute statute," and added a mens rea element .. into that statute. See State v. Bell, 649 N.W.2nd . 243 (N.D. 2002). North Dakota "switched camps" in .. 1989, and has remained in the mainstram of ..... possession with intent to distribute statutes since that time, while Florida "switched camps" in the ... other direction in 2002. Given that Florida was ... well within the "mainstream" in 1986 when Congress difined "serious drug offense" in § 924(e)(2)(A)(ii) it was error for the Eleventh Circuit to construe .. § 924(e)(2)(A)(ii) in a manner Congress could never imagined when it drafted that provision.

At the very least, had the Eleventh Circuit .... properly applied this Court's precedents and ..... pertinent rules of construction to find that § 924 (e)(2)(A)(ii) was ambiguous on the issue of mens rea

the rules of lenity would have required the court to adopt the defendant's reading of § 924(e)(2)(A)(ii) until Congress stepped in and clarified itself. See United States v. Santos, 553 U.S. 507, 512-15 (2008)

4. The Eleventh Circuit's analytical approach in Smith is clearly an outlier when considering ... decisions out of the Secound, Fifth, and Ninth . Circuits that have considered similar or ..... identical statutory language and faithfully .... applied the categorical approach

The Eleventh Circuit stands on its own in its .. decision not to apply the categorical approach when determining whether a conviction under Fla. Stat. .. § 893.13 categorically qualifies as a "serious drug offense" under § 924(e)(2)(A)(ii). Other circuits that have considered identical, or almost identical, statutory provisions, and employed the categorical . approach have arrived at conclusions that are more . in line with this Court's longstanding precedents .. with regard to the neccessity of a mens rea element.

In United States v. Savage, 542 F.3d 959 (2d ... Cir. 2008), the Second Circuit considered whether a conviction under a Connecticut law that defines .... "sale" to include a mere "offer" to sell is a .....

a "controlled substance offense" as defined in ..... U.S.S.G. § 4B1.1(b). Instead of engaging in a word match game between the words included in the ..... Guidelines' definition of "controlled substance .... offense" and the state statute to declare a ..... categorical match--as the Eleventh Circuit's ..... approach in Smith dictate--the Secound Circuit ..... engaged in a proper categorical analysis. Savage, 542 F.3d at 964-67. And after doing so, the Second Cicuit determined that the Connecticut conviction .. could not qualify as a "controlled substance offense because a "sale" under Connecticut law includes a .. mere offer to sell, and an offer to sell drugs is .. not a controlled substance offense because "a crime not involving the mental culpability to commit a ... substantive narcotics offense [does not] serve as a predicate controlled substance offense under the ... Guidelines." Id. at 965-66 (internal quotation marks omitted).

Similary, the Fifth Circuit, in United States v. Martinez-Lugo, 782 F.3d 198 (5th Cir. 2015), noted specifically when determining whether a Georgia .... offense constituted a "drug trafficking offense" ... under U.S.S.G. § 2L1.2(b)(1)(A)(i) that "[t]he fact

that [the defendant's] Georgia conviction has the same label . . . as an enumerated offense listed in the Guidelines definition . . . does not automatically warrant application of the enhancement." Martinez-Lugo, 782 F.3d at 202. Unlike the Eleventh Circuit in Smith, the Fifth Circuit employed the categorical approach: it first "assume[d] that an enumerated offense refers to the 'generic, contemporary meaning of that offense" and then compared the elements "to ensure that the elements of that generic enumerated offense [were] congruent with the elements of the defendant's prior offense." Id. In short, the Fifth Circuit made its determination in precisely the way Petitioner argues the Eleventh Circuit should have proceeded here. See id. at 202-03 ("The proper standard of comparison in this categorical inquiry is the elements of the enumerated offense of 'possession with intent to distribute,' not the general meaning of the Guidelines term 'drug trafficking.' That is because the Guidelines definition reflects a determination that certain enumerated offenses--such as possession with intent to districute--qualify for the 'drug trafficking offense' enhancement so long

the offenses are consistent with the generic, ... contemporary meaning of the enumerated offense that the Commission was contemplating when it adopted the definition.").

In fact, when the Fifth Circuit considered ..... whether a conviction under Fla. Stat. § 893.13 could serve to enhance a defendant's sentence under ..... U.S.S.G. § 2L1.2(b)(1)(B), it held that the Florida conviction could not "[b]ecause the Florida law does not require that a defendant know of the illicit ... nature of the substance involved in the offense." .. United States v. Medina, 589 F. App'x 277 (5th Cir. 2015). That is, in line with the Petioner's ..... argument here, the Fifth Circuit found the lack of . mens rea in Fla. Stat. § 893.13 to be dispositive of the issue.

Finally, the Eleventh Circuit's analytical ..... errors in Smith are further highlighted by the Ninth Circuit's decision in United States v. Franklin, .. __F.3d__,2018 WL 4354991 (9th Cir. Sep. 13, 2018). . There, the court considered whether a conviction ... under Washington law for unlawful delivery of a .... controlled substance was a "serious drug offense"

under the ACCA. Again, in approaching this question the Ninth Circuit engaged in a categorical analysis of the elements of each statute before determining that they were a categorical mismatch. In so doing, the court included accomplice liability as an element in the federal definition of "serious drug offense" because "one who aids or abets a [crime] falls, like a principal, within the scope of th[e] generic definition of that crime." Franklin, 2018 WL 4354991, at*2 (internal quotation marks omitted). That is, unlike the Eleventh Circuit in Smith, the Ninth Circuit looked byond the specific words included in the definition for "serious drug offense" and determined its elements by reference to the "generic definition" of that crime. Doing so yielded a result that much more closely tracked this Court's prior precedents and well-settled rules of construction.

Unlike the Eleventh Circuit, the Secound, Fifth, and Ninth Circuits have faithfully adhered to this Court's guidance in determining whether a defendant is subject to a harsh sentencing enhancement, and as a result, have arrived at vastly different results from those attained in the Eleventh Circuit. A ....

similarly-situated defendant in the Second, Fifth, and Ninth Circuits would not have been subject to the harsh ACCA-enhanced sentence that the Petioner's and other defendants in the Eleventh Circuit ..... erroneous, but binding, precedent in Smith. Since interpretation and application of these enhancements should not vary by location, this Court should ..... resolve the circuit conflict on this issue by ..... granting certiorari in this case.

5. The clear error in the Eleventh Circuit's .... holding in Smith that a conviction under a ..... strict liability state drug statute is a proper ACCA predicate is confirmed by this Court's .... post-Smith decisions in Elonis and McFadden

This Court's post-Smith decisions in Elonis v. United States, 135 S. Ct. 2276 (2015) and McFadden v. United States, 135 S. Ct. 2298 (2015), further accentuate the error in the Eleventh Circuit's ..... holding that mens rea is not an implied element of a "serious drug offense" as defined in 18 U.S.C. § 924 (e)(2)(A)(ii).

In Elonis, this Court rejected the same, overly-literal approach to statutory construction adopted Smith. Notably, the government contended in Elonis that the defendant could rightly face up to five ...

years imprisonment for transmitting a threat in .... in interstate or foreign commerce, in violation of 18 U.S.C. § 875(c), without any proof that he ..... intended his communications to contain a threat .... because Congress had not included an explicit mens . rea term in the language of § 875(c). Per the ..... government, Congress' inclusion of express "intent . to extort" requirements in other subsections of § 875 precluded the judicial reading of an "intent to threated" requirement into § 875(c). Elonis, 135 S. Ct. at 2008.

In rejecting the government's argument that the absence of any mens rea language in § 875(c) was ... significant in any manner, this Court reiterated ... that "the fact that [a] statute does not specify any required mental state [] does not mean that none ... exists," and held that § 875(c) indeed requires .... proof that the defendant intended his communications as threats. Id. at 2009. In so holding, this Court strictly applied the well-settled rules set forth in Morissette v. United States, 342 U.S. 246, 250 ..... (1952) ("[M]ere omission from a criminal enactment . of any mention of criminal intent" should not be ... read "as dispensing with it" because "wrongdoing ... must be conscious to be criminal."); Staples, 511

U.S. at 608, n.3 (holding that a defendant generally must "know the facts that make his conduct fit the definition of the offense"); and United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) (noting that the "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct").

More, specifically, when considering § 875(c) this Court stressed that the "crucial element separating legal innocence from wrongful conduct is the thrending nature of the communication," and there, "[t]he mental state requirement must ... apply to the fact that the communication contains a threat." Elonis, 135 S. Ct. at 2011. Similary, in X-Citement Video this court rejected a reading of a statute criminalizing distribution of visual depictions of minors engaged in sexually explicit conduct that "would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the proformers." Id. at 2010. This Court held instead that "a defendant must also know that those depicted

were minors, because that was the crucial element .. separating legal innocence from wrongful conduct." . Id. (internal citations omitted). Thus, per this .. Court's own jurisprudence, § 924(e)(2)(A)(ii) must . be read to require proof of a culpable state of mind in the underlying predicate state drug offense.

While the ACCA itself does not separate legal .. innocence from wrongful conduct, it does separate a less culpable felon-in-possession from the more .... culpablecareer criminal felon-in-possession. ..... According to Dean v. United States, 556 U.S. 568 ... (2009), the Staples presumption applies in ..... construing the language of a sentencing enhancement just the same as it applies to the language of ..... underlying offenses, and precludes the imposition of a sentencing enhancement predicated upon blameless . coneuct. Dean, 556 U.S. at 575-76. And indeeed, an ACCA enhancement predicated upon a post-2002 ..... conviction under Fla. State. § 893.13 is predicated blameless conduct. Plainly, a post-2002 conviction under §893.13 does not require the type of proof of knowledge that the Supreme Court has required in ... other cases--namely, that the defendant knew of the

illicit nature of the substance he distributed or possessed with intent to distribute. See Florida v. Atkins, 96 So. 3d 412, 431-35 (Fla. 2012) (Perry, J. dissenting) (nothing the many instances of "innocent possession" made criminal by the post-2002 version of Fl. Stat. § 893.13).

The error in Smith's reasoning that the language of § 924(e)(2)(A)(ii) is unambiguous and does not contain an implied mens rea element is only further highlighted by the government's candid concession, and this Court's ultimate reasoning and holding, in Mcfadden. This Court granted certiorari in McFadden to resolve a circuit conflict on an issued related to the issue raised in Smith: whether the Controlled Substances Analogue Enforcement Act of 1986 (21 U.S.C. § 813) is properly read to include an implied mens rea requirement. In his Initial Brief on the Merits, McFadden argued that the Fourth Circuit had erroneously read the absence of an express mens rea term in the Act to require the government to prove only that the defendant intended the substance for human consumption--not that he also knew that the substance he distributed was a "controlled substance

analogue." Brief of the Petitioner, 2015 WL ..... at **16, 20-21 (Mar. 2, 2015). In support of his .. position, McFadden made arguments similar to the ... arguments adanced in Smith that (1) Congress enacted the Act against a "backdrop" of interpreting ..... criminal statutes to necessitate mens rea, and (2) "[a]best significant reason to believe that Congress intended otherwise," Staples required courts to .... a requirement that the defendant "know the facts ... that make his conduct illegal." Id. at **26-28

The government, in its response brief, ... unexpectedly agreed that the Fourth Circuit had .... erroneously instructed the jury, and that ..... "violations of the Analogue Act must be governed by the mental-state requirements that courts have ..... universally found in CSA, 21 U.S.C. § 841(a) - ..... namely, that a defendant must have know that the ... substance was some kind of prohibited drug." Brief of the United States, 2015 WL 1501654, at *20 (Apr. 1, 2015). At oral argument, McFadden's counsel .... advised this Court that the briefing had greatly ... narrowed the parties' initial diagreement since the

government had expressly agreed that to prove a .... violation of the Act, it 'must show that the ..... defendant knowingly distributed an analogue." Oral Argument, 2015 WL 1805500 at **3-4 (Apr. 21, 2015). Thus, the only point of contention that remained was how the requisite knowledge may be proved. Id.

So, while McFadden's ultimate resolves a ..... relatively narrow question, its significance for the instant case lies in its recognition (and the ..... government's concession) of the Fourth Circuit's ... erroneous interpretation of the Act to require no .. proof of mens rea. This Court's holding that "the . goverment must prove that a defendant knew that the substance with which he was dealing was a controlled substance," even in the absence of an express mens . rea term in the Act, McFadden, 135 S. Ct. at 2305, . underscores and confirms the error inherent in ..... Smith's contrary reading of § 924(e)(2)(A)(ii) not to require proof of mens rea.

B. The Florida offense of resisting an officer with violence is not a "violent felony."

The Florida offense of resisting with violen e, see Fla. Stat. § 843.01, can only qualify as a "violent felony" if it has "as an element" the use, attempted use, or threatened use of physica l force, that is, "violent force...force capable of causing physical pain or injury to another pe rson." Curtis Johnson, 559 U.S. 133, 140 (2010); see Stokeling v. United States, 139 S. Ct 544, 5 44 (2019) (reiterating that nominal physical con tact, such as the donduct in Florida's battery s tatute, is different from the "violent" force co ntemplated in Curtis Johnson). As set forth bel ow, because resisting an officer with violence c an be completed with the nominal type of physica l contact akin to the touching in battery, it do es not meet the elements clause. Moreover, it i s also overbroad because only general intent is necessary to commit the offense.

A. Force

As noted in Descamps, 133 S. Ct. 2276, and r econfirmed in United States v. Estrella, 758 F.3

d 1239, 1245 (11th Cir. 2014), when a potential predicate sweeps more broadly than the elements of a federally-listed predicate, that offense do es not meet the elements clause. It is clear af ter Descamps that the "doing violence" element o f Florida's resisting with violence offense is a n "indivisible" element that sweeps more broadly than the elements clause's requirement. A viola tion of § 843.01 does not require in every case that the offender use substantial, injury-riskin g, "violent force." As explained by the Florida Supreme Court:

> The allegation that the defendant grippe d the hand of the officer, and forcibly prevented him from opening the door for the purpose of making the arrest under t he capias, necessarily inveles resistanc e, and an act of violence to the person of the officer while engaged in the exec ution of legal process. The force allege d is unlawful, and as such is sysnonymou s with violence....

Johnson v. State, 50 So. 529, 530 (Fla. 1909).

Although the charging document in the Flori da Johnson case failed to use the word "violenc e," the Florida Supreme Court held that it was

sufficient that the facts stated in the chargin g document "amount[ed] to violence."

As authoritatively interpreted by the Flori da Supreme Court, then, the "violence" element of § 843.01 is satisfied by the use of unlawful force. "Unlawful" force in Florida can be as m inor as an unwanted touch, a smily battery pros ribed by Fla. Stat. § 784.03. Such a touch, wh ile sufficient to sustain a conviction under § 843.01, does not contain the force necessary - violent force or strong physical force — to be ACCA predicate. Curtis Johnson, 559 U.S. at 14 0; Stokeling, 139 S. Ct. at 553.

Other Florida cases confirm that prima faci e case of resisting an officer with "violence" may be shown by de minimis contact with an offi cer— a defendant's mere resistance to being ha ndcuffed by holding onto a doorknob with his fr ee hand, and "wiggling and struggling" in an ef fort to free himself. **See** State v. Green, 400 So. 2d 1322, 1323 (Fla. 5th DCA 1981) (reversin g trial court's order of dismissal on such fact s; finding that a "prima facie case" of resisti

ng an officer with "violence" sufficient to go to the jury had been established when the total ity of whether Florida's resisting with "violen ce" offense categorically requires proof of "vi olent force."

B. Mens Rea

Descamps also abrogated the analysis of the Florida offense's mens rea in Romo-Villalobos. The intent element of Florida's offense does no t "match" and is categorically broader than the intent element required by the elements clause.

Assuming for the sake of argument that the Romo-Villalobos panel correctly concluded that a conviction under Fla. Stat. § 843.01 required proof of "general intent" as to all elements of the offense, **see** 674 F.3d at 1250 n. 3.

It is respectfully submitted that the Flori da Supreme Court's decisions in Frey v. State, 708 So. 2d 918 (Fla. 1998), and Polite v. State 973 So. 2d 1107 (Fla. 2007), established that a general intent is **only** required for the first e lements of the statute, "resist[ing], obstruct[

ing], ot oppos[ing] any officer," and that no i ntent is required as to the final "doing violen ce" element, which makes the crime "akin" to a strict liability crime. **See** Staples v. United S tates, 511 U.S. 600, 609 (1994) (recognizing th at "different elements of the same offenses can require different mental states").

In Leocal, the Supreme Court hld that the w ord "use" in the similarly-worded definition of "crime of violence" in 18 U.S.C. § 16(a) requir es "active employment," 543 U.S. at 10, and tha t the phrase "use...of physical force against t he person or property of another" in § 16(a), " most naturally suggests a higher degree of inte nt than negligent or merely accidental conduct. Id. What the Supreme Court meant by so stating plainly, was that the federal elements clause r equires a specific intent to apply violent forc e—and is not satisfied by mere, general intent to commit the actus reus of the crime (here, "r esisting, obstructing, or opposing" an officer)

In light of the "overbreadth" analysis mand ated by Descamps, other circuits have found tha

tt "has as an element the use, intended use, or threatened use of physical force against the pe rson 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 becau se the statute would be overbroad'"); United St ates v. Rico-Mendoza, 548 F. App'x 210, 212 (5t h Cir. 2013) (stating that when the least culpa ble act of the predicate offense was "the defen dant intentionally point[ing] any firearm towar d another, display[ing] in a threatening manner any dangerous weapon toward another," such crim e did not qualify as the "use of force" under t he elements clause because no "intent to harm o r apprehension by the victim of potential harm, " was required; the offense could include "an a ccidental or jesting pointing of the weapon").

After the clarification of the categorical approach in Moncrieffe and Descamps, and consis

tent with the mens rea analysis in Leocal and t hese other circuit decisions, a conviction for resisting with violence in violation of Fla. St at. § 843.01, a general intent crime, is catego rically "overbroad" by comparison to an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" and therefore not a violent felony within the elements clause of the ACCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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