No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ANDREW DORSEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

_____

Donna Lee Elm
Federal Defender

Rosemary Cakmis
Senior Litigator

Michelle Yard, Counsel of Record
Federal Defender Attorney
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
E-mail: michelle_yard@fd.org

QUESTIONS PRESENTED

I. Whether a Florida conviction for selling cocaine, delivering cocaine, or possessing cocaine with the intent to sell or deliver it, in violation of Fla. Stat. § 893.13, is a "serious drug offense" under the ACCA.

II. Whether a Florida conviction for resisting with violence, in violation of Fla. Stat. § 843.01, is a "violent felony" under the ACCA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Andrew Dorsey respectfully petitions for a writ of certiorari to review the order of the Eleventh Circuit denying him a certificate of appealability (COA) from the denial of his motion for post-conviction relief under 28 U.S.C. § 2255, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).

OPINION AND ORDER BELOW

The Eleventh Circuit's unpublished order is in Appendix A. The district court order denying the § 2255 motion is in Appendix B.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Dorsey's case under 18 U.S.C. § 3231. The district court dismissed Mr. Dorsey's 28 U.S.C. § 2255 motion on January 10, 2019. *See* App. B. Mr. Dorsey then filed a notice of appeal and application for a COA in the Eleventh Circuit. The Eleventh Circuit denied Mr. Dorsey a COA on May 8, 2019. *See* App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), provides, in pertinent part:

> (1) 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 . . . .
>
> (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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).

Florida Statutes § 893.13(1)(a)(1) proscribes selling cocaine, delivering cocaine, and possessing cocaine with the intent to sell of deliver it. The relevant portion of the statute is identical in 2006 and 2009, and states, in pertinent part, that:

> [I]t is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture or deliver a controlled substance. Any person who violates this provision with respect to a controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., commits a felony of the second degree . . . .

Fla. Stat. § 893.13(1)(a)(1).

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 . . . .

Fla. Stat. § 843.01 (2009).

STATEMENT OF THE CASE

In 2013, Mr. Dorsey pled guilty to possessing a firearm as a felon. In anticipation of sentencing, Probation prepared a presentence report (PSR), recommending Mr. Dorsey be sentenced under the Armed Career Criminal Act (ACCA) based on three prior Florida conviction cases: (a) sale or delivery of cocaine (two counts in 2006); (b) possession of cocaine with intent to sell or deliver in 2009; and (c) resisting an officer with violence in 2009. At sentencing, the district court adopted that recommendation and sentenced Mr. Dorsey to 180 months' imprisonment, followed by 60 months' supervised release. Mr. Dorsey did not appeal.

In May 2016, Mr. Dorsey moved to vacate his ACCA sentence under 28 U.S.C. § 2255 based on this Court's decision in *Samuel Johnson*, 135 S. Ct. 2551.[1] On January 24, 2018, the district court denied the motion, finding that Mr. Dorsey procedurally defaulted his *Samuel Johnson* claim. Specifically, the district court found that although Mr. Dorsey could establish cause to excuse his default, he could not establish prejudice because even after *Samuel Johnson*, Mr. Dorsey still had at least three Florida convictions that qualified as ACCA predicate offenses. The district court also declined to issue a COA.

Mr. Dorsey filed a timely notice of appeal in the district court and an application for a COA with the Eleventh Circuit. But the Eleventh Circuit also declined to issue a COA, stating:

> Here, the district court did not err by denying Mr. Dorsey's § 2255 motion because his claim was procedurally defaulted. Mr. Dorsey's claim was defaulted when he did not file a direct appeal, and he failed to overcome this default because he could not show that he was prejudiced. *See id*. Mr. Dorsey had at least three qualifying prior convictions for either violent felonies or serious drug offenses. His prior Florida convictions for selling or delivering cocaine, a second-degree felony, qualified as an ACCA predicate. *See United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014). His prior Florida conviction for possessing cocaine with the intent

[1] In *Samuel Johnson*, this Court held the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court later held that its decision in *Samuel Johnson* applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

to sell it also qualified as an ACCA predicate. *See id.* Finally, his conviction for resisting an officer with violence qualified as a third ACCA predicate, qualifying him for the ACCA's 15-year mandatory-minimum sentence, which he received. *See United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015). Accordingly, because reasonably jurists would not debate the district court's denial of Mr. Dorsey's § 2255 motion, his motion for a COA is DENIED.

Appendix A.

REASONS FOR GRANTING THE WRIT

In finding the Mr. Dorsey was not eligible for a COA, the district court and the Eleventh Circuit both relied on *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), which held that a conviction under Fla. Stat. § 893.13 is a "serious drug offense" under the ACCA. Recently, this Court granted review in *Shular v. United States*, No. 18-6662 (June 28, 2019), to decide whether such a conviction qualifies as a "serious drug offense." Thus, the proper disposition of this petition may be affected by this Court's resolution in *Shular*. Accordingly, Mr. Dorsey respectfully requests that this case be held pending the decision in *Shular* and then disposed of as appropriate in light of that decision.

Alternatively, this Court should grant Mr. Dorsey's petition to resolve a circuit split about whether the Florida offense of resisting with violence qualifies as a "violent felony" under the ACCA's elements clause. *Compare United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015) (finding that resisting with violence constitutes a violent felony), *and United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012), *with United States v. Lee*, 701 F. App'x 697 (10th Cir. 2017) (holding that Florida resisting with violence does not constitute a violent felony).

I. A FLORIDA CONVICTION UNDER FLA. STAT. § 893.13 DOES NOT QUALIFY AS A "SERIOUS DRUG OFFENSE" UNDER THE ACCA.

Mr. Dorsey's convictions under Fla. Stat. § 893.13 are not "serious drug offense[s]" under the ACCA. In *Shular*, this Court will review whether such a conviction qualifies as a "serious drug offense." Thus, this case should be held pending *Shular*.

Like the enumerated offenses in the "violent felony" definition of the ACCA, the "serious drug offense" definition lists enumerated drug offenses that qualify as predicate offenses—those that "involv[e] manufacturing, distributing, or possession with intent to manufacture or distribute." According to the Ninth and Sixth Circuits, the same type of categorical analysis that applies when

evaluating prior convictions under the ACCA's "violent felony" definition should apply when evaluating prior convictions under the "serious drug offense" definition. *See United States v. Franklin*, 904 F.3d 793, 800–03 (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, 396–97 (6th Cir. 2018) (comparing the defendant's delivery offense to the "generic definition of 'deliver' under the ACCA).

A drug conviction under Fla. Stat. § 893.13 does not qualify as a "serious drug offense" because Fla. Stat. § 893.13 is broader than the generic drug offenses listed in the ACCA's "serious drug offense" definition, all of which have a *mens rea* element. *See McFadden v. United States*, 135 S. Ct. 2298 (2015); *State v. Adkins*, 96 So. 3d 412, 429–30 (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. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1349–51 (11th Cir. 2012); *Adkins*, 96 So. 3d at 414–16. Thus, Florida's drug offenses do not require the prosecution to prove that a defendant knew 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. Thus, Mr. Dorsey's Fla. Stat. § 893.13 convictions cannot qualify as "serious drug offense[s]."

II. THE FLORIDA OFFENSE OF RESISTING ARREST WITH VIOLENCE IS NOT A "VIOLENT FELONY" FOR ACCA PURPOSES.

Mr. Dorsey's Florida conviction for resisting arrest with violence also does not qualify as an ACCA predicate offense. The only way such a conviction may qualify as a predicate offense is under the ACCA's elements clause, which requires a prior conviction to have "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 v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*); *see Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (reiterating that nominal physical contact, such as the conduct in Florida's battery statute, differs from the "violent" force contemplated in *Curtis Johnson*).

The Florida offense of resisting arrest with violence may be committed using nominal physical contact, much like that required under Florida's battery statute. *See Johnson v. State*, 50 So. 529, 530 (Fla. 1909) (stating that "gripp[ing] the hand of the officer, and forcibly prevent[ing] him from opening the door . . . 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. . . ."); *State v. Green*, 400 So. 2d 1322, 1323 (Fla. 5th DCA 1981) (finding that a "*prima facie case*" of resisting an officer with "violence" sufficient to go to the jury had been established when the totality of the evidence before the trial court was simply that the defendant "'wiggled and struggled' when the deputies attempted to handcuff him."). Such minimal contact lacks the violent force necessary to be an ACCA predicate. *Curtis Johnson*, 559 U.S. at 140; *Stokeling*, 139 S. Ct. at 553.

Notably, the Tenth Circuit unambiguously found that the Florida offense of resisting arrest with violence offense is not an ACCA predicate. *Lee*, 701 F. App'x at 701 ("Having compared the minimum culpable conduct criminalized by § 843.01 to similar forcible conduct deemed not to involve *violent* force, we conclude that a conviction under § 843.01 does not qualify as an ACCA predicate."); *id*. ("[W]e hold that a conviction under § 843.01 does not qualify as an ACCA predicate").

Mr. Dorsey's case presents the opportunity to address the contrary Eleventh Circuit precedent, which did not consider the "least culpable conduct" for conviction. *Hill*, 799 F.3d at

1322; *see also Romo-Villalobos*, 674 F.3d at 1249 (failing to address the Florida Supreme Court decision in *Johnson*; discounting the analysis in *Green*; and emphasizing other Florida resisting cases in which the defendants had engaged in more substantial, classically "violent" conduct presumed to be more typical).

On top of resolving this circuit split, this Court's intervention is needed because that Eleventh Circuit precedent violates *Descamps v. United States*, 133 S. Ct. 2276 (2013) (observing that when a potential predicate sweeps more broadly than the elements of a federally-listed predicate, that offense does not meet the elements clause).

For example, the intent element of Florida's offense does not "match" and is categorically broader than the intent element required by the elements clause. Even if 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,[2] the panel's conclusion that a general intent crime falls within the elements clause conflicts with this Court's precedent the panel did not cite or consider—*Leocal v. Ashcroft*, 543 U.S. 1 (2004).

In *Leocal*, this Court held that the word "use" in the similarly-worded definition of "crime of violence" in 18 U.S.C. § 16(a) requires "active employment," 543 U.S. at 10, and that the phrase "use . . . of physical force against the person or property of another" in § 16(a), "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* The federal elements clause thus requires a specific intent to apply violent force—and is not satisfied by mere,

[2] The Florida Supreme Court's decisions in *Frey v. State*, 708 So. 2d 918 (Fla. 1998), and *Polite v. State*, 973 So. 2d 1107 (Fla. 2007), establish that a general intent is ***only*** required 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 Staples v. United States*, 511 U.S. 600, 609 (1994) (recognizing that "different elements of the same offenses can require different mental states. Thus, Mr. Dorsey maintains *Romo-Villalobos* is wrong in this regard.

general intent to commit the *actus reus* of the crime (here, "resisting, obstructing, or opposing" an officer).

In light of the "overbreadth" analysis mandated by *Descamps*, 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 (5th Cir. 2013) (stating that when the least culpable act of the predicate offense was "the defendant intentionally 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").

After the clarification of the categorical approach in *Moncrieffe v. Holder, 133 S. Ct. 1678 (2013)* and *Descamps*, and consistent with the mens rea analysis in *Leocal* and these other circuit decisions, a conviction for resisting with violence in violation of Fla. Stat. § 843.01, a general intent crime, is categorically "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

Mr. Dorsey respectfully requests that this Court grant his petition.

Respectfully submitted,

Donna Lee Elm
Federal Defender

Rosemary Cakmis
Senior Litigator

/s/ Michelle Yard
Michelle Yard, BCS
Federal Defender Attorney
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone 407-648-6338
E-mail: michelle_yard@fd.org
Counsel of Record for Petitioner