No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYSHAWN ROBERTSON,

***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

I. Whether a criminal defendant moving for relief under 28 U.S.C. § 2255, based on a retroactive constitutional decision invalidating a federal statutory provision, can satisfy his burden of proof by showing his sentence may have been based on the unconstitutional provision, and his sentence exceeds the statutory maximum under current law.

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

LIST OF PARTIES

Petitioner, Rayshawn Robertson, was the movant 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.

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PETITION FOR A WRIT OF CERTIORARI

Rayshawn Robertson 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The Eleventh Circuit's unpublished order denying Mr. Robertson a certificate of appealability (COA) is in Appendix A. The district court order denying Mr. Robertson's motion to vacate his sentence under 28 U.S.C. § 2255 is in Appendix B.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Robertson's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. On March 12, 2019, the district court denied Mr. Robertson's § 2255 motion. Appendix B. Mr. Robertson then filed a notice of appeal and application for a COA in the Eleventh Circuit, which denied the COA on July 29, 2019. Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

The Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

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 § 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.

STATEMENT OF THE CASE

Mr. Robertson pled guilty to possessing a firearm as a felon, and on July 14, 2008, the district court sentenced him to 180 months' imprisonment under the Armed Career Criminal Act (ACCA). The Presentence Report (PSR) specified that his ACCA enhancement was applied based on three Florida convictions—one for resisting arrest with violence, in violation of Fla. Stat. § 843.01, and two for sale/delivery of cocaine, in violation of Fla. Stat. § 893.13(1)(A). At the sentencing hearing, the government relied on the same convictions to support the ACCA enhancement. Mr. Robertson did not appeal his conviction or sentence.

On June 23, 2016, Mr. Robertson moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his ACCA enhancement was unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*). Specifically, he argued that his conviction for resisting arrest with violence is not a "violent felony" after *Samuel Johnson*, and he therefore has only two ACCA predicates (the sale/delivery convictions). *Id.* The government disagreed, arguing that his conviction for resisting arrest with violence continues to qualify as a "violent felony" under the ACCA's elements clause.

On March 12, 2019, the district court denied the motion, stating that Mr. Robertson cannot meet his burden of proof under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), because he cannot show it was more likely than not that his ACCA sentence was based on the residual clause. The district court noted that the sentencing record did not show that it relied on the residual clause when imposing

the enhancement. Moreover, the district court held that Mr. Robertson still has three qualifying ACCA predicates. The district court also declined to issue a COA. Mr. Robertson appealed, but the Eleventh Circuit also denied him a COA.

REASONS FOR GRANTING THE WRIT

This case presents a good vehicle to resolve two circuit splits. The first split concerns a movant's burden of proof in § 2255 cases when the record is silent or ambiguous on whether a movant was sentenced under the residual clause of the ACCA. *Compare Beeman,* 871 F.3d at 1221-22, *United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017), and *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018), *with United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017), *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). The second split concerns whether the Florida offense of resisting with violence is a "violent felony" under the ACCA's elements clause. *Compare United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015), *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). Additionally, the Eleventh Circuit's precedent on this issue conflicts with this Court's precedent in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

I. A § 2255 movant raising a *Samuel Johnson* claim can satisfy his burden of proof by showing his ACCA sentence may have been based on the residual clause and that under current law, he is not an armed career criminal.

The courts below relied on *Beeman*, which itself was a split decision with a dissent. The majority in *Beeman* concluded that a *Samuel Johnson* claim may be established only if it is "more likely than not" that his ACCA sentence was based on

the residual clause. 871 F.3d at 1221–22. A movant cannot satisfy this burden if "it is just as likely that the sentencing court relied on the elements or enumerated crimes clause, solely or as an alternative basis for the enhancement." *Id.* at 1222. Characterizing the inquiry as one of "historical fact," the court stated:

> Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that [movant's prior conviction] no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact here: whether [at his original sentencing the movant] was, in fact, sentenced under the residual clause only.

Id. at 1224 n.5. Under the *Beeman* majority's standard, a silent record must be construed against a movant, and a movant may not rely on current law to establish that he was sentenced under the residual clause.

The *Beeman* dissent urged the court to adopt a rule that, when the sentencing record is inconclusive, *Samuel Johnson* error is established when the movant shows he could not be sentenced under any other clause of the "violent felony" definition. *Id.* at 1229–30. The dissent emphasized that under its rule, movants would still have to prove that they were more likely than not sentenced under the residual clause, but movants could satisfy that burden by establishing that, if sentenced today, they could not be sentenced under the elements or enumerated-crimes clauses. *Id.*

In *Dimott v. United States*, the First Circuit adopted the Eleventh Circuit's approach and held, over dissent, that a § 2255 movant "bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to

ACCA's residual clause." 881 F.3d 232, 243 (1st Cir. 2018). Like the Eleventh Circuit, movants in the First Circuit may not rely on current law to prove they were solely sentenced under the residual clause. *Id.* at 243 & n.8.

In *United States v. Snyder*, the Tenth Circuit adopted an approach that is effectively the same as the Eleventh Circuit approach. 871 F.3d 1122, 1130 (10th Cir. 2017). In that circuit, a movant must show that his prior convictions would not have satisfied the elements or enumerated crimes clauses under "the relevant background legal environment" at the time of his sentencing. *Id.* The "relevant background legal environment" does not include post-sentencing court decisions, including clarifying decisions. *Id.* at 1129. As a result, movants in the Tenth Circuit may not rely on current law to prove they were sentenced under the residual clause.

In contrast, the Fourth Circuit adopted a standard that places a lower initial burden on movants. The Fourth Circuit requires a movant show only that his sentence "*may* have been predicated on application of the now-void residual clause, and therefore *may* be an unlawful sentence." *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Once that threshold is crossed, the court asks whether the *Samuel Johnson* error was harmless. *Id.* at 682 n.4. To answer that question, the court applies current law to determine whether the movant's prior convictions qualify as "violent felon[ies]." *Id.* Under the Fourth Circuit's standard, a silent record is construed in the movant's favor.

The Ninth Circuit also construes a silent record in the movant's favor. Borrowing a principle that originated from *Stromberg v. California*, 283 U.S. 359 (1931), that court concluded an unclear record establishes *Samuel Johnson* error because "when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). Like the Fourth Circuit, the Ninth Circuit applies current law to determine whether the *Samuel Johnson* error is harmless. *Id.* at 897.

Mr. Robertson respectfully maintains that the path set forth by *Winston*, *Geozos*, and the *Beeman* dissent strikes the correct balance for determining how a movant in a silent-record case satisfies his burden to show *Samuel Johnson* error. At a minimum, reasonable jurists can, and do, debate the correct standard for determining whether a movant has satisfied his burden of proof on a *Samuel Johnson* claim.

II. A Florida conviction for resisting with violence does not qualify as a "violent felony" under the ACCA's elements clause.

The Florida offense of resisting with violence can only qualify as a "violent felony" 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 v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). Florida's resisting arrest with violence, however, can be completed with the nominal type of physical contact akin to the touching in battery. *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 deputies attempted to handcuff him."). Such minimal contact, while sufficient to sustain a conviction for battery under Fla. Stat. § 784.03 or resisting with violence under § 843.01, lacks the force necessary – violent force or strong physical force – to be an ACCA predicate. *Curtis Johnson*, 559 U.S. at 140.

Notably, the Tenth Circuit unambiguously found that a Florida 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. Robertson's case presents the opportunity to address the contrary Eleventh Circuit precedent, which did not consider the "least culpable conduct" for conviction. *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).

Besides resolving a circuit split between the Tenth and Eleventh circuits, this Court's intervention is needed because the Eleventh Circuit's precedent violates this Court's decision in *Leocal*.

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

Indeed, other circuits have found that general intent crimes such as this one are overbroad and do not have "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").

Consistent with *Leocal*'s mens rea analysis 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" under the ACCA's elements clause.

CONCLUSION

For the above reasons, Mr. Robertson respectfully requests that this Court grant his petition.

Respectfully submitted,

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