No. ____

IN THE

Supreme Court of the United States

ANTWOYN ANDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
Counsel of Record
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

Counsel for Petitioner

SEPTEMBER 27TH, 2019

QUESTIONS PRESENTED

I. Whether possession with intent to sell cocaine under Fla. Stat. § 893.13 is a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A), a question that will be decided in *Shular v. United States* (U.S. No. 18-6662) (cert. granted June 28, 2019).

II. Whether a criminal offense with a reckless *mens rea* qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i).

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Anderson, No. 18-cr-60204 (June 7, 2018)

United States Court of Appeals (11th Cir.):

United States v. Anderson, No. 19-10948 (Sept. 19, 2019)

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reprinted at __ F. App'x __, 2019 WL 4511939 and is reproduced as Appendix ("App.") A. App. 1a–4a. The district court's decision from the bench overruling Petitioner's sentencing objection is unreported.

JURISDICTION

The Eleventh Circuit issued its decision on September 19, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under the Armed Career Criminal Act, the term "serious drug offense" means, in relevant part, "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). And the term "violent felony" means, in relevant part, a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

STATEMENT

Petitioner pled guilty in the Southern District of Florida to being a felon in possession of firearm, in violation of 18 U.S.C. § 922(g)(1), and possession of a controlled substance, in violation of 21 U.S.C. § 844(a). App. 5a. The probation officer determined that he was subject to the Armed Career Criminal Act ("ACCA"), which transforms § 922(g)'s ten-year statutory maximum penalty into a fifteen-year mandatory minimum penalty where the defendant has three prior "serious drug offenses" or "violent felonies." 18 U.S.C. §§ 924(a)(2), (e).

The ACCA enhancement here was based on two prior convictions for possession with intent to sell cocaine, in violation of Fla. Stat. § 893.13, and one prior conviction for aggravated assault, in violation of Fla. Stat. § 784.07(2)(c). Petitioner objected, arguing that the former convictions did not qualify as "serious drug offenses," and that the latter did not qualify as a "violent felony." Dist. Ct. Entry 55 at 2–9; Dist. Ct. Dkt. Entry 89 at 9–12.

As to the drug offenses, he argued that, under the categorical approach, Fla. Stat. § 893.13 was overbroad vis-à-vis § 924(e)(2)(A)(ii) because, unlike the generic offenses enumerated there, a person may be convicted under § 893.13 without any knowledge of the illicit nature of the substance. He acknowledged that these arguments were foreclosed by *United States v. Smith*, 775 F.3d 1262, 1266–67 (11th Cir. 2014), which found it unnecessary to search for generic definitions of a "serious drug offense" and held that no element of *mens rea* as to the illicit nature of the

substance was expressed or implied in § 924(e)(2)(A)(ii). Petitioner nonetheless sought to preserve his arguments in the event of Supreme Court review.

As to the aggravated assault offense, he argued that the offense did not have as an element the use, attempted use, or threatened use of physical force because it could be committed recklessly. He acknowledged that his position was foreclosed by *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1338 (11th Cir. 2013). But he argued that *Turner* had overlooked Florida decisional law, which made clear that assault could be committed recklessly, and several courts (including the Eleventh Circuit at the time) had held that reckless conduct did not satisfy the ACCA's elements clause. He sought to preserve his argument for further review.

Bound by circuit precedent, the district court overruled Petitioner's objections and sentenced him to 235 months. Dist. Ct. Dkt. Entry 89 at 10; App. 6a. On appeal, Petitioner reiterated his arguments, again acknowledging that they were foreclosed by precedent but preserving them for further review. After the government filed its brief, this Court granted certiorari in *Shular v. United States* (U.S. No. 18-6662) (cert. granted June 28, 2019) on whether Fla. Stat. § 893.13 is a "serious drug offense." In his reply brief, Petitioner highlighted *Shular* and asked the Eleventh Circuit to hold his appeal until this Court decided *Shular*.

The Eleventh Circuit affirmed. Citing *Smith*, the court of appeals explained that it had "held that the Florida crime of possession of a controlled substance with the intent to sell, in violation of Fla. Stat. § 893.13, is categorically a serious drug offense under the ACCA." App. 3a. Thus, Petitioner's argument to the contrary

was "foreclosed by *Smith*." *Id.* Without mentioning *Shular* directly, the court observed that it did "not assign precedential significance to grants of *certiorari*." App. 2a. Citing *Turner* and its progeny, the court then reiterated that it had "held that the Florida crime of aggravated assault is categorically a violent felony under the ACCA," and that precedent "foreclosed" Petitioner's argument to the contrary. App. 3a–4a. Accordingly, the court upheld his sentence. App. 4a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT WILL DECIDE IN *SHULAR* WHETHER FLA. STAT. § 893.13 IS A "SERIOUS DRUG OFFENSE"

In *Shular*, a case arising out of the Eleventh Circuit, this Court granted certiorari to decide whether a state drug offense must categorically match the elements of a generic analogue offense in order to qualify as a "serious drug offense" under the ACCA, 18 U.S.C. § 924(e)(2)(A)(ii). *See Shular v. United States*, Pet. i, U.S. Br. in Opp. i (U.S. No. 18-6662) (cert. granted June 28, 2019). Current Eleventh Circuit precedent in *United States v. Smith*, 775 F.3d 1262, 1266–67 (11th Cir. 2014) does not require that application of the categorical approach. Having now granted certiorari, the Court in *Shular* could abrogate the circuit precedent that foreclosed Petitioner's sentencing appeal.

Moreover, the state drug offenses at issue in *Shular* are for sale or possession with intent to sell cocaine under Fla. Stat. § 893.13. That is the same drug offense at issue in *Smith* and that supported Petitioner's ACCA enhancement here. Accordingly, a favorable decision in *Shular* would vindicate Petitioner's argument that he was erroneously classified as an armed career criminal and make his

statutory maximum sentence ten years. Because the *Shular* decision may prove dispositive with respect to his ACCA enhancement, Petitioner respectfully requests that the Court hold this petition for that forthcoming decision.

II. THE CIRCUITS ARE DIVIDED ON WHETHER OFFENSES WITH A RECKLESS *MENS REA* SATISFIES THE ACCA'S ELEMENTS CLAUSE

1. In *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Court held that reckless conduct did satisfy the elements clause in 18 U.S.C. § 921(a)(33)(A), which defined the term "misdemeanor crime of violence" in 18 U.S.C. § 922(g)(9). In so holding, however, the Court said that its decision "concerning § 921(a)(33)(A)'s scope does not resolve whether [18 U.S.C.] § 16" (and, in turn, the identical elements clause in the ACCA) "includes reckless behavior," as "[c]ourts have sometimes given those two statutory definitions divergent readings." *Id*. at 2280 n.4. Following *Voisine*, the circuits have divided on whether recklessness satisfies the ACCA's elements clause.

The First, Fourth, and Ninth Circuits have held that it does not. *See United States v. Windley*, 864 F.3d 36, 37–39 & n.2 (1st Cir. 2017); *United States v. Rose*, 896 F.3d 104, 109–10 (1st Cir. 2018); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 498–500 & n.3 (4th Cir. 2018) (Floyd, J., joined by Harris, J., concurring); *United States v. Orona*, 923 F.3d 1197, 1202–03 (9th Cir. 2019); *United States v. Begay*, 934 F.3d 1033, 1040–41, 1044 & n.14 (9th Cir. 2019).

The Fifth, Sixth, Eighth, Tenth, and D.C. Circuits have held that it does. *See United States v. Burris*, 920 F.3d 942, 951–52 (5th Cir. 2019); *United States v.*

Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *United States v. Hammons*, 862 F.3d 1052, 1056 (10th Cir. 2017); *United States v. Pam*, 867 F.3d 1191, 1208 n.16 (10th Cir. 2017); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018).

Two remaining circuits are currently considering that issue en banc. *See United States v. Santiago*, No. 16-4194 (3d Cir. 2018); *United States v. Moss*, 920 F.3d 752, 754 (11th Cir. 2019), *vacated on rehearing* 928 F.3d 1340 (11th Cir. 2019). Oral argument in the Third Circuit is scheduled for October 16, 2019, and oral argument in the Eleventh Circuit is scheduled for February 2020. Any decision in those cases is therefore still many months away. And because the conflict is mature, any decision in those circuits will only exacerbate the split. So there is no reason to wait for this Court to intervene. Indeed, the lower courts recognize that the "deep circuit split" is now "intractable." *Walker v. United States*, 931 F.3d 467, 470 (6th Cir. 2019) (Kethledge, J., dissenting from the denial of rehearing en banc), *cert. petition pending* (U.S. No 19-373) (petition filed Sept. 19, 2019).

2. That question should be resolved. Due to the circuit conflict, individuals with identical criminal histories are now subject to disparate treatment based solely on the circuit in which they are sentenced. Hundreds of federal defendants are subject to the ACCA enhancement each year. And that enhancement transforms a ten-year statutory maximum into a fifteen-year mandatory minimum. Individuals should not face at least five additional years in prison based solely on the happenstance of geography.

That geographic disparity is particularly untenable given the frequency with which the question presented arises. That frequency is reflected by the number of post-*Voisine* cases addressing whether reckless conduct satisfies the elements clause. And *Voisine* was decided only two years ago. Those cases, moreover, span the nation and address various offenses from different jurisdictions. *See, e.g.*, App. 3a–4a (Florida aggravated assault); *Haight*, 892 F.3d at 1280–81 (D.C. assault with a dangerous weapon); *Verwiebe*, 874 F.3d at 262 (federal assault); *Pam*, 867 F.3d at 1207–08 (New Mexico shooting at or from a motor vehicle); *Windley*, 864 F.3d at 37–39 (Massachusetts assault and battery with dangerous weapon); *Fogg*, 836 F.3d at 956 (Minnesota drive by shooting).

3. This case provides the Court with an excellent opportunity to intervene. Petitioner's ACCA enhancement was based on only three prior convictions, one of which was for Florida aggravated assault. And the Eleventh Circuit denied relief from that ACCA enhancement on the ground that his aggravated assault conviction satisfied the ACCA's elements clause, relying on binding circuit precedent in *Turner*, which it refuses to reconsider. App. 3a–4a; *see United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) ("[E]ven if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it."); *In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016) (reiterating and applying *Turner*).

Moreover, Florida case law makes abundantly clear that aggravated assault requires only a reckless *mens rea*. *See LaValley v. State*, 633 So.2d 1126, 1127 (Fla. Dist. Ct. App. 1994) ("'reckless disregard for the safety of others' [may] substitute

for proof of intentional assault on the victim") (quoting *Kelly v. State*, 552 So.2d 206, 208 (Fla. Dist. Ct. App. 1989) (citing *DuPree v. State*, 310 So.2d 396, 398 (Fla. Dist. Ct. App. 1975) and *Green v. State*, 315 So.2d 499, 499–500 (Fla. Dist. Ct. App. 1975))); *accord Golden*, 854 F.3d at 1258 (Jill Pryor, J., concurring in result) (recognizing that "the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness").

Thus, this case squarely presents the question on which the circuits have divided, and a favorable resolution would substantially reduce Petitioner's 235-month ACCA sentence down to no more than 10 years.

4. Finally, reckless conduct does not satisfy the ACCA's elements clause. *Voisine* does not resolve that question, as there are material distinctions between the text, context, and purpose of the elements clause in § 16(a)/ACCA and that in § 921(a)(33)(A). When analyzing these provisions, this Court has repeatedly emphasized such distinctions. *See Voisine*, 136 S. Ct. at 2280 n.4; *United States v. Castleman*, 572 U.S. 157, 163–68 & n.4 (2014); *Curtis Johnson v. United States*, 559 U.S. 133, 143–44 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Indeed, the government recognized in *Voisine* that "[t]he definition of a 'misdemeanor crime of violence' under Section 922(g)(9) does not embody the same meaning as the term 'crime of violence' under 18 U.S.C. 16." *Voisine*, 136 S. Ct. 2272, U.S. Br. 12, 2016 WL 1238840 (Jan. 19, 2016).

As a textual matter, the elements clause in § 16(a) and the ACCA requires that the use of force be directed "against the person or another"—language that

Leocal found significant, 543 U.S. at 9—whereas § 921(a)(33)(A) requires the use of force without any such qualification. *United States v. Bennett*, 868 F.3d 1, 8–9 (1st Cir. 2017), *vacated as moot* 870 F.3d 34 (1st Cir. 2017). "And, in context, the word 'against' arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury in committing an aggravated assault." *Id.* at 18.

That is particularly true given that the elements clause in § 16(a) and the ACCA define the terms "crime of violence" and "violent felony," respectively, not "misdemeanor crime of violence." *See id.* at 22 (observing that assault committed by reckless conduct "does not necessarily reveal a defendant to pose the kind of risk that Congress appears to have had in mind in defining 'violent felony' under ACCA."). And this Court has repeatedly emphasized the importance of those underlying statutory terms. *See, e.g.*, *Curtis Johnson*, 559 U.S. at 139 ("Ultimately, context determines meaning," and "[h]ere we are interpreting the phrase 'physical force' as used in defining . . . the statutory category of 'violent felonies'") (brackets omitted); *Leocal*, 543 U.S. at 11 ("In construing . . . § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'").

Lastly, as a matter of statutory purpose, the ACCA targets offenders who would be likely to "deliberately point the gun and pull the trigger," not those those who merely "reveal a callousness toward risk." *Bennett*, 868 F.3d at 21 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)). By contrast, § 921(a)(33)(A) was designed to broadly reach all criminal acts of domestic violence, even those "that

one might not characterize as 'violent' in a nondomestic context." *Id*. (quoting *Castleman*, 572 U.S. at 16). Thus, while including reckless conduct in *Voisine* comported with the statutory purpose, doing so in the ACCA context would not.

CONCLUSION

For the foregoing reasons, the Court should hold this petition for *Shular*. If *Shular* is resolved in the petitioner's favor, the Court should grant certiorari, vacate the judgment below, and remand for further proceedings. If *Shular* is resolved in the government's favor, the Court should grant plenary review on the second question presented here.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
Counsel of Record
ANDREW L. ADLER
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

Counsel for Petitioner