No. 19-6370

IN THE
SUPREME COURT OF THE UNITED STATES

TROY BENNETT,

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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REPLY TO BRIEF FOR THE UNITED STATES

James T. Skuthan
Acting Federal Defender
Middle District of Florida

Rosemary Cakmis
Senior Litigator
Counsel of Record
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6095
E-mail: rosemary_cakmis@fd.org

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REASONS FOR GRANTING THE WRIT

Mr. Bennett's sentence was enhanced to 300 months under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on his prior convictions for resisting with violence under Florida Statutes § 843.01 and possession with intent to sell or deliver cocaine under Florida Statutes § 893.13. As explained in Mr. Bennett's petition for writ of certiorari, neither offense qualifies as an ACCA predicate. *See* Pet. at 4-12. Should either one not qualify, his statutory maximum would be 120 months. *See* 18 U.S.C. § 924(a)(2).

The mens rea for Florida's resisting-with-violence offense is similar to that of the offense at issue in *Borden v. United States*, No. 19-5410, 2020 WL 981806 (U.S. Mar. 2, 2020) (granting certiorari to resolve whether the ACCA's elements clause encompasses crimes with a mens rea of recklessness). This case should thus be held pending the decision in *Borden*. Alternatively, the nominal "force" required for the Florida offense warrants this Court's review.

This case also presents the opportunity to answer the question left open in *Shular v. United States*, 18-6662, 2020 WL 908904, at *7 n.3 (U.S. Feb. 26, 2020), concerning whether knowledge of the substance's illicit nature is required to qualify as a "serious drug offense" under the ACCA.

I. Resisting with violence under Florida Statutes § 843.01 is not a "violent felony" under the ACCA because it does not require the mens rea or type of "physical force" necessary for an ACCA predicate.

The first question presented in Mr. Bennett's petition is whether resisting with violence, in violation of Florida Statutes § 843.01, is a "violent felony" under the ACCA's elements clause. *See* Pet. at i.[1] The Florida offense does not qualify for two distinct reasons—(a) its mens rea

[1] The Brief of the United States (U.S. Br.), filed February 14, 2020, asserts that Mr. Bennett's petition should be denied as to the resisting-with-violence issue given that "[t]his Court has repeatedly and recently denied petitions for writs of certiorari raising similar contentions." U.S. Br. at 6-7. That certiorari petitions have been denied in other cases, however, is no reason to deny Mr. Bennett's petition. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989) (iterating that the

requirement does not amount to the "use" of physical force, *see* Pet. at 9-11; and (b) it does not require "physical force" as defined by this Court. *See* Pet. at 4-9. The government's contrary arguments (U.S. Br. at 6-13) misread Florida law.

A. The mens rea for Florida's offense of resisting with violence is similar to the mens rea at issue in *Borden*, and likewise is insufficient to qualify under the elements clause.

1. This Court granted certiorari in *Borden* to address the mens rea required for an offense to qualify as a "violent felony" under the ACCA's elements clause. The mens rea for the Tennessee offense of aggravated assault at issue in *Borden* is recklessness. *See* Tenn. Code Ann. § 39-13-101(a). The mens rea for Florida's resisting-with-violence offense is similar.

Florida Statutes § 843.01 provides:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree. . . .

Fla. Stat. § 843.01. As explained in Mr. Bennett's petition, the Florida Supreme Court has established that resisting with violence is a general intent crime, but the general intent is required *only* for the first elements of the statute—resisting and the victim's status. *See* Pet. at 10 (citing *Frey v. State*, 708 So. 2d 918 (Fla. 1998); *Polite v. State*, 973 So. 2d 1107 (Fla. 2007)). No intent is required as to the final "with violence" element, which makes the crime akin to a strict liability crime. *Id.*; *Frey*, 708 So. 2d at 921 (Anstead, J., concurring in part, dissenting in part).

"denial of a writ of certiorari imports no expression of opinion upon the merits of the case") (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)); *Griffin v. United States*, 336 U.S. 704, 716 (1949) (noting the Court has repeatedly admonished that "denial of a petition for certiorari imports nothing as to the merits of a lower court decision").

In arguing that the Florida offense requires a higher mens rea, the government makes the same mistake as the court below—it mischaracterizes Florida law and ignores that "different elements of the same offense can require different mental states," *Staples v. United States*, 511 U.S. 600, 609 (1994). *See* U.S. Br. at 10-11 (relying on *United States v. Romo-Villalobos*, 674 F.3d 1246, 1250 n.3 (11th Cir. 2012), for the proposition that *Frey* "held that the entire crime is one of general intent").

The "with violence" element of resisting with violence is what potentially makes the Florida offense a "violent felony" under the ACCA. The mental state required by that element, therefore, is the focus here.

The Florida Supreme Court has attached the adverbs "knowingly and willfully"—which render the offense one of "general intent" in Florida—to the elements of resisting an officer in the performance of his/her duties. *Frey*, 708 So. 2d at 920. The "with violence" element, however, does not require any intent to do violence. The court explained:

> The statute's plain language reveals that no heightened or particularized, i.e., no specific, intent is required for the commission of this crime, only a general intent to "knowingly and willfully" impede an officer in the performance of his or her duties.

Id. The *Frey* court expounded that the only way the Florida offense of resisting an officer with violence could become a specific intent crime would be "if the present statute were to be recast to require a heightened or particularized intent[.]" *Id*. The court illustrated this point, stating:

> For instance, the statute might be recast to read: "Whoever knowingly and willfully resists . . . an officer . . . in the lawful execution of any legal duty, *with the intent of doing violence* to the person of such officer . . . is guilty of a felony of the third degree."

Id. at 920 n.2 (emphasis added).

Significantly, in the 22 years since *Frey*, the Florida legislature has not recast § 843.01 to require an intent to do violence. Nor has any Florida court read an intent to do violence into the statute. Instead, the Florida Supreme Court reaffirmed *Frey* in *Polite*, which makes clear that the words "knowingly and willfully" do not modify the entire course of conduct described in the resisting-with-violence statute.

In *Polite*, the issue was "whether knowledge that a victim is a law enforcement officer is an essential element" of § 843.01. The Florida Supreme Court concluded that "'knowingly and willfully' modifies the entire phrase 'resisting, obstructing or opposing an officer,' including both the verbs 'resist, obstruct, or oppose' and the object 'an officer.'" 973 So. 2d at 1112. The Florida Supreme Court did *not* include the separate phrase "by offering or doing violence to the person of such officer or legally authorized person" in its holding on which elements "knowingly and willfully" modify.

The Florida Supreme Court's construction of § 843.01 thus remains the law of Florida, and that construction is binding on all federal courts. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (explaining that federal courts are "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the state offense at issue). The government's arguments that are not based on the Florida Supreme Court's interpretation of the state statute, therefore, must be rejected. *See* U.S. Br. at 10-11.

2. Even if it were assumed for the sake of argument that a conviction under § 843.01 requires proof of "general intent" as to all elements of the offense, the government is incorrect in concluding that this Court's review is not warranted because general-intent crimes can constitute violent felonies under the elements clause. *See* U.S. Br. at 11. As indicated in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), the federal elements clause requires a heightened intent to apply

violent force; it is not satisfied by a mere general intent to commit the actus reus of the crime (here, resisting, obstructing, or opposing an officer).

Furthermore, contrary to the government's claim (*see* U.S. Br. at 10-11), general intent is akin to strict liability or recklessness under Florida law. *See, e.g.*, *Frey*, 708 So. 2d at 921 (Anstead, J., concurring in part, dissenting in part) (stating that "general intent" crimes "creat[e] a form of strict liability"); *Dupree v. State*, 310 So. 2d 396, 399 (Fla. 2d DCA 1975) (stating that "the element of general intent in aggravated assault may be satisfied by proof of willful and reckless disregard of the safety of others").[2]

3. In light of the foregoing, Mr. Bennett asks this Court to review whether the Florida offense of resisting with violence qualifies as a violent felony. Alternatively, he asks that his petition be held pending the decision in *Borden*.

B. The degree of force required for Florida's resisting-with-violence offense is not sufficient to satisfy the federal definition of "physical force" for ACCA purposes.

Mr. Bennett also requests that this Court grant certiorari to resolve the circuit conflict regarding Florida's resisting-with-violence offense, as well as the tension among the circuits regarding similar resisting offenses. *See* Pet. at 5-9.

1. In addressing this issue, the government relies on state case law concerning the meaning of "physical force" for purposes of a *state* enhancement statute. *See* U.S. Br. at 8 (quoting *Harris v. State*, 5 So. 3d 750, 751 (Fla. 1st DCA 2009), which explained that for purposes of Florida Statutes § 775.082(9)(a)(1)(o), "[o]ffering to do violence plainly involves the 'threat of

[2] *See also* Black's Law Dictionary (9th ed. 2009) (defining general intent as "[t]he intent to perform an act even though the actor does not desire the consequences that result[,]" usually taking "the form of recklessness (involving the actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)").

physical force or violence' while actually doing violence plainly involves the 'use . . . of physical force or violence'"). But as this Court explained in *Johnson*:

> The meaning of "physical force" in § 924(e)(2)(B)(i) is a question of federal law, not state law. And in answering that question we are not bound by a state court's interpretation of a similar—or even identical—state statute.

559 U.S. at 138.

2. Also, like the Eleventh Circuit, the government errs by not relying on the minimum conduct criminalized by Florida Statutes § 843.01. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). As the Florida Supreme Court has explained, "force" that is "unlawful"—even simply "gripping the hand of the officer" to prevent him from opening a door and making an arrest—is necessarily "violence" for purposes of resisting with violence. *I.N. Johnson v. State*, 50 So. 529 (Fla. 1909). Thus, like Florida battery, "the 'unwanted' nature of the physical contact itself suffices to render it unlawful." *See Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (distinguishing the "force" required for Florida battery from the "force" required for Florida robbery).[3]

3. As a final matter, the government attempts to minimize the circuit conflict over whether Florida Statutes § 843.01 qualifies as an ACCA predicate by noting that the Tenth Circuit case, which is in direct conflict with the Eleventh Circuit cases, is unpublished and therefore is not precedential. *See* U.S. Br. at 12 (citing *United States v. Lee*, 701 F. App'x 697, 700 (10th Cir.

[3] Unlike the "force" required to overcome the victim's resistance for Florida's robbery statute at issue in *Stokeling*, the resistance/obstruction/opposition required for § 843.01 is not violent force within the meaning of the ACCA. *See* Pet. at 6-7 (citing *Wright v. State*, 681 So. 2d 852, 853-54 (Fla. 5th DCA 1996) (struggling, kicking, and flailing arms and legs without touching an officer); *State v. Green*, 400 So. 2d 1322, 1323-24 (Fla. 5th DCA 1981) (holding onto a doorknob and "wiggling and struggling" to free himself)); *see also Miller v. State*, 636 So. 2d 144, 151 (Fla. 1st DCA 1994) (scuffling after being handcuffed); *Kaiser v. State*, 328 So. 2d 570, 571 (Fla. 3d DCA 1976) ("a scuffle" with the officer).

2017)).[4] But whether *Lee* is "precedential" does not change the fact that if Mr. Bennett had been sentenced in the Tenth Circuit, he would not have been subject to the ACCA's mandatory-minimum sentence. *See* Pet. at 8-9.

II. A conviction for possession with intent to sell cocaine under Florida Statutes § 893.13 does not qualify as a "serious drug offense" under the ACCA because the State is not required to prove that the defendant "knew the illicit nature of the substance."

1. The second question presented in Mr. Bennett's petition is whether a Florida conviction for possession with intent to sell cocaine under Florida Statutes § 893.13 is a "serious drug offense" for ACCA purposes. The government's brief suggests that Mr. Bennett's petition should be "held pending the decision in *Shular* and then disposed of as appropriate in light of that decision." U.S. Br. at 6. This Court has since decided *Shular*, holding that the definition of "'serious drug offense' . . . requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." *Shular v. United States*, 18-6662, 2020 WL 908904, at *2 (U.S. Feb. 26, 2020).

This Court, however, did not reach the alternative question whether, even if the definition of a "serious drug offense" in the ACCA "does not call for a generic-offense-matching analysis, it requires knowledge of the substance's illicit nature." *Id.* at *7 n.3. The Court declined to reach this question because it fell outside the question presented and Mr. Shular had expressly disclaimed this argument in his supplemental brief filed at the certiorari stage. *Id*.

[4] Moreover, the government does not address the tension created by decisions in other circuits holding that resisting-with-violence statutes, which are worded similarly to Florida Statutes § 843.01, are not violent felonies. *See, e.g.*, Pet. at 8-9 & n.3 (citing *United States v. Jones*, 914 F.3d 893, 903 (4th Cir. 2019); *United States v. Bennett*, 863 F.3d 679, 681-82 (7th Cir. 2017); *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017)).

2. The question presented in Mr. Bennett's petition is broader than the one presented in *Shular*. *Compare* Bennett's Pet. at i ("Whether a Florida conviction for possession with intent to sell cocaine under Florida Statutes § 893.13 is a 'serious drug offense' under the ACCA."), *with* Shular's Petition, No. 18-6662, 2018 WL 9732183, at i (U.S. Nov. 8, 2018) ("Whether the determination of a 'serious drug offense' under the Armed Career Criminal Act requires the same categorical approach used in the determination of a 'violent felony' under the Act?").

Moreover, Mr. Bennett, unlike Mr. Shular, has never disclaimed this alternative argument. Before the Eleventh Circuit, Mr. Bennett argued that § 924(e)(2)(A)(ii) should be interpreted to require the mens rea that the defendant know the illicit nature of the substance, citing this Court's precedent interpreting statutes to include mens rea. *See* Initial Brief of Appellant Bennett, No. 18-10897, 2018 WL 6120126, at *18-*19 (11th Cir. Nov. 20, 2018) (arguing, "Because Congress did not clearly dispense with a mens rea requirement, § 924(e)(2)(A)(ii) should be interpreted to require knowledge of the illicit nature of the substance") (citing *Staples v. United States*, 511 U.S. 600, 618-19 (1994); *McFadden v. United States*, 135 S. Ct. 2298, 2302, 2305 (2015); *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015)).

3. Accordingly, Mr. Bennett respectfully asks for this Court's review of the open question concerning the proper interpretation of § 924(e)(2)(A)(ii) in his case.

CONCLUSION

Mr. Bennett respectfully requests that his petition for writ of certiorari be granted or that his petition be held pending *Borden*.

Respectfully submitted,

James T. Skuthan
Acting Federal Defender

/s/ Rosemary Cakmis
Rosemary Cakmis
Senior Litigator
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone 407-648-6338
Facsimile 407-648-6095
E-mail: rosemary_cakmis@fd.org
Counsel of Record for Petitioner

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