No. ____

IN THE

Supreme Court of the United States

DELVIN DEON TINKER,

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

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QUESTIONS PRESENTED

I. Under what circumstances is a criminal defendant pursuing a motion under 28 U.S.C. § 2255 entitled to relief under a retroactive constitutional decision invaliding a federal statutory provision, where the record is silent as to whether the district court based its original judgment on that provision or another provision of the same statute?

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).

III. Whether a criminal offense for resisting arrest, which can be committed by "wiggling and struggling," 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. Tinker, No. 14-20442 (Feb. 2, 2015) (criminal)

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

Tinker v. United States, No. 16-24673 (Jan. 3, 2019) (civil)

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

Tinker v. United States, No. 19-10835 (Aug. 8, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Delvin Deon Tinker ("Petitioner") respectfully seeks a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reproduced as Appendix ("App.") A. App. 1a–5a. A transcript of the district court's sentencing hearing is also produced as App. C.

JURISDICTION

The Eleventh Circuit issued its decision on August 8, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Under the Armed Career Criminal Act, the term "violent felony" means, in relevant part, any crime punishable by imprisonment for a term exceeding one year that "(i) 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 OF THE CASE AND THE FACTS

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). App. 6a. 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, in relevant part, on one prior conviction for aggravated assault, in violation of Fla. Stat. § 784.07(2)(c), and a prior conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01. Mr. Tinker was thus sentenced to 180 months' imprisonment. App. B. 6a.

After this Court's decision in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Tinker filed his motion to vacate pursuant to 28 U.S.C. § 2255. 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.

Similarly with the resisting arrest with violence offense, Mr. Tinker argued that a violation of § 843.01 does not require "violent force—that is, force capable of

causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). He acknowledged his position was again foreclosed by circuit precedent, see *United States v. Hill,* 799 F.3d 1318 (11th Cir. 2015), but argued that *Hill* overlooked Florida decisional law that a *prima facie* case for resisting with violence could be made by mere "wiggling and struggling." *See State v. Green*, 400 So.2d 1322, 1323 (Fla. Dist. Ct. App. 1981) (reversing trial court's order of dismissal on such facts; 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."). Mr. Tinker thus preserved this argument for the Court's review.

During the litigation, the Eleventh Circuit decided *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), holding that to obtain relief pursuant to *Samuel Johnson*, the movant must show that it is "more likely than not" that the sentencing court relied on the residual clause to impose the ACCA enhancement. *Beeman*, 871 F.3d at 1221-25. Mr. Tinker addressed this issue in his objections to the magistrate's report and recommendation, and argued that, at the time of his sentencing, the offense of resisting an officer with violence could only have qualified as a "violent felony" pursuant to the ACCA's residual clause. *See United States v. Nix*, 628 F.3d 1341, 1342 (11th Cir. 2010) (holding Florida resisting arrest with violence qualified under the residual clause). The record is silent on what clause the district court traveled under to find Mr. Tinker eligible for the ACCA enhancement. App. C.

The district court ultimately adopted the magistrate's recommendation that Mr. Tinker's motion be denied. After a timely appeal to the Eleventh Circuit and briefing from Mr. Tinker, the appellate court granted the United States' motion for summary affirmance. The court found that Mr. Tinker failed to meet his burden under *Beeman*, and that existing circuit precedent required the finding that the offenses of Florida aggravated assault and Florida resisting an officer with violence both qualify as ACCA predicates under the elements clause. App. A. 4a-5a.

Mr. Tinker thus asks this Court to review the denial of his Section 2255 motion and grant *certiorari* on the issues herein.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON THE BURDEN APPLICABLE FOR A DEFENDANT TO QUALIFY FOR RELIEF UNDER A RETROACTIVE CONSTITUTIONAL DECISION INVALIDATING A FEDERAL STATUTORY PROVISION

1. During Mr. Tinker's sentencing, the district court did not specify which clause she was traveling under to find he qualified under the ACCA for a 15-year mandatory prison term. The record is absolutely silent as to which prior conviction qualified under which clause. App. C.

2. In *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017), the Eleventh Circuit held that a petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that it was "more likely than not" that the use of the now-unconstitutional "residual clause" of the ACCA led to the sentencing court's enhancement of his sentence. *Beeman*, 871 F.3d at 1222. Thus, if the record is silent, as it was in Mr. Tinker's case, the petitioner bears the burden of proving the residual clause "more

likely than not" was used to increase his statutory maximum of ten years' imprisonment to a *minimum* of 15 years' imprisonment and maximum of life imprisonment. App. C.

3. The Third Circuit, in *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018), holds that a petitioner is entitled to relief if he "may have been sentenced pursuant to the now-unconstitutional residual clause of the ACCA." *Peppers*, 899 F.3d at 236. The Fourth and Ninth Circuits also employ the less-stringent "may have" standard. *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 897-98 (9th Cir. 2017).

4. The question presented is of exceptional importance because thousands of defendants over the past few decades have received ACCA sentences where the district court did not specify if the sentence rested on the residual clause. *See e.g., Raines v. United States*, 898 F.3d 680, 691 (6th Cir. 2018) (Cole, C.J., concurring) ("silence is the norm, not the exception"). The question presented also permeates current Section 2255 litigation based on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) and *United States v. Davis*, 139 S. Ct. 2319 (2019).

5. The Eleventh Circuit's opinion in *Beeman* is wrong, as it conflates the defendant's burden under the "relies on" element of the second-or-successive gateway, *see* 28 U.S.C. § 2244(b)(2)(A), with the defendant's ultimate burden of proving that a constitutional violation occurred. Once a defendant has received authority to file his Section 2255 claim, the habeas court's attention should then turn to assessing the sentencing court's actions and the merits of whether or not the prior conviction can

be sustained under any still-valid portion of the statute. *See Stromberg v. California*, 283 U.S. 359, 368 (1931) (holding a conviction cannot be upheld if it is impossible to say whether the conviction was based on an unconstitutional statutory ground or a still-available statutory ground).

6. The *Beeman* standard promulgated by the Eleventh Circuit makes it impossible for defendants, like Mr. Tinker, to be granted relief after *Samuel Johnson*. Using the Third Circuit's "may have" standard, the analysis reveals Mr. Tinker is deserving of relief: (1) his claim has merit because the sentencing judge, with her silence, "may have" relied on a unconstitutional portion of the ACCA and (2) current case law from other Circuits makes clear that neither Mr. Tinker's aggravated assault nor resisting with violence convictions qualify as "violent felonies" pursuant to the elements clause.

7. The Court should grant *certiorari* to correct this grave injustice in the Eleventh Circuit, as geography should play no part in a defendant's access to relief from an unconstitutional sentence.

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 took place on 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 the

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), *petition for cert. filed,* No 19-373(U.S. 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." Brief for the United States at *12, *Voisine v. United States*, 136 S. Ct. 2272(2016) (No. 14-10154) 2016 WL 1238840 (U.S. 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.

Mr. Tinker thus asks this Court to resolve whether a *mens rea* of recklessness satisfies the ACCA's elements clause.

III. THE CIRCUITS ARE DIVIDED ON WHETHER AN OFFENSE OF RESISTING ARREST WHICH ONLY REQUIRES "WIGGLING AND STRUGGLING" SATISFIES THE ACCA'S ELEMENTS CLAUSE

1. In *United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015), the Eleventh Circuit held that a conviction for resisting an officer with violence, pursuant to Fla. Stat. § 843.01, qualifies as a "violent felony" under the ACCA's elements clause. A violation of § 843.01, however, does not require *in every case* that the offender use substantial, injury-risking, "violent force," if, as interpreted by Florida courts, a *prima facie* case of resisting an officer with "violence" may be shown by *de minimis* contact with an officer – a defendant's mere resistance to being handcuffed by holding onto a doorknob with his free hand, and "wiggling and struggling" in an effort to free himself. *See State v. Green*, 400 So.2d 1322, 1323 (Fla. Dist. Ct. App. 1981) (reversing trial court's order of dismissal on such facts; 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.").

2. Thus, as interpreted by Florida courts, the "least culpable conduct" of "wiggling and struggling" make out a *prima facie* case of resisting an officer with violence, sufficient to go forward to the jury. *See Moncrieffe v. Holder*, 569 U.S. 184 (2013) (holding least culpable conduct controls); *Green*, 400 So.2d at 1323. The Eleventh Circuit ignores *Green's* holding in deciding that a violation of Fla. Stat. § 843.01 constitutes a "violent felony" under the ACCA's elements clause.

The Tenth Circuit recognized this, and expressly disagreed with *Hill*. In *United States v. Lee*, 701 F. App'x. 697 (10th Cir. 2017), the Tenth Circuit held that because "wiggling and struggling" does not involve violent force, Florida's crime of resisting an officer with violence does not qualify as a "violent felony." Id. at 701-702 (citing *Green*, 400 So.2d at 1323). In discussing "violent force" in *Lee*, the Tenth Circuit noted that "an offense may be *forcible* even in the absence of physical force." *Lee*, 701 F. App'x at 700 (citing *United States v. Romero-Hernandez*, 505 F.3d 1082, 1089 (10th Cir. 2007)) (emphasis added). The Ninth Circuit came to a similar conclusion about Arizona's resisting-arrest statute, which is analogous to Florida's. *See United States v. Flores-Cordero,* 723 F.3d 1085, 1088 (9th Cir. 2013) (holding a "minor scuffle" does not necessarily involve *Curtis Johnson* force).

3. This Court should resolve the existing split of authority, because, as detailed by the Tenth Circuit, "the application of the ACCA's mandatory minimum of fifteen years' imprisonment turns on parsing near-synonyms in decades-old opinions, opinions whose authors did not contemplate that such a loss of liberty would depend on whether the offense conduct was characterized as a bump or a jolt or a shove, or something more." *Lee*, 701 F. App'x. at 701. Were Mr. Tinker to reside in Kansas, he would have likely been sentenced to approximately 1/3 of the 15-year sentence he serves now. Geography must not dictate such disparate treatment.

CONCLUSION

For the foregoing reasons, the Court should issue the writ of *certiorari* and review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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