No. _____

IN THE
Supreme Court of the United States

ARVESTER 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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a state robbery offense that may be committed through mere snatching "have as an element the use, attempted use, or threatened use of physical force against the person of another" as is necessary for an offense to qualify as a "violent felony" under the Armed Career Criminal Act?

II. Does the Armed Career Criminal Act's definition of a "serious drug offense" require knowledge of the substance's illicit nature, an issue left undecided in *Shular v. United States,* 140 S. Ct. 779, 787 n.3 (2020)?

LIST OF PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

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

- *United States v. Arvester Lamonica Anderson*, No. 8:17-cr-486-T-30JSS (April 19, 2018)

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

- *United States v. Arvester Anderson*, No. 18-11886 (August 2, 2019, and May 27, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arvester Lamonica Anderson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's opinion, 774 F. App'x 608 (11th Cir. Aug. 2, 2019), is provided in the petition appendix (Pet. App.) at 1a–4a, as well as is the May 27, 2020 order denying rehearing en banc. Pet. App. 5a–6a.

The district court's judgment sentencing Mr. Anderson pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), is provided at Pet. App. 7a–11a.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Eleventh Circuit issued its decision affirm Mr. Anderson's conviction and sentence on August 2, 2019, and the decision denying rehearing was entered on May 27, 2020. Mr. Anderson has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rule 29.2.

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)

It shall be unlawful for any person –

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ; . . .

to . . . possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 924. Penalties

(a)(2) Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

. . .

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . 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 tittle and imprisoned not less than fifteen years . . . ..
(e)(2) As used in this subsection – . . .

> **(B)** the term 'violent felony' means 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.

Fla. Stat. § 812.13. Robbery (1987, 1989)

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear. (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084. (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission. (b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Fla. Stat. § 893.13. [Controlled Substances] Prohibited acts; penalties (2003)

Florida Statute § 893.13(1)(a) makes it unlawful for any person to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance."

Enacted effective May 2002, Florida Statute § 893.101 provides:

> (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
>
> (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

STATEMENT OF THE CASE

Mr. Anderson was charged with possession of a firearm and ammunition by a convicted felon, in violation of §§ 922(g)(1) and 924(e). He pleaded guilty without a written plea agreement.

A Pre-Sentence Investigation Report (PSR) was prepared for Mr. Anderson's sentencing. U.S. Probation recommended he be sentenced under the ACCA based on the following Florida offenses: a 1988 strongarm robbery offense; a 1990 robbery with a deadly weapon offense; and a 2003 delivery of a controlled substance within 1000 feet of a church offense. Prior to sentencing, Mr. Anderson objected as to his robbery convictions qualifying as "violent felonies" under the ACCA. He renewed those objections at sentencing, which were overruled in light of adverse, binding Eleventh Circuit precedent. The district court ultimately imposed the mandatory-minimum sentence under the ACCA of 180 months' imprisonment, followed by 5 years' supervised release.

Mr. Anderson appealed, maintaining that the three convictions relied upon to enhance his sentence under the ACCA did not qualify as "violent felonies" or as a "serious drug offense." Citing its own published opinions as foreclosing Mr. Anderson's arguments, the Eleventh Circuit

affirmed Mr. Anderson's ACCA sentence. Mr. Anderson thereafter moved for rehearing en banc as to the issue of 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 and also moved to stay the appellate rehearing proceedings pending this Court's decision in *Shular v. United States*, No. 18-6662, 2019 WL 2649851 (U.S. June 28, 2019). The stay was granted, and, after this Court's decision in *Shular*, the petition for rehearing was denied.

Mr. Anderson's ACCA-enhanced sentence should be vacated because his convictions for Florida robbery must be presumed to have been committed through mere snatching, and that means of committing the offense does not meet the "violent felony" definition in 18 U.S.C. § 924(e)(2)(B)(i) because the offense does not require force sufficient to overcome the resistance of the victim.

Further, Mr. Anderson's case additionally presents the question left undecided in *Shular v. United States,* 140 S. Ct. 779, 787 n.3 (2020)—i.e., whether the definition of a "serious drug offense" in § 924(e)(2)(A)(ii) requires knowledge of the substance's illicit nature. The Court did not address this question in *Shular* because the

petitioner had expressly disclaimed the argument. Mr. Anderson maintained this argument below and therefore respectfully seeks this Court's review.

REASONS FOR GRANTING THE WRIT

I. This Court's decision in Stokeling *left unanswered whether the Florida robbery offenses for which Mr. Anderson was convicted—the least culpable conduct for which someone could be convicted of was sudden snatching with any degree of force—has "as an element the use, attempted use, or threatened use" of violent force.*

In *Stokeling v. United States*, 139 S. Ct. 544 (2019), this Court held that a Florida robbery by means "of force"—however slight—qualified as "violent force" for purposes of the ACCA elements clause. However, the Court did not have occasion to consider in that case whether one convicted of a Florida robbery offense prior to 1997—where violent and injury-risking force are not required to commit and be convicted of robbery by force—would also meet the elements clause. That issue is presented here.

In *United States v. Lockley*, the Eleventh Circuit acknowledged that this particular means of committing Florida's robbery offense did *not* "specifically require the use or threatened use of physical force against the person of another." 632 F.3d 1238, 1245 (11th Cir. 2011).

Nevertheless, the *Lockley* court found it simply "inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force." 632 F.3d at 1245. For that reason, the court summarily found that "[t]he bare elements of § 812.13(1) also satisfy the elements" clause. *Id.* Relying on *Lockley*'s reasoning, the Eleventh Circuit has rejected a distinction between pre- and post-1997 robbery convictions. *United States v. Seabrooks*, 839 F.3d 1326, 1343 (11th Cir. 2016); *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016).

In his initial brief, Mr. Anderson distinguished the reasoning of *Stokeling*, *Seabrooks*, and *Lockley* on a variety of grounds. When determining whether a 'previous conviction' is an ACCA predicate, "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." *McNeill v. United States*, 563 U.S. 816, 820 (2011). Prior to 1997, Florida courts recognized that one means of committing robbery is by "use of force," and in such a robbery, the "degree of force used is immaterial." *See Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922); *McCloud v. State*, 335 So. 2d 257, 258–59 (Fla. 1976) (citing and following the holding in

Montsdoca, that "[a]ny degree of force suffices to convert larceny into a robbery"). Several intermediate appellate courts in Florida held that a conviction for robbery "by force" would be permissible even upon proof of only the slightest force—that necessary to "snatch" money from another's hands or physical possession. *See, e.g.*, *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986) (stating that "ever so little" force could sustain a robbery); *Larkins v. State*, 476 So. 2d 1383, 1385 (Fla. 1st DCA 1985) ("Robbery is a taking, not only by putting in fear, but by force or violence as well. The money was in Wirth's physical possession, and Larkins grabbed it from her. . . . It was therefore reasonable for the jury to conclude that, given the circumstances, sufficient force was exercised to fulfill the requirements of the robbery statute."); *Andre v. State*, 431 So. 2d 1042, 1043 (Fla. 5th DCA 1983) ("[T]he act of 'snatching' the money from another's hands is force and that force will support a robbery conviction.").

For that reason, the Eleventh Circuit held in *Welch* that it was necessary to assume that robbery convictions followed the pre-1997 standard. *See United States v. Welch*, 683 F.3d 1304 1311–2 (11th Cir. 2012) (noting that the controlling standard at the time of Mr. Welch's

robbery conviction was "that '[a]ny degree of force' would convert larceny into a robbery" (citing *McCloud*, 335 So. 2d at 258–59)). The law that governed at the time of his conviction was the Florida Supreme Court's decision in *McCloud*, under which "[a]ny degree of force suffice[d] to convert larceny into a robbery." *McCloud*, 335 So. 2d at 258. And because mere snatching sufficed to be a robbery, such a robbery does not constitute "violent force" as defined by the Supreme Court. *See United States v. Stokeling*, 684 F. App'x 870, 874 (11th Cir. 2017) (Martin, J., concurring) ("Sudden snatching with 'any degree of force,' *McCloud*, 335 So. 2d at 258, plainly does not require the use of a substantial degree of force. Neither does it necessarily entail violent force . . . . This means a conviction for Florida unarmed robbery during the time *McCloud* was controlling should not count as a violent felony within the meaning of the elements clause." (internal citations and quotation marks omitted)).

In 1997, the Florida Supreme Court clarified that for a taking to amount to "robbery," it must be "accomplished with more than the force necessary to remove the property from the person. Rather, there must be resistance by the victim that is overcome by the physical force of the

offender. The snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery." *Robinson v. State*, 692 So. 2d 883, 886–87 (Fla. 1997).[1] Therefore, Florida case law makes clear that prior to 1997, "violent," pain-causing, injury-risking force was not required to commit and be convicted of Florida robbery "by force."

As noted above, the Eleventh Circuit has previously rejected a distinction between pre- and post-1997 robbery convictions, stating that *Robinson* held what the law has always been. *See United States v. Seabrooks*, 839 F.3d 1326, 1343 (11th Cir. 2016); *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016). Thus, that court has treated all Florida robberies as though they were committed under the *Robinson* standard. *Id.* However, even if *Robinson* clarified what the law was supposed to be before 1997 (instead of changing the law), the distinction remains. This is because under *McNeill*, the relevant inquiry is what conduct was actually being prosecuted and accepted for conviction in the Florida courts at the time. *See Stokeling*, 684 F. App'x at 874 (Martin, J., concurring) ("[T]he Supreme Court has told us to look at

[1] In 1999, Florida enacted a law that punished "robbery by sudden snatching," apparently in response to the decision in *Robinson*. *See* Fla. Stat. § 893.131; *Nichols v. State*, 927 So. 2d 90, 90–91 (Fla. 1st DCA 2006); *Welch*, 683 F.3d at 1311.

what state courts required for a conviction at the time of that conviction . . . . Regardless of how the Florida Supreme Court characterized *McCloud* in its *Robinson* decision, there is no erasing the fact that conduct involving minimal force was prosecuted as robbery when *McCloud* was the controlling precedent"). Thus, *Robinson* didn't change the fact that before 1997, the least culpable conduct for which someone could be convicted of robbery in Florida was sudden snatching with any degree of force. *Id.* Therefore, Mr. Anderson's pre-1997 convictions must be presumed to have been committed through mere snatching, which does not qualify as a "violent felony." And this Court's decision in *Stokeling* supports that conclusion.

In *Stokeling*, the Court considered "whether a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of 'physical force' within the meaning of" ACCA. 139 S. Ct. at 548. And the Solicitor General emphasized the boundaries of the issue before the Court, arguing that Mr. Stokeling's 1997 robbery qualified under the elements clause because it had the "narrowing feature" announced in *Robinson*—that is, it required that the force be "sufficient to overcome a victim's resistance." Brief for

United States at 8, *Stokeling* (No. 17-5554), 2018 WL 3727777, at *8 (U.S. Aug. 3, 2018) (quoting *Robinson*, 692 So. 2d at 887). The Solicitor General specifically distinguished convictions obtained in jurisdictions where robbery could be accomplished by "simple purse-snatching or pocket-picking," which "does not count" under the elements clause. *Id.* at *7.

The Court agreed with the Solicitor General, expressly relying on the definition of robbery "articulated in *Robinson*," in which the Florida Supreme Court had held that robbery "requires 'resistance by the victim that is overcome by the physical force of the offender.'" 139 S. Ct. at 555 (quoting *Robinson*, 692 So. 2d at 886); *see* Pet. for Writ of Certiorari at 4, *Stokeling* (No. 17-5554), 2017 WL 8686116, at *4–5 (U.S. Aug. 4, 2017) (noting that Mr. Stokeling was convicted of robbery after *Robinson*). The Court ultimately held that the elements clause encompassed post-*Robinson* robberies like Mr. Stokeling's because "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*." 139 S. Ct. at 553 (emphasis added).

As *Stokeling* acknowledged, Mr. Anderson's 1988 and 1990 robbery convictions are different from the robbery offense for which Mr. Stokeling was convicted. Under *Stokeling*, the line between force sufficient to satisfy the elements clause and force insufficient to satisfy the elements clause is the line between pre-1997 Florida robbery and post-1997 Florida robbery. That line was expressly premised on *Robinson*'s holding "that the 'use of force' necessary to commit robbery requires 'resistance by the victim that is overcome by the physical force of the offender.'" 139 S. Ct. at 549 (quoting *Robinson*, 692 So. 2d at 886). Indeed, the majority opinion in *Stokeling* cited *Robinson* on multiple occasions and—by its own terms—expressly rested on "the standard articulated in *Robinson*. *Id.* at 555. Notably, Mr. Anderson's convictions were committed in Florida's Fourth DCA, which had made clear pre-*Robinson* that sudden snatching could support a robbery. *See United States v. Jenkins*, 651 F. App'x 920, 927–28 (11th Cir. 2016) (per curiam) (distinguishing a Second DCA robbery from a Fourth DCA robbery which could be committed through sudden snatching").

Because Mr. Anderson's robbery convictions were obtained prior to 1997, which did not require force sufficient to overcome the resistance of

the victim, they cannot qualify as an ACCA predicate, and require that he be resentenced without the enhancement.

II. This case presents the question left open in Shular*—whether 18 U.S.C. § 924(e)(2)(A)(ii) requires knowledge of the substance's illicit nature.*

In *Shular*, this Court held that § 924(e)(2)(A)(ii) does not require a "comparison to a generic offense" but "requires only that the state offense involve the conduct specified in the federal statute." 140 S. Ct. at 782I think. This Court left open the alternative question whether § 924(e)(2)(A)(ii) "requires knowledge of the substance's illicit nature," because the petitioner had expressly disclaimed this argument. *Id*. at 787 n.3. Mr. Anderson maintained this statutory interpretation argument below. Pet. App. 3a. His case thus squarely presents this question.

This Court's review is warranted because the Eleventh Circuit's reading of the ACCA is erroneous. *See* Pet. App. 3a. In § 924(e)(2)(A)(i), Congress defined a "serious drug offense" to include federal offenses under the Controlled Substances Act (CSA). These federal offenses require that the defendant know of the illicit nature of the controlled substance. For example, 21 U.S.C. § 841(a) makes it

unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance" and requires "that the defendant knew he was dealing with 'a controlled substance.'" *McFadden v. United States*, 576 U.S. 186, 188–89, 191–92 (2015). In § 924(e)(2)(A)(ii), Congress defined a "serious drug offense" to include prior state offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." Congress did not clearly dispense with a *mens rea* requirement in this statutory language. *See Staples v. United States*, 511 U.S. 600, 618 (1994).

The Eleventh Circuit has concluded to the contrary, stating: "No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by" § 924(e)(2)(A)(ii). *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014); *see* Pet. App. 3a. The Eleventh Circuit's reading of the ACCA, however, conflicts with this Court's decisions, which have "repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Elonis v. United States*, 135 S. Ct. 2001,

2009 (2015) (addressing 18 U.S.C. § 875(c)); *accord Staples*, 511 U.S. at 618–20.

This Court's "presumption in favor of scienter even when Congress does not specify any scienter in the statutory text" thus supports Mr. Anderson's reading. *Rehaif v. United States*, 139 S. Ct. 2191. 2195 (2019) (citing *Staples*, 511 U.S. at 606). Given the severe penalties required by the ACCA, it is unlikely that Congress meant to include an offense that does not require the defendant know he is dealing with an illicit substance. *See Staples*, 511 U.S. at 616–17 (reading the statute at issue to require *mens rea*, which was supported by the "potentially harsh penalty" of up to 10 years in prison); *McFadden*, 576 U.S. at 188–89, 191–92.[2]

Florida convictions after May 13, 2002, however, lack this element. *See* Fla. Stat. § 893.101 (eff. May 13, 2002); *Donawa v. Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013); *Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1349–51 (11th Cir. 2012); *State v. Adkins*, 96 So. 3d 412, 414–16; *In re Standard Jury Instructions in Criminal Cases*

[2] To the extent any ambiguity remains, the rule of lenity further supports Mr. Anderson's reading of § 924(e)(2)(A)(ii). *See, e.g., Yates v. United States*, 574 U.S. 528, 547–48 (2015).

(No. 2005-03), 969 So. 2d 245, 247–57 (Fla. 2007). In *Shular*, this Court observed that Florida permits a defendant to raise his lack of knowledge as an affirmative defense, which then requires the jury to find his knowledge beyond a reasonable doubt. 140 S. Ct. at 787. Mr. Anderson, however, entered a guilty plea on the conviction at issue. The government did not establish below that Mr. Anderson had admitted that he possessed the requisite knowledge of the substance's illicit nature in his state court proceedings.

Mr. Anderson accordingly asks for this Court's review to resolve the question left open in *Shular*. This issue is alone is outcome-determinative. Should the Court decide that § 924(e)(2)(A)(ii) requires knowledge of the substance's illicit nature, Mr. Anderson would be ineligible for the ACCA's increased penalties.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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