NO.: 23-5154 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

UNITED STATES OF AMERICA,
Respondent,

v.

JUSTIN CHRISTOPHER SMITH,
Petitioner.

Justin C Smith July 13, 2023

On Petition for Writ of Certiorari
To the Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Justin Christopher Smith # 53312-074
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Coleman, FL 33521

Pro se

QUESTIONS PRESENTED

1. Whether an appeal waiver can bar an attack on an enhanced statutory sentence?
2. Whether Petitioner's prior convictions for robbery and resisting arrest with violence were for offenses "committed on occasions different from one another" within the meaning of ACCA, section 924 (e) (1), and Wooden v United States, 595 U.S. __ (2022)?
3. Whether counsel for Petitioner ineffective for not arguing that Petitioner's prior convictions for resisting arrest with violence were not violent felonies?

LIST OF PARTIES

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CASES **PAGE NUMBER**

Constitutional & Statutory Provisions:

Others:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the petition and is

[X] unpublished; or

The opinion of the United States district court appears at Appendix B to the petition and is

[X] unpublished.

The opinion on rehearing of the United States Court of Appeals for the Sixth Circuit appears at Appendix C to the petition is

[X] unpublished.

The opinion on rehearing en banc of the United States Court of Appeals for the Sixth Circuit appears at Appendix D to the petition is

[X] unpublished.

JURISDICTION

The dates on which the United States Court of Appeals decided the case was on

February 24, 2023, May 26, 2023 (rehearing); June 12, 2023 (rehearing en banc). **See Appendixes A, C and D.**

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment VI – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *Assistance of Counsel for his defence.*

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. section 922 (g) (1) -- It shall be unlawful for any person ... who has been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 U.S.C. Section 924 (e) -- In the case of a person who violates section 922 (g) of this title and has three previous convictions by any court referred to in section 922 (g) (1) of this title 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, and, notwithstanding any other provision of law, the court shall

not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922 (g).

STATEMENT OF THE CASE

On November 28, 2018, Petitioner pled guilty to one count of a two-count Indictment that charged felon in possession of a firearm, in violation of 18 U.S.C. Sections 922 (g) (1) and 924 (e) pursuant to a written agreement. **ECF # 39**. After sentencing was re-set several times, **ECF #'s 39, 49, 51, and 52**, Petitioner was re-indicted by Superseding Indictment and one count of drug addict in possession of firearm was added to the original Indictment (section 922 (g) (3)), and an element was added to each count addressing the holding in Rehaif v United States, 588 U.S. __ (2019)[1] by adding "knowingly" to the first and second elements of the section 922 (g) (1) and (3) violations. **ECF # 54**.

After another plea agreement was signed and filed on August 16, 2019, **ECF # 63**, Petitioner pled guilty to Count One of the Superseding Indictment on August 27, 2019, and he was sentenced on the same day to a term of imprisonment of 180-month as an armed career criminal. **Id**. The Judgment was filed on August 29, 2019. **Id. at 64**.

The presentence investigation report (PSR) concluded that Petitioner was subject to an enhanced sentence under the Armed Career Criminal Act; because, he had been convicted pursuant to section 922 (g) (1), and he had three prior serious felonies that had occurred on different occasions. **ECF # 41**. The three predicates used to increase Petitioner's statutory maximum sentence for a violation of section 922 (g) (1) to a

[1] The Court held that when a person is charged with possessing a gun while prohibited from doing so under 18 U.S.C. section 922 (g), the prosecution must prove both that the accused knew that they possessed a gun and that they knew they held the relevant status.

violation of section 924 (e) were: 2001 conviction for *resisting arrest with violence* (case # 0110294CFANO), and 2002 convictions for *robbery* and *resisting arrest with violence* (case #'s 0206598CFANO and 0206599CFANO, respectively). Id. **See Appendix E, Exhibits I and II.**

A timely notice of appeal was filed on September 1, 2019, **ECF # 66**, and on appeal, Petitioner advanced two arguments: 1) The appellate waiver contained in Smith's amended plea agreement does not preclude an appeal of his classification as an armed career criminal; and, 2) The district court erred by relying on statements made in the Appellant's sentencing memorandum, an unapproved Shepard document, when it engaged in a categorical-approach analysis of Smith's 2003 conviction for resisting arrest and, consequently, did err by deciding that the conviction qualifies as a predicate for the Armed Career Criminal Act. On June 12, 2020, the Sixth Circuit granted the government's motion to dismiss due to appeal waiver. United States v Justin Smith, No. 19-5978 (6th Cir. 6/12/2020).

Petitioner filed his first and only post-conviction motion and memorandum in support pursuant to 28 U.S.C. Section 2255 on June 7, 2021 and advanced two arguments: *1)* Counsel for Petitioner provided ineffective assistance of counsel for his failure to: (a) Communicate with Smith and inform him of the relevant circumstances and likely consequences of pleading guilty as opposed to proceeding to trial; (b) Conduct an adequate and independent pretrial investigation; (c) Attempt to negotiate a favorable Plea Agreement; and (d) Properly challenge Smith's ACCA enhancement deprived Smith of effective assistance of counsel under the Sixth Amendment of the Constitution of the

United States; and, *2)* Whether Smith's sentence exceeds the statutory maximum of ten (10) years due to a misapplied ACCA enhancement. **CECF #'s[2] 1 & 2.**

The Government was ordered to respond to the section 2255 motion and did so on July 8, 2021. **CECF # 6.** On August 2, 2021, Petitioner filed a reply in opposition to the Government's Response. **CECF # 8.** Then, Petitioner filed a motion to hold the section 2255 motion in abeyance on November 2, 2021; so that the case Wooden v United States, No. 20-5279 could be decided by the Supreme Court. **Id. at 9.** In Wooden, the Court was asked to decide whether Wooden's ten burglaries which happened successive occurred on occasions different from one another.

Wooden was decided by the Supreme Court on March 7, 2022, and on April 4, 2022, Petitioner filed a motion to life the stay. **Id at 11.** The district court filed a memorandum opinion and ordered that the section 2255 motion be dismissed with prejudice, denied a certificate of appealability, and denied leave to proceed in forma pauperis. **CECF # 15.** The COA to the Sixth Circuit was denied on March 27, 2023. **CECF # 21. See also Appendix A.**

In the attack on his designation as an armed career criminal in the district court and in his COA, as relevant here, Petitioner alleged that his 2002 conviction for *resisting arrest with violence* could not be used as a predicate because it had occurred on the same occasion as the 2002 *robbery* conviction and he alleged that resisting arrest with violence was not a serious violent felony.

Petitioner's motion for rehearing was denied by the Sixth Circuit on May 26, 2023. **See Appendix C.** The motion for rehearing en banc was denied on June 12, 2023. **See Appendix D.**

[2] CECF # is civil docket number for 2:20-cv-00090-RLJ-CRW.

REASONS FOR GRANTING THE WRIT

The reason for granting the writ on Issue One is to determine whether the appeal waiver bars an attack on a sentence that is above the statutory maximum for a violation of 18 U.S.C. Section 922 (g) (1).

The reason for granting the writ on Issue Two is to determine whether Petitioner's prior convictions for robbery and resisting arrest with violence were for offenses occurring on different occasions, as the lower courts held, because the two priors happened at a distinct point in time, rather than simultaneously.

For Issue Three, there is a circuit split on whether Florida's resisting arrest with violence is or is not a serious violent felony and a writ is needed to decide who is correct.

SUMMARY OF ARGUMENT

For Issue One, Petitioner pled guilty to Count One which was a violation of 18 U.S.C. Section 922 (g) (1) and carried a statutory maximum sentence of ten (10) years. But Petitioner signed a plea agreement agreeing to a 180-month sentence; because, he believed that he was an armed career criminal, which was a violation of 18 U.S.C. Section 924 (e) and carried a statutory minimum sentence of fifteen (15) years, or 180-month. Petitioner believed that he was an armed career criminal; because, he supposedly had three prior violent felonies that had occurred on different occasions.

Even though, Petitioner argued against the armed career criminal sentence at sentencing, on direct appeal, and in the instant matter, Sixth Circuit's case law has prevented relief from his argument that he was being sentenced above the statutory maximum for his offense of conviction, a violation of section 922 (g) (1). Petitioner's amended plea agreement was filed on August 16, 2019, and in relevant parts, provided

that he could file an appeal of any sentence imposed above any mandatory minimum sentence. In light of Wooden, Petitioner's sentence is above his mandatory maximum sentence, which is 10 years.

For Issue Two, three prior convictions, which supposedly had occurred on different occasions, were used to designate Petitioner as an armed career criminal. The prior convictions used to designate Petitioner as an armed career criminal were: 2001 resisting arrest with violence, 2002 robbery and 2002 resisting arrest with violence.

Petitioner objected to this designation because, two (2) of the convictions should be treated as one predicate resulting in only two (2) predicate convictions. Petitioner asserted that his convictions for robbery and resisting arrest with violence in paragraphs forty (40) and forty-one (41) of the PSR should be treated as only one predicate because they were not committed "on occasions different from one another."

On April 17, 2002, the Defendant and another individual committed robbery in Pinellas County, Florida. The Defendant fled the scene and was subsequently arrested. During his arrest for the robbery, the Defendant resisted arrest by refusing to be handcuffed by the arresting officers. Without the armed career criminal sentence, Petitioner would have faced a maximum sentence of 10 years, but he was sentenced to a mandatory minimum sentence of 15 years for a violation of section 924 (e).

ARGUMENTS

Issue One: Whether an appeal waiver can bar an attack on an enhanced statutory sentence?

Supporting Facts and Argument: In its denial of the COA, the panel stated that "[j]urists of reason would agree that the collateral-attack waiver in Smith's plea

agreement bars consideration of his claim that the district court erroneously applied the ACCA enhancement. The district court properly advised Smith of the waiver at the plea hearing, Smith does not challenge the voluntariness of his waiver, and his claim does not fall within the exceptions to the waiver. See Slusser v. United States, 895 F.3d 437, 439 (6th Cir. 2018)." **Civil docket entry # 11-2 at 5 of 6 for appeal # 22-5971.**

Petitioner opposes the opinions of the Sixth Circuit in this matter; because, the plea waiver cannot bar an attack on a sentence above the statutory maximum for the offense. Without the armed career criminal designation, Petitioner faced a maximum sentence of 10 years, but he was incorrectly sentenced to a term of imprisonment of 15 years as an armed career criminal.

In United States v. Caruthers, 458 F.3d 459, 472 (6th Cir.), a panel of the Sixth Circuit concluded that "an appellate waiver does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded." Since the decision in Caruthers, the Sixth Circuit has restated the rule established in Caruthers in the general context of appellate and collateral waivers and has cited Caruthers for the broader proposition that, despite knowingly and voluntarily waiving the right to appeal, a defendant may nonetheless assert that his sentence was above the statutory maximum. See, e.g., United States v. Freeman, 640 F.3d 180, 193–94 (6th Cir. 2011) (explaining that although the defendant did not argue that his plea agreement was unknowing or involuntary and the defendant reserved the right to appeal a sentence above the statutory maximum, "even where a defendant does not reserve the right to appeal a sentence that exceeds the statutory maximum, 'an appellate waiver may not bar an appeal asserting that the sentence exceeds the statutory maximum' ". (quoting Caruthers, 458 F.3d at 471–72)); In

re Acosta, 480 F.3d 421, 422 n.2 (6th Cir. 2007) (citing the rule established in Caruthers and noting that, in the context of the defendant's second section 2255 motion, although voluntariness and ineffective assistance of counsel may invalidate a plea agreement and appellate waiver, "our focus on [those bases] is not intended to suggest that they constitute an exclusive list").

In Vowell v United States, 938 F.3d 260, the Sixth Circuit, after examining the holdings in Caruthers and Slusser, held that an appeal waiver did not bar a claim that the sentence was above the statutory maximum for the offense. Thus, jurists of reasoning could debate whether this issue should have been resolved in a different manner or that the issue presented was adequate to deserve encouragement to proceed further.

Issue Two: Whether Petitioner's prior convictions for *robbery* and *resisting arrest with violence* were for offenses "committed on occasions different from one another" within the meaning of ACCA, section 924 (e) (1), and Wooden v United States, 142 S. Ct. 1063 (2022)?

Supporting Facts and Argument: The issue in the certificate of appealability (COA) to the Sixth Circuit was whether Petitioner's two prior convictions, 2002 convictions for *robbery* and *resisting arrest with violence*, that occurred subsequent to each other, should be counted as two predicates or as only one predicate. In its Memorandum and Order denying relief on Petitioner's section 2255 motion, the District Court stated that, "the Court finds that the defendant's 2002 crimes of *robbery* and *resisting arrest with violence* were indeed committed on occasions different from one another for purposes of the ACCA." **ECF # 86 at 7 of 17.** The district court reached its conclusion by finding that Appellant completed the first crime of robbery and then fled

the scene before he was arrested; thus, creating two separate crimes. **Id**. The Sixth Circuit denied a certificate of appealability; because it found that

> "Jurists of reason would agree that the collateral-attack waiver in Smith's plea agreement bars consideration of his claim that the district court erroneously applied the ACCA enhancement. The district court properly advised Smith of the waiver at the plea hearing, Smith does not challenge the voluntariness of his waiver, and his claim does not fall within the exceptions to the waiver. See Slusser v. United States, 895 F.3d 437, 439 (6th Cir. 2018)."

Appendix A at page 5 of 6.

Petitioner's motion for rehearing was denied by the Sixth Circuit; because, the panel concluded that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a). **See Appendix C**. A rehearing en banc was denied on June 12, 2023, with an en banc panel finding that the panel that had denied his suggestion for rehearing had circulated the motion to all active members of the Court and none of whom requested a vote on the suggestion for an en banc rehearing. **See Appendix D**.

Petitioner opposes the findings that the 2002 offenses of robbery and resisting arrest with violence occurred on different occasions. On April 17, 2002, the Petitioner and another individual committed robbery in Pinellas County, Florida. Petitioner fled the scene and was subsequently arrested. During his arrest for the robbery, Petitioner resisted arrest by refusing to be handcuffed by the arresting officers.

Charges for both offenses, the 2002 robbery and the 2002 resisting arrest with violence, were filed by the same officers at the same time, one indictment was filed for both offenses with succeeding case numbers, 0206598CFANO and 0206599CFANO, respectively. The robbery was taking place when officers arrived on the scene which caused Petitioner to flee the scene. Then, he was pursued, apprehended, and arrested.

Title 18 U.S.C. section 922 (g) (1) provides in relevant parts that "it shall be unlawful for any person ... who has been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Title 18 U.S.C. Section 924 (e) provides that "in the case of a person who violates section 922 (g) of this title and has three previous convictions by any court referred to in section 922 (g) (1) of this title 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922 (g).

In Wooden v United States, 142 S. Ct. 1063 (2022), the Supreme Court had to decide whether the defendant, William Dale Wooden, had three prior convictions on "occasions different from one another." If he did not, he faced around two years in prison. But, if he did, that time in prison would jump to more than 15 years. In the 1990's, Wooden and three others broke into a storage facility and stole items from ten separate storage units. They did it all in one night and at one location. But the government argued that the break-in for each separate unit constituted "occasions different from one another" under the Armed Career Criminal Act.

A unanimous Supreme Court, in Wooden, held that offenses committed as part of a single criminal episode did not occur on different "occasions" and thus counts as only one offense for purposes of the Armed Career Criminal Act. The Court went to

explain that the ordinary meaning of the word "occasion" does not require occurrence at precisely one moment in time. For example, an ordinary person would describe Wooden as burglarizing ten units "on one occasion" but would not say on ten occasions, Wooden burglarized a unit in the facility. And indeed "Wooden committed his burglaries on a single night, in a single uninterrupted course of conduct." The history of the ACCA confirms this understanding, as Congress added an "occasions clause," which requires that prior crimes occur on "occasions different from one another." This interpretation is also consistent with the purpose of the ACCA, which is to address the "special danger" posed by the "armed career criminal" – a concern not presented by the situation of a single criminal episode.

The majority rejected the "temporal-distinctiveness test" relied on by the lower courts and held that the ordinary meaning of "occasion" did not support a test that found that offenses occur on different occasions simply if the elements of each offense are satisfied at different points in time. Id at 1069-70. In a series of colorful illustrations spanning from weddings to bar fights, Justice Kagan demonstrated how the word "occasion" is ordinarily used to refer to a span of time in which many unique and discrete actions occur—but still qualifies as one occasion[3]. For example, a person who hits three others during a barroom brawl has not committed three different assaults on three

[3] Id. at 1069-70. ("The occasion of a wedding, for example, often includes a ceremony, cocktail hour, dinner, and dancing. Those doings are proximate in time and place, and have a shared theme (celebrating the happy couple); their connections are, indeed, what makes them part of a single event. But they do not occur at the same moment: The newlyweds would surely take offense if a guest organized a conga line in the middle of their vows. That is because an occasion may—and the hypothesized one does—encompass a number of non-simultaneous activities; it need not be confined to a single one.").

different occasions; the person has committed three different assaults, back-to-back, on a single occasion. Id. at 1070.

In replacing the temporal-distinctiveness test, the Court established a multi-factor balancing test. Id. The Court noted many different circumstances that would be relevant to the "one occasion" consideration including the timing of the offenses, the proximity of location of the offenses, and the "character and relationship" of the offenses. Id. at 1071. Applying its test to Wooden's case, the Court found that, because Wooden committed the ten burglaries on the same night, in the same building, and as part of an uninterrupted course of conduct, he had committed the burglaries on a single occasion and ACCA therefore did not apply to him. Id.

Applying the Wooden's analysis to the instant matter of Petitioner, this Honorable Court should find that Appellant's 2002 *robbery* and *resisting arrest with violence* occurred on the same occasions and represent only one predicate. There was a robbery which led to a chase and an arrest. During the arrest, Appellant refused to be handcuffed and was charged with *resisting arrest with violence*. The *robbery* and the *resisting arrest with violence* occurred in the same general area, and the arrest was a result of the robbery.

Issue Three: Whether counsel for Petitioner ineffective for not arguing that Petitioner's prior convictions for resisting arrest with violence were not violent felonies?

Supporting Facts and Argument: Two prior convictions for resisting arrest with violence was used to designate Petitioner as an armed career criminal along with a robbery conviction. The Presentence Investigation Report (PSR) was filed in this matter on January 31, 2019. According to the PSR, Petitioner had three (3) predicate offenses which qualify him for the requisite mandatory minimum of fifteen (15) years

imprisonment under the Armed Career Criminal Act ("A.C.C.A.") as set forth in 18 U.S.C. section 924 (e). Two circuit courts, the 10th and 11th Circuits, ruled differently on whether Florida's resisting arrest with violence is serious violent felony, and both circuit courts used the categorical approach to arrive at different results.

To determine if a prior conviction qualifies as a violent felony under the ACCA, we apply the categorical approach, focusing on the elements of the crime of conviction, not the underlying facts. Descamps v. United States, 133 S.Ct. 2276 (2013). The question that must be answered then is whether Florida's resisting arrest with violence statute "has as an element the use, attempted use, or threatened use of physical force against the person of another." See section 924 (e) (2) (B) (i). This inquiry requires application of both federal law and Florida state law. Federal law defines the meaning of the phrase "use, attempted use, or threatened use of physical force" in section 924 (e) (2) (B) (i). Johnson v. United States (Johnson I), 559 U.S. 133, 138 (2010) ("The meaning of 'physical force' in section 924 (e) (2) (B) (i) is a question of federal law...."); Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (applying federal law to define "use"). And state law defines the substantive elements of the crime of conviction. Johnson I, 559 U.S. at 138 ("We are ... bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of [the crime of conviction].").

Petitioner's limits his challenge to the elements clause's "physical force" component. A two-step inquiry resolves whether Florida's resisting arrest with violence statute requires physical force as that term is used in the ACCA: we must identify the minimum "force" required by Florida law for the crime of resisting arrest with violence and then determine if that force categorically fits the definition of physical force. See

Moncrieffe v. Holder, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013) ("Because we examine what the state conviction necessarily involved ... we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." The Supreme Court has reminded us that in construing the minimum culpable conduct, such conduct only includes that in which there is a "realistic probability, not a theoretical possibility" the state statute would apply. Id. at 1685. Decisions from the state supreme court best indicate a "realistic probability," supplemented by decisions from the intermediate-appellate courts.

The Supreme Court's decision in Johnson I supplies the meaning of physical force as it is used in the elements clause. See Johnson I, 559 U.S. at 135. Although the ACCA does not define physical force, Justice Scalia writing for the majority in Johnson I sought to give the phrase its ordinary meaning. Id. at 138. The term "physical" plainly means "force exerted by and through concrete bodies, "distinguished from "intellectual force or emotional force." Id. Moving to the noun "force," the Court observed that it "poses the difficulty." Id. At common law, force could be "satisfied by even the slightest offensive touching," but the Court rejected this traditional definition, explaining that ultimately "context determines meaning." Id. at 139. And in an oft-quoted passage, the Court stated,

> We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person.

Id. at 140.

In the instant matter, the Sixth Circuit adopted the holding of the Eleventh Circuit in United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018), which concluded that *resisting arrest with violence* qualifies as a violent felony under the ACCA. **See Appendix A at 5 of 6**. Deshazior is in conflict with the Tenth Circuit's decision in United States v Lee, No. 16-6288 (10th Cir. 2017), on the same issue. In Deshazior, 882 F.3d at 1355 (11th Cir. 2018), the Eleventh Circuit held that a Florida conviction for *resisting arrest with violence,* qualifies as a violent felony under the Armed Career Criminal Act (ACCA). The Deshazior Court relied upon two earlier decided cases by the Eleventh Circuit, United States v Hill, 799 F.3d 1318 (11th Cir. 2015) and United States v. Romo–Villalobos, 674 F.3d 1246, 1251 (11th Cir. 2012), that had held that *resisting arrest with violence* qualifies as a violent felony under the ACCA.

According to Hill, in Florida, any person who "knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer," is guilty of resisting an officer with violence—a third degree felony. See Fla. Stat. section 843.01. Florida's intermediary courts have held that violence is a necessary element of the offense. See Rawlings v. State, 976 So.2d 1179, 1181 (Fla. Dist. Ct. App. 2008) ("[V]iolence is a necessary element of the offense [of resisting an officer with violence]."); see also Walker v. State, 965 So.2d 1281, 1284 (Fla. Dist. Ct. App. 2007) ("[R]esisting arrest with violence is a felony that involves the use or threat of physical force or violence....") (quoting Watson v. State, 749 So.2d 556, 556 (Fla. Dist. Ct. App. 2000)). See Hill, 799 F.3d at 1322-23.

But, in United States v Lee, No. 16-6288 (10th Cir. 2017), the Tenth Circuit held that a Florida's conviction for *resisting arrest with violence* under Florida statute 843.01

is not a violent felony and cannot be used as a predicate to designate a defendant as an armed career criminal. To determine if a prior conviction qualifies as a violent felony under the ACCA, the Tenth Circuit applied the categorical approach, focusing on the elements of the crime of conviction, not the underlying facts. United States v. Harris, 844 F.3d 1260, 1263 (10th Cir. 2017).

After using the categorical approach and after examining state of Florida cases on *resisting arrest with violence,* the Tenth Circuit held that "having compared the minimum culpable conduct criminalized by section 843.01 to similar forcible conduct deemed not to involve violent force, we conclude that a conviction under section 843.01 does not qualify as an ACCA predicate. Conduct like "wiggling and struggling," "scuffling" during an arrest, and clipping an officer's hand while fleeing does not involve "a substantial degree of force"—that is, violent force— "against the person of another," but is instead more akin to struggling to keep from being handcuffed), United States v Flores-Cordero, 723 F.3d 1085, 1088 (2013), pushing the shoulder of a store clerk during a robbery and causing the clerk to fall onto overstock shelves, United States v Gardner, 823 F.3d 793, 804 (4th Cir.), chasing after and bumping into an individual with some degree of force, United States v Ama, 2017 WL 1325247 at *4 (10th Cir. April 11, 2017), or snatching a purse from a victim's arm, United States v. Nicholas, No. 16-3043, 2017 WL 1429788, at *4 (10th Cir. Apr. 24, 2017). Therefore, consistent with those opinions, the Tenth Circuit held that a conviction under section 843.01 (*resisting arrest with violence*) does not qualify as an ACCA predicate. United States v Lee, No. 16-6288 (10th Cir. June 30, 2017).

Counsel did not conduct a thorough and adequate review to determine whether *resisting arrest with violence* was a violent felony; even though, counsel knew that Petitioner was waiving the right to appeal, and that a finding on his prior convictions could have major sentencing implications. Additionally, counsel could have negotiated the right to file a direct appeal on whether resisting arrest with violence was a violent felony, and this issue could have been settled by the Courts then instead of now. At the time of sentencing on August 27, 2019, the Tenth Circuit has decided Lee and United States v. Harris, 844 F.3d 1260, 1263 (10th Cir. 2017), cases that supported an argument that *resisting arrest with violence* was not a predicate that could be used to designate Petitioner as armed career criminal.

Without these two predicates, Petitioner would not have been designated as an armed career criminal and his statutory maximum sentence would have been ten (10) years, instead of statutory minimum and maximum sentences of 15 years to life.

CONCLUSION

Petitioner has made a "substantial showing of a denial of a constitutional right." 28 U.S.C. Section 2253 (c) (2). He has demonstrated "that reasonable jurists could debate whether [] the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v McDaniel, 529 U.S. 373, 484 (2000) (quoting Barefoot v Estelle, 463 U.S. 880, 893 n.4 (1983)).

Petitioner has made a substantial showing of the denial of a constitutional right – being sentenced above his statutory maximum of 10-years for a violation of 18 U.S.C. Section 922 (g) (1); and, the erroneous use of non-qualifying predicates to enhance the

sentence above its statutory maximum of ten years.

Petitioner respectfully requests that a COA be granted, or in the alternative, his ACCA sentence be vacated, and the instant matter remanded to the district court for re-sentencing.

Respectfully submitted on the 13 day of July 2023.

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