

IN THE SUPREME COURT
OF THE UNITED STATES

CASE NO. _____

UNITED STATES OF AMERICA,
Appellee-Respondent,

v.

JOHNNY L. DAWSON,
Appellant-Petitioner.

PETITION FOR ISSUANCE OF A
WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

By:
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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals erred in holding Petitioner's prior offenses qualified him under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

LIST OF PARTIES

All of the parties in this matter are listed in the caption on the cover page to this Petition.

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Appendix A: Opinion of the Eleventh Circuit Court of Appeals, dated April 13, 2018

Appendix B: Judgment of the U.S. District Court for the Middle District of Florida

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided this matter was April 13, 2018. No petition for rehearing was timely filed.

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

OPINIONS BELOW

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

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is, to the best of Petitioner's knowledge, unpublished.

The judgment of the U.S. District Court for the Middle District of Florida appears at Appendix B to the petition and is, to the best of Petitioner's knowledge, unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
U.S. Constitution, Amend. I
18 U.S.C. § 924(e)

TABLE OF AUTHORITIES

Anders v. California, 386 U.S. 738 (1967)	9,18,21
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U.S. Constitution, Amend. I	18
18 U.S.C. § 924(e) (also referred to as Armed Career Criminal Act or ACCA)	passim

STATEMENT OF THE CASE

On April 26, 2017, Petitioner entered a change of plea to plead guilty to a violation of 18 U.S.C. § 922(g), a felon in possession of a firearm, before the magistrate judge. The district court, subsequently, entered an order adopting the report and recommendation of the magistrate.

At sentencing, the court imposed an enhancement to Petitioner's sentence pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The indictment and the court-order PreSentence Investigation Report ("PSR") listed as Petitioner's "primary criminal history" as follows:

1. Possession of cocaine (10/8/03);
2. Aggravated assault (6/8/01);
3. Sale of counterfeit controlled substance (4/21/99);
4. Possession of cocaine with intent to sell/deliver (6/8/01); and,
5. Sale of cocaine (4/21/99).

See, PSR, at ¶ 2. The PSR concluded Petitioner fell within the ambit of the ACCA because he had at least three prior convictions for a violent felony or serious drug offense "that were committed on occasions different from one another." *Id.*, at ¶ 28. From the dates listed above, there are ONLY three specific dates listed.

Despite the PSR setting forth the above-referenced five (5) incidents alleged on three specific dates, the probation office stated it was applying the ACCA enhancement based upon

the specific following offenses:

1. Sale of cocaine (9/26/96);
2. Sale of cocaine (11/5/98);
3. Possession of cocaine with intent to sell/délivrer (10/8/99); and,
4. Aggravated assault (8/30/00).

See, PSR, at ¶ 28. Not a single one of these offenses was listed in the indictment or in Petitioner's "primary criminal history" in the PSR as listed above.

Following sentencing, Petitioner requested from his appointed counsel that they appeal the sentence because of the impermissible and improperly applied criminal history for ACCA purposes. Counsel, however, counsel opted to file a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Although Anders requires counsel to file such a brief and move for leave to withdraw when counsel cannot make any legitimate argument on appeal, counsel's own Anders brief concedes Petitioner had a legitimate argument as to the application of the ACCA to his case. Counsel chose to forego his duty to defend Petitioner, leaving him "hanging in the wind" to file his own appeal.

Peittioner, as a result, appealed his own 180-month sentence directly to the Eleventh Circuit Court of Appeals, contesting, inter alia, the impermissible application of the ACCA for his sentencing enhancement.

On April 13, 2018, the Eleventh Circuit issued its opin-

ion (appearing at Appendix A hereto). The appellate court affirmed Petitioenr's conviction and sentence after a purportedly de novo review.

Petitioner has now sought the instant writ of certiorari from this Honorable U.S. Supreme Court because of the error committed by the Eleventh Circuit in affirming his sentence. First, the Eleventh Circuit could never conduct a proper de novo review of the applicability of the ACCA based upon Petitioner's prior convictions because the sentencing court never reviewed and the government never introduced any documents according to Shepard v. U.S., 544 U.S. 13 (2005), such that the underlying predicate offenses could ever be properly established; the court relied solely upon the contents of the PSR. Second, the district court and the Eleventh Circuit on review never conducted proper analyses of the predicate offense statutes to determine if they qualify under the ACCA, analyses pursuant to Descamps v. U.S., 570 U.S. 254 (2013), Mathis v. U.S., 579 U.S. ___, 136 S.Ct. 2243 (2016), and Moncrieffe v. Holder, 569 U.S. 184 (2013). These complete and utter failures by the district court and the appellate court produced an unconstitutional sentence imposed under the ACCA.

REASONS FOR GRANTING THE PETITION

COMES NOW, Petitioner, JOHNNY L. DAWSON, pro se, and respectfully requests this Honorable U.S. Supreme Court issue a writ of certiorari to review the rroneous decision of the Eleventh Circuit Court of Appeals below. Petitioner is a layman of the law, unskilled in the law, and requests this Petition be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972).

ISSUE ONE
The Eleventh Circuit Erred In Holding
Petitioner's Prior Offenses Qualified
Him Under the ACCA

Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. Sec. 924(e), the sentencing court deemed Petitioner qualified based upon four (4) potential predicate offenses, and the Eleventh Circuit affirmed. Numerous errors occurred in this process which the Eleventh Circuit chose to ignore in order to ensure Petitioner's sentence remained enhanced.

A. The Offense Dates Do Not Match

Prior to sentencing, the district court (as usual) ordered the U.S. Probation Office to prepare a Pre-Sentence Investigation Report ("PSR"). The PSR stated that the indictment listed five (5) items for an enhanced penalty as comprising Petitioner's criminal history. These included

1. Possession of cocaine (Oct. 8, 2000);
2. Aggravated Assault - Deadly Weapon (Jun. 8, 2001);

3. Sale of counterfeit controlled substance (Apr. 21, 1999);
4. Possession of cocaine with intent to sell/deliver (Jun. 8, 2001); and,
5. Sale of cocaine (Apr. 21, 1999).

See PSR, at ¶ 2. The PSR also suggested that Petitioner had been convicted for these offenses "that were committed on occasions different from one another." See, PSR, at ¶ 28.

As will be discussed below, the sentencing court ignored this Court's direction under Shepard v. U.S., 544 U.S. 13 (2005), and relied solely upon the PSR in determining whether Petitioner's prior history qualified for ACCA enhancement. However, it should be obvious to any person who can read that the items listed in the PSR did NOT occur all on "occasions different from one another," thereby disqualifying some of the entries from consideration. Specifically, Items #3 and #5 both occurred on Apr. 21, 1999, and Items #2 and #4 also both occurred on Jun. 8, 2001. That the U.S. Probation Office opted to list these items separately as it did in order to create the impression that the activities occurred on "occasions different from one another" was nothing but disingenuous. That the district court relied upon that misrepresentation rather than reviewing the necessary and required Shepard documentation is nothing short of negligent. That the U.S. Court of Appeals for the Eleventh Circuit would affirm that decision is nothing less than criminal itself. There is no logical reason that anyone

would say that these actions all occurred on "occasions different from one another" unless it was to ensure Petitioner would be subject to the ACCA enhancement.

Further, the district court did not even rely upon those entries from the indictment, as set forth in the PSR. The U.S. Probation Office stated that the following offenses were used for enhancement application:

1. Sale of cocaine (Sept. 26, 1996);
2. Sale of cocaine (Nov. 5, 1998);
3. Possession of cocaine with intent to sell/deliver (Oct. 8, 1999); and,
4. Aggravated Aaault - Deadly Weapon (Aug. 30, 2000).

See, PSR, at ¶ 28. Not a single one of these supposed convictions match with those listed in the indictment. As a result, Petitioner was never put on notice that his sentence might be enhanced based on criminal activity which was never charged for enhancement purposes in the indictment. This again shows just how careless and callous the district court and the Eleventh Circuit was with regard to ensuring Petitioner would receive an enhanced sentence under the ACCA without regard for Petitioner's constitutional rights.

B. In Arguendo, Petitioner's Prior Convictions Do Not Rise To the Level of a "Serious Drug Offense" Under the ACCA

Assuming that the courts could rely and utilize the four (4) prior convictions set forth in Paragraph 28 of the PSR, there was no method for the sentencing court or the Eleventh

Circuit reviewing the issue de novo to ascertain that the convictions listed by the U.S. Probation Office were correct and applicable. See, U.S. v. White, 837 F.3d 1225 (11th Cir. 2016) (the court reviews whether a particular offense constitutes a violent felony or a serious drug offense de novo).

Initially, as stated above, the sentencing court never reviewed any of the specific documents identified in Shepard to determine Petitioner's prior convictions. Moreover, the government failed in its obligation to introduce such documentation. Instead, the sentencing court relied solely upon the contents of the PSR, a non-approved Shepard document. As a result, the sentencing court had no way to verify or ascertain whether Petitioner was actually convicted of the items listed within the PSR and the government never proved its obligation in order to secure the ACCA enhancement. This failure constituted reversible error but, under an alleged de novo review, the Eleventh Circuit compounded that error because it could not truly conduct a de novo review since no Shepard documents were ever introduced. This fallacy arranged within the judicial system effectively eviscerated Petitioner's constitutional rights.

Moreover, to determine whether a predicate offense qualifies as an ACCA "serious drug offense," certain analyses must

be conducted and neither the district court nor the Eleventh Circuit bothered to engage in such analyses. The ACCA defines a "serious drug offense" to include any offense under state law "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ... for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). To determine whether Petitioner's convictions were serious drug offenses under the ACCA, the courts were supposed to apply what this Court termed the "categorical approach." Under that approach, the court does not look at the facts that resulted in the earlier conviction. Descamps v. U.S., 570 U.S. 254 (2013). Instead, this Court precedent required the lower courts to look only at the elements of the statute under which Petitioner was convicted. Mathis v. U.S., 579 U.S. ___, 136 S.Ct. 2243 (2016). If the "least of the acts criminalized" by the statute does not fall within the definition of a serious drug offense provided by the ACCA, then a conviction under that statute cannot serve as an ACCA predicate offense. Moncrieffe v. Holder, 569 U.S. 184 (2013) (emphasis added). Thus, when applying the categorical approach, the lower court must identify the "least culpable conduct" prohibited by the statute of conviction and presume that the defendant's conviction rested on "nothing more"

than that conduct. Donawa v. U.S. AG, 735 F.3d 1275 (11th Cir. 2013); Moncrieffe, at 1684. As part of that step, the court must analyze "the version of state law that the defendant was actually convicted of violating." McNeill v. U.S., 563 U.S. 816 (2011). In the instant case, Petitioner contends that the three prior convictions for "drug related" offenses, as presented in this case, cannot sustain an ACCA enhancement.

Now, the Eleventh Circuit, in its opinion (at Appendix A hereto), states "the record indicates [Petitioner's] sentence was based in part on his three prior convictions under Florida Statute § 893.13(1)." App. A, at p. 2. Absent the introduction of Shepard documents, it is unfathomable how the Eleventh Circuit could have reached that determination de novo given that the PSR did not list the statutes, but rather only a description of the alleged offenses (as outlined above). It is solely because of the Eleventh Circuit's "determination" that Petitioner's prior offenses occurred under Fla. Stat. § 893.13(1) that it affirmed his sentence, citing to U.S. v. Smith, 775 F.3d 1262 (11th Cir. 2014), wherein the Eleventh Circuit held that convictions under § 893.13(1) qualify as "serious drug offenses" for ACCA purposes. Given that Smith was decided prior to Mathis, Petitioner contends the Eleventh Circuit's reliance on Smith is misplaced, and that the district court and the appellate

court de novo both should have undertaken a proper categor-
ical approach analysis. Had they done so, the fact that
Florida's statute under which the Eleventh Circuit assumed
Petitioner's convictions occurred contains as its least
culpable act -- and what is not included in the federal gen-
eric offense -- is "sale." See, Fla. Stat. § 893.13 (pro-
hibits sale, manufacture, delivery, or possession with in-
tent to sell, manufacture, or deliver a controlled substance).
Since, as noted above, the ACCA's definition does not include
the act of "sale" or "selling," despite the Eleventh Circuit's
"marriage" to its prior holding in Smith, Fla. Stat. § 893.13
cannot stand as an ACCA "serious drug offense" (even assuming
§ 893.13 is the correct and appropriate statute of the prior
convictions).

Essentially, since the district court failed to adhere to
this Court's precedents in Shepard, Descamps, and Mathis in
order to determine whether Petitioner's prior convictions truly
qualified him for ACCA enhancement (as opposed to simply relying
on the information the U.S. Probation Office opted to put in
the PSR, information which we already know was questionable
based on the mismatched dates), there was no way the Eleventh
Circuit could conduct a meaningful de novo review of whether
the prior convictions qualified as "serious drug offenses."

Instead, it is obvious that the Eleventh Circuit simply adopted the argument set forth in the Anders brief rather than conducting its own, proper review of the case, which violated Petitioner's First Amendment rights to access to the courts for meaningful review. Unless this Honorable Court issues a writ of certiorari to review this blatant error committed by the Eleventh Circuit Court of Appeals, Petitioner and any other appellant's constitutional rights are in danger of having no value. Petitioner's prior convictions, when a proper analysis is undertaken, cannot stand as ACCA predicates, and Petitioner's sentence must be vacated.

C. In Arguendo, Petitioner's Prior Conviction Does Not Qualify As a ""Violent Felony" Under the ACCA

Assuming that the courts could rely and utilize the four (4) prior convictions set forth in Paragraph 28 of the PSR, there was no method for the sentencing court or the Eleventh Circuit reviewing the issue de novo to ascertain that the conviction listed by the U.S. Probation Office was correct and applicable. White (the court reviews whether a particular offense constitutes a violent felony de novo).

Petitioner contends that the issue raised in Subsection B above related to the complete dirth of Shepard documents applies to this argument as well, and hereby adopts it by reference as if set forth herein verbatim..

The ACCA defines a violent felony as any crime punishable by a term of imprisonment exceeding one year that

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B)(i)-(ii). The first prong is called the "elements clause." The first part of (ii) is known as the "enumerated crimes." The last part of (ii) is known as the "residual clause" which this Court determined was unconstitutionally vague. Johnson v. U.S., 576 U.S. ___, 135 S.Ct. 2551 (2015). Since "aggravated assault" does not fall within the listed items in the enumerated crimes, and the residual clause has been deemed unconstitutional, the only way Petitioner's prior offense might qualify for ACCA use is under the "elements clause."

It should be noted from the outset that the Eleventh Circuit wholly failed to address this issue whatsoever in its opinion. See, generally, Appendix A. It is unclear to Petitioner how the appellate court could claim to have performed a de novo review when it did not even address whether this prior conviction qualified Petitioner for ACCA enhancement. Petitioner contends it does not.

Had the district court or the Eleventh Circuit actually bothered to undertake a proper categorical approach analysis in regards to Fla. Stat. § 784.021(1)(a)-(b), it would have been forced to conclude that the Florida statute does not contain, as an element, the "use of physical force." (Petitioner notes that the Florida statute does contain the elements of a threat to the person of another.) Absent the element of the "use of physical force," Fla. Stat. § 784.021 cannot meet the requisite definition of a "violent felony" under the ACCA. In Petitioner's research, he has determined that the Eleventh Circuit has mistakenly adhered to its prior decision in Turner v. Warden Coleman FCI Medium, 709 F.3d 1328 (11th Cir. 2013), for the proposition that Florida's aggravated assault statute is "categorically a violent felony" for ACCA purposes, despite the fact a proper analysis under Mathis would clearly show the error in this determination. Yet, without this Court's acting to correct this great injustice, Petitioner and numerous other defendants within the Eleventh Circuit will simply be "lumped" under the improper holding of Turner simply by rote.

Petitioner asserts the Eleventh Circuit erred by not even considering and analyzing whether his prior conviction for aggravated assault truly meets the definition of a violent felony for ACCA purposes (including based upon the district court's reliance only upon the PSR contents). When the analysis

is conducted, it is obvious that it does not qualify. As a result, Petitioner is serving an unconstitutional sentence and he requests this Honorable Court issue a writ of certiorari to review the erroneous opinion issued by the Eleventh Circuit Court of Appeals in this matter.

CONCLUSION

Petitioner has demonstrated he was improperly and unconstitutionally sentenced via an enhancement under the ACCA by the district court when it committed reversible error by not adhering to this Court's precedents and relied completely only on the contents of the PSR as drafted by the U.S. Probation Office. This constitutional violation was drastically and severely compounded by the Eleventh Circuit Court of Appeals when it affirmed Petitioner's sentence/conviction without, apparently, conducting the de novo review required, and simply relying upon counsel's Anders brief. Petitioner respectfully prays and hopes this Honorable U.S. Supreme Court will act by issuance of a writ of certiorari to the Eleventh Circuit to review this matter and ensure that his and all other criminal defendants' constitutional rights are respected and that this Court's issued opinions are followed by the inferior courts.

DATED: 6-20-18

Respectfully Submitted,



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