No. 18-6608

IN THE

SUPREME COURT OF THE UNITED STATES

William O'Neil — PETITIONER
(Your Name)

vs.

FCC Coleman - Medium, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Middle District of Florida - Ocala Div.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

William O'Neil; Inmate # 72468-004
(Your Name)

FCI - Miami Camp, P.O. Box 779800
(Address)

Miami, Florida 33177
(City, State, Zip Code)

(305) 259-2178
(Phone Number)

QUESTION(S) PRESENTED

1. Is the Eleventh Circuit's interpretation of 28 U.S.C. § 2255(e), or the savings clause correct in McCarthan v. Director of Goodwill Industries - Suncoast, Inc., 851 F.3d. 1076, 1100 (11th Cir. 2017)(en banc)(affirming the dismissal of a § 2241 petition for lack of jurisdiction) where it is in conflict with the 3rd Circuit Appeals and the 4th Circuit Appeals Court in that new retroactively applicable rules of statutory law may not be brought under § 2241?

2. Is the Government allowed to substitute simultaneous single occasion qualifying convictions, for convictions that have been overturned by the U.S. Supreme Court and the Appeals Court where they were never brought up at the initial sentencing?

3. Does Florida Statute 843.01, Resisting an Officer with a Threat of Violence qualify under the ACCA where there is a circuit split between the Eleventh and Tenth, where no actual touching is necessary for a conviction?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Sheri Polster Chappell,	United States District Judge
Roberta Bodnar,	Assistant United States Attorney
Patrick White,	United States Magistrate Judge
Robin Rosenberg,	United States District Judge
Ann Marie Villafana	Assistant United States Attorney

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TABLE OF AUTHORITIES CITED

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was July 2, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

924(e)(1)

(e) (1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] 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) [18 USCS § 922(g)].

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.], for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

28 U.S.C.S. § 2241 or U.S.C.S. § 2255(e)

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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 judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at 16-10979-EE; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[X] reported at 2014 U.S. DIST LEXIS 83642; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

STATEMENT OF THE CASE

Petitioner, William O'Neil was indicted in 2004 for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), possession of a firearm by an unlawful drug user 18 U.S.C. § § 922(g)(3) & 924(e). Petitioner refused the Government's offer of 15 years incarceration in order to exercise his right to a suppression hearing. The AUSA Ann Marie Villafana then threatened to charge Petitioner with distribution of a controlled substance, the use of which resulted in death, in violation of 21 U.S.C. § 841(b)(1)(c), if Petitioner didn't accept the plea.[1] Petitioner proceeded with the suppression hearing, and was superceded with the 841(b)(1)(c). Petitioner ultimately pled guilty to the possession of a firearm charges § 922(g)(1) and § 922(g)(3).[2]

Petitioner was promised 210 months, but received 240 months. Petitioner requested an appeal, but Petitioner's counsel refused. He told Petitioner that he waived his right to appeal. Petitioner did not appeal. In 2008, following this Court's decision in Begay, Petitioner filed his first 28 U.S.C. § 2255, a motion to vacate based on counsels failure to appeal and a challenge to the Armed Career Criminal designation. Magistrate White issued a report that recommended denial based on the fact that battery on a law enforcement officer, Fla. Stat. § § 784.03 and 784.07 and resisting an officer with violent, Fla. Stat. § 843.01 were predicate offenses that clearly fit in the elements clause or § 924(c)(1). On the day of the Judge's denial, March

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1 AUSA Villafana admitted to having evidence to prove the deceased Ms. Denopolis bought and brought the drugs herself.

2 Conviction for two 922(g) subsections from a single firearm is illegal.

STATEMENT OF THE CASE

10, 2010, this Court decided Curtis Darnell Johnson, 559 U.S. 133, 130 S.Ct. 1265, that Fla. Stat. § § 784.03 and 784.07 Battery on a Police Officer was in fact misdemeanor battery committed on a police officer and misdemeanor elements never qualify for 15 years in prison.

Petitioner filed a supplemental, and to Petitioner's amazement, Magistrate White changed course. In his new report, he said that now that the battery charges no longer qualify, he recommended denial because I still had qualifying offenses under § 924(e)(ii) or the residual clause. Ultimately, the Petition was denied as time-barred and or on some of the merits.[3] A Petitioner for a COA was denied, as was a Petition for Certiorari on April 2, 2012.

In 2011, Petitioner filed a petition pursuant to 28 U.S.C. § 2241 raising (4) grounds: (1) "a fundamental defect in my sentence;" (2) "flat ineligibility of his ACCA sentence;" (3) "illegal detention;" and (4) "due process violation by imposition of a sentence above the otherwise applicable guidelines." In response, the Government argued petitioner had made the same argument in his § 2255 Petition and that Petitioner was searching a forum "less likely to unearth his misrepresentations." Ultimately, Judge Chappell decided that she could not grant relief because, "the Eleventh Circuit has held multiple times that Fla. Stat. § 843.01 falls squarely within the residual clause and constitutes a violent felony for purposes of the ACCA, and denied Petition for lack of jurisdiction.[4]

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3 Magistrate White never addressed how the Government could substitute "other" convictions for convictions that no longer qualify from a single occasion with multiple charges.

4 Judge Chappell also never addresses the use of simultaneous convictions, swap-outs from the same case, for now non-qualifying convictions.

STATEMENT OF THE CASE

This Court then decided Johnson v. United States, 135 S.Ct. 2551, (2015), that the residual clause of the ACCA 924(e)(ii) was unconstitutionally vague and Welch, 135 S.Ct. 1257 decided it was retroactive. Petitioner filed a 60(b) Motion based on this newly discovered, retroactive decision. In writing, Judge Chappell denies me based on the residual clause, and now I have reason to rejoice, or so I thought. Judge Chappell denied my 60(b) stating that even though the residual clause is no longer applicable, it was good law when she made the decision, so I would need to seek relief higher up. Petitioner filed a COA with the Appeals Court. The Court denied the 60(b) based on its recent (en banc) decision in McCarthan v. Director of Goodwill Indust.-Suncoast, Inc., 851 F.3d 1076 (2017). Therefore removing Habeas Corpus, a constitutional right from prisoners unless a Supreme Court decision directly affecting the prisoner and made retroactive by the Supreme Court, and then by a 28 U.S.C. § 2255 petition only. The McCarthan decision is a new, en banc decision. Petitioner chose not to file for re-hearing based on that decision.

MERIT:

In O'Neil v. Warden FCC Coleman, Case No.: 5:11-cv-476-OC-38PR, Judge Chappell agrees that the P.S.R. Report only listed (5) prior qualifying offenses: (3) battery on a law enforcement officer in violations of Fla. Stat. § § 784.03 and 784.07; (1) resisting an officer with violence in violation of Fla. Stat. § 843.01; and (1) aggravated battery in violation of Fla. Stat. § 784.045. The (3) battery on a law enforcement convictions were voided by the Court, leaving only (2) prior convictions, which are not

sufficient for the draconian 15 year minimum mandatory ACCA. However, simultaneous with each battery on a law enforcement conviction, in the same cases, Petitioner also had a resisting an officer with violence conviction.[5] Judge Chappel decided that the Government could go back into the Plea Agreement and take another bit of the apple and change the battery convictions for the resisting convictions, because in the 11th Circuit, they still qualify under the residual clause or § 924(e)(ii).

CIRCUIT SPLIT:

Fla. Stat. § 843.01 resisting an officer with violence does not qualify as an ACCA predicate in the 10th Circuit, see U.S. v. Rashad Akim Lee, 701 Fed. Appx. 698, 2017, finding that conduct like "wiggling," "struggling" or "scuffling" during an arrest did not involve a substantial degree of force or violent force against the person of another. In the event Petitioner was lucky enough to be transferred to a prison in the 10th Circuit, I would be home.

In the Eleventh Circuit, the Court decided that "violence" is a necessary element of the offense in § 843.01 yet Florida has never given a definition for "violence." However, at a close review, "violence" is a necessary element of battery in Florida, which is a misdemeanor. The Florida Congress, nor the Florida Supreme Court have ever decided a degree of force necessary for a "violent felony," but it is certainly not misdemeanor violence that would qualify a defendant in Federal Court for 15 years in prison.

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5 The resisting with violence convictions were not mentioned at anytime as qualifying offenses for ACCA enhancement nor were they in the enhancement section of the PSR nor at sentencing.

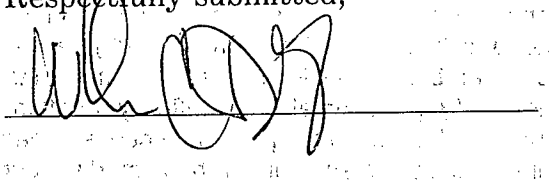
REASONS FOR GRANTING THE PETITION

Petitioner has been incarcerated over 14 years. The Guideline range without the ACCA was 41 to 53 months. Petitioner was never convicted of any crime of violence, never a weapon, nor ever a victim. The overzealous prosecutions for this Draconian enhancement ACCA which was supposed to be for men and women who had been convicted and released (3) times for gun crimes, not (3) of basically any convictions the Government can make up a story to appear violent. Fla. Battery on a law enforcement and a resisting with violence charges such as mine in the 1980's meant you got caught and "roughed up" before a ride to jail. Then, 20 years later, you get re-tried again by a Federal Court who says its an ACCA predicate and off you go for years. Oh, but if I am in the 10th Circuit, I get to go home. I beg this Court to end my nightmare, to look beyond the 11th Circuit's never ending attempt to outsmart this Court's decision and open a Habeus Corpus avenue for Petitioner where the Constitution guarantees. My case has never yet had a fair review of the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: September 24, 2018