ORIGINAL

No. 18-8662

IN THE

SUPREME COURT OF THE UNITED STATES

HOWARD LAWSON — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS
BEFORE JUDGMENT - PURSUANT TO S. Ct. Rule 11

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HOWARD LAWSON #68152-018
(Your Name)

FCI COLEMAN, PO. BOX. 1032
(Address)

COLEMAN, FLORIDA 33521 - 1032
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether Petitioner's prior aggravated assault under Fla. Stat. § 784.021 and aggravated battery .. with a deadly weapon pursuant to Fla. Stat. 784.045 qualify as **ACCA** predicates after the Supreme Court's recent decision in Franklin v. United States, No. 17 -8401 ?

2. Whether Petitioner has made a showing that his case is such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. 28 U.S.C. § 2101(e) ?

LIST OF PARTIES

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

[ ] 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:

TABLE OF CONTENTS

INDEX TO APPENDICES

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 B to the petition and is See S. Ct. Rule 11 & 28 U.S.C. § 2101(e)

[ ] reported at _____; 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[X] is unpublished.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 NO/OP to the petition and is

[ ] reported at _____; 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[ ] is unpublished.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[ ] is unpublished.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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was SEE S. Ct. Rule 11 & 28 U.S.C. § 2101(e).

[ ] 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).

Adjunct jurisdiction is under the All Writs Act 28 U.S.C. 1651(a) and 28 U.S.C. § 2101(e).

[ ] 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

Rule 11. Certiorari to a United States Court of Appeals before Judgment

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See **28 U.S.C. § 2101(e)**.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title [28 USCS § 1253], holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

STATEMENT OF THE CASE

Petitioner files his initial § 2255[2] arguing ... that his prior convictions for resisting an officer - with violance under Fla. Stat. §843.01 and aggravated battery with a deadly weapon under Fla. Stat. 784.07 were not "violent felonies" unser the Armed Career .. Criminal Act ACCA, § 924(e). The U.S. District Court for the Middle District of Florida, Tampa Division conducted perfunctory review of the writ, and denied Petitioner's claim, without addressing the merits. At no point in the litigation was the United States then allowed to respond or entertain the controversy.

Petitioner then sought review to the United States Court of Appeals in the Eleventh Circuit seeking a Certificate of Appealability (COA) which was denied as well, concluding "the district court did not err by failing to specifically address Petitioner's ... arguments." See OP/ORDER App **B**. Petitioner's claims were never giving plenary review, nor was the civil contoversy litigated outside sua sponte review. The Petitioner has sought a Panel Rehearing in conjunction with this request for Certiorari to the United States Court of Appeals for the Eleventh Circuit before Judgement, which is pending resolution in both courts.

REASONS FOR GRANTING THE PETITION

Taylor, set out the essential rules governing **ACCA** cases more than a quater centry ago. All that counts under the **Act** "we held then," are "the .... elements of the statute of conviction." 494 U.S. at 601. Johnson, was suppose to to put an end to this protracted litigation nightmare. However, this now protracted litigation has plagued the Court, the U.S. Court's of Appeals and the U.S. District Court's for nearly 30 years. Once again, another **ACCA** case enters this arena; only this time the pendency of this .. decision is proper to once and for all put an end to protracted litigation regarding the Eleventh Circuit's perfunctory review of cases.[3] This case involves ... difficult factual and legal issues that now translate into a pipeline of cases aimed at this Court and - accumulating expenses, in both time and money.

---

[3] See United States v. Higdon, 418 F.3d 1136 (11th Cir. 2005):

Whenever the Supreme Court decides an important issue of law, it routinely takes every case in which the court of appeals decision came out before the new decision was announced and in which the certiorari petitioner claims that new decision might apply, and treats all of those cases the same. The uniform treatment given all such cases is to vacate the court of appeals judgment and remand the case for further consideration in light of the new decision. Those boilerplate orders come out in bushel baskets full. There is no implication in the standard language of those orders that the court of appeals is to do anything except reconsider the case now that there is a new Supreme Court decision that may, or may not, affect the result. We have never felt constrained to read anything into such routine remands other than the direction that we take another look at the case because of the new decision.Ardley, 273 F.3d at 994 (Carnes, J., concurring in the denial of rehearing en banc).

A R G U M E N T

Petitioner submits for the Court's review the identical argument before the United States Court of Appeals for the Eleventh Circuit in Lawson v. United Sttaes, No. 1812973-C-(PANEL REHEARING).

MOTION FOR REHEARING PURSUANT TO 11th Cir.R. 27-2 AND/OR HOLD THIS CASE IN ABEYANCE PENDING THE OUTCOME IN Jimmy Lee Franklin v. United States, No. 17-8401 (S.Ct.)

COMES NOW, Appellant, Howard Lawson, pro se respectfully requesting that this Court reconsider its order entered on January 31, 2019 denying Mr. Lawson's request for a **certificate of appealability ("COA")** and request to proceed in forma pauperis **("IFP")**.

In his request for **COA,** Mr. Lawson argued that his prior convictions for resisting an officer with violence under **Fla.Stat. § 843.01** and aggravated battery with a deadly weapon under **Fla.Stat. § 784.07** were not **"violent felonies"** under the **Armed Career Criminal ct ("ACCA"), of Title 18 U.S.C. § 924(e).** When considering the least acts criminalized under the Statute as required under **Moncrieefe v. Holder, 569 U.S. 184, 191, 133**

S.Ct. 1678, 185 L.Ed.2d 727 (2013).

However, when disposing of his Title 28 U.S.C. § 2255 request, the district court failed to resolve this specific claim, as mandated by circuit precedent. Clisby v. Jones, 960 F.2d 925 (11th cir. 1992)(holding that the district court must resolve all claims raised in a pro se habeas petition, regardless of whether relief is to be granted or denied). Mr. Lawson timely moved for reconsideration under Rule 59(e) of the Fed.R.Civ.P. regarding the Clisby violation. The district court denied Mr. Lawson's request, as well as his COA request.

In this court's January 31, 2019 order this court stated that "[t]he district court did not err by failing to specifically address Mr. Lawson's arguments that his prior convictions were not violent felonies based on the 'least acts criminalized' by Statutes, because binding precedent in this Circuit holds that resisting an officer and aggravated battery with a deadly weapon are violent felonies under ACCA", citing United States v. Deshazior, 882 F.3d 1352, 1355 (11th cir. 2018); Turner v. Warden, 709 F.3d 1328, 1341 (11th cir. 2013).

The problem with this court's ruling, is that, whether a petitioner is entitled to relief regarding a unaddressed claim under Clisby, whether the unresolved claim has merit or not, is not a deciding factor. Dupree v. Warden, 715 F.3d 1295, 1299 (11th cir. 2013)("[W]e do not address whether Dupree's claim is meritorious. Under Clisby, our role is to vacate the judgment without prejudice and remand the case for reconsideration of the unaddressed claim"); Mims v. United States, 2018 U.S.App.LEXIS 28393 (11th cir. 2018)(holding that Mims was

entitled to a COA regarding his unaddressed claim under Clisby, regardless of whether the claim was meritorious); Daniele v. United States, 2018 U.S.App.LEXIS 18124 (11th cir. 2018)(holding that district court committed Clisby violation, even though court address equitable-tolling argument, where Daniele's claim was that he was entitled to equitable tolling based on his counsel's misrepresentation as to the filing of a Rule 35(b) motion was entitled to equitable tolling based on his inability to obtain his case file).

Thus, because this court has acknowledged that the district court did not specifically address the "least acts criminalized" claim raised in Mr. Lawson's pro se § 2255 motion, Clisby warranted the granting a COA in this case.

Mr. Lawson asserts that even though this court had binding precedent under Deshazior and Turner regarding resisting arrest with violence and aggravated battery with a deadly weapon. Such decisions are not applicable to the arguments that were raised by Mr. Lawson [i.e., whether the least acts criminalized under the Statute]. In fact, the Deshazior recognized that the defendant raised the identical claim as Mr. Lawson, where the court stated:

> "[D]eshazior contends that these cases were wrongly decided because the least act criminalized by Statute." citing Moncrieffe

While the court resolved Deshazior against the defendant. The Deshazior was not presented with the facts that Mr. Lawson presented. That is, whether his trial counsel was ineffective when failing to raise a Moncrieffe claim at the time of

sentencing, where there was a State court decision analyzing more minimized conduct than the precedent of this court. In fact, the Moncrieffe court mandates the exact opposite.

Recently, the Tenth Circuit explained why this court's precedent decisions are not in compliance with Moncrieffe. See United States v. Lee, 701 Fed.Appx. 697, 700 n.1 (10th cir. 2017). In disagreeing with this court's precedent of whether Fla.Stat. § 843.01 categorically was an ACCA predicate. The Lee court stated that:

> "Florida cases where defendants had engaged ~~in more substantial, and more violent,~~ conduct are not the correct measuring stick of whether the crime constituted a violent felony because a court's job is not to find what kind of conduct is most routinely prosecuted, and evaluate that"...Rather, under the categorical approach, we consider only the minimum conduct criminalized, not the typical conduct punished" Id., citing Moncrieffe, 569 U.S. at 191.

Here, this court failed to apply the correct "measuring stick". Specifically, instead of deciding whether resisting arrest with violence and aggravated battery with a deadly weapon were ACCA predicates when considering the decisions in Johnson v. State, 50 So.529 (Fla. 1909) and Severence v. State, 972 So.2d 931 (Fla.Dist.Ct.App. 2007). This court remains to believe that such offenses are violent felonies, despite the fact there are other State Court decisions to the contrary.

In fact, pending before the Supreme Court is the case of Jimmy Lee Franklin v. United States, No. 17-8401 (S.Ct.), in

which the government concedes that the Florida battery Statute is "**indivisible**" and therefore **Turner** was wrongly decided.

In that **Memorandum**, on appeal from the Eleventh Circuit, the Solicitor General concedes that this court erred when holding that battery on a law enforcement officer under **Fla.Stat. § 784.07** was an divisible Statute and applied a modified categorical approach when determining that offense was a "**violent felony**" under the **Armed Career Criminal Act ("ACCA")** of **Title 18 U.S.C. § 924(e)**. The ruling from this court in the **Franklin case** was based on **Turner v. Warden, 709 F.3d 1328 (11th cir. 2013)**.

Under Florida Law, battery occurs when a person:

1. **Actually and intentionally touches or strikes another person against the will of another; or**
2. **Intentionally causes bodily harm to an individual. See Fla.Stat. § 784.03(1)(a) and (b).**

However, if such a person commits a battery upon a pregnant woman or **possesses** a deadly weapon while committing such an offense. The offense is increased to a second-degree felony, despite the fact that the deadly weapon does not have to facilitate the battery offense. **See Severence v. State, 972 So.2d 931, 934 (Fla.Dist.Ct.App. 2007)(overruling prior precedent and holding that the "use of a deadly weapon" element in the aggravated battery statute does not requite the actor use the weapon in committing the forbidden touching).**

According to the Solicitor General in **Franklin**, the "**touch or strike**" provision of the Florida Battery Statute refer to alternative ways to commit a single offense and therefore is

"indivisible". See solicitor General's response at 5, citing Byrd v. State, 789 So.2d 1169, 1171 (Fla.Dist.Ct.App. 2001)(per curiam)(Florida simple battery Statute includes "two distinct definitions of the offense of battery"); Fla. Standard jury instructions in Criminal Cases 8.3 (1981)(treating "touched or struck" as a single offense element).

If the Solicitor General is correct (and he is according to State law) and the Franklin case is remanded for further consideration of the Petitioner's challenge to his ACCA sentence in light of the position taken by the Solicitor General. Such a ruling would for sure bring the decision in Turner to the point of abrogation and in turn, impact Mr. Lawson's claims that his prior aggravated assault offenses under Fla.Stat. § 784.021 and his prior aggravated battery with a deadly weapon under Fla.Stat. § 784.045 are not ACCA predicates.

The concession in Franklin effectively binds every U.S. Attorney's Office in the nation. During oral arguments, in Southern Union Co. v. United States, 132 S.Ct. 2341 (2012), the government conceded that it "Speaks with one voice when it comes to making concessions. That's certainly the case. And a concession made by the government in consultation with the Solicitor General's Office is one that the government attorneys should be following nationwide." The concession in Franklin binds the government in this case as well.

Petitioner herein demonstrates that the case is of such imperative importance as to justify deviation from normal appellate practice requiring - immediate determination from this Court. The pipeline of cases aimed at this court will innundate the Supreme Court's dockets for sessions to come. Instead of ending the .. **ACCA** protracted litigation, the Court will be faced with perpetual litigation.

CONCLUSION

The petition for a writ of certiorari should be granted before Judgment for the reasons stated above.

Respectfully submitted,

Howard Lawson

Date: 3-13-19