APP A

No. 17-8401

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY LEE FRANKLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner seeks review of several questions, including whether the court of appeals erred in denying his request for a certificate of appealability (COA) to challenge the district court's determination that his prior conviction for battery on a law enforcement officer under Florida law qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). See Pet. i, 24-35. For the reasons set forth below, the government now agrees that petitioner's Florida battery conviction is not a violent felony under the ACCA's elements clause. Accordingly, this Court should

grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of the position expressed in this memorandum.

1. Petitioner pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and the district court sentenced him, pursuant to the ACCA, to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. A3, at 1-3. The ACCA provides for a statutory sentencing range of 15 years to life imprisonment for a defendant who violates Section 922(g) and has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another." See 18 U.S.C. 924(e)(1).[1]

Under the elements clause of the ACCA, a "violent felony" includes any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). To determine whether a prior conviction constitutes a violent felony, a court generally applies the "categorical approach." See Mathis v. United States, 136 S.

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[1] Apart from petitioner's conviction for battery on a law enforcement officer, petitioner has more than three prior convictions for robbery, attempted robbery, and aggravated assault. See Pet. App. A8, at 2. The district court correctly determined, however, that many of those prior convictions were for crimes that were not "committed on occasions different from one another." Id. at 5 n.4 (citation omitted). If petitioner's conviction for battery on a law enforcement officer is not a conviction for a violent felony, he would not qualify for an ACCA sentence. Ibid.

Ct. 2243, 2248 (2016); Taylor v. United States, 495 U.S. 575, 602 (1990). Under the categorical approach, courts "focus solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis, 136 S. Ct. at 2248. If, however, the statute of conviction lists multiple alternative elements, it is "divisible" into different offenses, and a court may apply the "modified categorical approach," which permits the court to "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Id. at 2249 (citation omitted).

2. The district court's order denying relief rests on, inter alia, its conclusion that petitioner's Florida conviction for battery on a law enforcement officer qualified as a violent felony under the modified categorical approach. That conclusion was incorrect.

The Florida battery statute provides that the offense of battery occurs when a person:

> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to an individual.

Fla. Stat. § 784.03(1)(a) and (b) (1985). Under Florida law, battery is a third-degree felony when the victim is a "law

enforcement officer" or "correctional officer" who is "engaged in the lawful performance of his duties." Id. § 784.07(1)(a) and (2).

In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court held that simple battery under Florida law does not categorically qualify as a violent felony under the ACCA's elements clause. Id. at 138-145. The Court determined that an offender uses "physical force" for purposes of the ACCA's elements clause when he uses "violent force -- that is, force capable of causing physical pain or injury to another person," id. at 140 (emphasis omitted), and that Florida simple battery, which requires only an intentional touching and "is satisfied by any intentional physical contact, 'no matter how slight,'" does not categorically require such force. Id. at 138, 141 (quoting State v. Hearns, 961 So. 2d 211, 218 (Fla. 2007) (emphasis omitted)). The Court, however, did not address the application of the modified categorical approach to the Florida simple battery statute in Curtis Johnson.

The Florida simple battery statute, Fla. Stat. § 784.03 (2018), is divisible into two parts: Subsection (1)(a)(1), which covers "[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other," and Subsection (1)(a)(2), which covers "[i]ntentionally caus[ing] bodily harm to another person." Preston Johnson v. United States, No. 16-15560, 2018 WL 2435402, at *5-*6 (11th Cir. May 30, 2018) (emphasis omitted), petition for cert. pending, No. 17-9308 (filed June 6, 2018) (citing

Florida state-court decisions and model jury instructions); see 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"). Although simple battery is divisible between "touching or striking" battery and "bodily harm" battery, the offense of "touching or striking" battery is not further divisible because "touching" and "striking" refer to alternative ways to commit a single offense, not alternative elements. See Fla. Standard Jury Instructions in Criminal Cases 8.3 (1981) (treating "touched or struck" as a single offense element). And because a conviction for "touching or striking" battery may rest upon the "most 'nominal contact,' such as a 'tap on the shoulder without consent,'" a conviction for that type of simple battery does not categorically qualify as a "violent felony" under the ACCA. Curtis Johnson, 559 U.S. at 138 (quoting Hearns, 961 So. 2d at 219) (brackets and ellipses omitted).

Nothing in the record of this case indicates that petitioner's conviction for battery on a law enforcement officer was for "bodily harm" battery under Fla. Stat. § 784.03(1)(b) (1985). And because "touching or striking" battery does not categorically require the use of violent force, petitioner's battery conviction does not qualify as a violent felony under the ACCA's elements clause. Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and

remand for further consideration of petitioner's challenge to his ACCA sentence in light of the government's position set forth in this memorandum.[2]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JULY 2018

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[2] Petitioner also contends (Pet. 14-19) that the court of appeals erred in denying his application for a COA on his claim that his prior convictions for Florida armed robbery and attempted armed robbery do not qualify as violent felonies under the ACCA's elements clause. This Court is currently considering whether a conviction for Florida robbery under Fla. Stat. § 812.13 (1995) qualifies as a violent felony under the elements clause. See Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). Because vacatur and remand is warranted on the question whether petitioner's conviction for battery on a law enforcement officer is a violent felony, however, no reason exists to hold the petition for Stokeling. The government waives any further response to the petition unless this Court requests otherwise.

APP B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12973-C

HOWARD LAWSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Howard Lawson is a federal prisoner serving a 180-month sentence for possession of a firearm by a convicted felon, 18 U.S.C. § 922(g). His sentence was enhanced pursuant to the Armed Career Criminal Act ("ACCA").

Mr. Lawson filed his 28 U.S.C. § 2255 motion to vacate, asserting that: (1) his prior Florida convictions for resisting an officer with violence, Fla. Stat. § 843.01, and aggravated battery with a deadly weapon, Fla. Stat. § 784.045, did not qualify as violent felonies under the ACCA; and (2) counsel was ineffective for failing to challenge his ACCA sentence. The district court denied the § 2255 motion on the merits, and subsequently, Lawson's motion for reconsideration, Fed. R. Civ. P. 59(e). Mr. Lawson now seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") from this Court.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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January 31, 2019

Clerk - Middle District of Florida
U.S. District Court
801 N FLORIDA AVE
TAMPA, FL 33602-3849

Appeal Number: 18-12973-C
Case Style: Howard Lawson v. USA
District Court Docket No: 8:18-cv-01174-RAL-AAS
Secondary Case Number: 8:16-cr-00163-RAL-AAS-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12973-C

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ORDER:

Howard Lawson is a federal prisoner serving a 180-month sentence for possession of a firearm by a convicted felon, 18 U.S.C. § 922(g). His sentence was enhanced pursuant to the Armed Career Criminal Act ("ACCA").

Mr. Lawson filed his 28 U.S.C. § 2255 motion to vacate, asserting that: (1) his prior Florida convictions for resisting an officer with violence, Fla. Stat. § 843.01, and aggravated battery with a deadly weapon, Fla. Stat. § 784.045, did not qualify as violent felonies under the ACCA; and (2) counsel was ineffective for failing to challenge his ACCA sentence. The district court denied the § 2255 motion on the merits, and subsequently, Lawson's motion for reconsideration, Fed. R. Civ. P. 59(e). Mr. Lawson now seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") from this Court.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). The only grounds for granting a motion to alter or amend a judgment under Rule 59(e) are newly discovered evidence or manifest errors of law or fact. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007).

The district court did not err by denying Mr. Lawson's § 2255 motion because this Court has held that Florida convictions for resisting an officer with violence and aggravated battery with a deadly weapon qualify as violent felonies under the ACCA. *See United States v. Deshazior*, 882 F.3d 1352, 1355 (11th Cir. 2018) (affirming that a Florida conviction for resisting an officer is a violent felony under the ACCA's elements clause, and specifically rejecting that the "least acts criminalized" by the statute includes conduct which involves *de minimis* force, rather than the "use of physical force"); *Turner v. Warden Coleman FCA*, 709 F.3d 1328, 1341 (11th Cir. 2013) (holding that a Florida conviction for aggravated battery with a deadly weapon qualified as a violent felony under the elements clause under the ACCA), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551; *see also In re Rogers*, 825 F.3d 1335, 1341 (11th Cir. 2016) (affirming that a conviction under Florida's aggravated battery statute categorically qualifies under the ACCA's elements clause). Because Mr. Lawson's prior convictions qualified as predicate offenses under the ACCA, his counsel was not ineffective for failing to raise this argument. *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990) (stating that counsel's performance cannot be deficient for failing to raise issues that have no merit).

Additionally, the 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 the statutes, because binding precedent in this Circuit holds that resisting an officer and aggravated battery with a deadly weapon are violent felonies under the ACCA. *See Deshazior*, 882 F.3d at 1355; *Turner*, 709 F.3d at 1341. Accordingly, the district court properly denied Mr. Lawson's Rule 59(e) motion. *See Arthur*, 500 F.3d at 1343.

Because Mr. Lawson has failed to show that reasonable jurists would find debatable the district court's denial of his § 2255 motion, his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484. His motion for IFP status is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HOWARD DEWAYNE LAWSON,

Plaintiff,

v. CASE NO. 8:18-cv-1174-T-26AAS

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

Plaintiff, proceeding *pro se*, has filed a timely motion to vacate his sentence pursuant to 28 U.S.C. § 2255. After carefully considering the motion and accompanying memorandum of law, together with the proceedings in Plaintiff's underlying criminal case, case number 8:16-cr-163-T-26AAS, the Court concludes that the motion is due to be denied without the necessity of a response from Defendant or an evidentiary hearing because it plainly appears from the face of the motion and memorandum and the proceedings in the related criminal case that Plaintiff is entitled to no relief.

Plaintiff was sentenced as an armed career criminal to a term of 180 months followed by a term of supervised release of 48 months.[1] He did not appeal. Plaintiff's sentence pursuant to the Armed Career Criminal Act (the ACCA) was enhanced based on

[1] See case number 8:16-cr-163-T-26AAS, docket 42.

two prior State of Florida convictions for obstructing or opposing an officer with violence and aggravated battery with a deadly weapon.[2] He now raises two claims for relief: (1) he is actually innocent of being an armed career criminal since these two prior convictions do not constitute crimes of violence; and (2) his attorney rendered ineffective assistance of counsel in failing to challenge his enhanced sentence because these two prior convictions did not qualify as crimes of violence.

Both claims fail in the face of binding Eleventh Circuit precedent. In United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018), the Court reaffirmed that a Florida conviction for resisting an officer with violence qualifies as a violent felony under the elements clause of the ACCA. Likewise, in Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1341 (11th Cir. 2013), abrogated on other grounds by Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), the Court determined that a Florida conviction for aggravated battery with a deadly weapon qualified as a violent felony under the elements clause of the ACCA.[3] In light of this settled and binding Eleventh Circuit precedent, Plaintiff's counsel cannot be faulted for failing to argue that these two prior convictions did not support an enhancement of Plaintiff's sentence under the ACCA.

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[2] See id., docket 38 (Presentence Report), paragraph 30, page 6.

[3] Recently, in United States v. Boatwright, 713 F.App'x 871, 877 (11th Cir. 2017) (unpublished), a panel of the Eleventh Circuit noted that Turner is still binding precedent with regard to aggravated battery constituting a crime of violence.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion to Vacate (Dkt. 1) is denied. The Clerk is directed to enter judgment for Defendant and to close this case.

DONE AND ORDERED at Tampa, Florida, on May 15, 2018.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record
Defendant, *pro se*