IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

ANTWAYNE LOWRY,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

Arthur L. Wallace III, Esq.
Counsel for Petitioner
Florida Bar No. 769479
Lighthouse Professional Bldg.
2211 E. Sample Road
Suite 203
Lighthouse Point, FL 33064
Tel. (954) 943-2020
Fax. (954) 782-1552

QUESTION PRESENTED FOR REVIEW

ISSUE 1: Whether the trial and appellate court erred in denying Petitioner's Motion for Certificate of Appealability?

- Prefix-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

ANTWAYNE LOWRY,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

The Petitioner, ANTWAYNE LOWRY, respectfully prays that a writ of certiorari issue to review the judgment-order of the United States Court of Appeals for the Eleventh Circuit entered on January 30, 2019.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

OPINION BELOW

On January 30, 2019, the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence and denying his Motion for Certificate of Appealability. A copy of the opinion-order, as well as the District Court's order denying Petitioner's Motion to Vacate and Certificate of Appealability and Magistrate Judge Report are attached as Appendix A, B and C respectively.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the Defendant in the district court and will be referred to by name or as the Petitioner. The respondent, the Untied States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The Petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

On September 19, 2013, a federal grand jury in the Southern District of Florida returned an indictment charging Petitioner with being a convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (CR-DE 1). Petitioner, following arraignment and discovery, entered into a plea agreement with the United States wherein he agreed to plead guilty to the charge in exchange for the United States' promise to recommend his receipt of the acceptance-of responsibility adjustment at sentencing provided that he would qualify under the applicable guideline (CR-DE 23).

Following a change-of-plea colloquy, the Court accepted Petitioner's guilty plea (CR-DE 21; CR-DE 53, p. 54). The Court sentenced Petitioner to 180 months' imprisonment and four years' supervised release (CR-DE 40). Petitioner filed a direct appeal (CR-DE 41). On March 27, 2015, the Eleventh Circuit Court of Appeals affirmed the 180 month sentence (CR-DE 57), and on June 8, 2015, the Supreme Court denied certiorari review. United States v. Lowry, 599 F.App'x. 358, cert. denied, ___ U.S. ___, 135 S.Ct. 2827 (2015). On June 7, 2016, Petitioner filed a timely, initial § 2255 motion (CR-DE 58; CV-DE 1). On June 15, 2016, Magistrate Judge White entered an order appointing counsel for Petitioner and establishing a briefing schedule (CV-DE 4). After granting extensions of time and appointing new counsel, an amended § 2255 motion was filed on Petitioner's behalf on December 12, 2016 (CV-DE 19). On January 10, 2017, the government's response to the amended motion and memorandum of law was filed (CV-DE 19). On May 5, 2017, Petitioner filed his reply to government's response to his motion to vacate (CV-DE 26). On March 9, 2018 the magistrate court entered its report recommending that the motion be denied (CV-DE 28). On March 26, 2018, the district court entered its order denying Petitioner's motion to vacate and denying a Certificate of Appealability

(CV-DE 29).

Petitioner requests the Court to issue a Writ of Certiorari to the Eleventh Circuit Court of Appeals directing that a Certificate of Appealability (hereinafter COA) be issued allowing Petitioner to appeal to this Court the district court's denial of his Motion to Vacate.

Statement of the Facts

The facts on appeal arise from the record of the change of plea and sentencing proceedings and the factual proffer submitted in support of the guilty plea. The evidence of Petitioner's offense was as follows:

At the time of Petitioner's guilty plea hearing the prosecutor recited the following proffer of facts in support of the guilty plea: Judge, if this matter had gone to trial, the Government would prove the guilt of Mr. Lowry beyond a reasonable doubt through the submission of the following testimony and exhibits: August 29, 2013, approximately two p.m., Mr. Lowry was arrested by the Hollywood Police Department for selling two mollies -- THE COURT: What police department? MR. CHASE: Hollywood Police Department. THE COURT: Okay. He was arrested for selling some drugs? MR. CHASE: Two mollies. THE COURT: What are they? MR. CHASE: Two pills that contained mixture heroine and MDMA. He sold those pills for $20.00 to the

informant. A pre-marked $20.00 bill was found in possession of Mr. Lowry. Mr. Lowry was arrested. Mr. Lowry was accompanied by Maribel Lasano (phonetic). THE COURT: How is Maribel Lasano (phonetic)? MR. CHASE: According to my understanding, his girlfriend. She interferes with the arrest. She jumps on the back of the police officer. She is arrested. THE COURT: Okay. MR. CHASE: There is a recording device put in the vehicle. Ms. Lasano and Mr. Lowry in the vehicle, a recording was obtained of the conversation between Mr. Lowry and Ms. Lasano. During the recorded conversation in the rear seat of the police car, Mr. Lowry stated earlier that day he had given Terry his gun for safekeeping. Approximately six minutes and 39 seconds into the recording, Lowry stated, quote, Terry got my gun. My gun is not in the house, end quote. Terry was identified as Terrence Terry Palmer, a neighbor of Lowry that lived next door to Lowry in apartment number 8. Palmer signed a consent to search form and identified a black bag in his apartment behind a door indicating the Defendant Lowry. Two socks, Highpoint pistol loaded with a 14 magazine, one round in the chamber, 14 rounds of .40 caliber ammunition, rounds of ammunition and a .45 caliber magazine, a plastic bag with cocaine residue and plastic bag with point eight grams of marijuana. A computer check was performed on Mr.

Lowry to determine if he was a convicted felon. Mr. Lowry has been convicted of these crimes, Judge: A 1998 Miami/Dade case February 18, 1999, adjudicated guilty for possession with intent to sell cocaine and marijuana. 1998 Miami/Dade County case February 19, 1999, guilty plea adjudicated guilty to two counts cocaine sale carrying a concealed firearm; 2000 case in Miami/Dade County guilty plea adjudicated guilty April 27, 2000 for possession of cocaine. A 2000, Miami/Dade County case, guilty plea, adjudicated guilty October 2, 2000 for possession of cocaine. Two possessions. Constructive possession of the Highpoint ..40 caliber pistol and bullets in the socks. 18 There was a consent search done in the Defendant's apartment where there is a total of -- THE COURT: Is this after they went into the Palmer apartment? 22 MR. CHASE: Yes, sir. THE COURT: So what happens next? MR. CHASE: Mr. Lowry signed a consent to search form. One Starline .9 millimeter bullet and three boxes containing a total of 16 Blazer .45 caliber bullets seized from the master bedroom closet. Judge, there were three boxes, Blazer high caliber ammunition, each box contains 50 rounds. There were not 150 bullets found. From the three boxes 116 bullets, 34 bullets missing. Eight of those bullets were found in the sock that accompanied the high power caliber pistol found

in Mr. Palmer's apartment. THE COURT: I see. MR. CHASE: There is more. Subsequent of being advised of Miranda rights and waiving same, Mr. Lowry said he purchased the gun approximately three years ago living in Overtown. He bought the high caliber pistol from a person on the streets, did not identify. He claimed the serial number was obliterated or removed when he purchased the firearm. Judge, as you mentioned regarding traveling in interstate or foreign commerce requirement, the Government has an ATF witness that examined the gun, as well as, the bullets, Highpoint ..40 caliber pistol was manufactured in Ohio; 40 rounds of ..40 caliber, Minnesota; three rounds of PMC, South Korea; 7 rounds of CBC, ..40 caliber, Brazil; 116 rounds of Blazer .45 caliber ammunition, Idaho; one round of Starline ammunition, Missouri or California. That is the evidence that would have been produced had this man proceeded to trial. (CR-DE 53 44-49).

REASONS FOR GRANTING THE WRIT

ISSUE 1: Whether the trial and appellate court erred in denying Petitioner’s Motion for Certificate of Appealability?

A Certificate of Appealability (hereinafter referred to as “COA”) must issue upon a “substantial showing of the denial of a constitutional right” by the Petitioner. 28

U.S.C. §2253(c)(2). To obtain a COA under this standard, the Petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) 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. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

To obtain a COA under this standard, Petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) 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. 473, 484 (2000)

As this Court has emphasized, courts "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which a petitioner has lost on the merits, this Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree,

after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the requesting Petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

This Court recently applied this standard in *Welch v. United States*, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-1264. In that case, the Court broadly held that *Johnson v. United States,* 135 S.Ct. 2551 (2015) announced a substantive rule that applied retroactively to cases on collateral review. *Id.* at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether Welch's robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-1264,1268. Accordingly, the Court held that a COA should

issue. Petitioner submitted in his Motion to Vacate and in his amended motion that his ACCA 15 year mandatory sentence was imposed by the district court in error due to the inclusion of his conviction in Florida Eleventh Judicial Circuit, Miami-Dade County, Case Number F98-7276 arising from his arrest in Case Number J98-1928 for Possession With Intent to Deliver Cocaine, Possession With Intent to Deliver Cannabis and Resisting an Officer Without Violence. The primary offense of concern to this motion is the Possession With Intent to Deliver Cocaine, Count 1 which is a second degree felony offense in Florida punishable by up to 15 years in prison.

Petitioner argues that his prior conviction could not be used to enhance his sentence under the ACCA because the offense was an act of "juvenile delinquency" and Petitioner was first sentenced to serve a term of probation which was violated and thereafter sentenced to one year and one day in Florida state prison. It is undisputed that Petitioner was a juvenile (17 years of age) at the time of arrest and thereafter the case was "direct filed" to Circuit Court, Criminal (Adult) Division where the above information was filed to which Petitioner pled guilty. Petitioner submits that this act of juvenile delinquency which was conceded qualified as a serious drug offense and not a violent

felony, could not be used to enhance his sentence as the crime was a serious drug offense not exceeding one year and one month, and not a crime of violence or one committed with a specified weapon offense as specified in the ACCA (Armed Career Criminal Act: Text Below). The ACCA text reads as follows: 18 U.S.C. 924(e) (e)(1) 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). (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, 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 (language in italics unconstitutional under Johnson decision.); and (C) the term "conviction" includes **a finding that a person has committed an act of juvenile delinquency involving a violent felony.**

Petitioner contended that his F98-7276 act of juvenile delinquency does not qualify under the ACCA statute cited above. The Act specifically references included acts of juvenile delinquency to include conduct "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" which Petitioner did not commit and,

defines conviction to includes a finding that a person has committed an act of juvenile delinquency involving a violent felony, which Petitioner did not do. As the Act is silent as to the inclusion of a conviction for a drug offense punishable by greater than ten years to be considered a conviction, distinct from the enumerated crimes of violence, Petitioner submits that this act of juvenile delinquency cannot be relied upon to trigger the 15 year mandatory sentence. A plain reading of the statute clearly refers to acts of juvenile delinquency in relation to crimes of violence and specific weapons offenses, not serious drug offenses. The Eleventh Circuit Court of Appeals considered the triggering question in relation to an act of juvenile delinquency concerning a violent felony in *United States v. Cure*, 996 F.2d 1136, 1140 (11th Cir. 1993) wherein *Cure* argued that his prior crimes do not fall within the language of the statute because he was under 17 at the time they were committed and thus, he should be considered a juvenile for purposes of the statute. The two crimes under consideration did not involve the use or carrying of a firearm, knife or destructive device. Therefore, Cure claimed that he was not eligible for the sentence enhancement. The Eleventh Circuit disagreed and affirmed his 15 year sentence holding that under Florida

law any person over age 14 can be charged and otherwise tried as an adult and that such a conviction is an adult conviction as *Cure* was sentenced to in excess of one year. Petitioner submits that this decision is not controlling in this case as his triggering offense involved a serious drug offense and not a violent felony. Had the congress intended to include acts of juvenile delinquency for serious drug offenses as ACCA triggering prior convictions the serious drug offense would have explicitly been included in the statutory language. The government relied upon the decision in *United States v. Spears*, 443 F.3d 1358, 1360-61 (11th Cir. 2006) as support for opposition, however the *Spears* decision is distinguishable as the triggering predicate juvenile adjudication was a robbery, a violent felony not a serious drug offense. The Government likewise cites as authority the holding in *United States v. Safeeullah*, 453 F.Appx. 944, 948 (11th Cir. 2012) where the Eleventh Circuit held that defendant's prior conviction for possessing cocaine with intent to distribute falls directly within the ACCA's statutory definition of "serious drug offense," and rejected his challenge on the basis that he was a juvenile at the time of the offense where Georgia state law allowed an adult adjudication and he was in fact convicted as an adult. The holding in *Safeeullah* was

grounded upon the decision cited above in *United States v. Cure*, 996 F.2d 1136 (11th Cir. 1993) wherein the defendant unsuccessfully argues that two of his prior criminal convictions were improperly considered by the district court to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The Act provides, in pertinent part, that (e)(1) 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) of this title for a violent felony or a serious drug offense, or both ... such persons shall be fined not more than $25,000 and imprisoned not less than fifteen years....(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult....*Cure* argues that his prior crimes do not fall within the language of the statute because he was under 17 at the time they were committed and thus, he should be considered a juvenile for purposes of the statute. It is undisputed that the two crimes did not involve the use or carrying of a firearm, knife or destructive device. Therefore, *Cure* claims that he was not

eligible for the sentence enhancement. Id at 1139-1141. The *Cure* decision upon which the Eleventh Circuit relied in *Safeeullah* again is distinguishable from the instant case and only addresses the "violent felon" definition and does not address the "serious drug offense definition and the distinction in the statutory language related to the two separate types of criminal conduct. The Government's position would blend both classes of offense into one category, however the clear language of the statute distinguishes their application to juvenile adjudications. Reference to juvenile adjudications is limited to the clauses of the ACCA discussing "violent felonies" and is not connected where reference is made to "serious drug offense" adjudications. Had the Congress intended for ACCA triggering juvenile adjudications to include "serious drug offenses" all that would be needed would be to include "and serious drug offenses" after the term "violent felonies" in the Act. It is clear from the language of the Act that while both "violent felonies" and "serious drug offenses" will both potentially trigger an ACCA sentence, these two classes of offense are separate and distinct with reference to juvenile adjudications.

The district court held in denying Petitioner's motion that "Judge White concluded that although Lowry's claim is

procedurally barred, he would nonetheless evaluate the merits of his claim as they are readily disposed of. Lowry complains that the district court improperly enhanced his sentence under the Armed Career Criminal Act because it relied on a 1998 juvenile adjudication for a drug offense as one of his three predicate convictions. The magistrate court rejected Appellant's argument for two reasons finding: (1) a juvenile adjudication qualifies as a "serious drug offense" under ACCA; and (2) Lowry was, in any event, convicted as an adult and not adjudicated delinquent as a juvenile. The District Court accepted Judge White's second point and affirmed his report and recommendation on that basis. The Court found that nothing in the record rebutted the Government's showing that Petitioner was convicted and sentenced as an adult in his 1998 drug case, finding his conviction qualified as a predicate offense under ACCA." (CV-DE 29). Petitioner submits that the magistrate and district and appellate courts did not consider the distinction between the definitions of a drug trafficking offense and a crime of violence as related to an act of juvenile delinquency. The crime of violence definition makes two references to acts of juvenile delinquency in relation to crimes of violence and specific weapons offenses, whereas the serious drug

offense definition makes no such inclusion of reference to acts while a juvenile creating a meritorious issues for appeal.

Respectfully, a Writ of Certiorari should issue directing the Eleventh Circuit Court of Appeals to issue a Certificate of Appealability in this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

DATED this 29th day of April, 2019.

Respectfully submitted,

/s/ A. Wallace

_____
Arthur L. Wallace III, Esq.
Counsel for Petitioner
Florida Bar No. 769479
Lighthouse Professional Bldg.
2211 E. Sample Road
Suite 203
Lighthouse Point, FL 33064
Tel. (954) 943-2020
Fax. (954) 782-1552