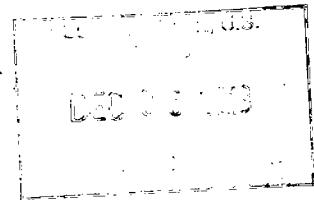


19-6128

IN THE
UNITED STATES SUPREME COURT

ORIGINAL



BACARI MCCARTHREN,
Petitioner,

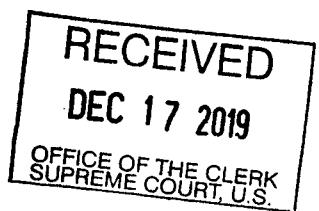
v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR REHEARING PURSUANT TO
S. Ct. RULE 44.

BACARI MCCARTHREN
FEDERAL CORRECTIONAL INSTITUTION
PO. BOX. 1032
COLEMAN, FLORIDA 33521 - 1032

PROCEEDING PRO-SE



CERTIFICATE PURSUANT TO RULE 44. 1-2

Petitioner herein certifies that this request for rehearing is warranted under grounds limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Specifically, Petitioner moves the Court to .. Rehear this case based on the fact no court has - yet to conduct a categorical test of the Fla Stat. § 784.045, et, seq. In the end, the Eleventh Circ uits failure to conduct a categorical test of the Fla. Stat. can be corrected nowhere else but in .. this Court.

In conjunction, Petitioner presents this Rule 44 in good faith and not as a dilatory .. tactic, and in the interest of justice, UNDER PENALTY OF PERJURY 28 U.S.C. § 1746.

December 6, 2019

/SS/ 
BACARI McCATHREN

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GROUND FOR REHEARING

Petitioner argues that rehearing is warranted under Rule 44.1-2. based on the fact that no court, has conducted a proper categorical approach-analys is of the Fla. Stat. 784.045, et seq. The Turner .. court pre Descamp / Mathis only conducted a modif categorical analysis to determine the nature of divisibility:

Using the modified categorical approach, and because the victim of the crime was a male, we can rule out battery on a pregnant women as the basis for Turner's conviction. That leaves only two potential basis for Turner's conviction, one of which involves - the intent ional or knowing causatuion of bodily harm, and the other which involves the use of a ... deadly weapon. (Petitioner was convicted of the deadly weapon subsection of the statute).

The Turner court went on to determine that "Either way, the crime has as an element, the use attempted use, or threatened use of physical force," "We can therefore say without compunction, that Turner's conviction for aggravated battery - qualifies as a violent felony for purposes of the ACCA."

In other words, the Turner court erroneously concluded that under (1)(a)(1) the "knowing causation of bodily harm" portion of the statute and - the (1)(a)(2) subsection "involves the use of ... a deadly weapon," both qualified categorically as a crime of violence predicate under the ACCA without conducting a categorical test of the entire statute.

The failure to conduct a categorical approach of the statutes subsection § 784.045. (1)(a)(2), was "fatal" in this case and doomed every case after or preceding Turner. Moreover, had the the .. Turner court conducted the strict categorical test which the court commands the Eleventh Circuit would have discovered that the deadly weapon does not have to be "used" in order to violate the statute § 784. 045 (1)(a)(2), because the weapon is not relevant or

2 Petitioner's counsel concluded in the petition for certiorari "If this Court rejects the Eleventh Circuit's path here, then Mr. McCarthren will not gain .. relief from his harsh career offender sentence, And he is not alone. Although this issue may appear to be provincial, it is widespread and recurring in the - Eleventh Circuit." (citing United States v. Vereen, 920 F.3d 1300, 1313-1314 (11th Cir. 2019)(applying Turner, without its own independent analysis, to .. aggravated batter statute).

material to the "touching or striking" element of the offense. This was a procedural error that - has gone unresolved since the Turner decision. In fact, the Turner panel failed to consider intervening state law. Severance v. State, (a conviction .. under § 784.045(1)(a)(2) is permissible if the defendant was "holding a deadly weapon without actually touching the victim with the weapon"). Id. In order to demonstrate this anomalous effect the procedural error in Turner created Petitioner cites to the .. Eleventh Circuit decision in United States v. Weaver, 760 Fed. Appx. 745 (11th Cir. 2019)(holding .. "it is irrelevant whether Weaver committed a battery that intentionally knowingly causes great bodily harm, permanent disability, or disfigurement under § 784.045(1)(a)(1) or while using a deadly weapon - under 784.045(1)(a)(2) because we recognized in Turner that both subsections qualify as violent ... felonies under the element clause"). This is contrary to the U.S. Solicitor General's concession in Franklin "touching or striking" element of Fla. Stat. 784.045 is indivisible. see also United States v. Boswell,

² Franklin v. United States, 139 S. Ct. 1254 203 L. Ed. 2d 270 (U.S. 02/25/2019).

711 Fed. Appx (7th Cir. 2018)(holding that Fla. Stat. § 784.045(1)(a)(1) is a violent felony under the elements clause without conducting a categorical test of either (1)(a)(1) or (1)(a)(2))(citing United States v. Butler, 777 F.3d 382, 387 (7th Cir. 2015) (same). see also United States v. Domenech, 2017 U.S. Dist. LEXIS 67388 (DC. 2017) ("the undersigned finds that, under **either theory**-causing great bodily harm or **use** of a deadly weapon defendant committed an .. Aggravated Battery in violation of Fla. Stat. 784.045 (1)(a)").

Rehearing should be granted in order to determine whether the parties overlooked the non-frivolous .. aspect of the writ of certiorari and direct appeal based upon the cognizable errors occurring in light of counsel's -failure to object and argue the - failure to apply a categorical approach to this ... Petitioner's concerns over the prior state convictions being used to designate petitioner a career offender. In conjunction with the Court's collectively, for failing to apply the proper categorical analysis /test to the Fla. Stat. § 784.045, et, seq.

"The categorical approach is the framework the U.S. Supreme Court has applied in deciding whether an offense qualifies as a violent felony under the Armed Career Criminal Act. Under the categorical approach, a court assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular .. occasion." Welch v. United States, 136 U.S. S. Ct. 1275 (U.S. 2016).

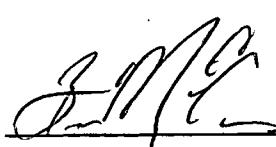
Petitioner demonstrates that a conviction under § 784.045(1)(a)(2) could never constitute a "crime of violence" under § 4B1.2, when considering the Court's holding in Moncrieffe, Descamps, and Mathis. (emphasis added in bold).

FOR THE REASONS STATED ABOVE, Petitioner moves this court for rehearing under Rule 44.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Rule 44, request to the U.S. Solicitor General by depositing this request in the prison mail-box on Friday, 12/6/2019, within the time to file rehearing in this Court; all pursuant to 28 U.S.C. § 1746.

December 6, 2019


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