

APPENDIX A

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12222-H

JAMES C. WRIGHT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

James Wright is a federal prisoner serving a 180-month sentence after entering an open guilty plea, in 2004, to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g), 924(e). In June 2016, he filed the instant, counseled 28 U.S.C. § 2255 motion to vacate, arguing that his sentence as an armed career criminal was unconstitutional, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

As background, Wright's presentence investigation report ("PSI") recommended that he be classified as an armed career criminal based upon the following Florida convictions: a 2002 conviction for aggravated battery with a deadly weapon; a 2001 aggravated fleeing or attempting

to elude conviction; a 1993 conviction for unarmed robbery, and a 1993 conviction for robbery.¹ Wright acknowledged in the instant § 2255 motion that the district court relied upon these prior convictions as predicate offenses to enhance his sentence under the Armed Career Criminal Act (“ACCA”). He maintained, however, that his conviction for aggravated battery with a deadly weapon, in violation of Fla. Stat. § 784.045(1)(a)(2), does not qualify under the ACCA’s elements clause. Wright acknowledged that this Court held, in *Turner v. Warden Coleman, FCI*, 709 F.3d 1328 (11th Cir. 2013), *abrogated on other grounds by Johnson*, 135 S. Ct. at 2551, that Florida aggravated battery qualified as a crime of violence under § 924(e)(i), but maintained that the decision was flawed, because the offense could be accomplished through mere touching.

The district court entered an order that denied the § 2255 motion and a certificate of appealability (“COA”). The district court found that Wright’s aggravated battery with a deadly weapon conviction qualified as predicate offense under the ACCA’s elements clause, based upon this Court’s holding in *Turner*, 709 F.3d at 1341. Because *Johnson* did not afford Wright relief, the court found that his § 2255 motion was untimely. His 2016 motion was filed more than a year after his 2004 conviction became final, and he could not rely upon *Johnson* for an extended limitations period under § 2255(f)(3).² Wright filed a timely notice of appeal. He now seeks a COA and leave to proceed *in forma pauperis* (“IFP”) from this Court.

To obtain a COA, a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas

¹ All parties agree that Wright’s Florida conviction for aggravated fleeing or attempting to elude no longer qualifies as a violent felony under § 924(e).

² The federal limitations period for a § 2255 motion often expires one year from the date on which the judgment of conviction becomes final. *See* 28 U.S.C. § 2255(f)(1). However, the limitations period may expire one year from the date on which a right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review. *See* 28 U.S.C. § 2255(f)(3).

petition on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Wright has not shown that reasonable jurists would debate the district court's denial of his § 2255 motion. Wright was convicted of aggravated battery with a deadly weapon, in violation of Fla. Stat. § 784.045(1)(a), which provides that a person commits aggravated battery by committing a battery: (1) that intentionally or knowingly causes great bodily harm, permanent disability, or disfigurement; (2) while using a deadly weapon. *See* Fla. Stat. § 784.045(1)(a). This Court held that Florida aggravated battery with a deadly weapon satisfies the ACCA's elements clause. *See Turner*, 709 F.3d at 1341. This holding was reaffirmed in *In re Rogers*, 825 F.3d 1335, 1341 (11th Cir. 2016). As such, Wright has not shown that a COA is warranted for his claim.

Wright has not shown that jurists of reason would debate the district court's denial of his § 2255 motion. As such, deny his motion for a COA is DENIED, and his motion for leave to proceed IFP is DENIED as MOOT.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

**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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November 30, 2017

Elizabeth Warren
U.S. District Court
300 N HOGAN ST
JACKSONVILLE, FL 32202

Appeal Number: 17-12222-H
Case Style: James Wright v. USA
District Court Docket No: 3:16-cv-00767-HLA-MCR
Secondary Case Number: 3:03-cr-00335-HLA-MCR-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: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMES C. WRIGHT,

Petitioner,

v.

CASE NO. 3:16-cv-767-J-25MCR
3:03-cr-335-J-25MCR

UNITED STATES OF AMERICA,

Respondent.

ORDER

Before the Court is Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and supporting Memorandum (Dkts. 1, 9), the Government's Response in Opposition (Dkt. 10), and Petitioner's Reply (Dkt. 11). From the record, the Court finds the following:

I. BACKGROUND

On October 22, 2003, Petitioner was charged in a one-count Indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). To support Petitioner's felon status, the Indictment listed the following prior felony convictions: a 2002 conviction for Aggravated Battery; a 2001 conviction for Aggravated Fleeing or Attempting to Elude a Police Officer; a 2001 conviction for Uttering a Forged Instrument; a 1995 conviction for Battery on a Law Enforcement; a 1993 conviction for Unarmed Robbery; and a 1993 conviction for

Robbery. On January 29, 2004, Petitioner pled guilty to the Indictment without the benefit of a written plea agreement. A Presentence Investigation Report (PSR) was prepared for the sentencing hearing, recommending that Petitioner be sentenced as an armed career criminal under the Armed Career Criminal Act (ACCA). On July 29, 2004, Petitioner was sentenced under the ACCA to a term of 180 months' imprisonment, to be followed by supervised release for a period of four years. Petitioner took a timely appeal, arguing that the court erred in summarily determining that his prior convictions were violent felonies or serious drug offenses for purposes of his sentence under the ACCA. On May 24, 2006, the Eleventh Circuit affirmed Petitioner's conviction and sentence. See *United States v. Wright*, 181 Fed.Appx. 914 (11th Cir. 2006). On June 17, 2016, Petitioner filed the instant counseled § 2255 motion challenging his sentence in light of the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015).¹ On August 1, 2016, upon motion of Petitioner, the § 2255 proceedings were stayed pending the Eleventh Circuit's decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016).² Dkt. 6. The stay was lifted December 22, 2016, and

¹The rule announced in *Johnson* was made retroactively applicable to cases on collateral review by the Supreme Court in *Welch v. United States*, 136 S.Ct. 1257 (2016).

²In *Fritts*, the Eleventh Circuit held that the defendant's prior Florida state court conviction of armed robbery categorically qualified as prior conviction for "violent felony" under the "elements" clause of the Armed Career Criminal Act (ACCA). *Fritts*, 841 F.3d at 944

the parties were directed to brief the issues raised in Petitioner's § 2255 motion.

Dkt. 8. This matter is ripe for consideration.

II. DISCUSSION

A. The ACCA and Johnson

Generally, the penalty for the offense of Felon in Possession of a Firearm, 18 U.S.C. § 922(g), is up to 10 years' imprisonment. 18 U.S.C. § 924(a)(2). However, if a defendant violates § 922(g) and has three previous convictions for a violent felony or a serious drug offense, or both, the ACCA increases the sentence to a term of imprisonment of not less than 15 years and up to life. 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony as:

[A]ny crime punishable by imprisonment for a term exceeding one year ... that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person or 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 .

18 U.S.C. § 924(e)(2)(B). Subsection 924 (e)(2)(B)(i) is known as the "elements clause;" the first 9 words of § 924 (e)(2)(B)(ii) is known as the "enumerated crimes clause;" and the last 13 words of § 924(e)(1)(B) (B)(ii), is known as the "residual clause."

In *Johnson*, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557–58, 2563. The Supreme

Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated clause of the ACCA's definition of a violent felony. *Id.* at 135 S.Ct. at 2563.

B. Petitioner's *Johnson* claim

In his § 2255 motion, Petitioner contends that he no longer qualifies for an enhanced sentence under the ACCA. Petitioner asserts that his Florida convictions for robbery (two convictions), aggravated battery, and aggravated fleeing or attempting to elude are not ACCA predicate offenses.

The Government argues that Petitioner is still an armed career criminal after *Johnson* because his convictions for robbery and aggravated battery continue to qualify as "violent felonies" under the ACCA.³ The Court agrees.

1. Robbery convictions.

Based on the Eleventh Circuit's decision in *Fritts*, Petitioner's robbery convictions are violent felonies under the elements clause of the ACCA.

Therefore, Petitioner's claim that his robbery convictions no longer qualify as ACCA predicate offenses after *Johnson* is due to be denied.

2. Aggravated battery conviction.

Likewise, Petitioner's aggravated battery conviction qualifies as an ACCA

³The parties agree that based on the Eleventh Circuit's decision in *United States v. Adams*, 815 F.3d 1291 (11th Cir. 2016), Petitioner's prior conviction for aggravated fleeing or attempting to elude under Fla. Stat. 316 § 1935(4)(a), does not qualify as a violent felony under the ACCA. See Dkt. 7, n2.

predicate offense under the "elements clause." See *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013), abrogated on other grounds by *Johnson v. United States*, 135 S. Ct. 2551 (2015)).

Here, according to the PSR, the offense occurred when Petitioner "put a .25 caliber gun to [the victim's] head and hit [the victim] in the head and face."

PSR ¶ 29.

On appeal, the Eleventh Circuit considered the uncontested facts contained in the PSR in its determination that Petitioner's prior battery conviction constituted a "violent felon[y]" under the elements clause of the ACCA." See *United States v. Wright*, 181 Fed.Appx. 914, 917 (11th Cir. 2006).

C. Timeliness of Petitioner's § 2255 Motion

Moreover, Petitioner's § 2255 motion is untimely under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Under the AEDPA, a federal prisoner must file a § 2255 motion within one year of the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (f)(1) - (4).

Because *Johnson* did not disturb the ACCA's definition of violent felony under its elements cause, Petitioner cannot use *Johnson* to trigger § 2255 (f)(3)'s limitation period. Therefore, the relevant date here is "the date on which the judgment of conviction becomes final." *Id.*, § 2255(f)(1). As previously mentioned, Petitioner's appeal was affirmed by the Eleventh Circuit on May 24, 2006. The mandate was issued June 22, 2006. It appears that Petitioner did not file a petition for a writ of certiorari. Thus, Petitioner's conviction became final on the date on which the time for filing a petition for a writ of certiorari expires, which is 90 days after the entry of the judgment on direct appeal. See *Clay v. United States*, 537 U.S. 522, 532, 123 S.Ct. 1072, 1079, 155 L.Ed.2d 88 (2003).

III. CONCLUSION

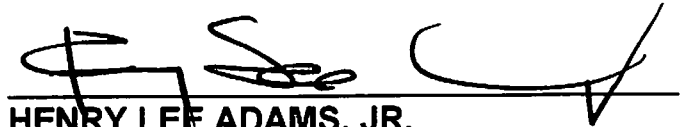
Upon consideration of the foregoing, it is **ORDERED**:

1. That the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Dkt. 1) is **DENIED** and this case is **DISMISSED with prejudice**.
2. The Clerk is directed to enter judgment accordingly and to close this case. A copy of this Order shall be filed in the underlying criminal case, Case No. 3:03-cr-335-J-25MCR.

3. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability shall not issue. See 28 U.S.C. § 2253(c)(2). Because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis. 28 U.S.C. § 1915(a)(3).

DONE AND ORDERED at Jacksonville, Florida this 21st day of

March, 2017.


HENRY LEE ADAMS, JR.
United States District Judge

Copies to:
Danli Song, Esquire
Ashley Washington, AUSA
Case No. 3:03-cr-335-J-5MCR