

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

LEONARD GRIFFIN
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 17-60452

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under the law established by this Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Griffin should be resentenced without applying the armed career criminal provisions of the Armed Career Criminal Act.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner Leonard Griffin on August 8, 2008.¹ The conviction was for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). His sentence was enhanced under the provisions of 18 U.S.C. § 924(e), the Armed Career Criminal Act (hereinafter “ACCA”). The district court case number is 3:07cr75-TSL-LRA. The subject § 2255 Petition arose out of the sentence ordered for the felon in possession conviction.

In 2015, after Mr. Griffin’s conviction and sentence, this Court ruled that the “residual clause” portion of the “violent felony” definition in the ACCA is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).² Invoking the holdings in *Johnson* (2015), Mr. Griffin filed the subject § 2255 Petition to Vacate Sentence on June 24, 2016. In the Petition, Mr. Griffin argued that he should be resentenced without application of the sentence enhancement provisions of the ACCA.

¹ The district court’s Judgment is attached hereto as Appendix 1.

² This Petition cites two important Supreme Court cases captioned “*Johnson v. United States*.” One was filed in 2015 and published at 135 S.Ct. 2551. That case renders the residual clause of § 924(e)(2)(B)(ii) unconstitutional. The other was filed in 2010 and published at 559 U.S. 133. That case defines the parameters of the phrase “physical force” in § 924(e)(2)(B)(i). In this Petition, *Johnson v. United States*, 135 S.Ct. 2551 (2015) is referred to as “*Johnson* (2015),” and *Johnson v. United States*, 559 U.S. 133 (2010) is referred to as “*Johnson* (2010).”

The district court entered an Order denying the relief sought in the § 2255 Petition on June 19, 2017. The court filed a Final Judgment on the same day.³

Mr. Griffin appealed the case to the United States Court of Appeals for the Fifth Circuit on June 19, 2017. The Fifth Circuit case number is 17-60452. The Fifth Circuit entered an Opinion affirming the district court's rulings on January 8, 2020. It entered a Final Judgment on the same day.⁴ The Opinion is reported at 946 F.3d 759.⁵

³ The district court's Order and its Final Judgment are attached hereto as composite Appendix 2.

⁴ The Fifth Circuit's Order and its Judgment are attached hereto as composite Appendix 3.

⁵ The reported rendition of the Opinion is attached hereto as Appendix 4.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on January 8, 2020. This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules, which was amended by this Court's Covid-19 related Order dated March 19, 2020. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

In *Johnson* (2015), the case that Mr. Griffin bases his argument on, this Court found that the “residual clause” portion of ACCA’s definition of “violent felony” is unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. 135 S.Ct. at 2563. The Due Process Clause of the Fifth Amendment states: “No person shall ... be deprived of life, liberty, or property, without due process of law[.]”

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Griffin sought to be resentenced without application of the ACCA's sentencing provisions. The § 2255 Petition concerns an underlying conviction and sentence filed in the United States District Court for the Southern District of Mississippi for a felon in possession of a firearm. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the felon in possession conviction arose from the laws of the United States of America.

B. Statement of material facts.

Facts relevant to the issue on appeal pertain solely to sentencing. Specifically, the facts focus on the district court's application of the "violent felony" provisions of the ACCA and the "residual clause" portion of the "violent felony" definition.

At sentencing, the Court deemed Mr. Griffin an armed career criminal under the combined provisions of 18 U.S.C. § 924(e)(1) of the ACCA and Guidelines § 4B1.4(b)(3)(B) because he purportedly had at least three prior qualifying violent felony convictions that rendered him an "armed career criminal." His status as an armed career criminal raised his adjusted offense level from 26 to 33. Also, armed career criminal status required a 15-year mandatory minimum sentence.

After applying reductions for acceptance of responsibility, Mr. Griffin's total offense level was 30. His calculated criminal history category was III. However, because he was deemed an armed career criminal, the provisions of § 4B1.4(c)(3) required a criminal history category of IV.

Without the "armed career criminal" enhancement, his offense level would have been 23 (pre-Chapter 4 enhancement offense level of 26 less 3 points for acceptance of responsibility). His criminal history category would have been III, rather than IV. At a criminal history category of III and a total offense level of 23, his Guidelines sentencing range would have been 57 to 71 months in prison. *See* Guidelines Sentencing Table. No statutory minimum sentence would be required.

With the armed career criminal enhancements, combining the criminal history category of IV with the offense level of 30 resulted in a Guidelines sentencing range from 135 months to 168 months in prison. However, the 15-year mandatory minimum sentence required by the ACCA increased the recommended Guidelines sentence to 180 months. The court sentenced him to serve 180 months in prison, and entered a Judgment reflecting that sentence on January 8, 2008.

Mr. Griffin is not contesting his guilt in regard to the instant felon in possession conviction. His sentence is the contested issue. The district court enhanced Mr. Griffin's sentence because of his status as an armed career criminal.

The prior felony conviction on which the prosecution relied to support his armed career criminal status were:

- Two “Strong Arm Robbery” convictions under Mississippi law.
- An “Aggravated Assault” conviction under Mississippi law.

At issue in this Petition is whether aggravated assault under Mississippi law is a violent felony post-*Johnson* (2015). If it is not, then Mr. Griffin has only two qualifying prior convictions, and he is no longer an armed career criminal under the ACCA. *See* § 924(e)(1) (stating that three prior qualifying convictions are required to trigger the armed career criminal enhancements).

V. ARGUMENT

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.”

Federal district and appeal courts are flush with cases arising from this Court’s rulings in *Johnson* (2015). As with Mr. Griffin’s case, many of the issues focus in part on defining action that constitutes “physical force against the person of another.” The “physical force” requirement must be met for a prior conviction to count as a “violent felony” under the force clause of the ACCA, which is contained in 18 U.S.C. § 924(e)(2)(B)(i). This Court provided a level of guidance on the “physical force” requirement in *Johnson* (2010),⁶ and *Stokeling v. United States*, 139 S.Ct. 544 (2019).

In *Johnson* (2010), this Court held that the “physical force” definition in § 924(e)(2)(B)(i) requires “violent force – that is, force capable of causing physical pain or injury to another person.” *Johnson* (2010), 599 U.S. at 141 (emphasis in original; citation omitted). “It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force.” *Id.* at 138. The *Stokeling* Court held that a crime

⁶ See *supra*, footnote 2.

satisfies the “physical force” requirement of the elements clause if the force required for a conviction “is sufficient to overcome a victim’s resistance.” 139 S.Ct. at 554. It is important to note that *Stokeling* does not overturn the *Johnson* (2010) Court’s ruling that the force at issue must be physical force.

Rule 10(c) of the Supreme Court rules states that certiorari can be granted when “a United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court.” The Fifth Circuit’s decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (*en banc*), which creates an almost boundless definition of “physical force” in the ACCA context, conflicts with this Court’s definitions of “physical force” established in *Johnson* (2010) and *Stokeling*.

At issue in *Reyes-Contreras* was whether a prior conviction for voluntary manslaughter was a crime of violence. *Reyes-Contreras*, 910 F.3d at 173. The district court found that it was, and enhanced the sentence accordingly. *Id.* On appeal, the Fifth Circuit found that assisting suicide by handing the suicide victim poison meets the force clause. *Id.* at 185. In short, the Fifth Circuit found that no force at all is required to meet the physical force cause. This holding is clearly at odds with this Court’s holdings in *Johnson* (2010) and *Stokeling*.

The Fifth Circuit’s holdings in *Reyes-Contreras* indicate that notwithstanding the holdings in *Johnson* (2010) and *Stokeling*, lower courts still

struggle with determining what types of actions constitute “physical force” under § 924(e)(2)(B)(i). Granting certiorari in this case will give the Court an opportunity to clarify the definition of “physical force” in the context of the ACCA. Therefore, the Court should grant Mr. Griffin’s Petition for Writ of Certiorari.

Also, Mr. Griffin notes that this Court granted certiorari on an issue that affects the subject argument. The case for which the Court granted certiorari is *James Walker v. United States*, Supreme Court number 19-373, which came to this Court from the United States Court of Appeals for the Sixth Circuit. As stated in the Petition for Writ of Writ of Certiorari, the issue in *Walker* is “[w]hether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a ‘violent felony’ under the Armed Career Criminal Act[.]” Walker filed his Petition on September 19, 2019, and the Court granted certiorari on November 15, 2019. However, Mr. Walker passed away before the Court had an opportunity to decide the issue, so the Court dismissed the petition. *Walker v. United States*, 140 S.Ct. 953 (2020).

Just as in *Walker*, Mr. Griffin’s aggravated assault offense can be committed with a *mens rea* of recklessness. See Miss. Code Ann. § 97-3-7(2)(a)(i). Granting certiorari in this case will give the Court an opportunity to review an issue that the Court previously deemed cert-worthy, but was denied the opportunity to rule on the issue.

B. Section 2255 standard.

Mr. Griffin's Petition is filed under the provisions of 28 U.S.C. § 2255.

Section 2255(a) states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(Emphasis added).

Mr. Griffin contends that his sentence “was imposed in violation of the Constitution.” His argument is based on the rulings in *Johnson* (2015), a case decided by this Court on June 26, 2015. The Court later held that *Johnson* (2015) is retroactively applicable to case on collateral review. *United States v. Welch*, 136 S.Ct. 1257 (2016).

C. The holdings in *Johnson* (2015).

The initial paragraph of the *Johnson* (2015) opinion provides a good synopsis of the issue addressed by the Court. This paragraph states:

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a “violent felony,” a term defined to include any felony that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. at 2555 (emphasis added).

The opinion focuses on a provision of the ACCA codified in 18 U.S.C. § 924. The relevant provision of § 924 states:

(e)(1) In the case of a person who violates section 922(g)[⁷] of this title and has three previous convictions by any court referred to in section 922(g)(1)[⁸] 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).

18 U.S.C. § 924(e)(1) (emphasis added; bracketed footnotes added).

Johnson (2015) pertains to the “violent felony” language in § 924(e). This phrase is defined in 18 U.S.C. § 924(e)(2)(B) as follows:

(e)(2) As used in this subsection –

* * * * *

(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*[.]

(Emphasis added).

⁷ 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.

⁸ 18 U.S.C. § 922(g)(1) limits the definition of a convicted felon to a felon “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]”

The *Johnson* (2015) holdings particularly focus on the language of § 924(e)(2)(B)(ii), which states that the definition of “violent felony” includes any act that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” This language is commonly referred to as the ACCA’s “residual clause.” See *Johnson* (2015), 135 S.Ct. at 2555-56.

Following is a summary of the relevant facts in *Johnson* (2015) and the Court’s framing of the issue in light of the case-specific facts:

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson’s previous offenses – including unlawful possession of a short-barreled shotgun, see Minn. Stat. § 609.67 (2006) – qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. We granted certiorari to decide whether Minnesota’s offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution’s prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. 2556 (citations to procedural history omitted).

In relation to the residual clause of the ACCA, the *Johnson* (2015) Court held:

[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process. Our contrary holdings in *James*⁹ and *Sykes*¹⁰ are overruled. Today’s decision does not call into question application of the Act to the four

⁹ The full cite for *James* is *James v. United States*, 550 U.S. 192, 180 L.Ed.2d 60 (2007).

¹⁰ The full cite for *Sykes* is *Sykes v. United States*, — U.S. —, 131 S.Ct. 2267 (2011).

enumerated offenses, or the remainder of the Act’s definition of a violent felony.

Johnson (2015), 135 S.Ct. at 2563 (bracketed footnotes added).

Under the above holdings in *Johnson* (2015), it is unconstitutional to increase a defendant’s sentence under § 924(e)(1) because he has any prior “violent felonies,” as defined under the residual clause of § 924(e)(2)(B)(ii). This ruling does not apply to the enumerated “violent felonies” stated in § 924(e)(2)(B)(ii), which are burglary, arson, extortion or crimes involving the use of explosives.

To summarize, post-*Johnson* (2015) a prior conviction qualifies as a “violent felony” under the ACCA if the conviction falls into one of two categories enumerated under 18 U.S.C. § 924(e)(2)(B). The crime of conviction must:

- (1) have “as an element the use, attempted use, or threatened use of physical force against the person of another” (§ 924(e)(2)(B)(i)); or
- (2) be “burglary, arson, or extortion” or “involve[] use of explosives” (§ 924(e)(2)(B)(ii)).

Prior to *Johnson* (2015), if a crime of conviction fell under a third category, the residual clause of § 924(e)(2)(B)(ii), then the prior conviction was a violent felony. Under the residual clause, a prior conviction is deemed a violent felony if it “otherwise involve[ed] conduct that present[ed] a serious potential risk of injury

to another[.]” *Id.* Since *Johnson* (2015) declared the residual clause unconstitutional, it is no longer applicable to the violent felony analysis.

D. Mr. Griffin’s prior aggravated assault conviction under Mississippi state law is not a “violent felony” under the ACCA.

Aggravated assault is not an enumerated crime under § 924(e)(2)(B)(ii) and the residual clause is now unconstitutional, so the only possible option allowing the prior aggravated assault conviction to be deemed a “violent felony” is § 924(e)(2)(B)(i). As analyzed in detail above, a prior conviction is considered a “violent felony” under § 924(e)(2)(B)(i) if it has “as an element the use, attempted use, or threatened use of physical force against the person of another[.]”

In *Johnson* (2010), this Court defined the level of force required to meet the “physical force” requirement of § 924(e)(2)(B)(i). “[T]he phrase ‘physical force’ means violent force – that is, force capable of causing physical pain or injury to another person.” *Johnson* (2010), 599 U.S. at 141 (emphasis in original; citation omitted). “It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force.” *Id.* at 138.

In 2019, this Court again analyzed the force requirement. In *Stokeling v. United States*, 139 S.Ct. 544 (2019), the Court held that a crime satisfies the “physical force” aspect of the elements clause if the force required for a conviction “is sufficient to overcome a victim’s resistance.” *Id.* at 554. But *Stokeling* does

not overturn the *Johnson* (2010) Court’s ruling that the force at issue must be physical force.

We begin with analyzing the charging statute for Mr. Griffin’s aggravated assault conviction, which is Mississippi Code § 97-3-7(2)(a). This code section states:

A person is guilty of aggravated assault if he (i) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) causes any injury to a child who is in the process of boarding or exiting a school bus in the course of a violation of Section 63-3-615[.]

Id. (emphasis added). There is no evidence before the court that a deadly weapon was used in the assault or that a child was harmed, so the emphasized language of § 97-3-7(2)(a) is the subject of our analysis.

To determine whether the level of force required under § 97-3-7(2)(a) meets the “violent force” requirement emphasized in *Johnson* (2010), we look to the Fifth Circuit’s rulings in *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006)), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169, 187 (5th Cir. 2018).¹¹ In that case, the defendant was convicted of illegally reentering the

¹¹ In candor to the Court, the defense acknowledges that *Villegas-Hernandez* was overruled by *Reyes-Contreras*, which was decided on November 30, 2018. Thus the argument asserted by the defense is against Fifth Circuit precedent. However, the holdings in *Reyes-Contreras* are arguably at odds with this Court’s holdings in *Johnson* and *Stokeling*.

United States after being deported following a state court assault conviction. *Id.* at 876-77. At issue was whether defendant’s assault conviction was an “aggravated felony” under U.S.S.G. § 2L1.2(b)(1)(C).).¹² *Id.* at 877. The district court found that it was, and defendant appealed. *Id.* at 877-78.

In *Villegas-Hernandez*, both parties agreed that the applicable subsection of the Texas Misdemeanor assault statute – Texas Penal Code § 22.01 – makes a person guilty of the offense if it is proven that he “intentionally, knowingly, or recklessly causes bodily injury to another[.]” *Villegas-Hernandez*, 468 F.3d at 878. “The government contend[ed] that 22.01(a)(1)’s requirement that a defendant cause bodily injury incorporates a requirement to show the intentional use of force, such that Villegas-Hernandez’s prior assault conviction satisfies 16(a)’s definition of crime of violence.” *Id.* at 878-79. The Fifth Circuit disagreed. *Id.* at 879.

Supporting its conclusion, the Fifth Circuit held “an assault offense under section 22.01(a)(1) satisfies subsection 16(a)’s definition of a crime of violence only if a conviction for that offense could not be sustained without proof of the use

¹² For purposes relevant to the appeal, § 2L1.2’s definition of “aggravated felony” is found in 18 U.S.C. § 16(a)’s definition of “crime of violence.” *See Villegas-Hernandez*, 468 F.3d at 877. Section 16(a) states:

The term “crime of violence” means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

This language is functionally identical to the language of 18 U.S.C. § 924(e)(2)(B)(i) that is at issue in the subject case.

of “destructive or violent” force. *Villegas-Hernandez*, 468 F.3d at 879 (emphasis added). Then, the court went on to provide examples of how a violation of the subject assault statute could be committed without the use of physical force:

The bodily injury required by section 22.01(a)(1) is “physical pain, illness, or any impairment of physical condition.” Tex. Pen. Code Ann. § 1.07(a)(8). Such injury could result from any of a number of acts, without use of “destructive or violent force”, making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim. To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another. Thus, use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)’s definition for crime of violence.

Villegas-Hernandez, 468 F.3d at 879.

Just like the statute in *Villegas-Hernandez*, a conviction under Mississippi’s aggravated assault statute “could result from any of a number of acts, without use of ‘destructive or violent force[.]’”¹³ For example, an aggravated assault could result from poisoning, which the *Villegas-Hernandez* court recognized as a means of harm that does not result from use of “destructive or violent force[.]” 468 F.3d at 879. For these reason, Mr. Griffin’s Mississippi aggravated assault conviction does not qualify as “violent felony” under the ACCA.

¹³ We “look to the *elements* of the crime, not to the defendant’s actual conduct in committing it” when we perform the violent felony analysis. *United States v. Calderon-Pena*, 383 F.3d 254, 257 (5th Cir. 2004) (*en banc*) (emphasis in original).

Finally, Mr. Griffin's aggravated assault offense can be committed with a *mens rea* of recklessness. Miss. Code Ann. § 97-3-7(2)(a)(i). As the now deceased petitioner argued in *Walker*, Mr. Griffin contends that a *mens rea* of recklessness is not sufficient to meet the ACCA's violent felony definition.

VI. CONCLUSION

Based on the arguments presented above, Mr. Griffin asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted June 4, 2020, by:

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