

APPENDIX 1

UNITED STATES DISTRICT COURT
Southern District of MississippiUNITED STATES OF AMERICA
V.
LEONARD GRIFFIN

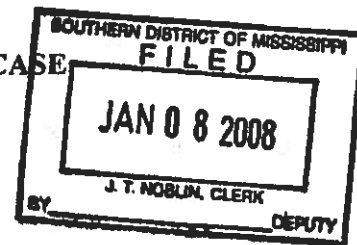
JUDGMENT IN A CRIMINAL CASE

Case Number: 3:07cr75TSL-LRA-001

USM Number: 09300-043

Kathy Nester
200 S. Lamar St., Suite 100-S, Jackson, MS 39201 (601) 948-4284

Defendant's Attorney:



THE DEFENDANT:

☒ pleaded guilty to count(s) single count Indictment☐ pleaded nolo contendere to count(s)
which was accepted by the court.☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
U.S.C. § 922(g)(1) and 924(e)	Felon in Possession of a Firearm	03/25/07	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 4, 2008

Date of Imposition of Judgment

Signature of Judge

The Honorable Tom S. Lee
Name and Title of Judge

Senior U.S. District Court Judge

Date

1/8/08

DEFENDANT: LEONARD GRIFFIN
CASE NUMBER: 3:07cr75TSL-LRA-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One hundred eighty (180) months

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the sentence be served at Yazoo City, MS, or the facility nearest the defendant's Jackson, MS, home for which he meets classification requirements. The defendant should receive credit of time served in state custody for the instant offense.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: LEONARD GRIFFIN
CASE NUMBER: 3:07cr75TSL-LRA-001**SUPERVISED RELEASE**Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 year(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LEONARD GRIFFIN
CASE NUMBER: 3:07cr75TSL-LRA-001

SPECIAL CONDITIONS OF SUPERVISION

- A. The defendant shall submit to random urinalysis testing and shall participate in a drug aftercare treatment program as directed by the supervising U. S. Probation Officer, to include inpatient treatment, if necessary.
- B. The defendant shall undergo a mental health evaluation and, if deemed necessary, shall participate in an approved mental health treatment program as directed by the supervising U. S. Probation Officer.
- C. The defendant shall complete an anger management counseling program as directed by the supervising U. S. Probation Officer.
- D. The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U. S. Probation Officer.

DEFENDANT: LEONARD GRIFFIN
CASE NUMBER: 3:07cr75TSL-LRA-001**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$1,500.00	

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LEONARD GRIFFIN
CASE NUMBER: 3:07cr75TSL-LRA-001**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☒ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☒ Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$ 50.00 over a period of xx (e.g., months or years), to commence 60 day(s) (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court P. O. Box 23552, Jackson, MS 39225-3552.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Numbers (including defendant number) and Defendant and Co-Defendant Names, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LEONARD GRIFFIN

VS.

CRIMINAL NO. 3:07CR75TSL-LRA
CIVIL ACTION NO. 3:16CV495TSL

UNITED STATES OF AMERICA

JUDGMENT

Pursuant to the court's order entered this day, it is hereby ORDERED AND ADJUDGED that Griffin's motions to vacate under § 2255 are dismissed with prejudice.

SO ORDERED this 19th day of June, 2017.

_____/s/ Tom S. Lee_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LEONARD GRIFFIN

VS.

CRIMINAL NO. 3:07CR75TSL-LRA
CIVIL ACTION NO. 3:16CV495TSL

UNITED STATES OF AMERICA

ORDER

This cause is before the court upon the motions of defendant Leonard Griffin for relief pursuant to 28 U.S.C. § 2255 and to supplement his § 2255 motion filed by counsel. The government opposes the § 2255 motion filed by counsel. The court, having considered the parties' memoranda and the record in this case, concludes that the motions are due to be denied.

Generally, a conviction under 18 U.S.C. § 922(g) for being a felon in possession of a firearm provides for a ten-year maximum term of imprisonment. See 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection ... (g) of section 922 shall be ... imprisoned not more than ten years"). However, the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), increases a defendant's prison term to a minimum of fifteen years and a maximum of life if the government proves that he has three or more previous convictions for "violent felonies." See 18 U.S.C. § 924(e)(2)(B). The ACCA, as enacted, defined "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1)

"has as an element the use, attempted use, or threatened use of physical force against the person of another" (force clause); (2) "is burglary, arson, or extortion, [or] involves the use of explosives" (enumerated offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (residual clause). 18 U.S.C. § 924(e)(2)(B). The Supreme Court in Johnson v. United States held that the residual clause was unconstitutionally vague, so that imposing an enhanced sentence based thereon violated due process. 576 U.S. -, 135 S. Ct. 2551, 2557-58, 192 L. Ed. 2d 569 (2015). However, the Court made clear in Johnson that its holding with regard to the residual clause did not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." 135 S. Ct. at 2563. The Supreme Court has held that Johnson announced a new substantive rule that is retroactively applicable to cases on collateral review. See Welch v. United States, -- U.S. -, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016).

On July 11, 2007, Griffin was charged in a single-count indictment with possession of a firearm by a convicted felon, a violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He pled guilty on September 7, 2007 pursuant to a written plea agreement. In anticipation of Griffin's sentencing being enhanced under the ACCA, the indictment recited that Griffin previously had been

convicted in the Circuit Court of Yazoo and Hinds Counties of the following felonies:

1. On or about August 27, 1997, in the Circuit Court of Yazoo City ... of the crimes of Aggravated Assault and Grand Larceny;
2. On or about September 28, 1992, in the Circuit Court of the First Judicial District of Hinds County . . . of the crime of Strong Arm Robbery; and
3. On or about February 10, 1992 in the Circuit Court of the First Judicial District of Hinds County, of the crime of Strong Arm robbery.

The Presentence Investigation Report recommended that Griffin's sentence be enhanced under the ACCA based on his prior convictions for aggravated assault and strong arm robbery. Griffin objected, contending that his 1991 and 1992 strong arm robbery convictions did not qualify as violent crimes under the ACCA.¹ The court overruled Griffin's objection, finding that the strong arm robberies qualified as violent felonies under the residual clause. The court sentenced Griffin to a 180-month term of imprisonment, followed by a three-year term of supervised release.

On May 16, 2016, Griffin, proceeding pro se, filed a § 2255 motion purporting to seek relief under Johnson, contending that the court erred in relying on his three prior convictions to enhance his sentence under the ACCA. Recognizing that the motion

¹ He did not contend that the aggravated assault conviction was not a violent felony.

was successive² and that the statute of limitations was about to run, the court immediately transferred the motion to the Fifth Circuit pursuant to In re Epps, 127 F.3d 364, 365 (5th Cir. 1997). Thereafter, out of an abundance of caution, his current counsel filed with the Fifth Circuit a motion for authorization to proceed in district court with his successive petition, accompanied by a copy of Griffin's pro se petition and a separate § 2255 motion prepared by counsel, which asserted that Griffin was entitled to relief under Johnson because his aggravated assault may have been deemed a violent felony under the residual clause. By order entered June 24, 2016, the Fifth Circuit granted Griffin authorization to file his motion with this court, stating,

The ACCA enhancement was applied based, in part, upon Griffin's Mississippi convictions for aggravated assault and strong arm robbery; however, we cannot tell from the available record whether Griffin's prior aggravated assault implicates the ACCA's residual clause. Nevertheless, in light of Welch v. United States, 136 S. Ct. 1257, 1264-65, Griffin has made a "sufficient showing of possible merit to warrant a fuller exploration by the district court."

² Griffin has previously filed two § 2255 motions, which were dismissed. As set forth above, the Fifth Circuit has granted authorization to file this successive petition. See 28 U.S.C. § 2244(b)(4) and § 2255(h)(2) ("second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

United States v. Griffin, No. 16-60331 (5th Cir. June 24, 2016). The clerk of this court promptly docketed the § 2255 motion prepared by counsel.

The government has responded in opposition, taking the position that the motion should be denied because (1) Griffin has not shown that the residual clause played a role in his sentence, making Johnson inapplicable and his claim is thus time barred, or, alternatively, (2) Griffin's aggravated assault conviction qualified as a violent felony under the ACCA's force clause. Defendant, through counsel, has since filed a supplement, pointing out that the court explicitly relied on the residual clause in overruling defendant's objections to using his two strong arm robbery convictions as enhancements under the ACCA. The government did not respond to this supplement.

Although the Fifth Circuit has found that defendant has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court," Reyes-Requena v. United States, 243 F.3d 893, 899-900 (5th Cir. 2001) (quoting Bennett v. United States, 119 F.3d 468, 469-70 (7th Cir. 1997)), this court must undertake its own gatekeeping review and "must dismiss the motion that [the circuit court] [has] allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion." Id. (citing Bennett, 119 F.3d at 470); Johnson v. Dretke, 442 F.3d 901, 908 (5th Cir. 2006) (discussing similarly worded provision, 28 U.S.C. § 2244(b)(2)(A) and stating

"Congress requires a petitioner to bear the burden of showing that his claim relies upon a new rule of constitutional law"). Here, the court is satisfied that Griffin has met his burden under 2255(h)(2) to file a successive motion. Johnson invalidated the ACCA's residual clause, creating a new rule of constitutional law retroactive to cases on collateral review. Welch, 136 S. Ct. at 1265. The invalidation of the "residual clause" was unavailable to Griffin before Johnson was decided and the court clearly relied on the residual clause in his sentencing. The court thus addresses the merits of Griffin's § 2255 claims.

To determine whether a prior conviction qualifies as a violent felony under the use of force clause, courts generally employ a categorical approach by which they look to the statutory definition of the offense in question, as opposed to the particular facts underlying the conviction, to determine whether the statutorily-defined offense necessarily fits within the ACCA definition of "violent felony." See Descamps v. United States, 133 S. Ct. 2276, 2283, 186 L. Ed. 2d 438 (2013). Under this approach, if a conviction under the Mississippi statutory definition of the crime of either armed robbery or aggravated assault would "necessarily require[] a finding that the defendant used, attempted to use, or threatened to use physical force against the person of another," then it follows that a robbery or aggravated assault in Mississippi constitutes a violent felony. See United States v. Ceron, 775 F.3d 222, 227 (5th Cir. 2014) (citing United States v. Herrera-Alvarez, 753 F.3d 132, 134 (5th

Cir. 2014)); see also United States v. Carrasco-Tercero, 745 F.3d 192, 198 (5th Cir. 2014) (categorical approach assumes that the defendant committed the least culpable act to satisfy the count of conviction and asks whether such conduct qualifies as a violent felony). Put another way, the offense of robbery or aggravated assault as set forth by the pertinent statutes satisfies the ACCA's definition of "violent felony" under the use of force clause if conviction for that offense could not be sustained without proof of "the use, attempted use, or threatened use of physical force against the person of another." See United States v. Villegas-Hernandez, 468 F.3d 874, 879 (5th Cir. 2006).

Here, the court, in sentencing, concluded that Griffin's two prior convictions for strong arm robbery were violent felonies and used those convictions, along with the aggravated assault conviction, to enhance his sentence under the ACCA. Defendant argues that this finding necessarily compels the conclusion that he is entitled to relief. He is incorrect. While the strong arm robbery convictions certainly fell within the definition of violent felony set forth in the now invalid residual clause, the court did not purport to rule that these convictions did not also qualify under the force clause. Under Mississippi law, "[s]imple robbery and 'strong arm robbery'" are one and the same." McKee v. State, 791 So. 2d 804 (Miss. 2001). At the time of defendant's indictment and conviction, Mississippi defined robbery as follows:

"Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some *immediate injury to his person*, shall be guilty of robbery." Miss. Code Ann. § 97-3-73. Notably, the offense is robbery only if the victim surrendered his property in anticipation of suffering imminent physical harm if he did not comply with the defendant's demands. See Register v. State, 232 Miss. 128, 132-33, 97 So. 2d 919, 921-22 (1957) (stating that "[t]he fear of physical ill must come before the relinquishment of the property to the thief, and not after; else the offense is not robbery."). Employing a categorical approach and thereby assuming that Griffin committed the least culpable act, that is, taking "by putting such person in fear of some immediate injury to his person," the court concludes that the crime of robbery involves, at least, the threatened use of physical force. Accordingly, Griffin's robbery convictions qualify as violent felonies under the force clause, which, to reiterate, defines "violent felony" as "having as an element the use, attempted use, or the threatened use of physical force against the person of another." 18 U.S.C. 924(e) (2) (B) (I). See United States v. Brown, 437 F.3d 450, 452 (5th Cir. 2006) (holding that simple robbery in Louisiana, which could be committed by "the use, attempted use, or threatened use of force against the person ... of another", qualified as a violent felony under the

ACCA); see also United States v. Brewer, 848 F.3d 711 (5th Cir. 2017) (employing the categorical method and concluding that bank robbery by intimidation, the least culpable means by which the crime could be committed, constituted a "violent felony" under the ACCA); cf. United States v. Nagsascus Terell Culpepper, No. 312CR00118CWRFKB10, 2017 WL 658777, at *3 (S.D. Miss. Feb. 15, 2017) (proving strong arm robbery in Mississippi "requires at least a showing that the defendant threatened the use of physical force" and thus the defendant's prior robbery conviction would be classified as a crime of violence under Guidelines § 4B1.2(a) because it "has as an element the use, attempted use, or threatened use of physical force against the person of another").

Moreover, the court also concludes that defendant's aggravated assault conviction³ also was a "violent felony" under the ACCA. In this regard, the court is persuaded by the reasoning set forth by Judge Mills in Beckwith v. United States, 4:12cr88,

³ At the time of his indictment and conviction, Mississippi's aggravated assault statute provided:
 A person is guilty of aggravated assault if he (a) 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; or (b) 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; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the penitentiary for not more than twenty (20) years.
 Miss. Code Ann. § 97-3-7.

2016 WL 4203510, at *3-4 (N.D. Miss. Aug. 9, 2016), where he employed the categorical approach to conclude that Mississippi's aggravated assault statute satisfied the residual clause set out in Guideline § 4B1.2(a)).

Accordingly, based on the foregoing, it is ordered that defendant's § 2255 motion(s) - both his pro se motion and the separate motion filed by his counsel - and the supplemental motion are denied.

Finally, this court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts. A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For cases rejected on their merits, a movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" to warrant a COA. Slack v. McDaniel, 529 U.S. 473, 484 (2000). The court finds that a COA should not issue in this case.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 19th day of June, 2017.

/s/ Tom S. Lee _____
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60452

United States Court of Appeals
Fifth Circuit

FILED

January 8, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LEONARD GRIFFIN,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

Before OWEN, Chief Judge, and HAYNES and COSTA, Circuit Judges.

PER CURIAM:

The question is whether Mississippi aggravated assault, MISS. CODE ANN. § 97-3-7(2) (West 1997), is a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e). We conclude that it is.

I.

The Armed Career Criminal Act (ACCA) imposes a fifteen-year minimum sentence on a defendant who is convicted of being a felon in possession of a firearm and has three previous convictions for “violent felon[ies]” or “serious drug offense[s].” 18 U.S.C. § 924(e)(1). Absent those prior convictions, the punishment range for the felon-in-possession offense is much lower—between zero and ten years. *Id.* §§ 922(g), 924(a)(2).

No. 17-60452

The Act defines “violent felony” as a crime punishable by more than a year of imprisonment that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the elements clause); (2) is burglary, arson, extortion, or involves the use of explosives (the enumerated offenses clause); or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the residual clause). 18 U.S.C. § 924(e)(2)(B); *United States v. Taylor*, 873 F.3d 476, 477 n.1 (5th Cir. 2017). *Johnson v. United States*, 135 S. Ct. 2551 (2015), held that the last of these definitions, the residual clause, is unconstitutionally vague. *Id.* at 2563. Soon after, the Supreme Court announced that *Johnson* retroactively applies to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Leonard Griffin invokes *Johnson* in this collateral challenge to his 2008 conviction for being a felon in possession of a firearm. The district court sentenced him as an armed career criminal after finding that he had three convictions for violent felonies. Two of his convictions were for Mississippi strong arm robbery. His third was for Mississippi aggravated assault. The court thus imposed the ACCA’s fifteen-year minimum sentence.

Within a year of *Johnson*, Griffin filed a successive section 2255 petition challenging his sentence. See 28 U.S.C. § 2255(f)(3). After we authorized Griffin to file the petition, the district court denied it on the merits. The district court ruled that Griffin’s three predicate offenses still constituted violent felonies under the ACCA’s elements clause, which *Johnson* did not affect. Although Griffin sought permission to appeal the classification of all three predicates as violent felonies, we granted him a certificate of appealability on only one issue: “whether the district court erred by denying [his] § 2255 motion based on its determination that Mississippi aggravated assault constitutes a violent felony post-*Johnson*.”

No. 17-60452

II.

In ruling on the motion for postconviction relief, the district court recognized that it relied on the residual clause at Griffin's 2008 sentencing. Accordingly, there is jurisdiction to consider this successive habeas application. *United States v. Clay*, 921 F.3d 550, 559 (5th Cir. 2019).

But reliance on the residual clause was harmless if Griffin's three convictions also satisfied the other, still-valid definitions of "violent felony." The certificate of appealability limits our review to Griffin's aggravated assault conviction. Because the ACCA does not list aggravated assault in its enumerated offense clause, Griffin's petition turns on whether Mississippi aggravated assault is a violent felony under the elements clause.¹

When Griffin was convicted of aggravated assault, the Mississippi statute read as follows:

A person is guilty of aggravated assault if he (a) 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; or (b) 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

MISS. CODE. ANN. § 97-3-7(2) (West 1997).

The statute is divisible. *See Mason v. State*, 867 So. 2d 1058, 1059 (Miss. Ct. App. 2004). We thus apply the modified categorical approach to evaluate whether the offense is a violent felony. *See United States v. Lerma*, 877 F.3d 628, 631 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 2585 (2018). Under that

¹ Although Griffin waived the right to collaterally attack his conviction in his plea agreement, the government forfeited the right to invoke Griffin's waiver by failing to assert waiver in the district court. *See United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006); *see also United States v. Wiese*, 896 F.3d 720, 722 n.1 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1328 (2019).

No. 17-60452

approach, we “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, a defendant was convicted of.” *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). If our inquiry narrows the offense to a particular section of the statute, we then assess whether that crime satisfies the elements clause. It does if one of its elements “include[s] the use, attempted use, or threatened use of physical force against the person of another.” *Lerma*, 877 F.3d at 631.

Griffin’s aggravated assault indictment charged him with violating subsection (a) of the Mississippi statute. He argues that section 97-3-7(2)(a) does not require the use of physical force because it allows conviction only on causing “serious bodily injury.” That injury can be caused, Griffin contends, from nonviolent acts like poisoning.

Our recent en banc decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), defeats Griffin’s argument. We held that both direct force (using destructive or violent force against someone) and indirect force (causing bodily injury through actions that are not themselves violent) constitute “physical force.” *Reyes-Contreras*, 910 F.3d at 181–82. We also held that causing injury necessarily involves the use of physical force. *See id.* at 183–84. Finally, with respect to mens rea, we held that “use of force” includes knowing and reckless conduct in addition to intentional conduct. *Id.* at 183.

After *Reyes-Contreras*, an offense satisfies the elements clause if the proscribed conduct “(1) is committed intentionally, knowingly, or recklessly; and (2) ‘employs a force capable of causing physical pain or injury’; (3) against

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the person of another.” *United States v. Gracia-Cantu*, 920 F.3d 252, 254 (5th Cir. 2019) (per curiam) (quoting *Reyes-Contreras*, 910 F.3d at 185).²

Mississippi aggravated assault is a violent felony under this rubric. The offense conduct must be committed “purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.” MISS. CODE ANN. § 97-3-7(2)(a) (West 1997); see also *Gracia-Cantu*, 920 F.3d at 254. And the conduct must cause “serious bodily injury to another,” MISS. CODE ANN. § 97-3-7(2)(a) (West 1997), which *Reyes-Contreras* explained “necessarily requires the use of physical force,” *United States v. Burris*, 920 F.3d 942, 952 (5th Cir. 2019).

We have previously recognized, albeit in an unpublished opinion, that our en banc elimination of the distinction between indirect and direct force means that Mississippi aggravated assault is a violent felony under the elements clause. *United States v. Liddell*, 776 F. App’x 258 (5th Cir. 2019). Further supporting that conclusion is another recent decision holding that the similarly worded Texas aggravated assault offense satisfies the elements clause. See *United States v. Gomez Gomez*, 917 F.3d 332, 333–34 (5th Cir. 2019); see also *United States v. Combs*, 772 F. App’x 108, 109–10 (5th Cir. 2019). Compare TEX. PENAL CODE ANN. § 22.02(a)(1), with MISS. CODE ANN. § 97-3-7(2)(a) (West 1997).

* * *

We AFFIRM the denial of Griffin’s section 2255 petition.

² Although *Reyes-Contreras* and *Gracia-Cantu* dealt with the definition of “crime of violence” under 18 U.S.C. § 16, we construe the elements clauses of section 16 and the ACCA congruently. See *Reyes-Contreras*, 910 F.3d at 174 n.6.

APPENDIX 4

946 F.3d 759

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Leonard GRIFFIN, Defendant - Appellant

No.

17

60452

FILED January 8, 2020

Synopsis

Background: After dismissal, 299 Fed.Appx. 470, of defendant's appeal from his sentence following negotiated guilty plea to being a felon in possession of a firearm, defendant filed motion to vacate sentence, alleging that his prior Mississippi conviction for aggravated assault did not qualify as a predicate violent felony for sentencing under Armed Career Criminal Act (ACCA). The United States District Court for the Southern District of Mississippi, [Tom S. Lee](#), Senior District Judge, 2017 WL 11139948, denied relief. Defendant appealed.

[Holding:] The Court of Appeals held that defendant's prior Mississippi conviction for aggravated assault qualified as a violent felony under the ACCA's elements clause.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (4)

[1] Sentencing and Punishment **Particular offenses**

350H Sentencing and Punishment

350HVI Habitual and Career Offenders

350HVI(C) Offenses Usable for Enhancement

350HVI(C)2 Offenses in Other Jurisdictions

350Hk1283 Violent or Nonviolent Character of Offense

350Hk1285 Particular offenses

Mississippi's aggravated assault statute was divisible, and thus, the federal court would apply the modified categorical approach when determining whether defendant's prior conviction under the statute qualified as a predicate violent felony under the elements clause of the Armed Career Criminal Act (ACCA), at sentencing for being a felon in possession of a firearm. 18 U.S.C.A. § 924(e)

(2)(B)(i); Miss. Code Ann. § 97-3-7(2) (1997 version).

1 Cases that cite this headnote

[2] Sentencing and Punishment **Violent or Nonviolent Character of Offense**

350H Sentencing and Punishment

350HVI Habitual and Career Offenders

350HVI(C) Offenses Usable for Enhancement

350HVI(C)2 Offenses in Other Jurisdictions

350Hk1283 Violent or Nonviolent Character of Offense

350Hk1284 In general

Under the modified categorical approach for evaluating whether a defendant's prior conviction, under a divisible state statute, qualifies as a predicate violent felony under the elements clause of the Armed Career Criminal Act (ACCA), the federal court looks to a limited class of documents, such as the indictment, jury instructions, or plea agreement and colloquy, to determine what crime, with what elements, a defendant was convicted of, and if the inquiry narrows the offense to a particular section of the statute, the court then assesses whether that crime satisfies the elements clause, and it does if one of its elements includes the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C.A. § 924(e)(2)(B)(i).

3 Cases that cite this headnote

[3] Sentencing and Punishment **Violent or Nonviolent Character of Offense**

350H Sentencing and Punishment


350HVI Habitual and Career Offenders

350HVI(C) Offenses Usable for Enhancement

350HVI(C)1 In General

350Hk1261 Violent or Nonviolent Character of Offense

350Hk1262 In general

A defendant's prior conviction satisfies the elements clause of the definition of violent felony in the Armed Career Criminal Act (ACCA) if the proscribed conduct: (1) is committed intentionally, knowingly, or recklessly; (2) it employs a force capable of causing physical pain or injury; and (3) it is against the person of another.  **18 U.S.C.A. § 924(e)(2)(B)(i).**

[1 Cases that cite this headnote](#)

[4] Sentencing and Punishment Particular offenses

350H Sentencing and Punishment

350HVI Habitual and Career Offenders



350HVI(C) Offenses Usable for Enhancement

350HVI(C)2 Offenses in Other Jurisdictions

350Hk1283 Violent or Nonviolent Character of Offense

350Hk1285 Particular offenses

Defendant's prior Mississippi conviction for aggravated assault, which required proof that defendant attempted to cause serious bodily injury to another, or caused such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to value of human life, qualified as a predicate violent felony under elements clause of Armed Career Criminal Act (ACCA), at sentencing for being a felon in possession of a firearm; mens rea for use of force was sufficient, and conduct that caused serious bodily injury to another necessarily required the use of physical force.

 **18 U.S.C.A. § 924(e)(2)(B)(i);**  **Miss. Code Ann. § 97-3-7(2)(a)** (1997 version).

[2 Cases that cite this headnote](#)

West Codenotes

Recognized as Unconstitutional

 **18 U.S.C.A. § 924(e)(2)(B)(ii)**

Appeal from the United States District Court for the Southern District of Mississippi, [Tom S. Lee](#), U.S. District Judge

Attorneys and Law Firms



[Gaines H. Cleveland](#), Assistant U.S. Attorney, U.S. Attorney's Office, Gulfport, MS, [Christopher L. Wansley](#), Assistant U.S. Attorney, U.S. Attorney's Office, Jackson, MS, for Plaintiff-Appellee.

[Michael L. Scott](#), Esq., [Thomas Creagher Turner, Jr.](#), Esq., Federal Public Defender's Office, Jackson, MS, for Defendant-Appellant.



Before [OWEN](#), Chief Judge, and [HAYNES](#) and [COSTA](#), Circuit Judges.


Opinion

PER CURIAM:

*760 The question is whether Mississippi aggravated assault,  **MISS. CODE ANN. § 97-3-7(2)** (West 1997), is a violent felony under the Armed Career Criminal Act,  **18 U.S.C. § 924(e)**. We conclude that it is.

I.

The Armed Career Criminal Act (ACCA) imposes a fifteen-year minimum sentence on a defendant who is convicted of being a felon in possession of a firearm and has three previous convictions for “violent felon[ies]” or “serious drug offense[s].”  **18 U.S.C. § 924(e)(1)**. Absent those prior convictions, the punishment range for the felon-in-possession offense is much lower—between zero and ten years. *Id.*  §§ **922(g), 924(a)(2)**.

The Act defines “violent felony” as a crime punishable by more than a year of imprisonment that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the elements clause); (2) is burglary, arson, extortion, or involves the use of explosives (the enumerated offenses clause); or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the residual clause).  **18 U.S.C. § 924(e)(2)(B);**

United States v. Taylor, 873 F.3d 476, 477 n.1 (5th Cir. 2017). *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), held that the last of these definitions, the residual clause, is unconstitutionally vague.

Id. at 2563. Soon after, the Supreme Court announced that *Johnson* retroactively applies to cases on collateral review. *Welch v. United States*, — U.S. —, 136 S. Ct. 1257, 1265, 194 L.Ed.2d 387 (2016).

Leonard Griffin invokes *Johnson* in this collateral challenge to his 2008 conviction for being a felon in possession of a firearm. The district court sentenced him as an armed career criminal after finding that he had three convictions for violent felonies. Two of his convictions were for Mississippi strong arm robbery. His third was for Mississippi aggravated assault. The court thus imposed the ACCA's fifteen-year minimum sentence.

Within a year of *Johnson*, Griffin filed a successive section 2255 petition challenging his sentence. See 28 U.S.C. § 2255(1)(3). After we authorized Griffin to file the petition, the district court denied it on the merits. The district court ruled that Griffin's three predicate offenses still constituted violent felonies under the ACCA's elements clause, which *Johnson* did not affect. Although Griffin sought permission to appeal the classification of all three predicates as violent felonies, we granted him a certificate of appealability on only one issue: "whether the district court erred by denying [his] § 2255 motion based on its determination that Mississippi aggravated assault constitutes a violent felony post-*Johnson*."

*761 II.

In ruling on the motion for postconviction relief, the district court recognized that it relied on the residual clause at Griffin's 2008 sentencing. Accordingly, there is jurisdiction to consider this successive habeas application. *United States v. Clay*, 921 F.3d 550, 559 (5th Cir. 2019).

But reliance on the residual clause was harmless if Griffin's three convictions also satisfied the other, still-valid definitions of "violent felony." The certificate of appealability limits our review to Griffin's aggravated assault conviction. Because

the ACCA does not list aggravated assault in its enumerated offense clause, Griffin's petition turns on whether Mississippi aggravated assault is a violent felony under the elements clause.¹

Although Griffin waived the right to collaterally attack his conviction in his plea agreement, the government forfeited the right to invoke Griffin's waiver by failing to assert waiver in the district court. See *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006); see also *United States v. Wiese*, 896 F.3d 720, 722 n.1 (5th Cir. 2018), cert. denied, — U.S. —, 139 S. Ct. 1328, 203 L.Ed.2d 574 (2019).

When Griffin was convicted of aggravated assault, the Mississippi statute read as follows:

A person is guilty of aggravated assault if he (a) 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; or (b) 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

MISS. CODE ANN. § 97-3-7(2) (West 1997).

[1] [2] The statute is divisible. See *Mason v. State*, 867 So. 2d 1058, 1059 (Miss. Ct. App. 2004). We thus apply the modified categorical approach to evaluate whether the offense is a violent felony. See *United States v. Lerma*, 877 F.3d 628, 631 (5th Cir. 2017), cert. denied, — U.S. —, 138 S. Ct. 2585, 201 L.Ed.2d 302 (2018). Under that approach, we "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, a defendant was convicted of." *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). If our inquiry

narrows the offense to a particular section of the statute, we then assess whether that crime satisfies the elements clause. It does if one of its elements “include[s] the use, attempted use, or threatened use of physical force against the person of another.” [Lerma](#), 877 F.3d at 631.

Griffin’s aggravated assault indictment charged him with violating subsection (a) of the Mississippi statute. He argues that [section 97-3-7\(2\)\(a\)](#) does not require the use of physical force because it allows conviction only on causing “serious bodily injury.” That injury can be caused, Griffin contends, from nonviolent acts like poisoning.

Our recent en banc decision in [United States v. Reyes-Contreras](#), 910 F.3d 169 (5th Cir. 2018) (en banc), defeats Griffin’s argument. We held that both direct force (using destructive or violent force against someone) and indirect force (causing bodily injury through actions that are not themselves violent) constitute “physical force.” [Reyes-Contreras](#), 910 F.3d at 181–82. We also held that causing injury necessarily involves the use of physical force. *See id.* at 183–84. Finally, with respect to mens rea, we held that “use of force” includes knowing and reckless conduct in addition to intentional conduct. *Id.* at 183.

*762 [3] After [Reyes-Contreras](#), an offense satisfies the elements clause if the proscribed conduct “(1) is committed intentionally, knowingly, or recklessly; and (2) ‘employs a force capable of causing physical pain or injury’; (3) against the person of another.” [United States v. Gracia-Cantu](#), 920 F.3d 252, 254 (5th Cir. 2019) (per curiam) (quoting [Reyes-Contreras](#), 910 F.3d at 185).²

² Although [Reyes-Contreras](#) and [Gracia-Cantu](#) dealt with the definition of “crime of violence” under [18 U.S.C. § 16](#), we construe the elements clauses of [section 16](#) and the ACCA

congruently. *See Reyes-Contreras*, 910 F.3d at 174 n.6.

[4] Mississippi aggravated assault is a violent felony under this rubric. The offense conduct must be committed “purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.”

[MISS. CODE ANN. § 97-3-7\(2\)\(a\)](#) (West 1997); *see also Gracia-Cantu*, 920 F.3d at 254. And the conduct must cause “serious bodily injury to another,” [MISS. CODE ANN. § 97-3-7\(2\)\(a\)](#) (West 1997), which [Reyes-Contreras](#) explained “necessarily requires the use of physical force,” [United States v. Burris](#), 920 F.3d 942, 952 (5th Cir. 2019).

We have previously recognized, albeit in an unpublished opinion, that our en banc elimination of the distinction between indirect and direct force means that Mississippi aggravated assault is a violent felony under the elements clause. [United States v. Liddell](#), 776 F. App’x 258 (5th Cir. 2019). Further supporting that conclusion is another recent decision holding that the similarly worded Texas aggravated assault offense satisfies the elements clause. *See United States v. Gomez Gomez*, 917 F.3d 332, 333–34 (5th Cir. 2019); *see also United States v. Combs*, 772 F. App’x 108, 109–10 (5th Cir. 2019). Compare [TEX. PENAL CODE ANN. § 22.02\(a\)\(1\)](#), with [MISS. CODE ANN. § 97-3-7\(2\)\(a\)](#) (West 1997).

We AFFIRM the denial of Griffin’s [section 2255](#) petition.

All Citations

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