

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GENO JACKSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit’s “prior panel precedent rule”—which requires blind adherence to prior circuit precedent even if the prior decision did not consider arguments supported by intervening decisions of this Court and was admittedly flawed—contravenes well-settled principles of stare decisis and denies Eleventh Circuit defendants their statutory right to appeal and due process of law, in conflict with the approaches of other circuits.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

Geno Jackson respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. *See United States v. Jackson*, 696 F. App'x 981 (11th Cir. 2017) (App. A).

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. Mr. Jackson appealed from that court's final judgment to the Eleventh Circuit Court of Appeals, in accordance with 18 U.S.C. § 3742 and 28 U.S.C. §§ 1291, 1294. The Eleventh Circuit affirmed the lower court judgment on August 24, 2017. *See App. A*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law

U.S. Const. amend. V.

Section 3742(a) of Title 18 of the U.S. Code provides, in relevant part,

A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law; [or]
- (2) was imposed as a result of an incorrect application of the sentencing guidelines

18 U.S.C. § 3742(a).

The Armed Career Criminal Act (ACCA) provides, in pertinent part:

In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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[.]

18 U.S.C. § 924(e).

The ACCA defines “violent felony,” as relevant here, 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 of another

18 U.S.C. § 924(e)(2)(B)(i).

U.S.S.G. § 2K1.1(a) provides in pertinent part,

- (a) Base Offense Level (Apply the Greatest)
 - (4) 20, if—(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense
 - (6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense

U.S.S.G. § 2K2.1(a)(4), (6).

The relevant commentary to U.S.S.G. § 2K2.1(a) explains:

“Crime of violence” has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B 1.2.

U.S.S.G. § 2K2.1, comment. (n.1).

U.S.S.G. § 4B1.2(a) provides, as relevant here:

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

- (1) has an element the use, attempted use, or threatened use of physical force against the person of another

U.S.S.G. § 4B1.2(a)(1).

Section 784.011 of the Florida Statutes states:

An “assault” is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Whoever commits an assault shall be guilty of a misdemeanor of the second degree

Fla. Stat. § 784.011.

Section 784.021 of the Florida Statutes provides:

An “aggravated assault” is an assault:

- (a) With a deadly weapon without intent to kill; or
- (b) With an intent to commit a felony.

Whoever commits an aggravated assault shall be guilty of a felony of the third degree

Fla. Stat. § 784.021.

STATEMENT OF THE CASE

Geno Jackson was convicted of possessing a firearm as a convicted felon and sentenced under the Armed Career Criminal Act (ACCA) in 2007. *See* 18 U.S.C. §§ 922(g), 924(a), (e). His conviction was affirmed on direct appeal. *See United States v. Jackson*, 300 F. App'x 869 (11th Cir. 2008). In 2016, however, his ACCA sentence was vacated in post-conviction proceedings based on *Johnson v. United States*, 133 S. Ct. 2551 (2015) (*Samuel Johnson*) (holding that the ACCA's residual clause is unconstitutionally vague). This resulted in the resentencing that gave rise to the instant direct appeal.

In anticipation of the resentencing hearing, the U.S. Probation Office prepared a memorandum addressing the sentencing provisions that had changed since the original 2007 sentencing, including the sentencing guidelines amendment that changed the definition of “crime of violence” on August 1, 2016. The memorandum stated that base offense level 20 applied because Mr. Jackson’s prior conviction for aggravated assault with a weapon was a “crime of violence.” *See* USSG § 2K2.1(a)(4)(A) (2016). With an additional four-level enhancement for using or possessing a firearm in connection with another felony offense, *see* USSG § 2K2.1(b)(6)(B) (2016), total offense level 24 was applied. The resulting guidelines range, as limited by the 10-year statutory maximum without the ACCA, was 110 to 120 months’ imprisonment; the supervised release range was one to three years.¹

¹ Without the ACCA enhancement, Mr. Jackson faced a statutory maximum of 10 years. *See* 18 U.S.C. § 924(a). And without the “crime of violence” increase, Mr.

The district court adopted these calculations without objection at the resentencing hearing on September 12, 2016. After hearing allocution, mitigation, and aggravation, the court resentenced Mr. Jackson, without the ACCA enhancement, to 120 months' imprisonment, followed by 36 months' supervised release.

On appeal, Mr. Jackson argued that the Florida offense of aggravated assault, § 784.021, Fla. Stat., does not qualify as a “crime of violence.” He acknowledged *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337–38, 1337 n.5 (11th Cir. 2013),² which held that “a conviction under section 784.021 will always include as an element the . . . threatened use of physical force against the person of another.” *Id.* at 1338 (internal quotation marks omitted). But, Mr. Jackson argued that *Turner* was fatally flawed because it did not consider this Court’s precedent—e.g., *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004)—or state law interpreting the state offense as only requiring the offense committed with a mens rea of “culpable negligence” or recklessness—e.g., *Pinkney v. State*, 74 So. 3d 572 (Fla. 2d DCA 2011), *LaValley v. State*, 633 So. 2d 1126 (Fla. 5th DCA 1994), *Kelly v. State*, 552 So. 2d 206 (Fla. 5th DCA 1989), *Green v. State*, 315 So. 2d 499 (Fla. 4th DCA 1975), and *DuPree v. State*, 310 So. 2d 396 (Fla. 2d DCA 1975).

Jackson’s base offense level would have been 14; his total offense level would have been 20; and his guidelines range would have been 70 to 87 months’ imprisonment.

² *Turner* was abrogated on other grounds as recognized in *United States v. Hill*, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015).

Moreover, *Turner*'s reasoning and holding had been undermined to the point of abrogation by this Court's recent decisions in *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

The Eleventh Circuit summarily rejected that argument based on its recent decision in *United States v. Golden*, 854 F.3d 1256, 1256–57 (11th Cir. 2017), *cert. denied*, 2017 WL 2855232 (Oct. 02, 2017), which held that “*Turner* remains binding precedent in this Circuit.” App. A at 1-2. Likewise, the court rejected Mr. Jackson's argument that *Turner* was wrongly decided, stating that “even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it.” *Id.* (quoting *Golden*, 854 F.3d at 1257).³ The Eleventh Circuit thus affirmed Mr. Jackson's sentence based on its rigid prior panel precedent rule, the precedent being *Turner* and *Golden*.

³ Although the parties disputed whether plain or invited error review applied, the Eleventh Circuit declined to decide that issue because, it stated, “Jackson's challenge fails even under de novo review.” App. A at 1 n.1.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit’s prior panel precedent rule contravenes well-settled principles of stare decisis and denies Eleventh Circuit defendants their statutory right to appeal and due process of law, in conflict with the approaches of other circuits.

Under the Eleventh Circuit’s “prior panel precedent rule, there is never an exception carved out for overlooked Supreme Court precedent.” *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001), which “categorically reject[s] any exception to the prior panel precedent rule based upon a perceived defect in the prior panel’s reasoning or analysis as it relates to the law in existence at the time”), *cert. denied*, 137 S. Ct. 2264 (2017).

Based on that rule, the Eleventh Circuit continues to strictly adhere to its “prior panel precedent” in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013)—holding that a Florida conviction for aggravated assault “will always include as an element the . . . threatened use of physical force against the person of another.” *Id.* at 1338 (internal quotation marks omitted).⁴ And in so doing, the court has acknowledged that *Turner* is flawed—e.g., the *Turner* court only superficially considered the language of the Florida simple assault statute; it did not consider the Florida courts’ interpretation of the intent element of that statute, i.e., as including culpable negligence or recklessness; and it did not determine the “least culpable conduct” for conviction, as required by this Court’s precedent, e.g., *Johnson v. United*

⁴ Although *Turner* was an ACCA case, the Eleventh Circuit applies its holding to the elements clause of § 4B1.2(a)(1), which is identical to the ACCA’s elements clause. See *United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017); *Fritts*, 841 F.3d at 940.

States, 559 U.S. 133 (2010) (*Curtis Johnson*), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). See *United States v. Golden*, 854 F.3d 1256, 1257-1267 (11th Cir. 2017) (Jill Pryor, J., concurring).

The majority in *Golden* rightly acknowledged that “some members” of the Court had also questioned the “continuing validity of *Turner* in light of [intervening] cases like *Descamps v. United States*, 133 S. Ct. 2276 (2013).” But it wrongly refused to reconsider *Turner* on that basis. And in finding Golden’s argument that his Florida aggravated assault conviction was not a “crime of violence” was “foreclosed by our precedent” in *Turner*, the *Golden* majority inexplicably disregarded that the *Turner* court did not seek to determine from the case law the “least of the acts criminalized” under the aggravated assault statute as required by this Court’s precedent, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1680 (2013). See *Golden*, 854 F.3d at 1257-1267 (Jill Pryor, J., concurring) (acknowledging that “intervening Supreme Court precedent confirms that *Turner*’s analysis cannot be correct,” and actually “was incorrect”; and stating “Circuit law should not compel district courts to continue applying *Turner* now that the Supreme Court has revealed the error of *Turner*’s approach”).

The denial of rehearing *en banc* in *Golden* has confirmed that the Eleventh Circuit is entrenched in its decision to apply its “prior panel precedent” rule in a novel and overly rigid manner, unlike any other circuit, contrary to well-settled principles of stare decisis. This Court’s intervention is vital not only to prevent this far-reaching perversion of the “prior panel precedent rule” in the Eleventh Circuit, but also to

relieve Eleventh Circuit defendants from the burden of the admittedly “flawed” decision in *Turner*.

A. The Eleventh Circuit’s application of its “prior panel precedent rule” conflicts with the approach of other circuits

The Eleventh Circuit’s blind deference to its prior panel precedent rule conflicts with the approach of most circuits and well-settled principles of stare decisis. *See also, e.g., The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (stating that a panel need not defer to “binding circuit precedent” “in the usual situation where binding circuit precedent overlooked earlier Supreme Court authority”); *Atlantic Thermoplastics Co., Inc., v. Faytex Corp.*, 970 F.2d 834, 838 n. 2 (Fed. Cir. 1992) (“A decision that fails to consider Supreme Court precedent does not control if the court determines the prior panel would have reached a different conclusion if it had considered controlling precedent.”); *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981) (in the “unusual and delicate situation” where a prior circuit case did not consider the impact of intervening Supreme Court precedent, the court must apply the Supreme Court decision, not the later-issued circuit case”).⁵

The First Circuit Court of Appeals’ recent decision in *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017), demonstrates the conflict for which this Court’s

⁵ The Seventh Circuit has adopted a more relaxed approach to stare decisis by rule. The Seventh Circuit permits one panel to overrule another so long as the subsequent panel circulates the proposed opinion among the active members of the court “and a majority of them do not vote to rehear *en banc* the issue of whether the position should be adopted.” 7th Cir. R. 40(e); *see generally United States v. Reyes-Hernandez*, 624 F.3d 405, 412-413 (7th Cir. 2010).

intervention is needed to assure that Eleventh Circuit defendants receive the same right to a meaningful appeal that similarly-situated defendants consistently receive in other circuits. In *Starks*, the appellant argued that a Massachusetts armed robbery conviction did not qualify as an ACCA violent felony, since the underlying unarmed robbery offense, as per Massachusetts caselaw, could be satisfied without using violent force. The government responded that the panel was “bound to agree that armed robbery is a violent felony” based upon the First Circuit’s prior holding in *United States v. Luna*, 649 F.3d 91 (1st Cir. 2011) that Massachusetts armed robbery was a violent felony under the elements clause because the statute could be satisfied by putting a victim in fear through “threatening words or gestures.” But the First Circuit sharply disagreed. It noted with significance that “*Luna* did not address the precise issue before this panel. The defendant in that case did not make, and therefore waived, the argument that *Starks* now presses.” Indeed, the First Circuit underscored, *Luna* “only meaningfully considered a single argument relating to the constructive-force form of armed robbery.” *Starks*, 861 F.3d at 323. And therefore, even though “the *Luna* opinion’s conclusion is phrased in broad terms,” the First Circuit explained, its “expansive language” addressing “without analysis” a broader argument that *Luna* himself had waived was “dicta,” since “it was not necessary to the court’s conclusion.” *Id.* As such, the *Starks* court held, “We are not bound to follow” *Luna*. *Id.*

While the other circuits have uniformly recognized an exception to the force of prior circuit precedent for an “intervening” Supreme Court decision, they do “differ

in how much the earlier decision must be undermined before it can be overruled.” Joseph Mead, “*Stare Decisis in the Inferior Courts of the United States*,” 12 Nev. Law Journal 787 (2012). The First Circuit, notably, does not require that the intervening decision of this Court be “directly controlling;” it need only “offer a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.” *United States v. Tavares*, 843 F.3d 1, 11 (1st Cir. 2016) (citing *United States v. Pires*, 642 F.3d 1, 9 (1st Cir. 2011)).

The Second Circuit likewise does not require that the intervening decision “address the precise issue already decided by [the] court,” but simply that the decision of this Court “casts doubt on [the circuit’s] controlling precedent” due to some “conflict, incompatibility, or ‘inconsisten[cy]’ between th[e] Circuit’s precedent and the intervening Supreme Court decision.” *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 154-55 (2nd Cir. 2015). In the Second Circuit, “[t]he effect of intervening precedent may be ‘subtle,’ but if the impact is nonetheless ‘fundamental,’ it requires [the court] to conclude that a decision of a panel [] is ‘no longer good law.’” *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 201 (2nd Cir. 2003) (citations, and internal quotation marks omitted); *Wojchowiski v. Daines*, 498 F.3d 99, 106 (2nd Cir. 2007). Notably, the Second Circuit also “permits a panel that believes an intervening Supreme Court decision has abrogated a prior decision to present that view to the active judges, and in the absence of objection, disregard the prior decision.” *McCullough v. World Wrestling Entertainment, Inc.*, 838 F.3d 201 (2nd Cir. 2016).

The Fourth Circuit finds it sufficient if there is simply a new “legal landscape” dictating a new mode of analysis, such that the prior decision is “clearly undermined” to the extent that it did not engage in the required mode of analysis. *See, e.g., United States v. Winston*, 850 F.3d 677, 684, 683, 685 (4th Cir. 2017) (prior circuit precedent holding that Virginia common law robbery was a “violent felony” within the elements clause of the ACCA was clearly undermined by the fact that it did not address the Virginia state courts’ interpretation of the terms “by violence or intimidation”).

The Sixth Circuit does not require the intervening decision of this Court to be “precisely on point, if the legal reasoning is directly applicable,” and “requires modification of [a] prior decision.” *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720-721 (6th Cir. 2016) (and cases cited therein).

The Eighth Circuit, like several of the others, requires only that this Court have rendered a decision that “casts into doubt” or “undermines” the prior decision.” *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014).

The Ninth Circuit, appears somewhat different in requiring that the intervening decision be “clearly irreconcilable with the reasoning or theory of intervening higher authority.” *See, e.g., United States v. Villareal-Amarilzas*, 562 F.3d 892, 898 n. 4 (8th Cir. 2009) (“In the Ninth Circuit, a three-judge panel may reexamine a prior panel decision only if a supervening Supreme Court decision is ‘clearly irreconcilable.’ By contrast, we may reconsider a prior panel’s decision if a supervening Supreme Court decision ‘undermines or casts doubt on the earlier panel

decision.” (citation omitted). But what that means, the Ninth Circuit has clarified, is not that the issues need to be “identical to be controlling;” a prior circuit decision is deemed “effectively overruled” if the intervening decision of this Court has “undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*); *United States v. Benally*, 843 F.3d 350 (9th Cir. 2016).

The Tenth Circuit’s test is simply whether the intervening Supreme Court’s decision “invalidates [its] previous analysis.” *United States v. White*, 782 F.3d 1118, 1123 n.2 (10th Cir. 2015). And the Federal Circuit, like the Sixth and the Ninth, holds that issues determined by an intervening decision of this Court “need not be identical to be controlling.” Rather, the Federal Circuit has clarified—citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)—lower courts are “bound not only by the holdings of higher courts’ decisions but also by their ‘mode of analysis.’” *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014).

The Fifth Circuit applies what it terms a “rule of orderliness,” pursuant to which the intervening decision of this Court must “be unequivocal” in its overruling of prior precedent, “not a mere ‘hint’ of how the Court might rule in the future.” *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016); *United States v. Boche-Perez*, 755 F.3d 327 (5th Cir. 2014)/8. Although the Fifth Circuit’s rule is somewhat analogous to the *Fritts-Golden* iteration of the “prior panel precedent rule” in the Eleventh Circuit, the more flexible approach of the First, Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Federal Circuits stands in direct conflict.

Plainly, therefore, the majority of the circuits recognize that an intervening decision of this Court need not be on “all fours” factually or legally to have undermined a prior precedent to the point of abrogation, and relieve a subsequent panel from following it. Rather, the intervening decision must simply dictate a different “mode of analysis” applicable to the issue before the lower court.

Had Mr. Jackson appealed his sentence in the First, Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Federal Circuits, these courts would have applied the new “mode of analysis” dictated by this Court’s intervening decisions in *Moncrieffe*, *Descamps*, and *Mathis*. They would have found the analysis in *Turner* of no import in determining whether a Florida aggravated assault conviction—which Florida case law indicates can be predicated upon mere recklessness—is a “crime of violence” within the elements clause.

B. The Eleventh Circuit’s Application of its “Prior Panel Precedent Rule” Denies Defendants Their Statutory Right to Appeal and Due Process of Law

Mr. Jackson had a statutory right to appeal his sentence, and Congress gave the Eleventh Circuit jurisdiction over that appeal. 18 U.S.C. § 3742. The Eleventh Circuit did not have discretion to refuse to exercise that jurisdiction. *See Sprint Communications v. Jacobs*, 134 S. Ct. 584, 588 (2013) (“In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction.”); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-17 (1976) (holding that “[a]bstention from the exercise of federal jurisdiction is the exception, not the rule” because of “the virtually unflagging obligation to exercise the jurisdiction given

them.”). While the obligation to exercise jurisdiction entails a duty to consider every argument that has not been waived, the Eleventh Circuit’s decision below effectively holds that the defendant in *Turner* waived Mr. Jackson’s argument for him by not raising it. And that cannot be the law, because that would deny Mr. Jackson due process.

For Mr. Jackson to truly have a statutory right to appeal his sentence, his appeal must, at a minimum, afford him a meaningful opportunity to formulate arguments and have them considered by a neutral and detached court. That is why the right to an attorney on appeal is guaranteed — to assure a meaningful appeal. *See generally* *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (“A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.”) Moreover, the statutory right to appeal entails the right to develop and present a complete argument and to have it considered by the appellate court. And that right is hollow if the appellate court may simply refuse to consider the arguments on the authority of a judge-made, overly-rigid iteration of the circuit’s “prior panel precedent rule.”

Notably, that rule is most definitely not a mere “procedural rule” like the prior Eleventh Circuit rule that issues not raised in an opening brief are forfeited — a rule the Court allowed to stand, albeit with great criticism, in *Joseph v. United States*, 135 S. Ct. 705 (2014). *See id.* at 706-707 (statement by Kagan, J., joined by Ginsburg and Breyer, JJ. respecting the denial of certiorari) (noting that “[n]ot a single other court of appeals” refused to accept a supplemental brief based upon an intervening

Supreme Court decision such as *Descamps*, and “[t]here is good reason for this near unanimity;” however, “deferring, for now, to the Eleventh Circuit in the hope that it will reconsider whether its current practice amounts to a ‘reasoned exercise’ of its authority”) (citation omitted).

Here, the rule misapplied by the Eleventh Circuit contrary to the rule applied by other circuits — is a rule of crucial substance. It goes to the very foundation of our federal court system of law: the principle of stare decisis. And therefore, it should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX A

United States v. Jackson, 696 F. App'x 981 (11th Cir. 2017)

696 Fed.Appx. 981 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Geno T. JACKSON, Defendant-Appellant.

No. 16-16404

Non-Argument Calendar

(August 24, 2017)

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:06-cr-00077-JDW-TBM-1

Attorneys and Law Firms

Michelle Thresher Taylor, Arthur Lee Bentley, III, Simon A. Gaugush, Francis D. Murray, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee

Howard C. Anderson, Federal Public Defender's Office, Tampa, FL, Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, Orlando, FL, for Defendant-Appellant

Before MARTIN, ROSENBAUM, and ANDERSON, Circuit Judges.

Opinion

*982 PER CURIAM:

Geno Jackson appeals his 120-month sentence of imprisonment for possession of a firearm by a convicted felon, imposed after the district court granted his 28 U.S.C. § 2255 motion, vacated his sentence, and resentenced him without an enhancement under the Armed Career Criminal Act ("ACCA"). On appeal, Jackson argues that the district court erred in finding that his prior Florida conviction for aggravated assault under

Fla. Stat. § 784.021 qualified as a "crime of violence" under U.S.S.G. § 2K2.1(a)(4)(A). As he acknowledges, however, this argument is foreclosed by binding circuit precedent.¹

¹ The parties dispute whether plain-error review or invited error applies to Jackson's current challenge. We need not decide that issue because Jackson's challenge fails even under de novo review.

Section 2K2.1(a)(4)(A) provides for an enhanced base offense level of 20 if the defendant committed any part of the offense subsequent to sustaining one felony conviction for either a "crime of violence" or a "controlled substance offense." A "crime of violence" for purposes of § 2K2.1(a)(4)(A) is any offense under federal or state law, 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; or (2) is one of a list of enumerated offenses, including aggravated assault. U.S.S.G. § 4B1.2(a) (Nov. 2016)²; see U.S.S.G. § 2K2.1 cmt. n.1 (incorporating § 4B1.2(a)'s definition).

² Jackson was resentenced using the 2016 version of the Guidelines Manual, which no longer contains a "residual clause" definition for "crime of violence" in U.S.S.G. § 4B1.2(a).

In *Turner*, we held that a conviction under Florida's aggravated-assault statute, Fla. Stat. § 784.021, qualifies as a violent felony under the ACCA. *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337–38, 1337 n.5 (11th Cir. 2013), *abrogated on other grounds as recognized in United States v. Hill*, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015). We held that "a conviction under section 784.021 will always include as an element the ... threatened use of physical force against the person of another." *Id.* at 1338 (internal quotation marks omitted). That holding likewise applies to the "elements" clause of § 4B1.2(a)(1), because that clause is identical to the elements clause of the ACCA. See *United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016).

Jackson argues that *Turner* has been undermined to the point of abrogation by cases like *Mathis v. United States*, — U.S. —, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), and *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), but we have rejected that contention since Jackson filed his initial brief in this Court. In particular, we held in *United States v. Golden*, 854 F.3d

1256, 1256–57 (11th Cir. 2017), *petition for cert. filed*, (U.S. June 30, 2017) (No. 17-5050), that *Turner* remains binding precedent in this Circuit. Jackson acknowledges *Golden* in his reply brief but maintains, for purposes of further review, that *Turner* was wrongly decided. “But even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it.” *Id.* at 1257.

Accordingly, the district court properly found that Jackson's Florida conviction for aggravated assault is a

“crime of violence” for purposes of § 2K2.1(a)(4)(A). We therefore **AFFIRM** Jackson's sentence.

AFFIRMED.

All Citations

696 Fed.Appx. 981 (Mem)

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